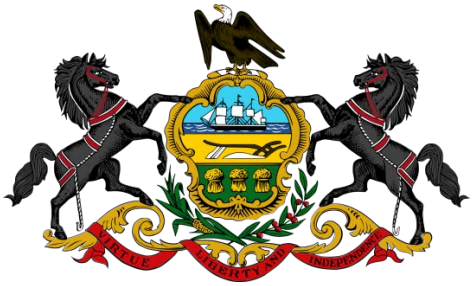
Environmental Hearing Board

# Adjudications and Opinions



## 2013
## VOLUME II

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

**JUDGES**

**OF THE**

**ENVIRONMENTAL HEARING BOARD**

**2013**

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

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## FOREWORD

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

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

## ADJUDICATIONS

## OPINIONS

## 2013

## ENVIRONMENTAL HEARING BOARD

## SUBJECT MATTER INDEX – 2013 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CLEAN AIR COUNCIL** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2011-072-R** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **Issued: August 7, 2013** |
| **PROTECTION and MARKWEST LIBERTY** | : | |
| **MIDSTREAM & RESOURCES LLC** | : | |

# OPINION AND ORDER DENYING MARKWEST'S APPLICATION FOR PERMISSION TO FILE AN INTERLOCUTORY APPEAL

**By Thomas W. Renwand, Chief Judge and Chairman**

## Synopsis

The Pennsylvania Environmental Hearing Board denies Permittee's Application for permission to file an Interlocutory Appeal because it has not met the necessary legal criteria for the Board to certify the Order. Piecemeal Interlocutory Appeals of Board Orders which do not resolve all claims should only be allowed in exceptional and rare circumstances.

## OPINION

### Background

Presently before the Pennsylvania Environmental Hearing Board (Board) is Permittee MarkWest Liberty Midstream & Resources LLC's (Permittee or



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MarkWest) Application to Amend Opinion and Order to Certify Legal Issue for Interlocutory Appeal and Motion for Stay of Proceedings Before the Board (Application to Amend Opinion and Order, Application, and Motion to Stay). The Pennsylvania Department of Environmental Protection (Department) consents to the Application and Motion to Stay. Appellant Clean Air Council, on the other hand, strongly opposes the relief requested.

This matter arises from a Motion for Partial Summary Judgment filed by MarkWest which was opposed by both the Department and Clean Air Council. Following an *en banc* oral argument before the entire Board assembled in Pittsburgh the Motion for Partial Summary Judgment was denied in our Opinion and Order of June 20, 2013. In its Motion for Partial Summary Judgment, MarkWest argued unsuccessfully that the Board grant it partial summary judgment on the ground that "functional relationship" is an illegal consideration in determining "adjacency" in single source determinations under the applicable law. We were unpersuaded by MarkWest's argument that "functional relationship" should never be considered in determining whether emissions should be aggregated. We further found that "questions of fact exist and should be decided after trial on the merits." *Slip Opinion, at pages 1-2.*

**Interlocutory Appeals by Permission**

"An appeal may be taken from (1) a Final Order or an order certified as a

Final Order; (2) an Interlocutory Order as of right; (3) an Interlocutory Order by permission; or (4) a Collateral Order. *Kensey v. Kensey*, 877 A.2d 1284, 1287 (Pa. Super. 2005)." *Application of MarkWest,* filed on July 8, 2013, *at page 2.* All the parties agree that our Order of June 20, 2013 denying MarkWest's Motion for Partial Summary Judgment is interlocutory and can only be appealed by permission. *See* 42 Pa. C.S. Section 702(b); Pa. R.A.P. 312; *see also Wareham v. Jeffes,* 564 A.2d 1314, 1318 n.8 (Pa. Cmwlth. 1989).

Section 702(b) of the Pennsylvania Judicial Code sets forth the procedure for the Board to follow in exercising its discretion on whether to certify an Interlocutory Order for immediate Appeal.

> When a court or other government unit, in making an Interlocutory Order in a matter in which its Final Order would be within the jurisdiction of an appellate court, shall be of the opinion that such Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the matter, it shall so state in such Order. The appellate court may thereupon, in its discretion, permit an Appeal to be taken from such Interlocutory Order.

42 Pa. C.S. Section 702(b).

Therefore, in order to even file an Interlocutory Appeal by permission, a party must meet a rigorous screening test. An Appeal from an Interlocutory Order thus requires that the Applicant obtain permission from the Board first before even

asking the Commonwealth Court to exercise its discretion to hear the Appeal. Pa. R.A.P. Section 1311 holds that an appeal may be taken by permission from an Interlocutory Order of the Board if the Board finds that it (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the Board Order may materially advance the ultimate termination of the matter. *See* 42 Pa.C.S. Section 702(b). Where the Interlocutory Order does not contain this statement, a party, such as MarkWest, may ask the Board to amend the Order accordingly. The Board will exercise its discretion in deciding whether to amend the Order. *Mercy Hospital of Pittsburgh v. Pennsylvania Human Relations Commission,* 451 A.2d 1357 (Pa. 1982).

**Discussion**

Appeals of Interlocutory Orders are not favored by the law and for good reason. *See BethEnergy Mines, Inc. v. Pennsylvania Department of Environmental Protection,* 1987 EHB 941. As pointed out by Clean Air Council on page 3 of its Response, the interlocutory review procedure is not designed to allow for review of issues that are merely difficult or would result in piecemeal adjudication. *See Kensey v. Kensey,* 877 A.2d 1284 (Pa. Super. 2005).

That is especially true here. The three part test requires a party to satisfy all three criteria. In our view the most important factors in our decision here are

found in an analysis of the first and third criteria. We do not believe that whether functional relationship should be considered in the adjacency analysis is a controlling question of law in this case. We think it is a mixed question of law and fact. However, and most importantly, the central question is: would an immediate appeal from our Order of June 20, 2013 materially advance the ultimate termination of this matter? We do not believe it would. As we set forth in our Opinion, adjacency analysis in single source review cases such as this one is fact intensive and based on a case by case review of the pollution emitting sources. The words of my friend and late colleague Judge Robert Myers are instructive:

> Appellants have raised many issues in their Notice of Appeal. The public notice issue is only one of them. An immediate interlocutory appeal of that single issue *might* dispose of it. However, that interlocutory appeal would delay resolution of the many other issues. Thus, the ultimate termination of this appeal would not be materially advanced. Accordingly, Permittee's Petition is denied.

*Throop Property Owner's Association v. Pennsylvania Department of Environmental Protection and Keystone Sanitary Landfill*, 1998 EHB 701, 708-709.

Likewise, the ultimate termination of this Appeal would not be materially advanced by an immediate Appeal of our Opinion and Order denying Permittee's Motion for Partial Summary Judgment. MarkWest candidly acknowledges in its comprehensive Application that a favorable ruling on whether "functional

relationship" is a factor for the Board to consider would not end the litigation. We noted this in our Opinion. "Even if we were to agree with Mark West that geographic proximity is the only factor that may be considered when evaluating whether properties are adjacent, we find the word 'proximate' to be equally ambiguous." *Clean Air Council, Slip Op. at 12.* Thus, significant issues of law and fact would remain even if the Board's decision were reversed. We would still need to define adjacency in the context of the MarkWest facility and determine whether the compressor stations were adjacent. For example, some of the questions that would still remain include whether the MarkWest Houston Processing Plant and the 10 compressor stations (or one or more of the compressor stations) satisfy the commonsense notion of a plant. Does the fact that the Houston Processing Plant is connected to the compressor stations by pipelines factor into the air permit decision? Was the Department of Environmental Protection's review of the air permit application in accordance with the law?

It must also be kept in mind that the Pennsylvania Department of Environmental Protection considered functional relationship in its decision to grant the air permit under which MarkWest has been fully operating its facility. Interestingly, MarkWest took no appeal to this Department decision but has raised it in this Appeal filed by Clean Air Council. MarkWest fully operates under its permit which the Department issued after *considering* functional relationship in its

adjacency analysis.

An Interlocutory Appeal would surely delay the resolution of this case with no corresponding streamlining of the actual trial time necessary to resolve this appeal. This seems to be especially true after reviewing the Parties' Prehearing Memoranda. MarkWest advises in its Prehearing Memorandum that it has abandoned its challenge to the legal standing of Clean Air Council to appeal the Department's decision granting MarkWest's air permit. This will necessarily shorten the hearing and will allow the parties to concentrate on the numerous air permitting issues raised in the Notice of Appeal. Although Clean Air Council has five witnesses listed it appears that three of those witnesses would mainly testify concerning its legal standing to bring this Appeal. Since that issue is now out of the case it appears that the main testimony elicited by Clean Air Council will come from only two witnesses.

The trial in this case is scheduled to commence in thirty-four days. The parties should be permitted to continue their prehearing preparations which will allow the Board to finally hold a hearing and resolve the important issues in this Appeal.

Therefore, we find in exercising our reasoned discretion that MarkWest has failed to satisfy the three criteria necessary for us to grant it permission to file an Interlocutory Appeal to our Opinion and Order of June 20, 2013.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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

## ORDER

AND NOW, this 7th day of August, 2013, following review of MarkWest's Application to amend opinion and order and Motion to Stay Proceedings, and the Response of the Department of Environmental Protection and Clean Air Council, it is ordered as follows:

1) The Application and Motion are **denied** because MarkWest fails to meet the first and third criteria as set forth in the applicable statute.
2) The issue raised by MarkWest is not the controlling legal issue in the case.
3) A favorable ruling in favor of MarkWest on this issue would not result in a material advancement of the ultimate resolution of the Appeal.
4) The granting of the Application would delay the ultimate resolution of the Appeal and add to the costs of all parties and the Pennsylvania

Environmental Hearing Board.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**DATED: August 7, 2013**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CHESAPEAKE APPALACHIA, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-016-L** |
| | : | **(Consolidated with 2011-143-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **and 2012-002-L)** |
| | : | |
| | : | **Issued: August 15, 2013** |

**OPINION AND ORDER**
**ON MOTION FOR SUMMARY JUDGMENT**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board dismisses as moot appeals from two Departmental letters that were rescinded and rendered null and void by the Department. The Board dismisses an appeal from a third Departmental letter because the letter does not constitute a final action of the Department.

**O P I N I O N**

On May 16, 2011, Chesapeake Appalachia, LLC ("Chesapeake") and the Department of Environmental Protection (the "Department") entered into a consent order and agreement ("COA"). The COA addresses Chesapeake's operational and remediation responsibilities with respect to 116 gas wells, 17 private drinking water supplies, and various surface waters of the Commonwealth, all of which are located in Bradford County. The COA contains numerous factual findings, most of which Chesapeake has agreed are true and correct. A sampling of those findings follows.

In February 2010, a Mr. Luce contacted Chesapeake to complain about his water supply well producing black water and "churning." Chesapeake responded and provided Mr. Luce with



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temporary replacement water. Chesapeake contacted the Department about the Luce water well and the actions Chesapeake intended to take in response to Luce's complaint. The Department reviewed Chesapeake's planned tasks and asked that additional measures be taken. Chesapeake carried out the additional measures requested by the Department.

Mr. Luce then informed Chesapeake that a pond on his property was bubbling. Chesapeake installed a vent stack on the Luce water well. An elevated concentration of methane was detected in the well headspace. Methane also was detected at low levels in the basement and upstairs of the Luce residence. Chesapeake installed a methane monitor in the basement of the Luce residence.

On March 24, 2010, a second landowner, Mr. Mignano, contacted Chesapeake about problems with his water well. Chesapeake responded and notified the Department. Eventually, Chesapeake installed methane monitoring equipment in a total of five residential locations in the area. With the approval of the Department, Chesapeake began remedial work at its gas wells in the area. The Department issued Chesapeake a notice of violation for the failure to prevent the migration of gas into sources of fresh groundwater and for defective casing or cementing of its wells. Visible water disturbance subsided in the Luce pond. Chesapeake drilled a new water well for the Luce residence in May 2010.

On June 25, 2010, the Department received a complaint of bubbling in a beaver pond in Tuscarora Township, Bradford County. The nearest gas wells to the beaver pond are operated by Chesapeake. The Department notified Chesapeake of this complaint and Chesapeake initiated an investigation. Chesapeake provided the Department with a summary of its investigation, including an isotopic analysis of the gas emitted from the beaver pond and of gas found in the annular space of the surface casing of Chesapeake's wells on three surrounding pads.

Chesapeake also submitted a plan of action that called for modifying the wellbore construction, particularly with respect to cementing, additional testing, and implementing a 3-string casing design. The Department issued Chesapeake a notice of violation for the unpermitted discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater for the area. Chesapeake instituted a monitoring plan, which included inspection of the beaver pond, private residences, and gas wells in the area. Gas emitted from the beaver pond had similar characteristics to gas found in the annular space of the surface casing of Chesapeake's nearby gas well. Bubbling at the beaver pond continued from June 25, 2010 in diminishing amounts to August 26, 2010. Chesapeake completed remedial work on its nearby gas wells between August 18, 2010, and August 30, 2010. Since August 26, 2010 to the time of the COA, no bubbling was observed at the beaver pond.

On July 13, 2010, the Department became aware of water supply complaints by Michael Phillips and Jared McMicken, who reside in Terry Township, Bradford County. The Department investigated the complaints and collected groundwater samples at the Phillips and McMicken residences. On July 21, 2010, the Department became aware of a water supply complaint by Scott Spencer, also in Terry Township. The Department investigated and collected samples of the Spencer well on the same day. Chesapeake collected water samples and installed methane alarm systems at the McMicken, Spencer, and Phillips residences. The Department issued Chesapeake a notice of violation for the unpermitted discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater in the area. Chesapeake has provided temporary replacement water, installed water well vent stacks, drilled replacement wells, and installed water treatment systems at the McMicken, Phillips, and Spencer residences. Isotopic analyses of gas from a residence and water wells in the area indicated that the gas at the

homes is not microbial in origin and is consistent with isotopic analyses of gas found in the annular space of the surface casing of Chesapeake's wells.

On August 4, 2010, Chesapeake responded to a landowner complaint of possible methane intrusion in a water supply at a home in Monroe Township, Bradford County. Chesapeake responded and, that same day, notified the Department that methane was detected in three private water supplies and one home in the area. The Department confirmed the presence of methane in the headspace of the three home water wells. Chesapeake instituted a monitoring plan for certain residences in the area. The Department issued Chesapeake a notice of violation for the unpermitted discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater.

On September 2, 2010, the Department received information of bubbling in the Susquehanna River near the community of Sugar Run in Wilmot Township, Bradford County. The Department inspected the Sugar Run area and found gas bubbling at numerous locations in the Susquehanna River. A sample of the gas was collected and sent to an independent laboratory to be analyzed. In addition, the Department inspected numerous residential dwellings in the Sugar Run area and found methane in several water supply wells. Chesapeake began screening the locations of bubbling in the river, certain residential water wells, and soils. The Department collected water samples from the potentially impacted water wells. Chesapeake thereafter installed vent stacks on water supply wells at residences in the Sugar Run area owned or occupied by Dale Dunklee, Donald Pickett, Carl Postupak, Kenneth Reinhart, David Buck and Robert Baldwin. Chesapeake also provided temporary replacement water for Donald Pickett and Carl Postupak. The Department issued Chesapeake a notice of violation for the unpermitted

discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater for the Sugar Run area.

On September 16, 2010, Chesapeake notified the Department that methane gas was detected in a water supply located along Spring Hill Road in Tuscarora Township, Bradford County. The nearest drilled Marcellus well, Chesapeake's Champdale well, is approximately 880 feet from that water supply. The Department issued Chesapeake a notice of violation for the unpermitted discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater for the Spring Hill Road area, and for defective casing or cementing of the Champdale/Champluvier gas wells.

On or about June 24, 2010, Bruce and Sherry Vargson contacted Chesapeake with a complaint about their water at their property in Granville Township, Bradford County. Chesapeake initiated an investigation and determined that an elevated concentration of methane gas was present in the well headspace. A water sample collected from the Vargson's water supply on June 26, 2010 indicated an elevated level of methane. On July 8, 2011, Sherry Vargson filed a complaint with the Department alleging her water supply had been impacted by gas drilling activity. On July 14, 2010, methane was detected in the headspace of the Vargson water well. The Department issued Chesapeake a notice of violation for the unpermitted discharge of polluting substances and the failure to prevent the migration of gas into sources of fresh groundwater.

Since August 2010, the Department has inspected various Chesapeake gas wells in the Sivers, Dan Ellis, Paradise Road, Sugar Run and Spring Hill Road areas. As a follow-up and precaution, Chesapeake has perforated and squeezed additional cement behind the casing in a number of its gas wells in the subject areas. In the course of its investigation, the Department

has collected water samples from drinking water wells at residences in the Paradise Road, Dan Ellis, Sugar Run, and Spring Hill Road areas. The Department also has collected isotopic gas samples to compare to gas from various gas wells drilled by Chesapeake to gas from various locations.

Based upon these and other undisputed facts set forth in the COA, the Department concluded that Chesapeake had in several instances caused or allowed the unpermitted discharge of natural gas into the groundwater. It also found that Chesapeake had failed in several instances to properly case and cement its gas wells in such a way as to prevent the migration of gas into sources of fresh groundwater.

Chesapeake agreed to pay a civil penalty of $700,000 for the violations set forth in the COA. Chesapeake also agreed to donate $200,000 to the Department's Well Plugging Fund and pay stipulated penalties of $1000 a day if it failed to comply with the COA.

The COA went on to establish a comprehensive program for Chesapeake to reevaluate and potentially rehabilitate dozens of its wells in Bradford County. The first step in the process is that Chesapeake agreed to submit to the Department for its review and approval a corrective action plan. The plan was to include a list of all gas wells drilled by or on behalf of Chesapeake in the areas addressed in the COA and identify the number of casings used in each well and the depth to which the strings of the casing are set. The plan would include the defined logging protocol ("wellbore evaluations") which Chesapeake would employ to evaluate the integrity of wells appearing on its list of wells, identify a hierarchy of the wells that would be so evaluated, and explain the rationale for selecting the hierarchy of such wells. It was to include an implementation schedule not to exceed six months that set forth, at a minimum, the date on which Chesapeake would commence the wellbore evaluation on the wells. It would identify the

actions Chesapeake would take to analyze each and every gas well identified, including Chesapeake's recommendations for the rehabilitation work necessary to control and mitigate shut-in surface casing pressure and stray gas from wells.

Within five days of the Department's approval of the corrective action plan, Chesapeake agreed to implement the plan as approved by the Department. It agreed within seven days of the date of the approval of the plan to begin pressure testing of accessible annuli on each of the gas wells identified for evaluation. (An annulus is the space around a pipe in a well bore.) It agreed to pressure test annuli for 48 consecutive hours and provide the test results for each tested well within five days of completion of the pressure test on each respective well. It agreed that, within 60 days of the date of the approval of the plan, Chesapeake would complete the 48-hour pressure test of the annuli on all of the gas wells and provide the Department with the results of the pressure tests. It agreed to report on its progress every other week. Its obligation to submit the weekly reports would only terminate when the Department determined in writing that Chesapeake had eliminated the unpermitted discharge of natural gas into the waters of the Commonwealth from any well owned and/or operated by Chesapeake within the areas of Bradford County identified in the COA.

The COA goes beyond requiring the payment of penalties and requiring corrective action by specifying certain operational requirements that Chesapeake agreed to follow going forward. For example, absent exceptional circumstances, all gas wells drilled by or on behalf of Chesapeake in the areas identified in the COA must be cased and cemented in a manner consistent with the specifications and practices set forth in an exhibit to the COA. Chesapeake was required to install pressure gauges on its wells at the surface and intermediate casing ports in

a manner allowing pressures to be inspected at any time by the Department. The COA also established a protocol for reporting and investigating water supply complaints.

With respect to 17 private water supplies, Chesapeake agreed to a screening and sampling program. If after 60 days beyond the date of the COA the dissolved methane was equal to or greater than 7 mg/l or the measured free gas in the headspace was greater than 25 percent of the L.E.L., then Chesapeake was required to submit a plan and schedule to address each water supply, including such remedial actions as Chesapeake had already implemented. This plan is different than the corrective action plan discussed above. Within 14 days of the Department's approval of the plan, Chesapeake agreed to fully implement that plan as approved by the Department, subject to any determination by the Department that the concentration of methane in the water supply is at background or otherwise acceptable levels for the aquifer that supplies the water supply and the concentration of combustible free gas at the wellhead is at levels that do not present any danger to persons or property if properly vented according to applicable regulations and Department practice. There were also provisions in the COA relating to the establishment of an escrow account in an amount approved by the Department that relates to owners of residences that do not allow Chesapeake to fully implement the plan approved by the Department.

With regard to any document that Chesapeake was required to submit pursuant to the COA, the Department would review Chesapeake's document and approve, modify, or disapprove the document in writing. (COA ¶9.) If the document was found to be deficient by the Department, within 14 days of receipt of notice of the deficiencies Chesapeake was required to submit a revised document to the Department that addressed the Department's concerns. The Department would approve, modify or disapprove the revised document in writing. Upon

approval by the Department, the document and any schedule therein would become a part of the COA for all purposes and become enforceable as such.

One of the key provisions of the COA for our current purposes is found at Paragraph 24, which reads as follows:

> **Decisions under Consent Order and Agreement.** Except for Paragraph 16.c., above [relating to transfers of interests in gas wells], any decision which the Department makes under the provisions of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101. Any objection which Chesapeake may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

Chesapeake submitted the first of the many documents called for in the COA on July 11, 2011. That document was the corrective action plan regarding the evaluation and potential remediation of its wells. On August 17, 2011, the Department sent Chesapeake a letter. The letter in its pertinent part reads as follows:

> The Department has performed a review of the revised Corrective Action Plan for Well Evaluation and Potential Remediation (CAP) submitted by Chesapeake on July 11, 2011 as required by the Consent Order and Agreement (COA) executed on May 16, 2011. Pursuant to paragraph 9 of the COA, the Department is approving the CAP with the following modifications added to the Corrective Action Plan under Item 3, Corrective Action:
>
> > a) The 16 wells listed in Table 2, Gas Wells With SISCPs Exceeding 100psig, should be considered Phase 1 for additional evaluation to prioritize them for remediation. Begin work on these wells immediately and establish a timeline for starting and remediating all 16 of these wells with all work to be completed within 4 months of the date of this letter. As Phase 2, assess the remaining 97 wells listed in Table #1, Gas Wells by Study Area, and prioritize them for remedial well work. Establish a timeline to follow Phase 1 above, and start remediating all 97 wells until the stray gas is

> eliminated. Should the gas migration cease prior to initiation of Phase 2, Chesapeake may petition the Department for an alternative.
>
> The CAP is approved as modified above. Please begin implementation within 5 days.

Chesapeake's appeal of this letter is docketed at EHB Docket No. 2011-143-L.

The Department issued another letter on December 2, 2011. That letter stated that it was intended to supersede and replace the prior letter, "which letter shall have no further effect." The parties have not told us what gave rise to the second letter, but we see that the language of the Department's modification of the corrective action plan was changed to read:

> The 16 wells listed in Table 1, Gas Wells With SISCPs Exceeding 100 psig, will be given first priority for additional evaluation and potential remedial work. All appropriate remedial work will be completed for all 16 wells. The remaining 97 wells listed in Table 2, Gas Wells by Study Area, will be further assessed and all appropriate remedial work undertaken as determined by the Department.

The letter in other respects is the same as the prior letter. Chesapeake appealed this second letter as well, and that appeal is docketed at EHB Docket No. 2012-002-L.

The Department sent Chesapeake a third letter on December 23, 2011. The only change in the letter appears to be what is perhaps a correction of an unintended inversion of table numbers:

> The 16 wells listed in *Table 2*, Gas Wells With SISCPs Exceeding 100 psig, will be given first priority for additional evaluation and potential remedial work. All appropriate remedial work will be completed for all 16 wells. The remaining 97 wells listed in *Table 1*, Gas Wells by Study Area, will be further assessed and all appropriate remedial work undertaken as determined by the Department. (Emphasis added.)

Again, the letter expressly stated that it superseded the prior letter. Chesapeake appealed the third letter, and that appeal is docketed at EHB Docket No. 2012-016-L. We thereafter granted Chesapeake's motion to consolidate the three appeals.

The Department has filed a motion for summary judgment asking us to dismiss all three appeals. Its first argument is that the appeals from the first two letters should be dismissed as moot because those letters were superseded and replaced by the December 23, 2011 letter, which Chesapeake also appealed. Its second argument is that the appeals should be dismissed for lack of jurisdiction because the letters are not appealable final actions of the Department. We heard oral argument *en banc* on the Department's motion on June 27, 2013, and the matter has now been fully briefed and is ready for disposition.

**I. Mootness**

Chesapeake does not appear to disagree with the Department's contention that the appeals from the Department's first two letters should be dismissed as moot. The only time Chesapeake mentions the mootness argument at all appears in a footnote in Chesapeake's briefs. Chesapeake does not deny in the footnotes that the appeals are moot. Rather, it merely argues that, **if** the appeals are not moot, they are appealable. It acknowledges that the Department has now repeatedly said the two superseded letters are "completely superseded," "defunct," null, void, and ineffective. In light of this string of synonyms and the absence of any disagreement on the point, we see no reason in this case to depart from the general principle that the Department's unequivocal rescission of an action renders an appeal from that action moot. *See Lipton v. DEP*, 2008 EHB 223, 234; *Cromwell Township v. DEP*, 2007 EHB 8, 12; *Borough of Edinboro v. DEP*, 2000 EHB 1067, 1068. No purpose would be served by continuing the appeals from the

superseded letters. Accordingly, the appeals from the August 17 and December 2, 2011 letters will be dismissed as moot.

**II. Jurisdiction**

In contrast to its concession regarding mootness, Chesapeake disputes the Department's claim that this Board lacks jurisdiction to review the December 23, 2011 letter. Chesapeake's overriding concern appears to be that it needed to file an appeal from the Department's letter because, if it did not appeal, there was a risk that it would have been forever barred from challenging the letter's contents by the doctrine of administrative finality. (T. 41.) Indeed, this appeal has all the markings of a protective appeal. The case has been pending for more than a year, and at least as of the time we held oral argument on the Department's motion, the parties had not conducted any discovery or otherwise actively litigated the case, instead seeking multiple extensions of pre-hearing deadlines. In fact, we are told that the parties are proceeding under the corrective action plan as submitted. (*See* T. 46.)

The doctrine of administrative finality is actually statutory in the context of EHB appeals. Section 4(c) of the Environmental Hearing Board Act provides that, "[i]f a person has not perfected an appeal in accordance with the regulations of the board, the Department's action shall be final as to the person." 35 P.S. § 7514(c). The "regulations of the board" (and several statutes for that matter) require an appeal to be filed within 30 days of receipt of notice of the Department's action. 25 Pa. Code § 1021.52. Thus, in what has become the classic statement of the doctrine,

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law.

*Department on Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). In other words, as a general rule, a party that *can* appeal *must* appeal or it forfeits its right to appeal. A party may not use an appeal from some future action to challenge a past action because, as our statute says, that past action became "final as to that person" when the person did not perfect an appeal *from that action* in accordance with the regulations of the Board. 35 P.S. § 7514(c). *See Winegardner v. DEP*, 2002 EHB 790, 791-93.

It follows that, if the Department's December 23 letter were indeed an administratively final Department action, Chesapeake's concern would have been well founded: If that were the case, Chesapeake not only would have been able to appeal the letter, it would have been required to appeal the letter if it disagreed with its contents. In fact, if Chesapeake is correct, Chesapeake *must* file appeals from every letter that the Department sends out containing what might someday be considered a decision under the COA if it wants to preserve its rights. Since there will probably be numerous letters given the comprehensive, far-reaching nature of the COA, involving as it does 116 gas wells, private water supplies, and various waters of the Commonwealth, Chesapeake's view means that there will doubtless be numerous appeals as well.

Fortunately, such a piecemeal, haphazard state of affairs is avoided because the Environmental Hearing Board Act sets forth a corollary to the rule that a party who *can* appeal *must* appeal. The corollary is: "no action of the Department adversely affecting a person shall be final as to that person *until the person has had an opportunity to appeal the action*" to this Board. 35 P.S. § 7514(c) (emphasis added). If a person can appeal, it must appeal, but if a person cannot appeal, it necessarily follows that the action is not final. A person who is deprived

of an opportunity to appeal an action is not bound by that action, and that action can have no preclusive effect against the person now or at any time in the future.

Assuming for the moment that the December 23 letter is an "action of the Department adversely affecting a person," we think that the COA has deprived Chesapeake of "the opportunity to appeal the action." By operation of Paragraph 24, decisions of the Department under the COA are not intended to be final actions or appealable adjudications. The COA makes it clear that neither party views the Department's decisions under the COA as final, which means they agreed that Chesapeake would not appeal them. Because Chesapeake cannot appeal them, they have no administrative finality. Chesapeake is not barred by the doctrine of administrative finality from appealing or otherwise challenging the contents of the Department's letter in any future proceeding. Because Chesapeake cannot appeal, it cannot be penalized for ignoring the letter. Its refusal to comply with a letter that cannot be appealed cannot be held against it in any way or Chesapeake's right to due process will have been violated. In short, Chesapeake may decide that it is a good business decision to comply, but it is not legally compelled to do so for fear that its failure to appeal being used against it in a future proceeding.

A Departmental action is either final or it is not. If it is final for purposes of the doctrine of administrative finality, it is final for purposes of appealability. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124-25. Here, the fact that the Department's letter has no finality for purposes of precluding future appeals means that it is also not final for purposes of an immediate appeal. Because it is not final, the Board has no jurisdiction.

This conclusion is reinforced by the language contained in Paragraph 24 of the COA that states that any objections that Chesapeake has to the Department's decisions under the COA are "preserved" until the Department enforces the COA. This language solidifies the idea that the

December 23 letter has no administratively final effect. Implicit in the doctrine of administrative finality is that each final action can only be appealed once. A party cannot file multiple appeals from the same Department action. Therefore, a communication cannot at once be something that does not need to be appealed because objections to it are "preserved," and something that can and, therefore, must, be appealed.

As it happens, we also do not believe that the letter is an 'action adversely affecting a person." At this point and in the context of this COA, the Department's letter is nothing more than a request. Since the Department's letter is not an administratively final action, it has no legal force and effect. Therefore, it does not create any new rights or, more to the point, obligations. It does not affect Chesapeake's property rights, privileges, liabilities, or other obligations. Accordingly, it is not an appealable decision. *Sayreville Seaport Assoc. v. DEP*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012); *Pickford v. DEP*, 967 A.2d 414, 420 (Pa. Cmwlth. 2009); *HJH, LLC v. DEP*, 949 A.2d 350, 352 (Pa. Cmwlth. 2009); *DEP v. Schneiderwind*, 867 A.2d 724, 727 n.2 (Pa. Cmwlth. 2005); *DER v. New Enterprise Stone Lime Co.*, 359 A.2d 845, 846-47 (Pa. Cmwlth. 1976); *Robinson Coal Co. v. DEP*, 2011 EHB 895, 898-99; *Hapchuk, Inc. v. DER*, 1992 EHB 1134, 1136; *Delta Excavating & Trucking Co. v. DER*, 1987 EHB 319, 322-23. *Contra, Redbank Valley Municipal Authority v. DEP*, 2006 EHB 813.

The Department's letter is not enforceable. The Department can enforce the COA, but not the letter. If the Department attempts to enforce the COA, the December 23 letter will play no part. The Department will be required to reassert its position as set forth in the December 23 letter and Chesapeake will not be foreclosed from raising any objections that it may have to that position. Chesapeake is under no obligation *by virtue of the letter* to implement its proposed CAP as modified. If the Department believes that Chesapeake has failed to comply with the

COA, it will need to bring an enforcement action. That enforcement may take the form of an order, formal assessment of a civil penalty, or a court action. *See Robinson Coal Company v. DEP*, 2011 EHB 895, 907-08. The letter will play no part in such an action. An unenforceable letter is not an appealable action.

The COA is an organic document that dictates a future course of conduct and delineates the relationship of the parties as that course is pursued. It is hardly a radical or new concept that the many decisions made during the implementation of the COA will not be separately appealable actions. Indeed, it is the longstanding general rule. Thus, *DER v. Bethlehem Steel Corp.*, 367 A.2d 222 (Pa. 1977) involved a consent order that contained a provision that was basically the exact opposite of Paragraph 24 in the COA in this case. The consent order in that case expressly reserved to the private party the right to appeal from certain decisions of the Department concerning implementation of the consent order. *Id.* 367 A.2d at 225 n.3. The court found that the purpose of the provision was to escape the general rule that such decisions are not generally subject to administrative review. *Id.* 367 A.2d at 229.

The Department's letter is like any other demand letter sent by one party to a contract to the other contracting party. If one party believes the other party has violated the contract or must do something pursuant to the contract, that party will not typically hire lawyers and rush into court. The party will normally start with telephone calls which may then escalate to a formal letter demanding performance. If that does not work and a court action ensues, the court action is based on failure to perform under *the contract*, not the demand letter. The situation presented here is no different.

As previously noted, there will undoubtedly be many communications from the Department to Chesapeake incorporating what might commonly be thought of as "decisions"

under the COA as the parties work through the many issues likely to arise in dealing with 116 gas wells and multiple water supplies. Reviewing each and every one of those "decisions" would result in exactly the sort of piecemeal litigation and "proliferation of appeals" challenging only one step of the Department's process that the Commonwealth Court warned against in *HJH, supra,* 949 A.2d at 353. We have frequently held that such piecemeal litigation is to be avoided. *Tri-County Landfill v. DEP*, 2010 EHB 747, 750; *Hanson Aggregates PMA v. DEP*, 2007 EHB 519, 528-29; *Environmental Integrity Project v. DEP*, 2010 EHB 156; *Borough of Danville v. DEP*, 2008 EHB 377, 380; *Stout d/b/a Atlas Railroad Construction Co. v. DEP*, 2007 EHB 482, 490; *Sechan Limestone Industries v. DEP*, 2004 EHB 185, 187; *United Refining Co. v. DEP,* 2000 EHB 132, 133; *Ziviello v. State Conservation Commission*, 1998 EHB 1138, 1139. This would seem to be particularly true where, as here, the parties themselves effectively acknowledged in a COA that such a piecemeal approach is undesirable.

It is perhaps worth pausing for a moment to reflect upon the practical implications of following Chesapeake's view that it is not bound by its commitment not to appeal. Doing so would, of course, require us to decide now whether the Department has acted unlawfully or unreasonably in issuing the December 23 letter. Here is what the Department's letter says:

> The 16 Wells listed in Table 2, Gas Wells With SISCPs Exceeding 100psig, will be given first priority for additional evaluation and potential remedial work. All appropriate remedial work will be completed for all 16 wells. The remaining 97 wells listed in Table 1, Gas Wells by Study Area, will be further assessed and all appropriate remedial work undertaken as determined by the Department.

Here is Chesepeake's only specific objection to the letter:

> To the extent that, under the December 23 Letter, the Department's modifications to the CAP require Chesapeake to undertake appropriate remedial work "as determined by the Department," they are not authorized by the COA and are otherwise contrary to

> law, unsupported by fact, arbitrary, capricious, unreasonable, and an abuse of discretion.

Thus, Chesapeake is appealing a statement regarding future, unknown and unknowable contingencies and possibilities in a letter that actually requires less than the COA itself, which expressly requires Chesapeake to implement its plans as modified by the Department. (COA ¶9.) Chesapeake appears to object more to the letter's attempt to reserve the right to determine what constitutes "appropriate remedial work" as opposed to any substantive decision regarding the details of its corrective action plan or whether any particular work is in fact appropriate. It is clear that the letter has no practical, immediate impact. Thus, the Department can be forgiven for suggesting that this appeal is little more than a thinly veiled attempt to appeal a commitment set forth in the COA itself, which is not allowed. *DER v. Bethlehem Steel Corp.*, 367 A.2d 222, 226 (Pa. 1977); *DER v. Landmark International, Ltd.*, 570 A.2d 140, 142 (Pa. Cmwlth. 1990).

So, if we were to accept jurisdiction, what would we be deciding? Whether the Department can reserve rights in a letter? Whether it can say "as determined by the Department"? What will we do when the Department makes the future "determinations" envisioned in the letter as the project moves forward? Is each new letter and each new determination following each new letter for each of the 116 wells and 17 water supplies and impacted waters of the Commonwealth a new appealable action? Will we also have an appeal if the Department modifies Chesapeake plan for remediating water supplies under Paragraph 7 of the COA? The parties voluntarily decided that such a piecemeal approach does not make sense, and instead, that if the Department is really serious about what it believes to be defects in Chesapeake's performance, it will need to take real enforcement action, not write letters. Chesapeake and the Department should both honor their agreement, and so should we.

Chesapeake argues that parties cannot by agreement alter the subject matter jurisdiction of the Board. That principle is obviously true, but it is a red herring. The COA does not alter the jurisdiction of the Board. The COA does not say "the Board has no jurisdiction over decisions under the COA." Rather, the COA describes the parties' intent and their mutual, voluntary commitment not to treat the Department's decisions as administratively final. The parties cannot tell the Board what to do, but they can promise each other that they will not treat the Department's nonenforcement decisions as appealable actions. They can agree that Chesapeake will not have the opportunity to appeal Department letters sent under the COA, and that these letters will, therefore, have no binding effect. There is no reason why we would not want to honor the parties' commitment.

Paragraph 16 of the COA addresses what happens if Chesapeake decides to transfer any legal or equitable interest in any of the wells that are the subject of the COA. Interestingly, the paragraph gives the Department essentially unbridled discretion to decide whether to modify Chesapeake's responsibilities under the COA with respect to a transferred well, and "Chesapeake agrees to waive any right that it may have to challenge the Department's decision in this regard." Like Paragraph 24, this does not constitute an improper attempt to define the Board's jurisdiction. It is the sort of waiver given by settling parties of appeal rights that happens every day.

If we were to hold that the Department's letter is appealable, we would have effectively rendered Paragraph 24 meaningless. The letter undeniably expresses a "decision under the COA." By consent, such decisions were not supposed to be appealed. If this letter can be appealed, we are effectively nullifying the agreement. If Chesapeake can appeal this letter, it is difficult to imagine a letter setting forth the Department's views of the COA that could not be

appealed, which is precisely contrary to Paragraph 24. A holding that the letter is appealable by Chesapeake is the same as a holding that the Board will not recognize the terms of a COA even though that COA, by definition, was not appealed and cannot now be appealed. We will have disregarded the parties' bargain, which normally would not be done even in an enforcement or contract action absent fraud, accident, or mistake. *Com. v. U.S. Steel*, 325 A.2d 324, 328 (Pa. Cmwlth. 1974); *Global Eco-Logical Services v. DEP*, 2001 EHB 99, 102.

Chesapeake argues that the December 23 letter is an "attempt to unlawfully expand the COA." (Brief at 12.) It complains that the Department's "interpretation of the CO and A is simply not tenable." (T. 36.) These are *precisely* the sort of arguments that may have a place in defense of an enforcement action, but not in an appeal from a letter. Furthermore, a Department letter that does nothing more than interpret a legal requirement is not a final, appealable action. *Sayerville,* 60 A.3d at 872; *Sandy Creek Forest, Inc. v. DEP*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986). The letter under appeal here sets forth the Department's interpretation of the legal requirements arising under the COA.

For all of these reasons, we conclude that the Department's December 23 letter is not a final action. Therefore, it cannot be appealed. We have no jurisdiction to review the letter.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CHESAPEAKE APPALACHIA, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-016-L** |
| | : | **(Consolidated with 2011-143-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **and 2012-002-L)** |

**ORDER**

AND NOW, this 15th day of August, 2013, it is hereby ordered that the Department's motion for summary judgment is **granted**. This appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

**STEVEN C. BECKMAN**
**Judge**

**DATED: August 15, 2013**

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

| | | |
|---|---|---|
| **RICHARD A. LEBO AND DONNA J. LEBO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-164-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: August 20, 2013** |

**OPINION AND ORDER**
**ON MOTION FOR SANCTIONS**

**By Michelle A. Coleman, Judge**

**Synopsis**

The Board grants both of the Department's motions for sanctions against Richard and Donna Lebo for failure to fully comply with discovery requests.

**OPINION**

Before the Board are two Motions for sanctions filed by the Department of Environmental Protection (DEP or Department) against Richard and Donna Lebo (Appellants or Lebos) for failing to comply fully with the rules of discovery. Events which precipitated the motions are as follows.

**Factual Background**

On December 21, 2012, DEP filed a Motion to compel responses to its discovery requests. Attached to the motion was a copy of the Requests served on Appellants. The Lebos filed an Answer to the Motion along with new matter on January 4, 2013. The New Matter asserted that Appellants had difficulty obtaining from East Hanover Township the documents



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http://ehb.courtapps.com

necessary to respond to DEP's discovery requests, and sought a sixty (60) day extension to complete their responses to the discovery.

In response to Appellants' request for an extension of time to file their responses, which was made in their New Matter, on January 7, 2013, the Board issued an Order staying the Motion to compel, recalculating discovery deadlines, and setting a date of March 5, 2013 for complete responses to Department's discovery requests.

On or about March 11, 2013, the Board received a letter from Appellants' counsel dated March 7, 2013, two days after the deadline. The letter informed the Board that an Agreement in Principle had been reached between counsels and requested another sixty (60) day stay. An Order was issued granting the Stay and giving Appellants until May 5, 2013 to respond and file complete answers to the Department's discovery requests. The Order also extended the discovery deadline to June 25, 2013 and dispositive motions deadline to July 25, 2013. Said Order was issued on March 12, 2013.

On May 14, 2013, the Department e-filed a Motion for Sanctions stating that Appellants had not complied with the Order of March 12, 2013 by responding to the Discovery Request by May 5, 2013, and as of May 14, 2013, still had not responded. DEP also claimed in Paragraph 9 that the Lebos' counsel had informed DEP that the Lebos had withdrawn from the Agreement in Principle and acknowledged that discovery was due on May 5, 2013. The Department requested therefore that Appellants be barred from offering factual evidence or expert testimony and supporting documents or exhibits at trial. Under 25 Pa. 1021.93(c), Appellants had fifteen (15) days to respond to the Motion for Sanctions. Responses were due May 29, 2013.

Appellants' Answer to the Motion for Sanctions was e-filed on June 3, 2013, five (5) days after the 15 day period allowed for answers. In the Answer, at Paragraph 9 the Lebos deny

withdrawing from settlement discussions and claim to be considering a draft Consent Order and Agreement. At Paragraph 10, Appellants admitted that they did not submit responses to discovery on or before May 5, 2013 as required in the Board's Order. They stated that they served answers on the Department as of June 3, 2013. Having made this statement in Paragraph 10, they claimed in Paragraph 11 that the responses to the discovery requests have been submitted. No discovery Responses were attached to the Appellants' Answer.

On June 4, 2013, the Board issued a rule to Show Cause why sanctions should not be stayed to allow the parties time to finalize a Consent Order and Agreement. This rule was returnable on June 11, 2013. The Department returned its Response to the Rule on June 11, 2013, and again requested that the Board impose sanctions. In support of the request the Department stated that Appellants had failed to fully respond to discovery requests, and had provided untimely and incomplete answers to the questions to which they did respond. Also, the Department contended that it did not receive a response to the Consent Order and Agreement despite Appellants' claim to the contrary.

Appellants filed their Answer to the Rule to Show Cause on the same day. In the Answer Appellants claimed that they had submitted that day a revision of the Consent Order and Agreement and believed that discussions between Appellants and the Department would be ongoing. Appellants requested a Stay of thirty (30) days, until July 11, 2013, to facilitate these discussions.

On June 26, 2013, fifteen (15) days later, the Department filed its Second Motion for Sanctions. In this Motion the Department incorporated its Motion for Sanctions filed on May 14, 2013, and reminded the Board that an Order requiring Appellants to file complete responses to discovery by May 5, 2013 and requiring that discovery be completed by June 25, 2013 had been

issued on March 12, 2013. The Motion also states that Appellants failed to provide the discovery as ordered and failed to provide an expert report as an alternative to responding to expert interrogatories. DEP requests that Appellants be barred from introducing evidence and documents not disclosed and using witnesses, including expert witnesses, which have not been vetted through discovery.

Appellants submitted an Answer to the Department's Second Motion for Sanctions on July 11, 2013, prior to the fifteen (15) day deadline. In the Answer Appellants claim that they provided complete answers to discovery on June 3, 2013 and that they have not submitted an expert report as none is required since they do not intend to provide expert testimony at the hearing.

## DISCUSSION

The Department asks the Board to sanction Appellants for failure to fully comply with the Rules of Discovery. Under 25 Pa. Code § 1021.161, the Board has the authority to impose sanctions for failure to comply with Board rules and orders.

> **§ 1021.161. Sanctions.** The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

We have held that this Board has wide discretion in fashioning appropriate sanctions for discovery violations based on the magnitude of the violations viewed on a case by case basis. *See Ranuado, et al. v. DEP*, 2011 EHB 858, 861 citing *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 834. (The Board granted sanctions for failure to comply with discovery

requests); *Sri Venkateswara Temple v. DEP*, 2005 EHB 54. (The Board dismissed an appeal for failure to comply with Board orders which indicated "an intent not to pursue an appeal.").

In its first Motion for Sanctions, the Department claimed that although there was an Agreement in Principle between the Parties, Appellants had withdrawn from that Agreement and both sides knew that discovery, per the Board's March 12, 2013 Order, was due on May 5, 2013. The Lebos, the Department claims, did not file responses as required by that Order. As of the date of the Motion's e-fling, May 14, 2013 the Department claimed that no responses to discovery had been filed. Under 25 Pa. Code § 1021.93, the Appellants had fifteen (15) days to respond to the Motion for Sanctions, therefore the Response was due on May 29, 2013.

On June 3, 2013, the Lebos e-filed an Answer to Department's Motion for Sanctions. In the Answer, Appellants deny that they have withdrawn from pursuit of a settlement and claim that they are reviewing a Consent Order and Agreement. The Lebos admit to an untimely response to the discovery requests. They claimed that the required responses to discovery were submitted on the same day as the e-filing of the Answer, June 3, 2013. However, no discovery with appropriate responses was attached to the Answer to the Motion for Sanctions, so the Board lacks independent knowledge of the alleged submission.

Relying on the information received in the Motion for Sanctions and the Answer thereto, the Board on June 4, 2013 issued a Rule to Show Cause why sanctions should not be stayed to allow the Parties to finalize the aforementioned Consent Order and Agreement. This rule was returnable on June 11, 2013.

Both Parties responded on June 11, 2013.

In its response to the Rule, the Department renewed its Motion for Sanctions, citing the facts previously stated and adding that Appellants had filed a late response to the Motion for

Sanctions and an incomplete response to the discovery requests. By way of example DEP claims that the Lebos failed to provide information about their communication with residents of the township, and with representatives of the township and the local conservation district. Also, the Department continued, the Lebos never provided a response to the proposed COA. Appellants also did not provide the identity of any consultants or identify any evidence produced by these consultants. DEP requests that its Motion be granted.

The Lebos' Answer was short and simple. They claimed first that answers had been submitted on June 3, 2013; second, a revised version of the COA was submitted on June 11, 2013 and finally, their belief that a settlement would be reached. They requested a thirty (30) day extension. Again, no responses were attached to their submission. Per Order of the Board, dated March 12, 2013, discovery ended on June 25, 2013. On June 25, 2013, the Department filed its reports and qualifications of two (2) experts, Ron Eberts and Nathan Crawford. The next day, June 26, 2013, the Department filed its Second Motion for Sanctions. Appellants' Answer to the Second Motion for Sanctions was due fifteen (15) days later, July 11 2013. This date coincides with the end of the Appellants' requested thirty (30) day extension. In this Motion, the Department reiterates its previous requests and adds the complaint that Appellant failed to file expert reports "as an alternative to... expert interrogatories. Second Motion for Sanctions p. 2

Although Appellants filed a timely Answer to the Second Motion for Sanctions, they claim that they have filed full and complete answers to discovery and that they have had discussions with the Township engineer and the Department concerning settlement options.

The Lebos have claimed in both their Answer to the Department's Motion to Compel with New Matter, and in their Answer to the Second Motion for Sanctions that they have an engineer working on their behalf. Although the engineer is mentioned, no information,

qualifications, opinions or reports have been submitted in reference to any testimony before this Board. From statements made in the Answer, it appears that Appellants have relied on this engineer for advice in settlement discussions and were using the advice to counter DEP offers of settlement.

However, no responses, requests for discovery or Appellant generated discovery issues are attached to Appellants' Answers. The Board is not aware of any discovery provided by or requested by Appellants submitted prior to the close of discovery. As stated above, the Board previously has imposed sanctions, same as serious as dismissal, where a party has partially complied, or completely failed to comply with the rules of discovery, or with Board orders. *See Ranuado et al.*, at p. 863-864. Also, *See Miles v. DEP*, 2009 EHB 179, 181 (failure to follow Board orders and rules indicates a lack of intent to pursue an appeal); *see also KH Real Estate, LLC*, 2010 EHB 151; *Bishop v. DEP*, 2009 EHB 259; *Pearson v. DEP*, 2009 EHB 628; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

In most of the cases cited above, the delinquent party either failed completely to follow rules of discovery and Board orders or failed to comply with a specific discovery request. In the matter at hand, Appellants have filed Answers to Motions, albeit not always in a timely manner, and both Parties admit that some material in the discovery requests has been submitted. (See Department's Response to Rule to Show Cause, June 11, 2013, Paragraphs 18, 20, 22a-e.) However, Appellants have not been diligent in their duty to provide necessary information for a trial of this matter.

Therefore, since only some adherence to the Rules of Discovery and Board Orders has been achieved, the Board grants the Department's request for sanctions, and sanctions are

imposed barring the introduction of evidence, documents or witnesses *not* disclosed during discovery in this matter. Any evidence, documents, witnesses or experts and their reports which were provided as part of the discovery process, and submitted prior to the close of discovery will be permitted at trial in this matter.

We enter the following order.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **RICHARD A. LEBO AND DONNA J. LEBO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-164-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 20th day of August, 2013, it is hereby **ORDERED** that the Department's Motion for Sanctions is granted in that any discovery materials not supplied prior to the close of discovery are barred from submission at trial; those supplied prior to the close of discovery may be offered as evidence.

**ENVIRONMENTAL HEARING BOARD**

**MICHELLE A. COLEMAN**
**Judge**

**DATED: August 20, 2013**

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| **COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION** | : | |
| **v.** | : | **EHB Docket No. 2013-009-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SENECA RESOURCES CORPORATION, Permittee** | : | **Issued: August 27, 2013** |

## OPINION AND ORDER ON DENYING MOTION TO STAY

**By: Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis:** The Pennsylvania Environmental Hearing Board denies a request to stay an Appeal pending the resolution of a related case in Commonwealth Court where the issues are completely different. The party seeking the stay has not shown compelling reasons for the Board to grant the stay.

### Background

Presently before the Pennsylvania Environmental Hearing Board is the Appellant Pennsylvania Game Commission's Motion for Stay. The Pennsylvania Game Commission in its Motion filed on July 18, 2013 requests that we stay its Appeal pending the adjudication of a separate civil case it filed in Commonwealth Court



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against the Permittee, Seneca Resources Corporation (Seneca Resources).

On January 22, 2013, Appellant appealed the Pennsylvania Department of Environmental Protection's (Department) granting of a permit authorizing Seneca Resources to drill a well into the Utica Shale formation approximately 8,750 feet deep and subsequently operate it. According to the Pennsylvania Game Commission, "[a]lthough the cases are related, the issues are completely different, as the civil case is a land dispute involving the property rights of Appellant and Seneca Resources Corporation, where the Appeal captioned above is an Appeal of the decision of [the Department]." *Motion to Stay Proceedings Pending Outcome of Civil Case,* Paragraph 4. Appellant contends that Seneca Resources has made the present case "an issue in the civil case" which the Pennsylvania Game Commission asserts prevents it from resolving the present Appeal with the Department. It contends once the case before Commonwealth Court is concluded it "will be able to amicably resolve any issues" in this case. *Motion to Stay,* Paragraph 8.

The Department filed no response to the Motion to Stay. Seneca Resources strongly opposes the Motion. Seneca Resources contends that it advised the Commonwealth Court of the pendency of the Appellant's Appeal before the Board as a defense to the Pennsylvania Game Commission's request for a Preliminary Injunction. Instead, Seneca Resources agrees with the Appellant that the issues in the two cases

are different and sees no reason why both cases cannot proceed accordingly. The Permittee also asserts that Appellant fails to enunciate any legal reason why the present Appeal could not be resolved by settlement or adjudication independent of the Commonwealth Court proceeding. Seneca Resources argues that Appellant fails to allege how it would be prejudiced in the latter proceeding if it settled this proceeding with the Department.

**Discussion**

A stay of proceedings is an extraordinary measure that should only be granted for compelling reasons. *Ziviello v. Department of Environmental Protection,* 1998 EHB 1338. In deciding whether to issue a stay we consider the following factors: the Appellant's interests and potential prejudice, the burden of a stay on the Department of Environmental Protection and Permittee, the burden on the Board, and the public interest. *Sechan Limestone Industries, Inc. v. Department of Environmental Protection, Citizens for Pennsylvania's Future, Friends of McConnell's Mill State Park, Inc., and County of Lawrence,* 2004 EHB 185, 187. Since a stay is an extraordinary measure the party seeking the stay must offer compelling reasons setting forth why a stay is warranted. *Stadler v. McCulloch,* 882 F.Supp (E.D. Pa. 1995).

In *Ziviello* and *Valley Forge Chapter of Trout Unlimited v. Department of Environmental Protection,* 1997 EHB 925, we denied the motions to stay proceedings.

In *Ziviello,* no supersedeas was in place and there was no way to predict if or when a request for a nutrient management plan would be approved. In *Valley Forge Chapter of Trout Unlimited,* a stay was requested based on the pendency of a draft permit which would have arguably made the appeal before the Board moot. Nevertheless, Judge Coleman denied the request reasoning that there was no way to know when, if ever, the draft permit would or could become final. In *Sechan,* we granted the stay. The main issue in this case involved the harms/benefit test which was under consideration by the Pennsylvania Supreme Court in two other cases. The need for judicial economy and consistent decisions were compelling reasons to grant the stay pending the Supreme Court's ruling.

We also granted motions to stay further proceedings where the Appellants were involved in pending parallel criminal prosecutions. *Niebauer v. Department of Environmental Protection,* 2004 EHB 678. *See also Allan's Waste Water Service, Inc. v. Department of Environmental Protection,* EHB Docket No. 2011-044-R (Order issued on July 26, 2011)(Parties agreed to stay proceedings pending the resolution of pending criminal prosecutions). In *Niebauer,* we granted the motion to stay further proceedings finding that a stay would not harm the public or the environment and would protect the Appellant's due process rights in the criminal proceeding. We held that "the public's greater interest is that justice be done. If justice is done, 'then the

Crown wins.'" 2004 EHB at 681.

The Pennsylvania Game Commission has not set forth a sufficient reason for us to stay *its* Appeal pending the resolution of a case which it readily admits involves completely different issues. We are ordinarily hesitant to stay appeals contingent on litigation in related cases absent a strong legal or policy reason. This is especially true here where both cases were filed by the party now seeking the stay and when one of the parties involved, the Permittee Seneca Resources strongly opposes the request for stay.

Indeed, the Pennsylvania Game Commission has not offered compelling reasons setting forth why a stay is warranted in this case. Why cannot this Appeal be settled or resolved while the Commonwealth Court action is pending? The Appellant raises the issue but does not set forth any reasons supporting its contention. Moreover, unlike *Sechan* the Commonwealth Court action in this matter involves different issues and the Pennsylvania Game Commission has not set forth how a decision of the Commonwealth Court in that case would be controlling in this one.

Moreover, both this Appeal before the Pennsylvania Environmental Hearing Board and the civil action before the Commonwealth Court were brought by the Pennsylvania Game Commission. Once a party sets the wheels of justice in motion, it must set forth strong reasons to stop the legal process; especially when one of the

parties adversely affected by the litigation strongly opposes the request. Seneca Resources points out that it has a strong interest in resolving this attack on its permit. We are cognizant of the potential disruptions, including legal, economic, and psychological, that pending litigation may have on a company and its operations. It distracts senior management from its business pursuits and employees from their day to day job duties. Money and resources must be devoted to defending the litigation and hiring attorneys and experts. It can adversely affect a company's relationships with lending institutions, vendors, and local municipalities. Long term plans of the company including hiring may be impacted. Therefore, we have a duty to resolve cases in a timely fashion.

In this case, the Pennsylvania Game Commission has not enunciated any legal or policy reasons as to why we should grant the stay it requests. Indeed, Seneca Resources sets forth strong policy reasons for denying the request for stay. Seneca Resources has an interest in timely resolving by adjudication or settlement the issues raised in this Appeal. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION** | : | |
| **v.** | : | **EHB Docket No. 2013-009-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SENECA RESOURCES CORPORATION, Permittee** | : | |

**ORDER**

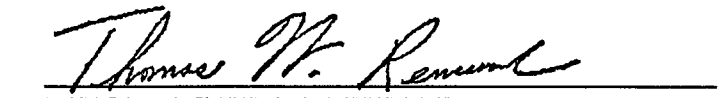
AND NOW, this 27th day of August, 2013, following review of the Pennsylvania Game Commission's Motion for Stay and the Response of Seneca Resources, it is ordered as follows:

1) The Motion for Stay is **denied.**

2) On or before **September 4, 2013,** Counsel shall advise the Board of the number of days needed for hearing in this case.

3) On or before **September 4, 2013,** Counsel shall advise the Board of any dates they are not available for hearing in Pittsburgh in December 2013 and January 2014.

**ENVIRONMENTAL HEARING BOARD**



**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**DATED: August 27, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **JOHN R. WEAVER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-041-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: August 29, 2013** |

**OPINION IN SUPPORT OF ORDER**
**DENYING PETITION FOR SUPERSEDEAS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board denies a petition for supersedeas of an order requiring an appellant to investigate and remediate damage caused to waters of the Commonwealth on his property primarily because the appellant has a low likelihood of success on the merits, and the continuing existence of actual and threatened pollution on the property.

## OPINION

The Appellant, John R. Weaver, together with his wife, B. Laura Weaver, owns a 121 acre farm near Linesville in Conneaut Township, Crawford County. The Department of Environmental Protection (the "Department") issued an order to the Weavers on April 2, 2013. This appeal is John Weaver's appeal from that order. The order found that Weaver has violated the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. § 693.1 *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, by, among other things, variously filling and excavating stream channels, floodways, and wetlands on his property without the necessary permits, installing unpermitted water obstructions, and failing to implement erosion and sedimentation control best management practices.



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The order directs the Weavers to cease and desist all earth disturbance activities at the site. Paragraph 2 of the order directs the Weavers to install temporary stabilization measures pending more permanent rehabilitation of the site. Paragraph 3 of the order requires the Weavers to submit to the Department for approval a water resource delineation report prepared by a qualified professional delineating all waterways and wetlands on the site and the encroachments therein. Paragraphs 4, 5, and 6 require the Weavers to submit to the Department for approval restoration plans prepared by a qualified professional for three areas on the site denominated Investigation Units 1, 2, and 3. Paragraph 7 of the order requires the Weavers to submit a site restoration report when all of the work is done. Paragraph 8 requires annual wetland monitoring reports starting in 2014. Paragraph10 requires the Weavers to allow Department personnel to enter the site during daylight hours to inspect the earth disturbance activities at the site and determine compliance with the Department's order.

Weaver has filed a petition asking us to supersede Paragraphs 3-8 and 10 of the order pending the hearing on the merits. Weaver has not asked us to supersede Paragraph 1 of the order, which requires him to cease and desist earth disturbance activities at the site, or Paragraph 2, which requires him to install temporary stabilization measures such as seeding and mulching in disturbed areas pending completion of more permanent measures at the site. With respect to the remaining paragraphs of the order, he argues that it is economically impossible for him to comply, and even if he could comply, doing what the Department asks would dramatically reduce the value of his property. He says that he "has invested heavily in the arability of the farm," and "[t]he Order's requirements, if enforced, would make the property more difficult to farm, impossible to sell, and likely result in the property being used as a dump, as it was prior to Mr. Weaver's ownership." He adds that he has already taken significant steps to stabilize the

property, and that further measures are unnecessary. He argues that the Department's demand that he allow Department personnel unfettered access to the site in the future violates his constitutional right to exclude the government from warrantless entries onto his property. Finally, he asserts that the Department is being unfair by seeking to enforce its order in the Crawford County Court of Common Pleas prior to this appeal being fully adjudicated by this Board.

We conducted a view of the premises on August 19 and a hearing on the petition for supersedeas on August 20, 2013. On August 21 we issued an order granting the petition for supersedeas in part and denying it in part. We revised the access provision of the order by providing that the Department must make a reasonable effort to give the Weavers 24-hour advance notice of inspections. We denied the petition with respect to the other provision of the order. A copy of the order is attached. This opinion is written in support of the order.

**Discussion**

The standard for granting a supersedeas of an action of the Department taken under the DSEA is spelled out in Section 24(b) of the Act as follows:

> (b) An appeal to the hearing board of any action of the department shall not act as a supersedeas. A supersedeas may be granted by the hearing board upon a showing by the petitioner:
>
> (1) the irreparable harm to the petitioner or other interested parties will result if the supersedeas is denied;
>
> (2) that there is a likelihood of the petitioner's success on the merits; and
>
> (3) that the grant of a supersedeas will not result in irreparable harm to the Commonwealth. The board may grant such a supersedeas subject to such security as it may deem proper.

32 P.S. § 693.24(b). The standard in the Environmental Hearing Board Act is to the same effect, except that that statute also provides 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). *See also* 25 Pa. Code § 1021.63 (same).

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2012-196-M (February 1, 2013); *Rausch Creek Land LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Services*, 1999 EHB at 651; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three criteria. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corporation*, 1996 EHB 808, 810; *Lower Providence Township v. DER*, 1986 EHB 395, 397.

It is important to remember that the Board is not called upon to decide the case on the merits in the context of a petition for a supersedeas. Rather, the Board is required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future. *Global Eco-Logical*, 1999 EHB at 652. Based upon that prediction, as well as balancing of harms that would be suffered if a supersedeas is in place during the litigation process, we decide whether the Department's action

should be stayed until the case can be adjudicated based upon a more complete record by the full Board.

In order to show us that he is likely to succeed on the merits, Weaver needs to convince us that the Department will be unable to sustain its ultimate burden of proving that its order constitutes a lawful and reasonable exercise of its discretion based upon the facts as we find them to be. *Perano v. DEP*, 2011 EHB 453, 515. The Department's burden is limited to overcoming objections properly raised and thereafter preserved in the appellant's notice of appeal and amendments thereto, its pre-hearing memorandum, and its post-hearing brief. *GSP Mgm't Co. v. DEP*, 2011 EHB 203, 207. In the context of a petition for supersedeas, our immediate focus is on the appellant's objections that form the basis for the request for emergency relief.

The portion of Weaver's petition that has given us the most pause is his objection to Paragraph 10 of the order, which requires him to allow Department personnel to enter the site during daylight hours to inspect the earth disturbance activities at the site and determine compliance with the order. He argues that the provision impermissibly infringes upon his right to exclude others from his land and that it is otherwise unreasonable. Although he seemed to contend in his supersedeas papers that a warrant should be required for each and every inspection, he appeared to back off of that demand somewhat at the hearing. To the extent that remains his position, we believe he is unlikely to prevail on the issue.

The pertinent statutory provision regarding the Department's authority to access private property is found at Section 16 of the DSEA, which reads as follows:

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

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

32 P.S. § 693.16. The section makes it clear that Weaver was initially entitled to refuse entry to his property without presentation of "a search warrant or other suitable order authorizing such entry and inspection." *Cf. Pennsylvania Independent Petroleum Producers v. DER*, 525 A.2d 829, 835 (Pa. Cmwlth. 1987) (construing similar language in the Oil and Gas Act, 58 P.S. § 601.508). The question presented here, however, is whether the Department is required to obtain a new warrant for each and every re-inspection, or whether it can instead rely upon an order requiring Weaver to allow access without a warrant until the site is remediated.

We believe that the order under appeal suffices as the "other suitable order" mentioned in the statute. The purpose of a warrant requirement is to ensure that a neutral judicial officer passes upon the question of the government's need to conduct a search. *Comm. v. Coleman*, 830 A.2d 554, 560 (Pa. 2003); *Warrington Twp. v. Powell*, 796 A.2d 1061, 1067 (Pa. Cmwlth. 2002). The Department's order is subject to immediate appeal and possible supersedeas. This Board functions as a neutral judicial officer capable of objectively evaluating the Department's need to conduct a search. In that way the privacy and security of Weaver is safeguarded by a neutral authority against arbitrary invasions of governmental officials.

Of course, the Department's access order has been challenged and it must withstand scrutiny. Section 16 of the DSEA states that sufficient probable cause to issue a search warrant exists if there is probable cause to believe that the object of the investigation (Weaver) is subject to regulation under the act, and access, examination, or inspection is necessary to enforce the provisions of the act. 32 P.S. § 693.16(b). Although the statute does not apply this standard to "other suitable orders," we believe that it is an appropriate starting point. *See also* Section 5(b)(8), of the Clean Streams Law, 35 P.S. § 691.5(b)(8) (Department is authorized to make such inspections of public or private property "as are necessary to determine compliance with" the law) and Section 610, 35 P.S. § 691.10 (orders may be issued that are necessary to aid in enforcement of the Act). In addition, Weaver is entitled to protection from *unreasonable* searches. *Commonwealth v. Revere*, 888 A.2d 694, 707 (Pa. 2005) (the central requirement and the touchstone of the Fourth Amendment is reasonableness). Indeed, we review all of the provisions of the Department's orders (if challenged) for reasonableness. *Perano*, 2011 EHB at 515; *Rockwood Borough v. DEP*, 2005 EHB 376, 384.

Weaver is subject to regulation under the act. The evidence shows that, not only are there wetlands, floodways, and waters of Commonwealth on his property, he has obstructed and encroached upon those waters without obtaining the necessary permits. *See, e.g.*, 32 P.S. §§ 693.6 (permit requirement) and 693.13 (duties of owners of water obstructions and encroachments). There is more than probable cause to believe that Weaver is subject to regulation under the act.

Secondly, access, examination, and inspection of the property are necessary to enforce the provisions of the act, or in the words of the Clean Streams Law, to determine compliance

with the law. There is no other way for the Department to determine whether Weaver has complied with the remediation requirements of the order.

Thirdly, the order is reasonable. The order only requires Weaver to allow access to open areas on the property during daylight hours for the narrowly tailored purpose of inspecting earth disturbance activities and determining compliance with the order. The inspections can easily be conducted without interfering with normal farming activities. The areas in question are rather far from Weaver's home. The order has resulted in a legitimate, tolerable, and temporarily reduced expectation of privacy that is not inconsistent with Weaver's constitutional rights. *Cf. DER v. Blosenski Disposal Service*, 566 A.2d 845, 848 (Pa. 1989) (quoting *Donovan v. Dewey*, 101 S. Ct. 2534, 2539 (1981) (discussing warrantless searches in the administrative context); *Comm. v. Tobin*, 828 A.2d 415, 418-24 (Pa. Cmwlth. 2003) (same).[1]

Weaver's primary complaint appears to be that he is not entitled to prior notice of an inspection. The Department responds that it has had significant difficulty in the past in getting ahold of Weaver, and that he prohibits entry when asked. At the hearing, however, the Department consented to a revision of the order to provide that 24-hour prior notice will be attempted in good faith, and we have superseded Paragraph 10 in part to provide for such notice.

Turning to the other portions of the Department's order, it is very clear that Weaver has very little likelihood of success. Weaver has not asked us to supersede the requirement that he

[1] We are not suggesting by citing *Blosenski* that the exception to the warrant requirement for searches of businesses in "closely regulated industries" applies in this case. *See New York v. Burger*, 107 S. Ct. 2636 (1987). To the contrary, we expect that Weaver has not voluntarily engaged in what may fairly be characterized as a closely regulated business simply by farming property that contains waters of the Commonwealth. *See Huber v. NJ DEP*, 131 S. Ct. 1308 (2011) (statement regarding denial of certiorari). In fact, as previously noted, the DSEA recognizes the right of an owner or operator of property to refuse entry without a "warrant or other suitable order." 32 P.S. § 693.16(b). We do, however, believe that the attenuated expectation of privacy that may be said to exist *after* the issuance of a lawful order mandating reasonable access to the site (following denial of a petition to supersede that order) is analogous to the attenuated expectation of privacy that obtains at a heavily regulated facility.

cease and desist unpermitted earth disturbance activity at the site, or the requirement that he install temporary stabilization measures in previously disturbed areas. This in a way is something of an acknowledgement that he has engaged in unlawful activity. Weaver has asked us to supersede the provision of the order that require him to investigate and then remediate the unlawful conditions at the site. He objects to some of the specific measures that the Department says must be addressed in Weaver's restoration plans, such as recontouring access roads, removing fill from waterways and wetlands, and restoring stream channels.

Interestingly and importantly, Weaver does not deny in his petition for supersedeas that he has violated the DSEA and the Clean Streams Law by filling wetlands, placing fill in floodways, excavating and dramatically altering stream channels, installing culverts, and failing to employ adequate erosion and sedimentation control measures. Weaver quibbles with a few of the details of the Department's findings here or there, but following the hearing, there is no denying that Weaver has done significant and extensive damage to the waters of the Commonwealth on his property without obtaining the necessary permits. Weaver does not deny that the Department has the authority to demand that this unpermitted damage be corrected.

Instead, Weaver's main argument is that he simply cannot afford to comply with the Department's order. However, financial inability to comply with a Departmental order is not a defense to the validity of the order in a Board proceeding. *Ramey Borough v. DEP*, 351 A.2d 614, 615 (Pa. Cmwlth. 1976); *Perano v. DEP*, 2011 EHB 298, 310; *Rozum v. DEP*, 2008 EHB 731, 735. The defense may find traction in an enforcement or contempt proceeding, but it has no place here. Therefore, Weaver is not likely to succeed on the merits of this defense.

Along the same lines, Weaver complains that complying with the order would make his land less valuable and more difficult to mine and/or farm. This defense has no merit for several

reasons. First and most obviously, since the purported increase in the value of the property resulted from unlawful activity, the fact that returning the property to the condition that existed prior to the unlawful activity will result in a loss of value is no defense to the Department's order. Furthermore, we cannot accept that there would be a loss in value because any potential buyer would face the prospect of future enforcement activity being brought against it given the condition of the property, and that exposure would seem to need to be factored into the sale price. Still further, Weaver's argument raises difficult issues of proof, and making the comparisons that he asks us to make necessarily involves considerable speculation. We have no credible evidence that the property has been rendered more valuable as a result of Weaver's illegal activity, or that the property would be worth less if it were remediated and managed in compliance with the law.

Weaver himself was the only witness who testified in support of his petition. Weaver provided us with no technical basis for concluding that there is anything wrong with the dictates of the order. In contrast, the Department presented the credible testimony of an expert in these matters, Scott Dudzic, and Karl Gross, another Department employee experienced in permitting under the DSEA. Both individuals described the extensive damage that has occurred at the site. Their testimony was backed up by photographs and our view of the premises. The order establishes an orderly and fairly typical program for restoring the site. The order appears at this juncture to be lawful, reasonable, and necessary to aid in the enforcement of the law, and it is supported by the facts.

Weaver relies on a letter written by one of the Department's mine inspectors, Arnie Belz, in 2008, which advised Weaver as follows:

> The Noncoal Surface Mining Conservation and Reclamation Act (Act 219) contains an exemption from the definition of "surface

> mining" for the extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him. There are many cases where noncoal minerals will be excavated by a landowner from property owned or leased by him for his own noncommercial use. Under such conditions a permit under Noncoal SMCRA would not be required.
>
> Please remember that material cannot be removed from this site for commercial purposes Should you desire to remove material for commercial operations in the future, you will be required to submit a surface mining permit application.

(App. Ex. 2.) This letter does not absolve Weaver from the need to obtain appropriate permits under the DSEA and the Clean Streams Law for the water obstructions and encroachments on his property. This letter, for example, did not authorize Weaver to excavate what had formerly been a stream channel to build what he has referred to as a "settling pond" that is 38 feet wide by at least 286 feet long.

Weaver contends that further stabilization measures and E&S BMPs are unnecessary on the site. The Department's witnesses credibly testified that Weaver's contention is incorrect. The exact details remain to be seen, but there is no doubt that further measures are necessary at the site if ongoing accelerated E&S is to be abated.

Weaver complains that the Department is being unfair by proceeding with an enforcement action in the Crawford County Court of Common Pleas while his appeal is still pending before this Board. He would have us issue a supersedeas so that the Department is foreclosed from seeking enforcement in that court until the appeal before this Board runs its course.

The Department's decision to pursue enforcement proceedings during the pendency of an EHB appeal is not a basis for issuing a supersedeas. It has long been established that the Department is entitled to pursue enforcement during the pendency of an EHB appeal. *DER v.*

*Bethlehem Steel Corp.*, 367 A.2d 222 (Pa. 1976), *cert. denied*, 97 S. Ct. 1600 (1977); *DER v. Norwesco*, 531 A.2d 94, 96 (Pa. Cmwlth. 1987). Otherwise, the appeal would have the effect of a stay, which is directly contrary to statutory statements in both the DSEA and the Clean Streams Law that an appeal to this Board does not operate as a stay of the Department's action. 32 P.S. § 693.24; 35 P.S. § 7514. Absent a supersedeas, the courts have said that an appeal to this Board "must be carried out on the polluter's time, not at the expense of the general public." *Bethlehem Steel*, 367 A.2d at 229. They have also said that the availability of a supersedeas is sufficient to protect the appellant's due process rights. *Norwesco*, 531 A.2d at 96.

The DSEA provides that "[a]ny person violating or failing to comply with any order of the Department from which no appeal has been taken or which has been sustained on appeal, *or which has been appealed but where no supersedeas has been granted* for the period in which the order has been violated shall be deemed in contempt of such order". 32 P.S. § 693.20 (emphasis added). This statutory language leaves no doubt that an enforcement action may proceed if no supersedeas has been granted. This makes perfect sense. The EHB appeal process rarely takes less than one year and often takes several years to complete. If there is a condition on a site that compels the issuance of an enforcement order in the first place, it is not surprising that the Department may not be in a position to wait that long if it is to perform its duties under the Act in a timely manner.

Furthermore, there is no logical reason why we would supersede a Department order simply because an enforcement proceeding is also pending. Our review focuses on the content and validity of the order. In contrast, a court's focus in an enforcement proceeding is not on the content of the order, but on whether it has been complied with. 32 P.S. § 693.20(c); *DEP v. Cromwell Twp.*, 32 A.3d 639 (Pa. 2011); *Bethlehem Steel*, 367 A.2d at 230; *Interstate Traveler*

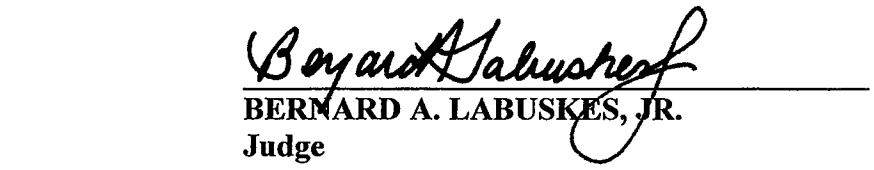
*Services v. DER*, 406 A.2d 1020, 1023-24; *DER v. Wheeling-Pittsburgh Steel Corp.*, 375 A.2d 320 (Pa. 1977); *Com. v. Derry Twp.*, 351 A.2d 606 (Pa. 1976). *See also U.S. v. Rylander*, 460 U.S. 752, 756 (1983). The court does not get into the content of the order, and we do not get into enforcement issues. In the words of our Supreme Court, dual proceedings actually enhance, rather than interfere with, the integrity of the regulatory scheme. *Bethlehem Steel*, 367 A.2d at 230.

For all of these reasons, we view Weaver's likelihood of success on the merits as being very low. Therefore, there is little point in balancing harm because a petitioner must make a credible showing on all three criteria. Nevertheless, with respect to the irreparable harm to the petitioner, it is true that the need to incur significant expense for which an appellant has no recourse may under certain circumstances constitute irreparable harm. *Mundis v.* DEP, 1998 EHB 766, 774; *Power Operating Company v. DEP*, 1997 EHB 1186, 1198. However, the economic loss is less compelling where, as here, it is occasioned by the expense of remediating what appears to have been the petitioner's illegal activity. *Greif Packaging v. DEP*, 2012 EHB 85, 90; *Kennedy v. DEP*, 2008 EHB 423, 425; *Tire Jockey Services v. DEP*, 2001 EHB 1141, 1160. Such self-inflicted harm carries little weight.

In contrast, actual and threatened pollution clearly exist on the Weaver property. Actual excess sedimentation was occurring as of the day before the hearing. Of more concern to us is the alteration and/or obliteration of large portions of the streams on the property. Physical alteration of the surface waters of the Commonwealth constitutes pollution. *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 1038, 1042, 1045; *Oley Twp. v. DEP*, 1996 EHB 1098, 1117-18. The issuance of a supersedeas while such pollution is continuing is inappropriate. 35 P.S. § 7514.

It is for all of these reasons that we issued an order denying the petition for supersedeas. A copy of that order is attached.

**ENVIRONMENTAL HEARING BOARD**



**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: August 29, 2013**

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

**For the Commonwealth of PA, DEP:**
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Office of Chief Counsel – Northwest Region

**For Appellant:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **JOHN R. WEAVER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-041-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 21st day of August, 2013, following a view of the premises and a hearing, it is hereby ordered that the petition for supersedeas is granted in part and denied in part. With the consent of the Department, Paragraph 10 of the April 2, 2013 order under appeal is superseded by the following language: "The Weavers shall not interfere with the Department's representatives who will be inspecting their property, provided that the Department makes a reasonable effort to give notice of the inspection at least 24 hours before the inspection." The petition is in all other respects denied because the petitioner has a low likelihood of success on the merits, and actual and potential pollution is occurring on the site. An opinion in support of this order will follow.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: August 21, 2013**

**c: For the Commonwealth of PA, DEP:**
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Office of Chief Counsel – Northwest Region



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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **LIMERICK PARTNERS I, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-185-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: September 5, 2013** |

**OPINION AND ORDER ON**
**PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board grants Appellant's Motion for Summary Judgment in part and denies the Department's Cross-Motion for Summary Judgment. The Board interprets the Permit Extension Law as extending the permit term of the Department-issued permit beyond the date of the statutory permit extension period. The Board, however, only extends the permit term in question for a limited period after the end of the statutorily established permit extension period, and has not restarted the full permit term allowed by law as Appellant requested.

## OPINION

The Department of Environmental Protection ("Department") issued a water obstruction and encroachment permit to the Appellant, Limerick Partners I, LP ("Appellant" or "Limerick Partners") on January 29, 2009, which included a three-year permit term.[1] Before the permit term expired, the General Assembly enacted Act 46 of 2010 ("Act 46" or "Permit Extension Law") which amended the Pennsylvania Fiscal Code related to the extension of state and local approvals and permits affecting real estate development. 72 P.S. §§ 1601–I *et seq.* The

[1] Water Obstruction and Encroachment Permit E46-1012 (the "permit") was issued on January 29, 2009 and authorizes the enclosure of 956 linear feet of an unnamed tributary to Mingo Creek.



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Appellant's permit is subject to this recently enacted Law, and this appeal arises under the terms of this Law and under the Appellant's use of the provisions of this Law to extend the permit term of the water obstruction and encroachment permit in question. It is therefore useful to begin with a discussion of this new state law.

**Permit Extension Law (Act 46 of 2010)**

The General Assembly enacted the Permit Extension Law on July 6, 2010. Act of July 6, 2010 (P.L. 279 Act No. 46). Act 46 is codified in the Fiscal Code at 72 P.S. §§ 1601-I *et seq.* As the Department noted in its *Pennsylvania Bulletin* notice, "Act 46 was passed by the General Assembly on July 6, 2010, to provide relief to the building industry impacted by the economic downturn and to that end is focused on land development for residential and commercial purposes." 40 Pa. B. 4458 (Aug. 7, 2010). The relief was in the form of automatic extensions of permit terms, which would otherwise expire, for a period of time to eliminate the need to obtain new or renewal permits for development beyond the typical expiration dates for such permits. The extension period was defined in Act 46 as "July 2, 2013." 72 P.S. § 1602-I. As the 2008 economic downturn lingered, the General Assembly enacted Act 87 of 2012. Act 87 amended the definition of extension period and substituted "July 2, 2016" for "July 2, 2013." Act of July 2, 2012 (P.L. 823, Act No. 87); 72 P.S. § 1602-I. The Department and the Appellant agree that the Appellant's water obstruction and encroachment permit is subject to the Permit Extension Law (Act 46 of 2010 as amended by Act 87 of 2012), but they disagree over the way to calculate how long the new Law extended the permit.

To understand the nature of their dispute, it is helpful to describe the provisions of the Permit Extension Law in some greater detail. The Permit Extension Law adds eight new sections to the Fiscal Code. Section 1601-I provides that the new Article XVI of the Fiscal Code

"relates to development permit extensions." 72 P.S. § 1601-I. Section 1602-I adds definitions for the terms "Approval," "Development," "Extension period" and "Government agency." Under these terms, the Parties are in agreement that the Department is a "Government agency" whose "Approval," the water obstruction and encroachment permit at issue in this appeal, is subject to the Permit Extension Law.

The core requirement in the Permit Extension Law is found in Section 1603-I(a) which provides:

> **(a) Automatic suspension.**—The expiration date of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period.

72 P.S. § 1603-I(a). Under this provision, the expiration date of an approval is automatically suspended during the extension period. The Parties have widely different views regarding the proper way the Board should interpret this provision. The Department asserts that permits are only extended during the extension period and not beyond. The Appellant asserts that the permits can be extended beyond the extension period because Act 46 "tolls" the expiration dates during the extension period.[2] Section 1603-I(b) preserves longer terms or durations of approvals available in the absence of the Permit Extension Law and specifically states that nothing in the section prohibits granting additional extensions allowed by law. 72 P.S. § 1603-I(b). Section 1603-I(a.1) and (c) contain specific rules for use in cities of the first-class and for use in connection with certain riparian land leases in the City of Philadelphia, respectively. 72 P.S. §§ 1603-I(a.1) and (c).

Section 1604-I establishes rules for applying the Permit Extension Law when there are subsequent changes in law, regulation or policy during the extension period. 72 P.S. § 1604-I.

[2] The Appellant also asserts that the new Law restarts a new, full permit term at the end of the extension period.

Subsection (a) establishes a general rule, and subsections (b) and (c) provide special rules for planning code approvals and approvals involving rights in the beds of navigable waters of the Commonwealth. § 1604-I.

Section 1605-I establishes rules and obligations regarding agency verifications of the existence of an approval subject to the new Law and the expiration date of a particular approval subject to the request. 72 P.S. § 1605-I(a)(1). Under section 1605-I, a person may submit a request to a government agency, and the agency then has 30 days to respond by either affirming or denying that a particular approval is subject to the new Law and by providing the expiration date for that particular approval. 72 P.S. § 1605-I(b). Subsection (d) establishes rules for appeals from disputes over agency verification under two applicable laws. 72 P.S. § 1605-I(d). Section 1605-I plays an important role in addressing the legal issue in this appeal as set forth in more detail below.

Section 1606-I governs applicability of the new Permit Extension Law, and it sets forth various exceptions to the permit extension provisions. 72 P.S. § 1606-I(a). Subsection (b) establishes special rules for the automatic extension of approvals related to sewer and water systems. 72 P.S. § 1606-I(b). Under this provision, application of the extension period is contingent upon the existence of sufficient available capacity.

Section 1607-I provides that each affected government agency shall publish notice of applicability of the extension period to approvals granted by the agency in the *Pennsylvania Bulletin*. 72 P.S. § 1607-I(a). The Department is an affected government agency and it published its notice in the *Pennsylvania Bulletin* on August 7, 2010 which listed the Department approvals subject to the new Law and those that are exempted. 40 Pa. B. 4458 (Aug. 10, 2010).

Section 1608-I contains several miscellaneous provisions. 72 P.S. § 1608-I. Subsection (a) contains a broad rule of construction that "Nothing in this article shall be construed to modify any requirement of law that is necessary to retain Federal delegation to, or assumption by, the Commonwealth of the authority to implement a Federal law or program." 72 P.S. § 1608-I(a). Subjection (b) provides that a government agency retains full enforcement authority to suspend or revoke an approval during the extension period just as it could in the absence of the extension period. 72 P.S. § 1608-I(b).

**Jurisdiction of the Board**

As a preliminary matter under Act 46, the Board needs to address the issue of the Board's jurisdiction over the disputes between the Parties regarding the Department's response to Appellant's request for verification authorized by the Permit Extension Law enacted by the General Assembly in 2010. The Board must address this issue because there is an ambiguity in the Permit Extension Law.

As set forth above, Section 1602-I of the Permit Extension Law contains the definitions applicable in the new Law. 72 P.S. § 1602-I. Under these definitions, it is crystal clear that certain Department permits or other approval decisions are subject to the Permit Extension Law. The definition of "government agency" includes a department of the Commonwealth such as the Department, and the definition of "approval" includes any governmental agency approval or permit related to development granted pursuant to state statutes or regulations including the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, or the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.* The approval at the center of this appeal is a water obstruction and encroachment permit issued pursuant to the statutes identified above and the regulations promulgated

thereunder. Both Parties agree that the permit is an approval subject to the Permit Extension Law.

Section 1605-I of the Permit Extension Law establishes procedures and requirements for government agency verification of both the existence of and expiration date of an approval subject to the Law. 72 P.S. § 1605-I(a)(1). Upon receipt of a request for verification, a government agency shall respond affirming or denying the existence of the approval and its expiration date. 72 P.S. § 1605-I(b). Section 1605-I also contains provisions concerning appeals of verification decisions. Section 1605-I(d) provides that:

> (d) Appeals of verification.--A dispute arising under this section shall be appealable in accordance with one of the following applicable laws:
>
> (1) 2 Pa.C.S. § 105 (relating to local agency law).
>
> (2) The act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code.

72 P.S. § 1605-I(d). Neither of these listed statutes (Local Agency Law and Municipalities Planning Code) govern or address appeals from Department actions, and therefore, the Board finds that they are not "applicable" here. As a result, the Permit Extension Law contains no express requirement governing appeals of Department actions in response to a request for verification of a Department issued approval subject to the Permit Extension Law. Because the Department has the authority and obligation to take appealable actions under Section 1605-I, the legal issue is whether appeals of these Department actions are subject to Section 1605-I(d). The Board holds that they are not.

In the absence of any clear direction in the Permit Extension Law, the Board finds that it has jurisdiction over this appeal under its general authority in Section 7514 of the Environmental Hearing Board Act ("EHBA"). 35 P.S. § 7514. The Board interprets the Department's new

authority to take appealable action in response to requests for verification under Section 1605-I of the Permit Extension Law along with the Board's broad jurisdiction over all appealable Department actions in Section 7514 of the EHBA in *para materia* to provide the Board with jurisdiction over appealable actions taken under the new Permit Extension Law. 1 Pa. C.S.A. § 1932. Both statutes relate to Department actions to issue the permits in question under environmental statutes which the Department administers. Moreover, there is no express intent in the Permit Extension Law to repeal the existing special provision establishing Board jurisdiction over appealable Department actions, and the more particular grant of Board jurisdiction in the EHBA controls the more general grant of jurisdiction to a broad class of unnamed government agencies in Section 1605-I of the Permit Extension Law. 1 Pa. C.S.A. § 1933. The Board, therefore, has jurisdiction over this appeal under Section 7514 of the EHBA.

**Interpretation of Section 1603-I**

The Board has cross-motions for summary judgment pending before it to resolve this appeal. The Parties agree that there are no material facts in dispute. The legal dispute is over the correct interpretation of the language in Section 1603-I(a) which provides:

> (a) Automatic suspension.—The expiration date of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period.

72 P.S. § 1603-I(a). Both Parties have different interpretations of the phrase, the "expiration date of an approval . . . shall be automatically suspended during the extension period."

The Department asserts that under this language all approvals extended by the new Law expire immediately after the end of the extension period. Approvals are extended for different periods of time depending upon their original expiration dates, the Department argues, and they all expire on the same date immediately after the end of the extension period. This interpretation

provides the shortest permit extension relief amongst the Parties' conflicting interpretations, but it provides the greatest level of environmental protection. Permits and the pollution control requirements in them can become stale or outdated over time, and there is greater risk of change as you extend the expiration date of a permit. Similarly, circumstances on the ground can change over time that adversely impact the environment. A permit issued today for a particular project in a particular location may not be appropriate without updating requirements within a decade or more. The Department, therefore, cannot be faulted for advancing an interpretation that pursues the most protective environmental result, which is one that does not allow the extension of any permit term beyond the extension period.

In contrast, the Appellant asserts that the Permit Extension Law does allow the extension of a permit term beyond the extension period. Under the Appellant's view, the Permit Extension Law extends a permit term through the extension period at which time the permit is granted a new, full permit term that is allowed under law. The permits in question have a three-year permit term, and Appellant asserts that they have a permit term that expires three years after the end of the extension period. The Appellant advances an interpretation that provides the longest possible permit term. The Appellant cannot be faulted for advancing this interpretation because the longest possible permit term provides the best economic advantage to construct the development allowed by the permits.

The Board rejects both the Department's and the Appellant's extreme interpretations. The Board agrees with the Appellant that the new Law authorizes permit terms beyond the end of the extension period, but the Board disagrees with the Appellant regarding the way to determine the expiration date for a particular approval.

The starting point for all statutory interpretation is the statutory language and the object of all interpretation and construction of statutes is to ascertain and effectuate the intent of the General Assembly. 1 Pa. C.S.A. § 1921(a). In addition, every statute shall be construed, if possible, to give effect to all of its provisions. *Id.* Under the rules of statutory construction, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S.A. § 1921(b). However, when the words of a statute are ambiguous and are not explicit, a court may ascertain the intent of the General Assembly by considering a number of factors such as:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statues upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

1 Pa. C.S.A. §§ 1921(c). Applying these basis rules to the Permit Extension Law, and in particular Subsection (a) of Section 1603-I, it is clear that the language in Subsection (a) is ambiguous and not explicit, and therefore, the Board must consider the other factors to ascertain the intention of the General Assembly to determine whether Section 1603-I allows an extension of a permit term beyond the extension period.[3]

[3] The Department asserts that Section 1603-I is not ambiguous and that it is explicit. The Board rejects this assertion because the language is not explicit. The language does not address when a particular permit expires; it only addresses that the expiration date in an approval is suspended.

The Board agrees with the Appellant that the Board must construe the language in Section 1603-I(a) regarding suspension of the expiration date during the extension period together with Section 1605-I regarding the verification procedures and obligations. Both parts of the statute relate to the same thing regarding extensions of expiration dates of government approvals, and they should be construed in *para materia*. 1 Pa. C.S.A. § 1932. In addition, the Department's interpretation of Section 1603-I(a) is incorrect under the Pennsylvania Statutory Construction Act because it gives no effect to the requirement in Section 1605-I that requires affected government agencies, such as the Department, to verify the evidence of an approval subject to the new Law *and* its particular expiration date. 1 Pa. C.S.A. § 1921(a) Under the Department's mistaken view, all affected approval of all agencies all expire on the same date that is the end of the extension period. There is no reason or purpose to require an affected agency to identify the expiration date for a particular approval if all approvals expire on the same date. To give effect to this provision, the Board agrees with the Appellant, in part, that the Permit Extension Law authorizes permit expiration dates beyond the end of the extension period.

The Board, however, disagrees with the Appellant, in part, because the Appellant's extreme interpretation runs afoul of the same statutory construction trap that the Appellant used to defeat the Department's interpretation. Under the Appellant's extreme position, all approvals subject to the new Law have their permit expiration dates reset at the end of the extension period to the full original permit term. If a permit, such as the one under appeal, has a three-year permit term, then all such permits will have an expiration date three years after the end of the extension period. All permits of a certain type will have the same expiration date, and, like the flaw in the Department's position, this interpretation does not give effect to the Department's verification obligation to identify the expiration date for a particular approval. If they all expire on the same

date, regardless of when they were issued, then there is no reason or purpose to require the Department to identify a particular expiration date. To give effect to the language imposing the verification obligation on the Department, the Board must reject the interpretation advanced by the Appellant that asks the Board to reset a new, full permit expiration date.

A middle ground exists between the two extreme positions advanced by the Parties. The Board adopts this middle ground interpretation as set forth below.

**Dates Beyond the End of the Statutorily Defined Extension Period**

The Department's major argument in support of its narrow interpretation is that the statutory language in Section 1603-I(a) is not ambiguous, and it explicitly provides that all approvals of all government agencies expire at the end of the extension period. The Board rejects this argument for two reasons. First, the language "the expiration date . . . shall be automatically suspended during the extension period" is not clear on its face. If the General Assembly wanted all approvals to expire on the same date at the end of the extension period, there are more direct ways to draft such a requirement. Section 1603-I(a) addresses suspension of expiration dates, but it does not specifically addresses when an approval expires. The provision does not address how to calculate a new expiration date after the extension period and the period of suspension have ended.

Second, the ambiguity in Section 1603-I(a) is more obvious when you construe the provision in Section 1603-I(a) with the verification requirements in Section 1605-I. Under this provision, the Department is obligated to verify two facts in response to a request for verification. First, the Department is required to verify the existence of a valid approval. Second, and more importantly for deciding that Section 1603-I(a) is ambiguous, the Department is required to provide a written verification regarding the expiration date for that approval. If all

approvals for all government agencies expire on the same date, as the Department asserts, then there is no reason or purpose for this requirement. The Department's position does not give effect to this language, violating one of the fundamental rules of statutory construction. 1 Pa. C.S.A. § 1921(a). To give effect to this verification obligation, the Department is required to respond in writing to a request for verification "affirming or denying the existence of the approval" and "its expiration date." 72 P.S. § 1605-I(b). Each approval has its expiration date, and the Department is required to provide an individualized verification for each request.

Having decided that the language in Section 1603-I(a) is ambiguous, the Board must consider the factors in Section 1921(c) to determine the intention of the General Assembly. 1 Pa. C.S.A. §§ 1921(c)(1)–(8). Under these factors, there is no support for the Department's interpretation and there is significant support for the Appellant's interpretation that the Permit Extension Law authorizes permit expiration dates beyond the end of the extension period. As the Department recognized in its *Pennsylvania Bulletin* notice, the General Assembly was addressing circumstances adversely affecting the building construction and development industry as a result of the severe economic downturn that began in 2008. The object of Act 46 was "to provide relief to the building industry impacted by the economic downturn . . . ." The relief that it provided was in form of automatic extensions of the expiration dates of certain types of government agency approvals related to development. The automatic extensions were needed to avoid the expiration of permits for projects that were delayed as a result of the economic downturn.

Act 46 was enacted in 2010, and was amended in 2012, to provide additional relief to the building industry by further extending the extension period by an additional three years from

July 2, 2013 to July 2, 2016. The amendment is evidence of the General Assembly's intent to further expand the relief provided.[4]

The General Assembly's overall intention to provide relief to the building industry supports the Appellant's view that Section 1603-I(a) authorizes expiration dates beyond the end of the extension period. The Board therefore agrees with the Appellant that the Department erred when it decided in its verification that the expiration date for the Appellant's permit was July 2, 2013, the end of the expiration period.

The Board nevertheless disagrees with the Appellant that the Permit Extension Law restarts the full permit term at the end of the extension period. This complete restart of the permit term or duration is not authorized by Section 1603-I(a). Under the Board's view, Act 46 suspended the expiration date during the extension period, and a permittee, such as the Appellant, is entitled to the unused or unexpired term from the date Act 46 suspended the expiration date for a particular permit to the end of the extension period. In this case, which involves a permit with a three-year permit term, the Appellant is entitled to that remaining portion of its permit term that was not used when Act 46 suspended the permit's expiration date. Rather than restarting a new three-year permit term at the end of the extension period that the Appellant requests, the Board construes Section 1603-I(a) as authorizing an expiration date beyond the extension period that is calculated by adding that portion of the permit's original three-year term that remained when Act 46 suspended the expiration date of the permit in question.

[4] The 2013 re-enactment of the Development Permit Extension Act earlier this summer is a further indication of the legislative interest in providing relief to the building industry. While the substantive requirements of the prior version were not changed, the recent re-enactment is a strong indication of the General Assembly's intent to provide relief to the building industry by extending permit expiration dates.

This interpretation has the added benefit of giving effect to the verification language in Section 1605-I that requires the Department to identify a particular expiration date for a particular permit that is the subject of a verification request. Under this interpretation, the Department is obligated to calculate a separate expiration date for each permit subject to a request. This interpretation would also provide more relief to the building industry by authorizing expiration dates beyond the extension period, which is consistent with the General Assembly's overall intention in enacting Act 46, and it gives effect to all of the language in Section 1605-I.

The issue of the proper interpretation of Section 1603-I(a) of the new Permit Extension Law has not yet been addressed by any Pennsylvania appellate court, and there is therefore no binding authority to guide the Department's interpretation. The Appellant has identified two decisions of Courts of Common Pleas that have addressed similar or related issues arising from local government approvals subject to the new Permit Extension Law. *See In re: Appeal of Keystone Custom, Inc. and Fox Clearing, LLC*, (Lancaster County Court of Common Pleas No. CI-10-03933) 2010 Pa. Dist. & Cnty. Dec. Lexis 697 (Oct. 22, 2010); *Logan Greens Community Assoc., Inc. v. Church Reserve, LLC*, (York County Court of Common Pleas No. 2011-SU-794-93) (Opinion Granting Judgment for Defendant and Dismissing the Quiet Title Action, July 20, 2012) (On appeal to Commonwealth Court Docket No. 1819 CD 2012, argued on March 11, 2013). The interpretation of Section 1603-I(a) that the Board adopts in this case is consistent with the interpretation of this provision by two Courts of Common Pleas in recent opinions described below. Both of these decisions support the Board's view that the Permit Extension Law authorized permit expiration dates beyond the end of the expiration period. Neither decision supports the Appellant's view that the permit expiration date is fully reset at the end of

the extension period for the maximum permit term allowed by law. Both support the view that the Appellant is entitled to the remaining portion of the original permit term that was unused when Section 1603-I(a) "automatically suspended" the expiration date.

In the *Appeal of Keystone Custom Homes* decision, the Lancaster County Court of Common Pleas calculated that the "Appellants are entitled to an additional approval period after the conclusion of the Extension Period representing the period from the beginning of the Extension Period, January 1, 2009, until the original expiration date." 2010 Pa. Dist. & Cnty. Dec. Lexis 697, page 8. Similarly, in the *Logan Greens* decision, the York County Court of Common Pleas calculated the extension period as follows:

> Accordingly, the deadline for Defendant to convert or withdraw Lot 54 was tolled on January 1, 2009, the first day of the Extension Period. 72 P.S. §1602-I. In accordance with Judge Farina's opinion in *Appeal of Keystone Custom Homes*, the deadline imposed by the Declaration has been extended by the Permit Extension Act. The Deadline to convert and/or withdraw Lot 54 will be extended after the conclusion of the Extension Period on July 1, 2013 for a period of time representing the amount of time from the start of the Extension Period until the original July 30, 2011 deadline. The Permit Extension Act has therefore tolled the time period during which Defendant is required to convert or withdraw Lot 54 and has extended the period during which Defendant must convert or withdraw Lot 54 until January 30, 2015.

*Logan Greens Community Assoc.*, slip op. at page 14 (footnote omitted). The calculations the Courts made in these decisions to determine the new expiration dates are consistent with the Board's interpretation in this appeal.

**Deference to the Department's Interpretation of Section 1603-I(a)**

The Department also asserts that its interpretation of Section 1603-I(a) is entitled to deference. In support of this assertion, the Department cites a recent Board decision in which the Board gave deference to the Department's interpretation of a different provision in the Permit Extension Law. *New Hanover Township v. DEP*, 2010 EHB 795, 799-800.

While the Department is correct that the Board gave the Department's interpretation deference in *New Hanover Township*, the appeal currently before the Board is distinguishable for the reasons set forth below. The Department's interpretation of Section 1603-I in this appeal is therefore not entitled to deference for the reasons set forth below.

In *New Hanover Township*, the Board was faced with the issue of the correct interpretation of Sections 1606-I and 1608-I of the Permit Extension Law. 72 P.S. §§ 1606-I and 1608-I. Under these provisions, the General Assembly enacted exceptions to the new Law (Section 1606-I) and a general rule of construction that nothing in the new act shall be construed to modify any requirement of law that is necessary to retain a federal delegation to implement a federal law or program (Section 1608-I). To implement the new Law and to identify those approvals that are subject to the new Law, each affected agency was directed to publish a notice of applicability of approvals subject to the new Law. 72 P.S. § 1607-I.

The Department is an affected government agency, and it published a notice in the *Pennsylvania Bulletin* in which it listed Department approvals subject to Permit Extension Law. 40 Pa. B. 4458 (Aug. 7, 2010). In addition, the Department also discussed the exceptions to applicability of the new Law in Section 1606-I and Section 1608-I. 40 Pa. B. 4458.

In *New Hanover Township*, the Board addressed the exceptions in Section 1606-I and Section 1608-I to the Department's NPDES permitting program. *See* 25 Pa. Code, Chapter 92. The NPDES permitting program is a federally delegated permitting program, and the Department in its August 7, 2010 Notice of Applicability published in the *Pennsylvania Bulletin* identified its delegated NPDES permitting program as a Department approval that was *not* subject to the new Permit Extension Law. The Board agreed with the Department's interpretation and stated that the Board was "inclined to defer the Department's interpretation" regarding the applicability of

the Permit Extension Law to the federally delegated NPDES permitting program that the Department administers in Pennsylvania. *New Hanover Township*, 2010 EHB at 800. The Board decided that the Department's interpretation of Sections 1606-I and 1608-I was entitled to deference because the Department had an independent role in the implementation of these provisions in the new Permit Extension Law. *See, e.g. Eagle Envtl. II, L.P. v. DEP*, 884 A.2d 867, 878 (Pa. 2005); *Windslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000). The Department's interpretation of these Sections governing exceptions to applicability required the Department to exercise specialized judgment regarding the nature of particular approval programs that the Department implements under federal delegations. Decisions about the applicability of the new Law to particular approval programs that are implemented by the Department are unique to the Department.

In contrast, in this appeal, the Board is faced with a question of statutory interpretation that is not unique to the Department or its expertise, nor to the approval programs it implements. The issue concerns the calculation of the time period that a particular government agency approval is extended under Section 1603-I. 72 P.S. § 1603-I. This is a generic issue of interpretation concerning all approvals issued by any government agency whose approvals are subject to the Permit Extension Law. The Department has no specialized role or particular expertise in implementing this provision that all other government agencies also implement. Because the Department's interpretation of Section 1603-I does not involve an issue related to the Department's particular expertise, the Board will not accord deference to the Department's interpretation as the Board previously did in the *New Hanover Township* decision that involved an interpretation of a different provision in the Permit Extension Law. *See, e.g., Mercury Trucking, Inc. v. PUC*, 55 A.3d 1056, 1066-67 (Pa. 2012).

**Recent Re-Enactment of Permit Extension Law**

The Parties have been busy since the Board heard oral argument on June 27, 2013 communicating with the Board regarding the recent repeal and re-enactment of the Permit Extension Law. The Department filed a letter on July 11, 2013 in which it informed the Board that Act 54 of 2013 repealed Act 46 of 2010 (as amended by Act 87 of 2012). *See* Act of July 9, 2013 (P.L. 2158, No. 54). In addition, the Department stated that Act 54 enacted the language of Act 46 as a standalone law and removed it from the Fiscal Code. The Department also provided additional commentary regarding Act 54, which the Board views as further argument in support of the Department's cross-motion for summary judgment pending before the Board under Act 46.

The Appellant, upon receipt of the Department's letter, submitted a more extensive letter dated July 12, 2013 regarding the legislative history of Act 54. It disputed a suggestion, which the Appellant found in the Department's July 11, 2013 letter that Act 54 did not intend to re-enact Act 46 as a tolling statute.

Upon receipt of the Appellant's letter, the Department fired off its second letter dated July 17, 2013 in which it argued that the Appellant's analysis in its July 12, 2013 letter is incorrect. The Department challenged the Appellant's use of comments attributed to a single Legislator and its use of overall legislative histories of Act 46 and Act 54.

Not to be outdone, the Appellant filed its second letter dated July 19, 2013 in response to the Department's July 17, 2013 letter. The Appellant supplied the Board with additional authority to support the Appellant's position that the Board should construe Act 46 as a tolling statute. In addition, the Appellant noted that Act 54 retains the verification requirements previously found in Section 1605-I.

While the Board appreciates the Department's prompt notice that Act 46 had been repealed after the Board held oral argument, Act 54 of 2013 re-enacts the substantive requirements of Act 46 without exception. Other than adding a new official short title in Section 1 as "Development Permit Extension Act," Act 54 retains the same language regarding the automatic suspension of an expiration date during the extension period and the verification procedures found in Act 46. There is nothing in the legislative history of Act 54 or the re-enacted language of Act 54 which affects the Board's interpretation of Act 46. The Board still must construe ambiguous language in Section 1603-I(a) to effectuate the intent of the General Assembly.

For the foregoing reasons, the Board grants the Appellant's motion for summary judgment in part and denies the Department's cross-motion for summary judgment.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **LIMERICK PARTNERS I, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-185-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 5th day of September, 2013, it is hereby **ORDERED** that the Board grants Appellant's motion for summary judgment and remands the verification to the Department to be revised consistent with the Board's Opinion.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**RICHARD P. MATHER, SR.**
**Judge**

**STEVEN C. BECKMAN**
**Judge**

**DATED: September 5, 2013**

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

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**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **LIMERICK PARTNERS I, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-185-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**DISSENTING OPINION OF**
**HONORABLE BERNARD A. LABUSKES, JR.**

I agree that the Board has jurisdiction, that this case is ripe for determination on summary judgment, that the Board has no reason to defer to the Department's interpretation of the Permit Extension Law, and that Limerick's proposed interpretation of the Permit Extension Law is wrong. I respectfully disagree, however, with the interpretation of the Extension Law that has been fashioned by my colleagues.

Initially, I note that the majority's interpretation was not suggested by either party but instead represents a middle ground between what the majority characterizes as the two extreme interpretations forwarded by the parties. Unfortunately, this middle ground finds no support in the statutory language and is not otherwise supported by the rules of statutory construction.

The Extension Law is not ambiguous. When the language of a statute is clear, it is dispositive of legislative intent. *Lynnebrook Manor v. Borough of Millersville*, 963 A.2d 1261, 1267 (Pa. 2008). As set forth in the Statutory Construction Act, 1 Pa.C.S. § 1921(b), "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Only if the language of a statute is ambiguous should a court or this Board seek to ascertain legislative intent. *Commonwealth v. Fithian*, 961 A.2d 66, 74 (Pa. 2008).

It is very significant to me that the Extension Law only extended the expiration **date** of governmental approvals. Section 1603-I(a) reads:

> **(a) Automatic Suspension.**—The expiration **date** of an approval by a government agency that is granted for or in effect during the extension period, whether obtained before or after the beginning of the extension period, shall be automatically suspended during the extension period.

72 P.S. § 1603-I(a) (emphasis added).

The statute does not, as the majority says, extend permit **terms**. The Legislature easily could have referred to "the **term** of a governmental approval." It did not. A term is a period of time or a number of days. A date is, of course, one day in time. The majority has in effect changed the statute to read that the **term** of a governmental approval shall be tolled during the extension period, but that clearly is not what the statute says.

Furthermore, the Extension Law only applies to those governmental approvals with expiration dates that fall within "the extension period." The "extension period" is a defined term and it, by definition, ends on a specific calendar date: July 2, 2016. The date does not vary from permit to permit. The majority's interpretation effectively disregards the definition of "expiration period" and says that each permit will have a new expiration date that is only indirectly related to the statutory expiration date of July 2, 2016. Permit extensions will now extend beyond the statutorily defined "extension period."

The majority incorrectly says that the statute does not address when each permit expires. Each permit expires on July 2, 2016. The statute is very clear on that. There was no need to calculate individual permit expirations, which is why no calculation is included in the statute. The majority has fashioned its own unique interpretation that now involves a new calculation that finds no support in the statute.

The statute says the expiration date is only suspended "during" the extension period. The majority's interpretation essentially changes the statute to read "suspended during the extension period and an additional period thereafter to reflect the amount of time between the expiration date in the permit and July 2, 2016." Obviously, that is quite a change from the statutory language.

Only those permits that have expiration dates that fall within the defined extension period benefit from the law. The Legislature did not extend the terms of all development permits in the Commonwealth during the extension period. It is only those permits that would have otherwise *expired* during the economic downturn that gained a reprieve. This shows that it is the **date** that matters, and it is the **date** that is extended, not the total term of the permit. If the Legislature had intended to do what the majority has done, there would be no need to limit the statute to permits set to expire before July 2, 2016. It would have simply tolled the terms of all permits during the period of economic downturn.

Thus, the words of the Permit Extension Law are explicit and there is no need to resort to the principles of statutory construction set forth in the Statutory Construction Act, 1 Pa.C.S.A. § 1921, in order to divine the Legislature's intent. However, even if I do employ those principles, I come to the same place that my reading of the plain meaning of the Law leads me. First, when we consider "the occasion and necessity of the statute," "the circumstances under which it was enacted," "the mischief to be remedied," and "the object to be attained," 1 Pa.C.S.A. § 1921(c)(1)-(4), the goal of the Extension Law is to provide relief to a segment of the building industry impacted by an economic downtown. The "mischief to be remedied" is the economic downturn. The "object to be attained" is to provide relief from the effects of the downturn. The period of the economic downturn is "the extension period." The period is the

same for everybody because individual permit terms have nothing to do with prevailing economic conditions. Yet, the majority's construction means that every permit will now have a different term that is, at best, only indirectly related to the mischief to be remedied. Some permits will extend years beyond the end of the downturn as defined by the Legislature, and this goes well beyond the object to be attained by statute.

Even if the statute was ambiguous, it would not have been inappropriate to interpret the Extension Law narrowly as the Department has done. There are many good reasons for including expiration terms in development permits. The Extension Law not only trumps the considerations of environmental protection expressed by the Legislature in numerous other statutes, it suspends the ability of every municipality in the Commonwealth to regulate development within its borders based upon current facts and law. Changes in fact or law that might otherwise be significant must be ignored. 72 P.S. § 1604-I(a) I am not questioning the policy behind the Extension Law, merely pointing out that it necessarily conflicts with other policies of the Commonwealth. The Legislature's intent as expressed in the Extension Law can be honored without adding on the extension fashioned by the majority.

The Extension Law was ultimately designed to allow for economic growth through development by ensuring that projects that might otherwise have died might now only be postponed. The Law was not designed to create valuable assets to be held for long periods of time without being put to any use. Limerick's permit, for example, is essentially being held for investment purposes and has not resulted in any actual or planned economic development. The period that a developer can do this should be limited to the defined extension period and no more, or development is actually being hampered instead of encouraged.

The speculation that a large number of permits will expire on one date (July 2, 2016) does not render the Department's construction absurd as suggested by Limerick. First of all, most permittees actually use their permits. The Extension Law practically speaking only applies to unused permits. Second, there is no proof that there will be a large number of permits. The affidavits in support of the Department's motion say that, while the Department's office has issued hundreds of permits over the time in question, it has received only 20-25 requests for determinations. Third, permits have been issued all along with dates beyond the extension period that would not be affected under my interpretation. Fourth, millions of taxpayers pay their taxes on one day. General permits expire on one date. Creating a common regulatory compliance date or expiration date that affects multiple parties is not uncommon.

The Department's construction of the Extension Law is not harsh. As previously noted, practically speaking only stalled projects are at issue. Even for those projects, permit renewals and extensions are commonly available. If they are not, there is probably a good reason they are not. At a minimum, they allow the government unit an opportunity to reevaluate a project based upon current law and conditions.

Too much has been made of Section 1605-I of the Extension Law. That provision says that a permittee may ask a governmental unit to verify that it has a valid approval and to identify the expiration date of the approval if it has one. Upon receipt of the request for verification, the governmental unit must respond in writing "affirming or denying the existence of the approval, its expiration date and any issues associated with its validity within 30 days." 72 P.S. § 1605-I. The need to clarify the expiration date is only one aspect of this provision, and arguably, not the primary aspect. A permittee is primarily interested in knowing that it has a "valid approval." It wants to know whether there are "any issues associated with its validity." But more to the point,

by requiring governmental units to verify an expiration date, the statute is really requiring the unit to determine whether a permittee's "valid approval" is affected by the Permit Extension Law. The statute could have said that the government unit must determine whether a given approval is "covered by the Extension Law," but it is much more helpful to just tell the permittee (who should not be expected to study the Extension Law) what its expiration date is, even if that means several permits will have the same date by virtue of the Law.

Furthermore, the requirement to provide a date certain does not just apply to permits whose expiration dates have been extended by the Extension Law. For permits covered by the Law, there is only one date (July 2, 2016), but for other permits the dates will vary. As shown in the *Keystone Custom Homes* case, as well as the split decision in this case, it can be confusing and debatable whether a given approval is valid, whether it is covered by the Extension Law, whether it has an expiration date, and what that date is. It is not surprising to me that the Legislature would create a provision that allows for some certainty, even though the date might be the same for the limited class of approvals extended under the Law. Finally, the requirement to provide an expiration date (i.e. determine whether a permit is covered by the Extension Law) set forth in Section 1605-I is not superfluous, but even if it was, it would not in my mind justify the majority's expansive interpretation of 1603-I(a).

For all of these reasons, I believe the Department made the correct determination in this case and I would have granted its motion for summary judgment and dismissed Limerick's appeal.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**DATED: September 5, 2013**

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **JOSEPH D. CHIMEL AND PAUL PACHUSKI** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-033-M** |
| | : | **(Consolidated with 2011-034-M)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and D. MOLESEVICH &** | : | **Issued: September 20, 2013** |
| **SONS CONSTRUCTION, INC., Permittee** | : | |

# OPINION AND ORDER
# ON DEPARTMENT'S MOTION IN LIMINE

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Department's motion in limine which seeks to exclude from evidence a permittee's conduct at a permit site after the transfer and renewal of a permit to the permittee. The Board finds that this type of evidence may be relevant to the issues in this appeal, and the Board declines to impose a blanket exclusion on this type of evidence.

## O P I N I O N

Joseph D. Chimel and Paul Pachuski ("Appellants") filed appeals before the Environmental Hearing Board (the "Board") objecting to the Pennsylvania Department of Environmental Protection's (the "Department") transfer and renewal of Surface Mining Permit 49851602 (the "Permit") to D. Molesevich & Sons Construction, Inc. ("Molesevich") allowing Molesevich to operate a coal preparation plant located in Atlas, Pennsylvania (the "Atlas Coal Breaker"). The Appellants object to the Department's transfer and renewal of the Permit,



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claiming that the Permit expired on December 10, 2006; that if the Permit did not expire, the Permit was renewed solely for reclamation purposes pursuant to the former permittee's request, which limited the scope of the Permit to reclamation activities only; that Molesevich was not in compliance with Department regulations at the time of the renewal; and that the Department unlawfully allowed Molesevich to add acreage to the Permit. Appellants further argue that the Department should have required Molesevich to apply for a new permit, which should have included certain setback requirements, as well as requirements to enclose the entire operation with a six foot high fence, partially cover all conveyors, maintain the common use roads which it uses in furtherance of its operations, refrain from producing dust, dirt, and excessive noise levels that place an undue burden on local residents, and construct and utilize an alternative access route.

The Department filed a Motion in Limine before the Board seeking to preclude the introduction into evidence of Molesevich's conduct performed at the Permit site after the transfer and renewal of the Permit, arguing that Molesevich's conduct post-renewal and transfer is irrelevant to assessing the efficacy of the Department's actions. More specifically, the Department objects to evidence of the scope of Molesevich's current operations, the amount of noise and dust emanating from the Permit area and Molesevich's compliance with certain dust and dirt suppression requirements. The Department argues that evidence of conduct post-transfer and renewal is indicative of Molesevich's compliance with the Permit, which in turn would support a theory that the Department has failed to take adequate enforcement action against Molesevich. The Board, however, lacks the authority to order or direct the Department to take enforcement action "absent a claim of bias or corruption or perhaps other unusual circumstances." *Ballas v. DEP*, 2009 EHB 652, 653.

The Appellants deny that they are challenging the Department's prosecutorial discretion. Rather, they are seeking to show both that the transfer and renewal of the Permit was improper and that the Appellants have standing to bring, and the Board has jurisdiction to hear, this appeal. Further, the Appellants argue that Molesevich's conduct is relevant to whether the presumption of successive renewals, provided at 25 Pa. Code § 86.55(a), should apply, as well as whether the Permit site has "valid existing rights" as defined at 25 Pa. Code § 86.1.

As a preliminary matter, the Board's *de novo* standard of review is not limited to the facts available to or considered by the Department at the time it made its decision. *The Rail Road Action and Advisory Committee v. DEP*, 2009 EHB 472, 476-77. The Board is permitted to hear evidence that arose after the Department made its decision, and therefore "any evidence generated up until now is potentially relevant." *Id.* at 476 (emphasis omitted).

The Board's Rules provide that relevant and material evidence of reasonable probative value is admissible and that although the Board is not bound by the technical rules of evidence, it generally applies the Pennsylvania Rules of Evidence. 25 Pa. Code § 1021.123(a). Relevant evidence is evidence that has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Pa. R.E. § 401. Whether evidence has a tendency to make a given fact more or less probable is to be determined by the Board "in the light of reason, experience, scientific principles and other testimony offered in the case." Pa. R.E. § 401, *Official Comment.*

The Board agrees with the Appellants that this evidence is likely relevant to the objections made in this appeal. While the Board recognizes that it lacks the authority to order or direct the Department to take enforcement action, the Board finds that evidence of the scope of Molesevich's conduct is a fact of consequence in the Appellants' case. Evidence of the scope of

Molesevich's conduct fits squarely within the Appellants' objections regarding whether the Permit was properly transferred and renewed and whether the Permit should have been limited solely to reclamation activities, as well as the scope of "valid existing rights" associated with the Permit. Evidence related to any dust, dirt, and noise produced by the Atlas Coal Breaker is of consequence to the Appellants' standing to bring, and the Board's jurisdiction to hear, this appeal. Evidence of whether Molesevich is complying with certain dust and dirt suppression requirements would tend to support or undermine the Appellants' factual claims related to the amount of dust and dirt produced by the Atlas Coal Breaker.

At the very least there remains a question at this point in the litigation as to the relevance of Molesevich's conduct after the Permit transfer and renewal. As a general practice, the Board refrains from ruling on relevance where relevance remains uncertain prior to trial. *Gadinski v. DEP*, 2011 EHB 68, 70 ("At this phase in litigation, it is not yet apparent whether these materials cited by Gadinski will be relevant at trial and may have a tendency to make any fact that could determine the outcome of this appeal more or less probable"); *DEP v. Neville Chemical Co.*, 2005 EHB 181, 183 (stating Board was uncertain whether evidence was relevant prior to trial).

The Department's motion in limine raises premature objections to the relevancy of the scope of Molesevich's conduct at the Permit site and the adverse impacts that that conduct has had on the Appellants. The Board will refrain from ordering a blanket exclusion of this evidence without a fuller context within which to assess whether this evidence will have probative value. Instead, the Board retains authority to consider individual objections raised by the Department and Molesevich as to the relevancy of specific questions asked during the course of the hearing conducted on September 16, 17, and 18, 2013.

Accordingly, we issue the order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **JOSEPH D. CHIMEL AND PAUL PACHUSKI** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-033-M** |
| | : | **(Consolidated with 2011-034-M)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and D. MOLESEVICH &** | : | |
| **SONS CONSTRUCTION, INC., Permittee** | : | |

## ORDER

AND NOW, this 20th day of September, 2013, upon consideration of the Department's motion in limine and the Appellants' response thereto, it is hereby ordered that the Department's motion in limine is **denied**.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: September 20, 2013**

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

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| **LAURENCE HARVILCHUCK** | : | |
| | : | **EHB Docket No. 2013-013-M** |
| **v.** | : | **(Consolidated with 2013-014-M,** |
| | : | **2013-015-M, 2013-016-M and** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-017-M)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | **Issued: September 20, 2013** |
| **APPALACHIA, LLC, Permittee** | : | |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR LEAVE TO JOIN**
**WPX ENERGY, INC. AS PERMITTEE**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies Appellant's Motion for Leave to Join WPX Energy, Inc. as Permittee. The Board lacks authority under its Rules to involuntarily join parties in appeals before the Board. To the extent that the Appellant argues that the Department issued the Well Permits to the wrong corporate entity, the Board takes no position on the existence or merits of this objection, and the Board reserves judgment on this issue until a later date.

## O P I N I O N

Before the Environmental Hearing Board (the "Board") is Laurence Harvilchuck's (the "Appellant") Motion for Leave to Join WPX Energy, Inc. as Permittee (the "Motion to Join"). According to the Appellant, WPX Energy Appalachia, LLC ("WPX Energy Appalachia"), which opposes the Motion to Join, is not the real permittee, and the Appellant would like to join WPX Energy, Inc. ("WPX Energy") as Permittee. The Department of Environmental Protection (the



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"Department"), after failing to initially respond to the Motion to Join and later being ordered by the Board to respond, now also opposes the Motion to Join.[1]

As way of background, the Appellant appealed five Well Permits issued by the Department authorizing WPX Energy Appalachia to drill and operate wells in Silver Lake Township, Susquehanna County. The appeals of those Well Permits have been consolidated at EHB Docket No. 2013-013-M.

The Appellant, in the instant Motion to Join, asserts that WPX Energy is the real party in interest and that WPX Energy is using the identity of WPX Energy Appalachia as its *alter ego*. The Appellant bases his Motion to Join on a number facts that the Appellant asserts are sufficient to pierce the corporate veil. The Appellant bases his claim and theory on the 2007 Pennsylvania Supreme Court case, *Fletcher-Harlee Corp. v. Szymanski*, 936 A.2d 87 (Pa. 2007), which cited the 1988 Pennsylvania Supreme Court case, *Village at Camelback Property Owners Assoc., Inc. v. Carr*, 538 A.2d 528 (Pa. 1988). From there, the Appellant lists a number of facts suggesting that WPX Energy and WPX Energy Appalachia are in fact one in the same entity. The Appellant points out that WPX Energy is the sole controlling entity in WPX Energy Appalachia;[2] both entities share the same mailing address, telephone number, domain name for email communication, and service mark; WPX Energy's in-house counsel is representing WPX Energy

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[1] The Board is aware of the Department's longstanding reluctance to take an active role in defending its permit decisions in third-party appeals. While there may be a limited benefit to the Department with this approach regarding the technical merits of a particular permit decision, the Board sees no value with this approach for any party, or the Board, when issues such as the joinder issue in this appeal arise. The Department is always one of two or more litigants in all appeals before the Board, and the Board always benefits from hearing the Department's views even when we ultimately decide against the Department. The Board encourages the Department to *not* rest on its oars when the Board has to decide important legal issues in third-party permit appeals.

[2] By way of further explanation, WPX Energy Appalachia, in its response to the Motion to Join, states that WPX Energy Appalachia, LLC is actually wholly owned by WPX Energy Production, LLC, which is in turn wholly owned by WPX Energy, Inc. In that sense, WPX Energy Appalachia, LLC is still wholly owned by WPX Energy, Inc., albeit indirectly. WPX Energy Appalachia, LLC's Memorandum of Law at 3.

Appalachia; and WPX Energy participated in a conference pursuant to 58 Pa. C.S.A. § 3251(a) that otherwise included only parties to this appeal.

The Appellant also argues that the Board's May 7, 2013 Order granting admission *pro hac vice* of Lisa A. Decker constituted a de facto joinder of WPX Energy. Although that motion was entitled WPX Energy Appalachia, LLC's Amended Motion for Admission *Pro Hac Vice* of Lisa A. Decker, the proposed order attached to that motion, which the Board signed, named WPX Energy, Inc. as the author of the motion. Overall, the root of the Appellant's Motion to Join is that the Department issued the Well Permits to an improper entity, WPX Energy Appalachia, and instead should have issue the Well Permits to WPX Energy.

WPX Energy Appalachia primarily addresses the merits of the Appellant's legal argument. Not surprisingly, WPX Energy Appalachia, in its response to the Motion to Join, argues that the Appellant has failed to provide sufficient evidence to pierce the corporate veil and, therefore, to join WPX Energy. WPX Energy Appalachia also argues that the Appellant failed to attach sufficient exhibits to support the Appellant's factual assertions. It also claims that it mistakenly named WPX Energy, Inc. in the proposed order attached to WPX Energy Appalachia, LLC's Amended Motion for Admission *Pro Hac Vice* of Lisa A. Decker, arguing that this oversight is not dispositive of which corporate entity Ms. Decker is representing in this appeal. WPX Energy Appalachia believes that it is the valid holder of the Well Permits and that the permits should not have been issued to WPX Energy. Also, as WPX Energy Appalachia alludes to in its response to the Motion to Join, the theory of piercing the corporate veil is not intended to be applied in these circumstances, particularly because it would not be used to attribute any liability, such as claims for civil penalties, to WPX Energy.

The Appellant responded to WPX Energy Appalachia's response, providing only further argument in support of its theory that the Board should pierce the corporate veil and join WPX Energy.

In addition to arguing that WPX Energy Appalachia is the proper holder of the Well Permits, the Department, in its Board-ordered response to the Motion to Join, phrases the issue quite differently. Rather than argue about *whether* the Board *should* join WPX Energy, Inc., the Department argues that the Board *cannot per se*, as a limitation of its authority, join a non-party in an appeal before the Board. The Department points out that the Board's Rules contain no provision addressing joinder or authorizing the Board to involuntarily join parties to an appeal. In support of this position, the Department cites *Ferri Contracting Company, Inc. v. DEP*, 506 A.2d 981 (Cmwlth. 1986). In this Commonwealth Court opinion, the Court "affirmed the Board's interpretation of its regulations that the Board does not have the authority to involuntarily join parties." *Id.* at 985. The Board agrees with the Department that the Board lacks the authority to join non-parties in appeals before the Board.[3] In fact, the Board's case law on the issue of involuntary joinder also has consistently held that the Board has no authority to force a party's participation in a proceeding through compulsory joinder. *Parker Twp. Bd. of Supervisors v. DER*, 1991 EHB 1724, 1725-26; *Lower Paxton Twp. Auth. v. DER*, 1995 EHB 131, 138; *Thomas v. DEP*, 2000 EHB 452, 458.

To the extent that the Appellant argues in its Motion to Join that the Department issued the Well Permits to the wrong corporate entity, the Board declines to address this issue in the context of deciding the Motion to Join, and the Board reserves judgment on that issue until a later date. The Board declines to address the merits of this issue for several reasons. First, as set

[3] This aspect of the Board's discussion illustrates why the Board encourages the Department to take a more active role in the legal issues presented in third-party appeals.

forth above, the Board lacks the authority under its Rules to involuntarily join another party under any legal theory. Second, the use of the alter ego or piercing the corporate veil theory in a permitting context rather than an enforcement context concerning liability raises several novel legal issues[4] that the Board should wait to address when it has the authority to take the action that is requested. Third, it is not apparent from the Appellant's Notice of Appeal that the Appellant has objected to the Department's action to issue the permits under appeal to WPX Energy Appalachia rather than to WPX Energy. Finally, the Appellant indicated that it moved to join WPX Energy in aid of continuing discovery. The Board is unaware of any outstanding discovery disputes among the parties at this time. Denial of the Appellant's Motion to Join should not limit the discovery which the Appellant is entitled to, and the Board is available to address any discovery disputes should any arise.

The Appellant correctly identifies a reference to WPX Energy, Inc. in the Board's May 5, 2013 Order granting WPX Energy Appalachia, LLC's Amended Motion for Admission *Pro Hac Vice* of Lisa A. Decker. In the Order, drafted by the Permittee and filed with its motion, WPX Energy, Inc. is identified as the movant, not WPX Energy Appalachia, LLC. The Appellant asserts that this Order is a de facto joinder of WPX Energy, Inc. as Permittee. The Board disagrees. The Order filed by WPX Energy Appalachia, LLC contains an error that the Board did not notice when it granted the Amended Motion for Admission *Pro Hac Vice* of Lisa A. Decker. The error in the Order is not a de facto joinder of WPX Energy, Inc., although it does add an unnecessary level of confusion as the Board addresses the Appellant's Motion to Join.

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[4] For example, the Parties agree that WPX Energy Appalachia, LLC is a duly established Delaware Limited Liability Corporation authorized to do business in Pennsylvania. Under the facts and in the context of a permitting decision, there is an issue regarding the Department's appropriate level of inquiry beyond simply determining that the Permittee is a duly established corporate entity that is authorized to do business in Pennsylvania. Does the Department have to consider alter ego or piercing the corporate veil theories and factors every time it issues a permit, license or approval to any corporate entity?

For the foregoing reasons, the Board denies the Appellant's Motion for Leave to Join WPX Energy, Inc. as Permittee. Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **LAURENCE HARVILCHUCK** | : | |
| | : | **EHB Docket No. 2013-013-M** |
| **v.** | : | **(Consolidated with 2013-014-M,** |
| | : | **2013-015-M, 2013-016-M and** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-017-M)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | |
| **APPALACHIA, LLC, Permittee** | : | |

## ORDER

AND NOW, this 20th day of September, 2013, it is hereby **ORDERED** that the Board denies Appellant's Motion for Leave to Join WPX Energy, Inc. as Permittee.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: September 20, 2013**

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

**For the Commonwealth of PA, DEP:**
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Nicole Mariann Rodrigues, Esquire
Office of Chief Counsel – Northwest Region

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Brackney, PA 18812

**For Permittee:**
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Lisa A. Decker, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURENCE HARVILCHUCK** | : | |
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| | : | **2013-015-M, 2013-016-M and** |
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| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | **Issued: October 10, 2013** |
| **APPALACHIA, LLC, Permittee** | : | |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR LEAVE TO AMEND**
**CONSOLIDATED APPEAL 2013-013-M**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M because it is not verified and supported by affidavits as required by the Board's Rules. Because the Appellant's Motion fails to comply with the Board's Rules, the Board does not have to address whether the Appellant's proposed amendment would cause no undue prejudice to the opposing parties.

## OPINION

Before the Environmental Hearing Board (the "Board") is Laurence Harvilchuck's (the "Appellant") Motion for Leave to Amend Consolidated Appeal 2013-013-M (the "Motion to Amend"). The Permittee, WPX Energy Appalachia, Inc. ("WPX Energy Appalachia"), opposes the Motion to Amend. The Department of Environmental Protection (the "Department"), after



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failing to initially respond to the Motion to Join and later being ordered by the Board to respond, now also opposes the Motion to Join.[1]

The Appellant moves to amend his Notices of Appeal consolidated at 2013-013-M to include the following objection:

> 4. The Department abused its discretion and acted arbitrarily, capriciously, and contrary to law by failing to perform due diligence to ascertain whether or not the person named as Permittee, WPX Appalachia, was the proper person to which the Permits should have been issued pursuant to 58 Pa. C.S. §3211(a) which states that no person shall drill or alter a well without having first obtained a well permit.
>
> (a) The Department did not perform any inquiry or investigation, beyond the identification of Permittee as a duly established corporate entity that is authorized to do business in Pennsylvania, as to whether or not the named Permittee was, in fact, the person responsible for causing or conducting operations or other activities involving the wells and/or sites identified in the Permits issued by the Department.

The Appellant cites three facts in support of the Motion to Amend. The Appellant claims that at the time of filing the Notices of Appeal, the Appellant was unaware (1) "of additional facts, later disclosed in the course of discovery, which demonstrate the further involvement of persons, other than Permittee, directly responsible for causing or conducting operations or other supporting activities involving the wells and/or sites identified in the Permits that are subject of this consolidated Appeal;" (2) "that David Freudenrich, Regulatory and Construction Manager, was in fact an employee of WPX Energy, Inc., not Permittee;" and (3) "that multiple employees of WPX Energy, Inc., including its Senior Counsel, would be directly involved in litigating this

[1] In the Board's September 20, 2013 Opinion and Order, the Board highlighted its disappointment with the Department for failing to respond to the Appellant's Motion to Join. Less than three weeks after the Department received the Board's direction on this point, the Department has now again initially failed to respond to the instant, and highly related, Motion to Amend. The Board will reiterate its belief that the Department's failure to take an active role in defending permit decisions in third-party appeals is an approach that does not add value for any party or the Board. The Board and other parties, and therefore the Commonwealth as a whole, benefit from hearing the Department's views.

consolidated Appeal." Appellant's Motion to Join at 2. The Appellant ultimately concludes that the proposed amendment would not cause prejudice to WPX Energy Appalachia because the current proceedings are still in the discovery phase of litigation. WPX Energy Appalachia and the Department both assert that the Appellant has not met his burden to demonstrate that no undue prejudice will result to the opposing parties pursuant to 25 Pa. Code § 1021.53(b).

The Board does not have to address whether the Appellant has met his burden to demonstrate no undue prejudice. WPX Energy Appalachia points out that the Appellant's Motion to Amend fails to comply with the Board's Rule at 25 Pa. Code § 1021.53(c) which requires that motions for leave to amend an appeal be verified and supported by affidavits. As the Board has stated in past opinions, a motion for leave to amend an appeal must be denied where "it is not verified and supported by affidavits. . . . Supporting affidavits are mandatory." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375 (citing *CNG Transmission Corp. v. DEP*, 1998 EHB 1, 3).

While the Board denies the Appellant's Motion to Join on procedural grounds, the Board takes no position on the merits of the Appellant's position that the proposed amendment would cause no undue prejudice to the opposing parties.

For the foregoing reasons, the Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M. Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **LAURENCE HARVILCHUCK** | : | |
| | : | **EHB Docket No. 2013-013-M** |
| **v.** | : | **(Consolidated with 2013-014-M,** |
| | : | **2013-015-M, 2013-016-M and** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-017-M)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | |
| **APPALACHIA, LLC, Permittee** | : | |

## ORDER

AND NOW, this 10th day of October, 2013, it is hereby **ORDERED** that the Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: October 10, 2013**

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

**For the Commonwealth of PA, DEP:**
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Nicole Mariann Rodrigues, Esquire
Office of Chief Counsel – Northwest Region

**For Appellant, *Pro Se*:**
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**For Permittee:**
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Lisa A. Decker, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURENCE HARVILCHUCK** | : | |
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| **v.** | : | **(Consolidated with 2013-014-M,** |
| | : | **2013-015-M, 2013-016-M and** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-017-M)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | **Issued: October 11, 2013** |
| **APPALACHIA, LLC, Permittee** | : | |

**AMENDED OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR LEAVE TO AMEND**
**CONSOLIDATED APPEAL 2013-013-M**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M because it is not verified and supported by affidavits as required by the Board's Rules. Because the Appellant's Motion fails to comply with the Board's Rules, the Board does not have to address whether the Appellant's proposed amendment would cause no undue prejudice to the opposing parties.

## OPINION

Before the Environmental Hearing Board (the "Board") is Laurence Harvilchuck's (the "Appellant") Motion for Leave to Amend Consolidated Appeal 2013-013-M (the "Motion to Amend"). The Permittee, WPX Energy Appalachia, Inc. ("WPX Energy Appalachia"), opposes the Motion to Amend. The Department of Environmental Protection (the "Department"), after



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failing to initially respond to the Motion to Amend and later being ordered by the Board to respond, now also opposes the Motion to Amend.[1]

The Appellant moves to amend his Notices of Appeal consolidated at 2013-013-M to include the following objection:

> 4. The Department abused its discretion and acted arbitrarily, capriciously, and contrary to law by failing to perform due diligence to ascertain whether or not the person named as Permittee, WPX Appalachia, was the proper person to which the Permits should have been issued pursuant to 58 Pa. C.S. §3211(a) which states that no person shall drill or alter a well without having first obtained a well permit.
>
> (a) The Department did not perform any inquiry or investigation, beyond the identification of Permittee as a duly established corporate entity that is authorized to do business in Pennsylvania, as to whether or not the named Permittee was, in fact, the person responsible for causing or conducting operations or other activities involving the wells and/or sites identified in the Permits issued by the Department.

The Appellant cites three facts in support of the Motion to Amend. The Appellant claims that at the time of filing the Notices of Appeal, the Appellant was unaware (1) "of additional facts, later disclosed in the course of discovery, which demonstrate the further involvement of persons, other than Permittee, directly responsible for causing or conducting operations or other supporting activities involving the wells and/or sites identified in the Permits that are subject of this consolidated Appeal;" (2) "that David Freudenrich, Regulatory and Construction Manager, was in fact an employee of WPX Energy, Inc., not Permittee;" and (3) "that multiple employees of WPX Energy, Inc., including its Senior Counsel, would be directly involved in litigating this

[1] In the Board's September 20, 2013 Opinion and Order, the Board highlighted its disappointment with the Department for failing to respond to the Appellant's Motion to Join. Less than three weeks after the Department received the Board's direction on this point, the Department has now again initially failed to respond to the instant, and highly related, Motion to Amend. The Board will reiterate its belief that the Department's failure to take an active role in defending permit decisions in third-party appeals is an approach that does not add value for any party or the Board. The Board and other parties, and therefore the Commonwealth as a whole, benefit from hearing the Department's views.

consolidated Appeal." Appellant's Motion to Amend at 2. The Appellant ultimately concludes that the proposed amendment would not cause prejudice to WPX Energy Appalachia because the current proceedings are still in the discovery phase of litigation. WPX Energy Appalachia and the Department both assert that the Appellant has not met his burden to demonstrate that no undue prejudice will result to the opposing parties pursuant to 25 Pa. Code § 1021.53(b).

The Board does not have to address whether the Appellant has met his burden to demonstrate no undue prejudice. WPX Energy Appalachia points out that the Appellant's Motion to Amend fails to comply with the Board's Rule at 25 Pa. Code § 1021.53(c) which requires that motions for leave to amend an appeal be verified and supported by affidavits. As the Board has stated in past opinions, a motion for leave to amend an appeal must be denied where "it is not verified and supported by affidavits. . . . Supporting affidavits are mandatory." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375 (citing *CNG Transmission Corp. v. DEP*, 1998 EHB 1, 3).

While the Board denies the Appellant's Motion to Amend on procedural grounds, the Board takes no position on the merits of the Appellant's position that the proposed amendment would cause no undue prejudice to the opposing parties.

For the foregoing reasons, the Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M. Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **LAURENCE HARVILCHUCK** | : | |
| | : | **EHB Docket No. 2013-013-M** |
| **v.** | : | **(Consolidated with 2013-014-M,** |
| | : | **2013-015-M, 2013-016-M and** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-017-M)** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | |
| **PROTECTION and WPX ENERGY** | : | |
| **APPALACHIA, LLC, Permittee** | : | |

## ORDER

AND NOW, this 11th day of October, 2013, it is hereby **ORDERED** that the Board denies the Appellant's Motion for Leave to Amend Consolidated Appeal 2013-013-M.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: October 11, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **KEVIN CLANCY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-110-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEISWONGER CONSTRUCTION CO., Permittee** | : | **Issued: October 11, 2013** |

# ADJUDICATION

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

An Appeal of the Pennsylvania Department of Environmental Protection's approval of Stage I bond release of a Surface Mining Permit is dismissed. Permittee has satisfied the criteria for Stage I bond release. The property has been backfilled and regraded to the approximate or original contour and adequate drainage controls have been installed. Although Appellant's address was incorrect in the Permittee's records and he did not receive timely written notice of the actual filing of the application for bond release it was harmless error. Appellant had made his objections demonstratively to the Department and repeated them after becoming aware of the pending application for bond release. Appellant had a full opportunity to present his objections to the Department. Mr. Clancy was not



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prejudiced by the failure to provide him with timely notice of the Permittee's request to the Department to grant Stage I bond release. The Department reviewed, investigated and addressed the issues raised by Appellant before approving Stage I bond release.

**Background**

This is an Appeal filed by Mr. Kevin Clancy, as administrator of the Estate of Ruth K. Clancy (Clancy Estate Property or Mr. Clancy) of the Pennsylvania Department of Environmental Protection's (Department) approval of an application for Stage I bond release of a Surface Mining Permit issued to the Permittee, Neiswonger Construction, Inc. (Neiswonger Construction or Permittee). The Department granted its approval on June 28, 2011 and Mr. Clancy filed a timely appeal with the Pennsylvania Environmental Hearing Board.

The Clancy Estate Property consists of approximately 36 acres in Washington County, Pennsylvania. Mr. Clancy, an attorney, grew up on this family property and now lives approximately 20 minutes away in California, Pennsylvania. Two of Mr. Clancy's brothers reside on the Clancy Estate Property.

A hearing on the merits of this Appeal was held before Chief Judge Thomas W. Renwand in Pittsburgh on October 29, 2012. Appellant filed his Post-Hearing Brief on April 16, 2013. Neiswonger Construction filed its Post-Hearing Brief on May 8, 2013 and the Department filed its Post-Hearing Brief on May 17, 2013.

The record consists of the 155 page transcript and 17 exhibits. After a full, complete and careful review of the record and the Post-Hearing Briefs, we make the following findings of fact.

## FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, *as amended*, 52 P.S. §§ 1396.1-1396.19a ("Surface Mining Act") and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law").

2. Neiswonger Construction is a corporation that is engaged in the business of mining coal by the surface method (commonly referred to as "strip mining") in Pennsylvania, with a mailing address of 17592 Route 322, Strattanville, PA 16258. (Exhibit C-1.)

3. On January 30, 2009, the Department issued to Neiswonger Construction Surface Mining Permit ("SMP") No. 63080102, authorizing coal mining on the 187.8 acres in SMP No. 63080102 located in Somerset Township, Washington County. (Exhibit C-1.) SMP No. 63080102 is also known as the Obringer Mine.

4. The Appellant is Kevin Clancy, the administrator of the estate of Ruth K. Clancy ("Clancy Estate Property"). The estate owns 36.196 acres within the

187.8 acres of SMP No. 63080102. (N.T. at 7, 8 (stipulation); Exhibit C-1; N.T. at 66, 67, Exhibit C-16.)

5. Mr. Clancy personally advised the coal operator, Neiswonger Construction, that he was concerned about what he thought was an excessive slope on the northeast portion of the Clancy Estate Property. (N.T. at 8.)

6. In August, 2010, Mr. Clancy expressed these concerns to Mr. Keith Lucas, a Pennsylvania Department of Environmental Protection Mine Inspector, and his supervisor, Mr. Theodore Pytash, of the Greensburg Mining Office of the Pennsylvania Department of Environmental Protection. (N.T. at 8.)

7. A meeting was held on August 24, 2010 at the Clancy Estate Property with Mr. Pytash, Mr. Lucas, representatives of Neiswonger Construction, Richard Lustik, the area farmer who did the reclamation, and Mr. Lustik's son Jordan. (N.T. at 8-9.)

8. Mr. Clancy said he was concerned with what he considered was excessive slope built into the reclaimed northeast area of the Clancy Estate Property closest to the Lustik property. (N.T. at 10.)

9. As a child Mr. Clancy farmed potatoes on this part of the Clancy Estate Property. (N.T. at 11.)

10. Hiser Engineering, Inc. ("Hiser Engineering") is the engineering consultant hired by Permittee Neiswonger Construction for the Obringer Mine. Jonathan Hiser is the president and owner of Hiser Engineering. (N.T. at 142.)

11. By letter dated December 16, 2010, Hiser Engineering notified the Estate of Ruth Clancy of reclamation activities it had performed on the Clancy Estate Property. The letter stated that 28.4 acres of the Clancy Estate Property were backfilled and graded to approximate original contour, and that 27.1 acres of the Clancy Estate Property were planted with permanent grasses. The letter was addressed to 214 Hillcrest Drive, California, PA 15419. (Exhibit C-11; Appellant's Exhibit No. 1.)

12. Appellant received the December 16, 2010 letter from Hiser Engineering to the Estate of Ruth Clancy, addressed to 214 Hillcrest Drive, California, PA 15419 even though the correct address is **281** Hillcrest Drive. (N.T. at 11.)

13. The letter advised Mr. Clancy to contact the Pennsylvania Department of Environmental Protection "if you wish the Department to make a formal determination of the adequacy of the reclamation." (Appellant's Exhibit No. 1.)

14. Mr. Clancy responded to the December 16, 2010 letter from Hiser Engineering to the Estate of Ruth Clancy via a letter dated December 29, 2010 that was faxed to the Greensburg District Mining Office of the Department. In the

letter, he conveyed the same concerns he expressed in the meeting held at the Clancy Estate Property on August 24, 2010 as set forth in Finding of Fact Number 8. (Appellant's Exhibit No. 2; N.T. at 15, 16.)

15. There was no testimony as to whether Mr. Clancy or anyone at either the Department or Hiser Engineering was aware at this time that the letter to Mr. Clancy from Hiser Engineering was incorrectly addressed as indicated in Finding of Fact No. 12. Mr. Clancy evidently neither advised the Department of Environmental Protection nor Hiser Engineering that his address was not correct in their records.

16. Appellant expressed in writing three objections about the reclamation activities on the Clancy Estate Property in his December 29, 2010 faxed correspondence to the Department. Appellant also expressed these objections in person during a January 27, 2011 inspection which he attended with Mining Inspector Lucas. Appellant testified that the concerns he expressed in his December 29, 2010 correspondence and his concerns as described by Mining Inspector Lucas in his January 27, 2011 inspection report "mirror one another." (N.T. at 29; Exhibit C-22; Appellant's Exhibit No. 7.)

17. Appellant expressed his objections about Neiswonger Construction's Stage I bond release request to the Department. (*See, e.g.*, N.T at 10, 45.)

18. Mr. Clancy specifically requested "that the DEP conduct all available conferences, hearings and/or processes to make a final determination of the adequacy of the reclamation performed by the operator." (Appellant's Exhibit No. 7.)

19. Mr. Clancy received a response to his December 29, 2010 correspondence in a letter from Mr. Pytash dated January 10, 2011. The letter was sent to his correct address at 281 Hillcrest Drive. Mr. Pytash advised that no bond release application had been made yet but that "one may be in the offering." (N.T. at 16, 86; Appellant's Exhibit No. 3.)

20. The Department considered Appellant's objections to the Stage I bond release before the decision was made that the Stage I bond release criteria were met. (N.T at 128.)

21. Apart from the Appellant, the Department did not receive any other objections to Neiswonger Construction's Stage I bond release application from affected landowners. (N.T. at 96.)

22. No informal conference was held concerning the Stage I bond release application because Appellant agreed to instead participate in an on-site Stage I bond release inspection, and because there were no other objections received from affected landowners. (N.T at 96.)

23. On or about January 3, 2011, Hiser Engineering began the process of applying for release of the Stage I bond for the Obringer Mine. That process, set forth in law, included the submission of a Stage I Coal Completion Report to the Department, as well as providing notice to affected landowners via letters, and publishing notice of the application for Stage I bond release in a newspaper of local circulation once a week for four consecutive weeks. (N.T. at 144, Permittee's Exhibit 1.)

24. As part of the application for Stage I bond release, Hiser Engineering sent the original and two copies of the Stage I Completion Report and accompanying information for the Obringer Mine to the Department with a cover letter dated January 3, 2011. (N.T. at 143-144, Permittee's Exhibit 1.)

25. Hiser Engineering sent identical notice letters to twenty-one surface and adjoining property owners. The letters were sent on behalf of Hiser's client, Neiswonger Construction, and were signed by Mr. Jonathan Hiser. (N.T. at 144-145, Permittee's Exhibit 1.)

26. The notice letters to the twenty-one surface and adjoining property owners were mailed on or about January 3, 2011. (N.T. at 144-145, Permittee's Exhibit 1.)

27. The entry on the list that Hiser Engineering used for the Clancy Estate Property was "Estate of Ruth Clancy, 214 Hillcrest Drive, California, PA 15419." (Permittee's Exhibit 1.)

28. Hiser Engineering's procedure for determining that the notice letters are received is to follow up with landowners if they get a return that the letter was not deliverable. If a letter is returned as undeliverable, Hiser Engineering would perform a search of courthouse records to see if there has been a change in address. (N.T. at 146.)

29. None of the twenty-one notice of application for Stage I bond release letters to surface and adjoining property owners that were mailed on or about January 3, 2011 were returned by the United States Postal Service as non-deliverable. (N.T. at 146; Permittee's Exhibit 1.)

30. Hiser Engineering sent a letter dated January 3, 2011 to the Observer-Reporter newspaper requesting that the following advertisement be published once a week for four consecutive weeks:

> **NOTICE**
>
> Notice is hereby given that Neiswonger Construction, Inc., 17592 Route 322, Strattanville, PA 16258, has requested a Stage I bond release on surface mining permit #63080102 pursuant to the Surface Mining Conservation and Reclamation Act, the Clean Streams Law, and applicable Title 25 Rules and Regulations of the Department of Environmental Protection. The permit was issued on January 30, 2009 and is located north and south of Vanceville Road (SR-2019), east of

> Horseshoe Drive and west of Somerset Road (T-794) in Somerset Township, Washington County. Total bond liability is $152,000.00; requested amount of bond release is $91,200.00 for 104.4 acres. The area has been backfilled, graded in accordance with the approved permit.
> Written comments, objections, and requests for a public hearing or informal conference may be submitted to the Department of Environmental Protection, Armbrust Professional Center, 8205 Route 819, Greensburg, PA 15601-8739 within 30 days following the date of the final publication of this notice. Written comments, objections or requests for a public hearing or informal conference must include a brief statement as to the nature of the objections.
>
> 1-19, 26, 2,9

This advertisement was published in the Washington County Observer-Reporter newspaper on January 19, January 26, February 2 and February 9 of 2011. (N.T. at 144; Permittee's Exhibit 1.)

31. In a letter dated January 11, 2011, from Clerk Typist III Bonnie G. Deems of the DEP Greensburg District Mining Office to the Estate of Ruth Clancy, the Department notified the Estate of Ruth Clancy that Neiswonger Construction, Inc. had applied for a Stage I bond release for property on the Obringer Mine owned by the Clancy Estate Property. This letter was addressed to the "Estate of Ruth Clancy, 214 Hillcrest Drive, California, PA 15419." (Appellant's Exhibit No. 6.) Again, the wrong address.

32. If a letter is returned by the United States Postal Service as undeliverable, the Department's well established normal practice is to retain the envelope so stating that the letter is undeliverable in the file. (N.T. at 127.)

33. In the case of the letter dated January 11, 2011, from the DEP Greensburg District Mining Office to the Estate of Ruth Clancy, addressed to 214 Hillcrest Drive, California, PA 15419, containing notice that the mine operator had applied for a Stage I bond release concerning the Clancy Estate Property that had been mined, there was no envelope in the Department's file indicating that it was not delivered. (N.T. at 127-128.)

34. The Appellant did not receive the incorrectly addressed letter dated January 11, 2011 from the Pennsylvania Department of Environmental Protection notifying him that Neiswonger Construction had applied for Stage I bond release.

35. In an internal, one-page DEP memorandum dated January 11, 2011, Mining Inspector Lucas was notified of the pendency of the Stage I bond release application for 104.4 acres of the Obringer mine and was asked to conduct a bond release inspection and water quality review of the area. (Exhibit C-17; Appellant's Exhibit No. 6.)

36. Appellant was in contact with Mining Inspector Lucas in January of 2011. Mining Inspector Lucas made specific arrangements for Appellant to participate in a Stage I bond release inspection on January 27, 2011. (N.T. at 28.)

37. On January 27, 2011, Appellant went to the Clancy Estate Property on the Obringer Mine to meet with Mining Inspector Lucas during an inspection of the premises that the Department conducted to evaluate whether the criteria for Stage I bond release had been met. (N.T. at 28; Exhibit C-22; Appellant's Exhibit No. 7.)

38. During the January 27, 2011 inspection of the Clancy Estate Property, Surface Mining Inspector Keith Lucas addressed three topics of Appellant's concerns. (Exhibit C-22; Appellant's Exhibit No. 7.)

39. Appellant's first complaint was that the slope of an area on the northeast section of the Clancy Estate Property behind the dwelling was steeper than it had been pre-mining. Appellant also complained of minor erosion in several locations and of a few small clumps of topsoil that apparently rolled from the backside of the stockpiles into the trees at the top (northeast) side of the property. (Exhibit C-22; Appellant's Exhibit No. 7.)

40. As to the complaint about the steeper slope directly behind the dwelling than had been the case pre-mining, Mining Inspector Lucas responded that the area met the Stage I bond release standard of approximate original contour since it approximated the pre-mining slope, it blended smoothly into the adjoining ground above and to the side, and that the area complained about was 13 degrees as measured with a Leitz pocket transit. Mr. Lucas also explained that the toe

would be slightly regraded at the time the collection ditch is removed. (Exhibit C-22; Appellant's Exhibit No. 7.) As to Appellant's complaint about minor erosion in several locations and of a few small clumps of topsoil that apparently rolled from the backside of the stockpiles into the trees at the top (northeast) side of the property, Mining Inspector Lucas explained to Appellant that these issues would be dealt with at a later time, but that they were not part of the Stage I bond release criteria which only covers backfilling and regrading to approximate original contour and establishing good drainage controls in accordance with the approved reclamation plan. (Exhibit C-22; Appellant's Exhibit 7.)

41. Appellant's second topic of concern was that the valley area north of the home was narrower and steeper before mining. Mining Inspector Lucas responded that during the January 27, 2011 inspection of the restored area, the area was very similar to the pre-mining contour. (Exhibit C-22; Appellant's Exhibit 7.)

42. Appellant's third topic of concern centered on the northwest side of the Clancy Estate Property, specifically, the area below the electric line tower. During the January 27, 2011 inspection, Appellant complained that this area was flatter than before mining occurred, and that water drainage had been altered so that water that previously flowed into Appellant's pond now was flowing the other way into an unnamed tributary of Pigeon Creek center branch. (Exhibit C-22; Appellant's Exhibit 7.)

43. In response to Appellant's third topic of concern expressed during the January 27, 2011 inspection, Mining Inspector Lucas compared what he observed on January 27, 2011 to a map of pre-mining contour. This comparison showed that pre-mining the area had a shallow slope to the west and northwest, similar to the slope Surface Mining Inspector Lucas observed during his January 27, 2011 inspection of the area. Further review of the pre-mining contours map revealed that the drainage divide between the two unnamed tributaries was not at the property line, but instead it angled from approximately 120 feet from the line (near the tower) to approximately 315 feet from the property line immediately west of the pond embankment. Mining Inspector Lucas concluded that the pre-mining contour map showed that water to the west of this drainage divide could not have flowed off the Clancy Estate Property as described by Appellant. (Exhibit C-22; Appellant's Exhibit 7.)

44. On January 31, 2011, after his Stage I bond release inspection of the 104.4 acres in question, Mining Inspector Lucas completed the one-page internal DEP memorandum form after his Stage I bond release inspection of the 104.4 acres in question checking the following recommendation, "No corrective action necessary at this time. Unless I contact you otherwise, bonds may be released when the application is complete and the public comment period has expired." (Exhibit C-17; Appellant's Exhibit 6, *see* Proposed Finding of Fact No. 22, *infra.*)

45. In late May of 2011, Appellant conducted a file review at the Department's Greensburg District Mining Office concerning the Clancy Estate Property. (N.T. at 20.)

46. Appellant had actual notice that the Department was conducting an evaluation of the propriety of releasing the Stage I bond for the Clancy Estate Property on the Obringer Mine no later than late May 2011 when Appellant conducted a file review of the Obringer Mine at the Greensburg District Mining Office. (N.T. at 34.)

47. Theodore Pytash is employed as a Supervisor of Surface Mining Conservation Inspectors at the Greensburg District Mining Office. N.T. at 60. Mr. Pytash has 39 years of experience in all aspects of surface mining, including reclamation. Mr. Pytash is also a registered professional surveyor in the Commonwealth of Pennsylvania. At the hearing of this matter on October 29, 2012, the Board recognized Mr. Pytash as an expert in surface mining. (N.T. at 60-63.)

48. Mr. Pytash was Mining Inspector Lucas' supervisor during Mr. Lucas' evaluation of Neiswonger Construction's Stage I bond release application. (N.T. at 88.) Mr. Lucas retired from the Department in June of 2012 and moved to Florida. (N.T. at 88.)

49. In early June, 2011, Mr. Pytash called Appellant. During this phone call Mr. Clancy agreed to participate in a Stage I bond release inspection on June 17, 2011 and specific arrangements for the inspection were also made. (N.T. at 24; 96.)

50. On June 17, 2011, Mr. Clancy was present during a Stage I bond release inspection of the Clancy Estate Property. Also present for the inspection were Mr. Pytash, Mining Inspector Lucas and Bill Klingensmith of Permittee Neiswonger Construction. (N.T. at 25; 47.)

51. Based on the June 17, 2011 inspection and the earlier January 27, 2011 inspection, the Department determined that the Permittee satisfied the criteria for Stage I bond release on the Clancy Estate Property because, *inter alia,* the land was restored to its approximate original contour, it blended well with the adjoining Lustik property, there were no highwalls, spoilpiles or depressions, and no drainage controls were necessary. (N.T. at 75-78; 81; Exhibit C-15, Photographs 1, 2, 11.)

52. Photographs of the Clancy Estate Property taken by Mr. Pytash on October 11, 2012 depict the same conditions that Mr. Pytash observed on his inspection of June 17, 2011 with the exception that there was more vegetation growing on October 11, 2012 than he had observed on June 17, 2011. (N.T. at 99; Exhibit C-15, Photographs 1-11; N.T. at 74.)

53. Mining reclamation activities in this case, including reseeding and revegetation, were done by Richard Lustik. Mr. Lustik is a farmer who grew up on a farm, and has been farming approximately 2,000 to 3,000 acres of corn and soybeans since 1979. Mr. Lustik owns property adjacent to the Clancy Estate Property, and was recognized by the Board at the hearing on October 29, 2012 as an expert in farming and reclamation. (N.T. at 133-135.)

54. Mr. Lustik farmed the Clancy Estate Property on the Obringer Mine in corn, soybean and wheat for many years. The area depicted in Photograph No. 11 of Exhibit C-15 shows the same area that is depicted in Photograph No. 1 of Exhibit C-15. Photograph No. 1 of Exhibit C-15 shows the area from a side view, while Photograph No. 11 shows a direct view of the steepness of the area. This area is steeper than it was before mining. While not visible in Photograph No. 11, there is an area between the top of the slope and the tree line that became more level after mining. Photograph No. 11 shows where the Lustik property adjoins the Clancy Estate Property on the Obringer Mine at the two tire marks, with the Lustik property being to the right of the tire marks. Another more eastern area of the Clancy Estate Property on the Obringer Mine became more level after mining where a deep ravine was filled in. (N.T. at 133-135; Exhibit C-15, Photographs No. 1, 11.)

55. The north east section of the Clancy Estate Property where Appellant complained of post-mining steepness was reclaimed to approximate original contour as demonstrated in Hiser Engineering's cross-section charts of the area. (N.T. at 148-151; Permittee Exhibit 2.)

56. Backfilling at the Obringer Mine has been completed. (N.T. 10, 78-79; Exhibit C-15.)

57. Drainage controls were installed in accordance with the approved reclamation plan for the Obringer Mine. (N.T. at 75-76; Exhibits C-1 & 15.)

58. Vegetation is growing on the reclaimed site of the Obringer Mine, which includes the Clancy Estate Property. (N.T. at 41; Exhibit C-15.)

59. The post-mining contours of the Clancy Estate Property approximate the pre-mining contours that existed before the Obringer Mine opened. (N.T. at 138, 150-51; Permittee Exhibit 2.)

60. The post-mining contours of the eastern area of the Clancy Estate Property are substantially the same as those of the adjoining property of Richard Lustik. (N.T. at 75-76; Exhibit C-15, Photograph Nos. 1, 11.)

61. Permittee satisfied the criteria for Stage I bond release for the Clancy Estate Property on the Obringer Mine. (N.T. at 81, 97.)

**Discussion**

Mr. Clancy, like all who appeal the Department's approval of a Stage I bond release, has the burden of proof in this matter. 25 Pa. Code Section 1021.122(c)(2); *Wayne v. Department of Environmental Protection,* 2000 EHB 888, 902. Therefore, Mr. Clancy bears the burden of proving by a preponderance of the evidence that the Pennsylvania Department of Environmental Protection abused its discretion in approving Neiswonger Construction's application for Stage I bond release by acting unreasonably and/or in violation of the criteria set forth in Section 4(g) of the Pennsylvania Surface Mining Act, 52 P.S. Section 1396.4(g), and the regulations at 25 Pa. Code Section 86.174. *See also Lucchino v. Department of Environmental Protection,* 2000 EHB 655, 667. "Preponderance of the evidence" means "that the evidence in favor of the proposition must be greater than that opposed to it..." *McGinnis v. Department of Environmental Protection and Eighty-Four Mining, Inc.,* 2012 EHB 109, 125. Stated another way, Mr. Clancy must prove that the Pennsylvania Department of Environmental Protection's decision to approve Stage I bond release was unreasonable, inappropriate or not in conformance with the law. *Pennsylvania Trout v. Department of Environmental Protection,* 2004 EHB 310, 362.

**Standard of Review**

The Pennsylvania Environmental Hearing Board, as directed by the Commonwealth Court of Pennsylvania in *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978) reviews all challenged final actions of the Pennsylvania Department of Environmental Protection *de novo*. *See also Groce v. Department of Environmental Protection and Wellington Development-WVDT, LLC,* 2006 EHB 856, 893. Former Chief Judge Krancer, in the oft-cited case of *Smedley v. Department of Environmental Protection and International Paper Company,* 2001 EHB, 131, concisely set forth our duty:

> We must fully consider the case anew and we are not bound by prior determinations made by the 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 a reviewing body, is substituted for the prior decision maker, the Department, and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. Department of Environmental Protection*, 2001 EHB 19, 32. Therefore, we make our own findings of fact based solely on the record developed before us.

*Smedley*, 2001 EHB at 156.

**The Statutory and Regulatory Requirements for Bond Release**

As correctly pointed out by the Department in its comprehensive Post-Hearing Brief, Section 4(g) of the Pennsylvania Surface Mining Act, establishes a three tiered schedule for bond release. The first tier, Stage I bond release, permits the Department to release up to sixty percent of the total bond amount where the Permittee has completed backfilling, regrading, and drainage control in accordance with the approved reclamation plan.

> (a) Subject to the public notice requirements of subsection(b), if the Department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may upon request by the permittee or any other person having an interest in the bond, including the Department, release in whole or in part the bond or deposit according to the following schedule:
>
> (1) At Stage I, when the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan, the release of up to sixty percent of the bond for the applicable permit area, so long as provisions for treatment of pollutional discharges, if any, have been made by the operator.

52 P.S. Section 1396.4(g)(1).

Stage II bond release allows for an additional release of funds when revegetation is successfully established in accordance with the approved reclamation plan, and where the land is not contributing suspended solids to runoff outside the permit area. 52 P.S. Section 1396.4(g)(2). Finally, Stage III bond

release is appropriate where the Permittee has completed mining and reclamation operations and has made provisions for the future treatment of any future pollutional discharges, if any. 52 P.S. Section 1396.4(g)(3).

In addition to the above statutory requirements, Pennsylvania has promulgated regulations to implement these statutory provisions. The regulations pertaining to Stage I bond release, which are the subject matter of this Appeal, provide as follows:

> (a) When the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate or original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan, Stage I reclamation standards have been met.

25 Pa. Code Section 86.174(a).

**Technical and Procedural Errors in the Process**

We first address the technical and procedural errors in the process set forth by Mr. Clancy. These errors all stem from the incorrect listing of the address for the Clancy Estate Property, which is Mr. Clancy's address. The correct address is 281 Hillcrest Drive, California, Pennsylvania while Hiser Engineering, which undertook the responsibility to legally notify all entities entitled to notification of Neiswonger Construction's application for Stage I bond release, listed the address as 214 Hillcrest Drive. This error was compounded in the process as evidently the Department relies on the addresses provided by the Permittee rather than using its

own (obviously the Department had the correct address for Mr. Clancy as its same mining office had addressed correspondence to him at the 281 Hillcrest Drive address). Indeed, in this very matter, Mr. Pytash of the Department of Environmental Protection had written to Mr. Clancy at his correct address, 281 Hillcrest Drive, on January 10, 2011 in response to his letter of December 29, 2010. The very next day the same office of the Department of Environmental Protection, relying on the incorrect address provided to it by the consultant for Neiswonger Construction, attempted to notify Mr. Clancy of the application for Stage I bond release by sending it to him at 214 Hillcrest Drive rather than his correct address. We have no reason to doubt Mr. Clancy's testimony he never received this letter while at the same time we have no reason to doubt the Department's testimony that the letter was never returned to it.

We all have experienced the unfortunate occurrence of receiving letters that, although containing our street addresses were addressed to someone else. If the letter intended for Mr. Clancy contained the wrong street address it may have been delivered to someone who simply discarded it. That would certainly explain why the letter was never returned to the Department's Greensburg District Mining Office. In this day of computers and the ability to check addresses easily there is no reason why Hiser Engineering, or the Department for that matter, could not have ensured that the list of addresses of 21 entities entitled to notice was correct.

In this very case, the same office of the Pennsylvania Department of Environmental Protection sent letters to Mr. Clancy on two successive days to the same street in the same town but to different house numbers.

The failure to give Mr. Clancy timely notice of the application for Stage I bond release is a serious omission. The law provides that written notice be given to interested parties and such written notice of the application for Stage I bond release is important for the integrity of the process itself. In other circumstances, we would have no hesitancy in vacating and reversing the Department action for failure to provide such timely notice.

However, after hearing the testimony and reviewing all the evidence such a result is not warranted under the facts of this case. Mr. Clancy was given ample and full opportunity to voice his objections to both the Department of Environmental Protection and Neiswonger Construction. On August 24, 2010, Mr. Clancy met with Mr. Lucas, Mr. Pytash, and representatives of Neiswonger Construction including the farmer, Mr. Lustik, who performed the reclamation work. At this meeting, Mr. Clancy detailed his concerns and objections.

Mr. Clancy responded to Neiswonger Construction's letter of December 16, 2010 with the same objections he had earlier voiced in August. He clearly indicated in writing the reasons he was opposed to Stage I bond release.

Coincidentally, Mr. Lucas met with him on the Clancy Estate Property on January 27, 2011. This was *after* the application for Stage I bond release was filed. At this meeting, Mr. Lucas and Mr. Clancy went through each one of his objections which were addressed in detail by Mr. Lucas. In fact, Mr. Clancy testified before the Pennsylvania Environmental Hearing Board that the objections he conveyed to Mr. Lucas at this meeting "mirrored" the objections set forth in his earlier correspondence of December 29, 2010 which were received by the Department immediately before the Stage I bond release application was filed with the Department of Environmental Protection.

We are somewhat surprised that the pendency of the application for Stage I bond release was not mentioned or discussed at the January 27, 2011 meeting between Mr. Clancy and Mr. Lucas. Although Mr. Clancy was not aware at that point that the application had been filed Mr. Lucas surely was. In any event, the meeting was certainly not an academic exercise but a detailed discussion of the objections Mr. Clancy had and a review by the Department on the actual Clancy Estate Property of the reclamation work performed.

Once Mr. Clancy became aware of the Stage I bond release application after going to the trouble of reviewing the Department's file and obtaining further information from the Department, Mr. Pytash was in contact with him. Indeed, a meeting at the Clancy Estate Property was held in June 2011. Mr. Clancy voiced

the same objections to Stage I bond release at this meeting that he had voiced repeatedly and of which he had made the Department fully aware.

The evidence shows that Mr. Clancy's objections, concerns, and views regarding the Stage I bond release were fully aired, understood, and considered by the Department in making its decision to approve the application for Stage I bond release. His objections were not rejected because of any delay in transmitting them to the Department. The Department was already fully aware of Mr. Clancy's objections.

We have held on numerous occasions that an Appeal of an action of the Pennsylvania Department of Environmental Protection is not a giant game of "gotcha." *Concilus v. Department of Environmental Protection*, 2012 EHB 60, 62; *Consol Pennsylvania Coal Co. v. Department of Environmental Protection*, 2011 EHB 571, 576; *Shuey v. Department of Environmental Protection,* 2005 EHB 657, 712. Where the Department deviates from the applicable law or regulation the party must show that such deviation negatively impacted their position and caused them legal harm. Here, all the parties knew Mr. Clancy's position and objections. He met with the Department three times to convey his views. He also sent at least one detailed letter setting forth his position.

Procedural errors and technical errors are to be avoided. However, we are convinced that the error here of not giving Mr. Clancy timely notice of the

application for Stage I bond release because the notice was sent to an incorrect address is harmless error for the reason that the Department already was fully aware of Mr. Clancy's objections and had considered them in reaching its decision.

**Did the Department Properly Grant Stage I Bond Release?**

Mr. Clancy in his Post-Hearing Brief lists the criteria for the release of Stage I bonds under the Pennsylvania Surface Mining Act and the applicable regulations. Mr. Clancy must prove by a preponderance of the evidence that the Department erred in granting Stage I bond release. This requires the Board to decide whether the Department's decision was correct that Neiswonger Construction appropriately backfilled and regraded the affected area of the Clancy Estate Property, returned it to approximate or original contour, and installed drainage controls in accordance with the approved reclamation plan. *See* 52 P.S. Section 1396.4(g); *see also* 25 Pa. Code Section 86.174(a).

Mr. Clancy failed to prove by a preponderance of the evidence that the statutory and regulatory criteria for Stage I bond release were not met. He presented no scientific or expert testimony to support his position which mainly centered on a small part of the Clancy Estate Property being slightly steeper post mining than it had been before mining. At the same time, there are other parts of the Clancy Estate Property which are flatter. The approximate original contour requirement does not mandate that a site be reclaimed to the exact, precise pre-

mining contours. *Lucchino v. DEP*, 1998 EHB 473. Under the regulatory requirement the post-reclamation contours need only be approximate. 25 Pa. Code § 87.1. The approximate original contour requirement is satisfied where the affected area is returned to a contour similar to the pre-mining slope and the affected area blends smoothly into adjoining areas, above and below the mined area and to either side of it. The evidence reflects that the post mining Clancy Estate Property approximates the original contour of the pre-mining property and is consistent with the surrounding topography.

We find the testimony of Neiswonger Construction's expert, Mr. Lustik, very credible. He carefully explained how the reclamation of the Clancy Estate Property was performed. He was extremely familiar with the property as he lives next to it and has actually farmed the Clancy Estate Property for years.

We also find Mr. Pytash's testimony instrumental in reaching our decision. Despite the Department's failure to provide Mr. Clancy with timely notice of the application for Stage I bond release, we are confident that the Department fully addressed and considered Mr. Clancy's objections within the necessary statutory and regulatory framework. The Department met with Mr. Clancy at the Clancy Estate Property at least three times to discuss his objections and concerns and view the reclamation performed on the land. Like the appellant in an earlier case, *John v. Department of Environmental Protection,* 2009 EHB 121, 139, we have no

doubt that the reclamation work does not meet Mr. Clancy's approval. However, the test is not whether the landowner is satisfied but, rather, whether the reclamation work satisfies the statutory and regulatory requirements. Here it does.

Therefore, we will enter an Order dismissing the Appeal.

## CONCLUSIONS OF LAW

1. The Pennsylvania Environmental Hearing Board has jurisdiction over the parties and over Mr. Clancy's appeal of the Department of Environmental Protection's decision to approve the application for Stage I Bond Release of the Obringer Mine.

2. Mr. Clancy failed to prove by a preponderance of the evidence that the Pennsylvania Department of Environmental Protection erred in granting Stage I Bond Release to Neiswonger Construction. *John v. Department of Environmental Protection,* 2009 EHB 121, 141; 25 Pa. Code Section 1021.122(c ).

3. Stage I Bond Release reclamation standards are met when the permit area has been backfilled and regraded to the approximate original contour, when drainage controls have been installed, and where the topography is consistent with the neighboring properties. 25 Pa. Code Section 86.174 (a).

4. Late notice of the filing of Stage I Bond Release is harmless error where the Appellant had already fully advised the Department of Environmental Protection and the Permittee of his objections, where he was given an opportunity to further make those objections after being notified of the application for Stage I Bond Release, and where his objections and concerns were fully and fairly considered by the Department before reaching its decision.

5. The Department of Environmental Protection's approval of Stage I Bond Release was appropriate, reasonable and in accordance with the law. 25 Pa. Code Section 86.174(a).

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **KEVIN CLANCY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-110-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEISWONGER CONSTRUCTION CO., Permittee** | : | |

# ORDER

AND NOW, this 11th day of October, 2013, following a hearing in the above Appeal and the careful review of the Post Hearing Briefs, transcript, and exhibits, it is ordered as follows:

1) The objections to Stage I bond release are **denied.**

2) Neiswonger Construction satisfied the statutory and regulatory requirements for Stage I Bond Release.

3) Mr. Clancy's Appeal is **dismissed.**

**ENVIRONMENTAL HEARING BOARD**

Thomas W. Renwand

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

**STEVEN C. BECKMAN**
**Judge**

**DATED: October 11, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **RAUSCH CREEK LAND, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-137-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee** | : | **Issued: October 11, 2013** |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

## Synopsis

The Board suspends and remands a surface mining permit to the Department for further consideration because (1) there is a legitimate property rights dispute regarding the operator's right to utilize a portion of the site, (2) the Department approved a reclamation plan that does not account for the fact that the site deviates substantially from approximate original contour due to overfilling of coal ash, (3) the site does not have adequate erosion and sedimentation control or an acceptable plan for installing such control, and (4) the permit does not account for the discharge of pit water that may require treatment.

## Background

This matter is before the Environmental Hearing Board on an appeal filed by Rausch Creek Land, LP ("Rausch Creek") from the Department of Environmental Protection's (the "Department's") renewal of Porter Associates, Inc.'s ("Porter's") surface mining permit on August 12, 2011 (corrected on August 24, 2011). The permit approves the reclamation of



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previously mined areas with coal ash. Rausch Creek filed petitions for a temporary supersedeas and a supersedeas along with its notice of appeal.

On September 15, 2011, we issued an order granting Rausch Creek's petition for a temporary supersedeas. Porter disregarded the order and continued to bring coal ash onto the site in violation of our temporary supersedeas. (Supersedeas Transcript pages ("S.T.") 203-204, 287-314, 370-374.) We held a hearing on the supersedeas petition on September 26 and 28, 2011. We granted Rausch Creek's supersedeas petition on October 6, 2011. On November 13, 2013, at Rausch Creek's request with no objection from the other parties, we ordered the bifurcation of the appeal to separate for later consideration an issue regarding Porter's right pursuant to its lease to reclaim a portion of the site. On April 22 and 23, 2013, we held a hearing on four of the five objections raised in Rausch Creek's appeal. Following a determination that bifurcation was no longer necessary, we held a hearing on the lease issue on May 23, 2013. We approved the parties' stipulation that all five days of the hearing in this matter constitute the record for purposes of adjudication. We conducted two site visits.

## FINDINGS OF FACT

1. The Department is the agency charged with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.*, the Coal Refuse Disposal Control Act, 52 P.S. § 30.51 *et seq.*, the Anthracite Coal Mine Act, 52 P.S. § 70-101 *et seq.*, the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes.

2. Rausch Creek is a Pennsylvania Limited Partnership based in Valley View, Pennsylvania.

3. Porter is a Pennsylvania corporation based in Wilkes-Barre, Pennsylvania.

4. Rausch Creek owns property in Porter Township, Schuylkill County on which Porter operates a mining operation sometimes referred to as the Porter Stripping. The operation primarily involves reclaiming previously affected surface mining pits with coal ash.

5. The Department originally issued the permit at issue in this appeal, Surface Mining Permit 54890105, to Kocher Coal Company in 1990. (Stipulation; S.T. 31-32, 489-492; Commonwealth Exhibit No. ("C. Ex.") 1.)

6. The Department transferred the permit to Porter in 1991. (S.T. 31-32, 501-502; Hearing Transcript page ("T.") 35; C. Ex. 6.)

7. The Department renewed the permit on July 20, 1995, September 11, 2002, October 18, 2006, and August 12, 2011. The August 12 renewal was amended on August 24, 2011 to correct typographical errors. (S.T. 490; Rausch Creek Exhibit No. ("RCL Ex.") 9, 10.) The 2011 renewal is the subject of this appeal.

**Approximate Original Contour**

8. There are two pits on the site: the Holmes Pit and the Primrose Pit. (S.T. 496.)

9. The site slopes from its high side on the south down to the north. (T. 250; C. Ex. 15.)

10. Mine sites such as the Porter Stripping must be reclaimed so that after mining they reflect the approximate original contour ("AOC") of the site as it appeared prior to mining. 25 Pa. Code §§ 87.1 and 88.1. The permittee proposes final reclamation grades (i.e. final contours) in the permit application that are intended to represent AOC, the Department reviews and approves those grades, and they become part of the permit. (RCL Ex. 9, 10.)

11. The Department at least in this case views AOC as a flexible concept, such that substantially different contours can all qualify as AOC at a given site. (S.T. 343; T. 110, 230-231, 263-265, 288, 377; Porter Exhibit No. ("P. Ex.") 12A.)

12. The Department has adjusted the approved final contours (and, thus, AOC) at the Porter Stripping permit on multiple occasions, in part to assist Porter in keeping its bonding costs as low as possible. (S.T. 120-126, 366-367, 450, 464, 468-469, 516-519; T. 377-381; RCL Ex. 7; P. Ex. 12A.)

13. The record contains a set of reclamation grades proposed by Porter in 1995, but it is not clear whether those grades were ever approved and incorporated into the permit. (S.T. 101-114, 120, 171-172, 186, 243-244, 363, 478, 491; T. 120; RCL Ex. 5, 7; C. Ex. 7; P. Ex. 8.)

14. The permit renewals issued in 2002 and 2006 referenced a different set of final contours. (T. 8-11, 61, 74; RCL Ex. 1.)

15. In the Department's view, the 1995 contours would have resulted in Porter being required to post too high of a bond when full-cost bonding started, so the contours were lowered to the 2002 levels. Generally speaking, the 2002 contours depicted a continuous, somewhat concave slope from south to north on the site. (S.T. 244-245.)

16. Every expert witness that testified in this case agrees that the 2002 contours constituted AOC. (S.T. 41-42; T. 287, 333-334, 377, 382; RCL Ex. 1; C. Ex. 16; P. Ex. 12A.)

17. Porter substantially exceeded the 2002 final grades without obtaining prior approval to do so in its permit. (S.T. 61, 65, 69, 77-101, 108, 247; T. 22-23, 82, 183, RCL Ex. 1-9.)

18. The Department was made aware of the exceedances through annual bond reviews and reports from the landowner. (S.T. 247; RCL Ex. 1-9.)

19. Rausch Creek as the landowner began lodging well-documented complaints regarding the overfilling with the Department in 2007. (S.T. 216.) The Department's inspectors do not have the means to independently verify reclamation grades as part of their inspections on site. (T. 12, 36-37.) They can only make an "eyeball determination." (T. 16, 36-37.)

20. Porter's application for the 2011 permit renewal proposed final contours substantially higher than the previously approved 2002 contours. (RCL Ex. 1-9.) When the Department's lead reviewer noticed the discrepancies between the various contours that may or may not have been approved at the site and asked what final grades to include in the 2011 permit renewal, he was told not to worry about it. (T. 63.)

21. The Department's transmittal letter for the 2011 permit renewal said: "The permittee shall backfill with spoil material and coal ash to approximate original contour as outlined on cross-sections (current and reclamation contours) dated June 3rd, 2011, (updated from the September 7th, 1995 sections)." (S.T. 137; RCL Ex. 9, 10.)

22. The 2011 final contours are significantly higher, and allow much more ash to be placed on the site, than the 2002 final contours. (S.T. 138, 355; RCL Ex. 1.)

23. The Department approved the final contours in the 2011 permit *after* Porter had already filled the main pit on the site to at least those levels in many places. (S.T. 71, 113, 134-135, 258; RCL Ex. 1-9.)

24. The effect of the permit revision from the 2002 to the 2011 contours was to allow more fill at the northern end of the fill area, thereby creating a larger flat area on the top of the fill and commensurately steeper contours on the northern slope. (T. 145, 161-162, 297-298; RCL Ex. 1; C. Ex. 15.)

25. The site would have met AOC without the adjustment to accommodate for more fill in 2011; i.e., the additional fill approved in the 2011 renewal was not necessary for the site to meet AOC. (T. 288; RCL Ex. 1; Finding of Fact ("FOF") 16.)

26. The Department's and Porter's witnesses testified that, although the 2002 grades depicted AOC, the 2011 permit grades also depict AOC. (T. 132, 251-255, 263-265, 333, 351-352, 373; C. Ex. 12, 15, 18; P. Ex. 12A.)

27. The 2011 final contours do not provide for any downslope erosion and sedimentation (E&S) control. (S.T. 163; RCL Ex. 9, 10; FOF 44-55.)

28. The Department admits that, at a minimum, the map depicting final grades in the permit will need to be revised to account for E&S control. (S.T. 487.)

29. The Department found when it issued the 2011 permit renewal that the final contours were "close to being met" but that ash could nevertheless continue to be brought onto the site. (RCL Ex. 9.)

30. In fact, the site at the time of the permit renewal and in its current condition deviates significantly from the final 2011 approved grades and AOC. (S.T. 376, 538, 542-543; T. 30, 42, 71-72, 183-188, 192, 197, 199, 201, 207, 255, 260-261, 298-300, 333-336, 367, 370, 393-394; RCL Ex. 1-9; C. Ex. 5; P. Ex. 12A, 13A.)

31. Every expert that testified agreed that the site currently does not conform to AOC (as depicted on the 2011 contours). (S.T. 538, 542-543; T. 262, 298; RCL Ex. 1-9; C. Ex. 5; P. Ex. 12A, 13A.)

32. Terry Schmidt, P.E., of Skelly & Loy, Rausch Creek's expert, credibly opined that Porter's activities "represent building a pile or mountain in contrast to reclaiming an abandoned pit to AOC." (RCL Ex. 7.)

33. Although the eastern and southern portions of the fill meet AOC, the ash on the western end of the fill does not appear to tie in with the terrain or constitute AOC. (T. 294.)

34. It is not clear how the western end can be brought into AOC without exceeding the currently approved ash placement area. (T. 295; C. Ex. 15.)

35. The 1800-foot northern (downslope) portion of the fill deviates significantly from the approved grades and AOC because the fill extends out past the top of the approved slope that is approved in the permit. The fill squares out at the top past where the slope should have started going down, resulting in an unacceptably steep slope that drops down precipitously to the haul road at the bottom. (T. 30, 42, 71, 72, 183-188, 192, 197, 199, 201, 207, 255, 260-261, 298-300, 333-336, 367-368, 370, 393-394, 456; RCL Ex. 7; P. Ex. 5, 12A, 13A.)

36. At places the slope is almost vertical. (T. 261; RCL Ex. 8.)

37. The unacceptable northern slope results in accelerated erosion. (T. 191, 201, 399; P. Ex. 12A.)

38. The slope also causes a jarring, unstable, unsafe, visually unacceptable appearance that does not blend into the surrounding terrain and complement it, which is inconsistent with the goal of attaining AOC. (S.T. 132, 376, 542; T. 191; RCL Ex. 8, 12, 13.)

39. There must be a more gradual blending on the northern side of the fill to eliminate the abrupt slope and achieve AOC. (S.T. 376; T. 187, 260-261, 298-300, 367.)

40. Although the problem existed at the time of the permit renewal, the permit does not address how the site can be reclaimed to AOC. (RCL Ex. 9, 10.)

41. Reclaiming the site to AOC may be problematic for several reasons:

a. The permit authorizes more ash to be brought onto the site;

b. There is no room to spread out at the bottom of the northern slope because it extends to the edge of the haul road, which constitutes the permit boundary;

c. It is not clear whether there is any room on the western end of the fill for the redistribution of ash;

d. The other areas of the fill are at or close to AOC already;

e. The legal right to move the fill into the Primrose Pit is unsettled (discussed below);

f. It is not clear that commingled ash that has already been compacted and dried out can be moved and re-used consistent with the criteria that permitted it to be used in the first place; and

g. No accommodation has been made for E&S controls. (S.T. 155; RCL Ex. 1; T. 9-10, 31, 36, 91,173,194-195, 208, 261-262, 270-271, 300-302, 336.)

42. The Department erred by renewing Porter's permit with an inadequate reclamation plan that does not address these preexisting issues. (FOF 1-41.)

43. If material needs to be regraded or moved around onsite, it may be appropriate to recalculate the bond for the site. (S.T. 170.)

**E&S Control**

44. The Department did not require a change in Porter's E&S controls when it renewed the permit. In fact, it did not review them at all. (S.T. 273; T. 20-21, 44-47, 54, 73, 83, 97, 304-306.)

45. If a permit renewal application proposes "drastically changed areas or the lay of the land configuration", it is prudent to assess the E&S controls to determine whether pre-existing E&S controls remain adequate. (T. 49, 57.)

46. The 2011 renewal significantly changed the final reclamation grades and involved a substantial change in the land configuration and drainage patterns at the site. (S.T. 308, 533; T. 57-58.)

47. The E&S control that is primarily at issue in this case is Sediment Pond 2 and the appurtances thereto ("SP-2").

48. The permit prior to renewal called for the installation of SP-2 near the north-western end of the site. (RCL Ex. 1.)

49. E&S controls approved in the permit prior to the 2011 renewal were based on drainage patterns that no longer exist and have changed significantly based on the site as designed and built. (S.T. 249, 308, 533; T. 57-58; RCL Ex. 2, 15.)

50. The documentary and testimonial evidence is unclear and inconsistent regarding exactly where and when SP-2 was supposed to have been installed. (T. 85, 95-96, 118, 123, 132-133, 308; RCL Ex. 2, 15.)

51. SP-2 was never installed. At the time of the permit renewal and the supersedeas hearing, the sediment controls called for in the permit for the north end of the project were nonexistent. There were no structures in place as called for and described in the permit; rather, there was only a "low spot" where water would tend to flow, which had no defined sides, bottom, or outlet. (S.T. 198, 322; T. 96-99, 123, 157-158, 255, 358; RCL Ex. 8.)

52. The Department approved a final reclamation plan in the 2011 renewal that does not account for adequate E&S control. (S.T. 322, 487.)

53. Recognizing this as a result of this litigation, the Department has now asked Porter to revise its plans, and Porter has submitted plans for a redesign of the E&S controls. (T. 99, 118, 129, 142, 259, 304-306, 309.) The revised plans are not a part of the record in this case.

54. The Department has put a hold on reviewing the plans because of the uncertainties associated with this litigation, and certain nonlitigation issues regarding a haul road. (T. 142, 159-160, 306-308.)

55. Revising the permit to include appropriate E&S control may not be as straightforward as it might otherwise have been because ash has been placed in a very steep, high slope right up to the edge of the downslope haul road where the pond was supposed to be, and it may not be appropriate to install an E&S pond on top of ash. (T. 118, 260; C. Ex. 15.)

**Primrose Pit Water**

56. Porter's permit as renewed in 2011 authorized the filling of the Primrose Pit on the site, subject to bonding. (RCL Ex. 9, 10.)

57. The Primrose Pit accumulates water, and before it can be used for ash placement, the pit water must be discharged. (RCL Ex. 9, 10.)

58. Porter's permit does not authorize the discharge of chemically impaired (i.e. acid mine drainage) water. (S.T. 149; T. 279-280; Porter Proposed FOF 73, 74.)

59. The Department anticipates that the pit water can and will be discharged through the site's E&S controls. (S.T. 259-260, 275, 406, 566.)

60. If the water is impaired, it may not be discharged through the E&S controls, and because the permit makes no provision for such a discharge, the permit would need to be revised. (S.T. 407, 566-568; T. 58-59, 279-280.)

61. Although the water in the pit is not in contact with mine pool water, and preliminary indications are that it is not otherwise impaired, the quality of water, particularly at depth, is not known. (S.T. 140-147, 153, 171, 230-240; T. 275, 310, 437; C. Ex. 3.)

62. It also would be prudent to sample the water before discharging it through E&S controls without any treatment. (S.T. 231, 237-238; T. 59, 309.)

63. It would be also be prudent to ensure that, even if samples show that the pit water is uncontaminated and the Department determines that it may be discharged through the E&S controls during dry weather flow conditions, the Department is given advance notice of the discharge, the E&S ponds are capable of handling the proposed discharge at an approved pumping rate, and the discharge is sampled to ensure compliance with the Part A limits in the permit. (S.T. 151-152, 168, 233-240, 569-570.)

64. The permit does not require that these prudential measures be taken. (RCL Ex. 9, 10.)

65. In the absence of clear permit conditions, it is not clear if or in what context the Department would review Porter's plan for dewatering the Primrose Pit. (S.T. 151, 232-240, 280, 287, 406-407; T. 321-326.)

**The Lease Dispute**

66. Porter's legal right of access to the Primrose Pit is based upon a January 29, 1991 lease. Rausch Creek is the landowner and lessor and Porter is the tenant and lessee. (C. Ex. 38.)

67. The Department is aware that there are at least four lawsuits pending in the Court of Common Pleas of Schuylkill County between Porter and Rausch Creek regarding the lease in general and Porter's right to use the Primrose Pit in particular. (S.T. 63-66, 213; May Transcript page ("M.T.") 66; RCL Ex. 1; P. Ex. 6, 6A.)

68. The Department's District Mining Office Manager decided that Porter has the stronger legal claim under the lease and, therefore, has the legal right to fill the Primrose Pit pursuant to his assessment of the property dispute, and accordingly, the Department issued the

renewed permit without condition authorizing Porter to fill the Primrose Pit. (M.T. 66-68; C. Ex. 3, 6, 11, 15, 22-25; P. Ex. 6, 6A.)

69. The lease says that "Lessee [Porter] shall have the exclusive rights to deposit ash and mine anthracite coal by surface mining methods within the *designated areas* of the *demised premises*...." (C. Ex. 38.) (Emphasis added.)

70. The lease says the "demised premises" are described in "Exhibit A." (C. Ex. 38.)

71. Porter and Rausch Creek have each produced what they claim to be the true "Exhibit A." Rausch Creek's version depicts the Primrose Pit within the "demised premises" but *excludes* the pit from the "designated areas" for ash disposal. (T. 213; RCL Ex. 1.) Porter's version does not make this distinction. (P. Ex. 2.)

72. Instead of including the Primrose Pit as a "designated area" for ash disposal, Rausch Creek's version of Exhibit A describes the pit as a "future refuse disposal area." (RCL Ex. 1.)

73. Part of Porter's "Exhibit A" is dated October 30, 1994, three years *after* the lease was signed. (P. Ex. 2, 3.)

74. Paragraph 7 of the lease provides:

> Lessor [Rausch Creek] shall retain right to deposit coal re[f]use in the Holmes stripping and abandoned Primrose stripping as is described in Surface Mining Permit Number 54890105. Lessee [Porter] agrees to grade coal refuse with Lessee's equipment at no charge to the Lessor on a weekly basis and not to exceed two (2) hours per week.

(C. Ex. 38.)

75. Rausch Creek in its lawsuits in the Court of Common Pleas has also challenged the continuing vitality of the lease and Porter's right to occupy *any* of the property, and it has

asked that Porter be ejected entirely from the site. (P. Ex. 5.) There is no evidence that the Department evaluated this dispute.

76. There is a legitimate dispute whether Porter enjoys an express grant to utilize the Primrose Pit, which will need to be resolved by the Court of Common Pleas. (FOF 66-75).

77. The Department erred by in effect adjudicating the legitimate property dispute between Porter and Rausch Creek and issuing the renewed permit without condition. (FOF 66-76.)

## DISCUSSION

Rausch Creek's appeal raises five objections: (1) the Department erred by approving Porter's permit to place ash in the Primrose Pit because there is a legitimate dispute regarding Porter's legal right to use the pit; (2) the 2011 permit approved reclamation grades and the current condition of the site exceed approximate original contour (AOC); (3) there is no provision in the permit for a point source discharge of accumulated water from the Primrose Pit in advance of its reclamation; (4) the approved erosion and sedimentation (E&S) controls are inadequate; and (5) the posted reclamation bonds are inadequate.[1]

**Property Issue**

Rausch Creek argues that the Department erred by allowing Porter to mine in the Primrose Pit because Porter has no right to do so under its lease with Rausch Creek. There is no

[1] Unfortunately, the majority of the proposed findings of fact in Porter's post-hearing brief do not contain references to the appropriate exhibit or page number of the transcript. This not only constitutes a violation of our rules, 25 Pa. Code § 1021.131, more importantly, it materially reduces the utility of the brief as an aid to us in the preparation of this Adjudication. We are not in a position to adopt a party's proposed findings if they are not supported by record citations. In a similar vein, the Department in its post-hearing brief with considerable justification criticizes Rausch Creek's post-hearing brief as being nearly devoid of legal authority to support it arguments. In contrast, the Department, which normally takes a reduced role in third-party appeals of a permit, filed a 70-page post-hearing brief that fully conforms with our rules. Among other things, the Department's post-hearing brief contains 67 proposed findings of fact, 10 pages of discussion, and multiple proposed conclusions of law arguing that Porter has the stronger legal argument in its lawsuits regarding the lease dispute.

question that the Department must ensure that a permit applicant has the legal right to enter and commence coal mining activities within a permit area. 52 P.S. § 1396.4(a)(2)(F); 25 Pa. Code § 86.64. *See Pond Reclamation Company v. DEP*, 1997 EHB 468, 473-74; *Body v. DER*, 1992 EHB 758, 760-61. It is equally well settled, however, that the Department may not actually resolve contract disputes or questions of title. *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229; *Coolspring Stone Supply v. DEP*, 1998 EHB 209, 213. The question, then, is: What is the Department supposed to do when it is informed that a dispute exists regarding the applicant's right of access?

The Department is not required to independently search out whether a dispute exists in every case, *Reading Anthracite Co. v. DEP*, 1998 EHB 112, 123, and information that a dispute exists does not in and of itself preclude the Department from issuing the permit as a matter of law, *Columbia Gas Transmission Corporation v. DEP*, 2003 EHB 676, 698; *Coolspring Stone Supply*, 1998 EHB at 213-14; *Chestnut Ridge*, 1998 EHB at 229-30. However, once the Department is advised of a dispute, it has a duty to look beyond the face of the permit application and assess whether the dispute is legitimate, i.e., whether the dispute puts the applicant's right of entry in doubt. If the right to mine is doubtful, the Department must err on the side of caution. It may not issue the permit, or may not issue it without an appropriate condition, until the dispute is resolved. *Empire Coal Mining & Development v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Lucchino v. DER*, 1994 EHB 380, 399.

The Department must err on the side of caution for several reasons. Most obviously, there should be no question that an applicant has the right to mine, or perhaps more importantly from the Commonwealth's perspective, reclaim a particular parcel. Equally as obvious, the Department ought to respect the rights of landowners. Furthermore, because the Department has

neither the authority nor the resources and expertise to resolve property disputes, it is appropriate to cut off its responsibility at the point of determining no more than that there is a legitimate dispute. Neither the Department's District Mining Office Manager, who is not a lawyer, nor attorneys with the Governor's Office of General Counsel assigned to the Department, should in this context be rendering legal opinions in a legitimate property-law dispute. Just as the Department must avoid becoming a statewide zoning hearing board, *New Hanover Township v. DEP*, 2011 EHB 645, 662-64, the Department must avoid becoming a statewide arbiter of property disputes. Still further, allowing the Department to delve into more detailed analyses of property claims and make permitting decisions based upon those analyses creates a risk of conflicting results between the Department and the forums such as the Court of Common Pleas who should be deciding such matters. Finally, mining is for all intents and purposes irreversible. Doubts should be resolved *before* it is allowed to proceed, not after.

The Department was informed in this case that there is a lease dispute between Rausch Creek, the property owner, and Porter, the lessee. There are four actions pending in the Schuylkill County Court of Common Pleas regarding these claims. Armed with this knowledge, it was incumbent upon the Department to determine whether there is a legitimate dispute. The Department did this. The problem is that it went too far and had its nonlegal personnel actually adjudicate the dispute by determining that Porter has the better claim. Among other things, it went so far as to decide between two disputed versions of a pivotal document: the so-called Exhibit A to the Lease. The Department continues to argue in its post-hearing brief that Porter's Exhibit A has the better claim to being authentic. This is precisely the sort of property-law analysis in which the Department should not be engaged. That is the job of the Court of Common Pleas.

Porter, and to a much greater extent the Department on Porter's behalf, has presented a credible argument that the lease authorizes Porter to use the Primrose Pit. But Rausch Creek has also presented a credible argument that the lease does not authorize such access. The lease says that "Lessee [Porter] shall have the exclusive rights to deposit ash and mine anthracite coal by surface mining methods within designated areas of the demised premises ... ." The lease says that the demised premises are described in an "Exhibit A." The parties dispute the identity of this Exhibit A. Rausch Creek presented a map marked Exhibit A that was prepared by Kocher Coal Company, Rausch Creek's predecessor, at the time the lease was being negotiated. The map's legend says, "This map known as Exhibit 'A' is to accompany an agreement between KOCHER COAL COMPANY and PORTER ASSOCIATES, INC. and is acknowledged as being a part to said agreement by the following signatures." Signature blocks follow, but the map is not signed. (RCL Ex. 3.) The map depicts a "Lease Area known as Demised Premises." Within that area, a significantly smaller area is delineated as the "Designated Ash Disposal Area." Pointedly, the "Designated Ash Disposal Area" does not include the Primrose Pit.

Porter and the Department say Rausch Creek's map is not the real Exhibit A. Porter has instead shown us a metes and bounds narrative captioned "Exhibit A" and a small schematic captioned "Map of Exhibit A." The schematic shows a large tract marked "property boundary" and a slightly smaller tract marked "Exhibit A boundary." (P. Ex. 2, 3.) Although this area includes the Primrose Pit, these exhibits are not particularly helpful because they merely describe the "Demised Premises," and there is no dispute that the demised premises encompass essentially the entire tract. However, the lease does not grant to Porter the right to deposit ash on the entire tract. Rather, it only grants that right within *designated areas* of the Demised Premises. If Rausch Creek's "Exhibit A" is the true Exhibit A, the delineation of a designated area on that

map, which very clearly excludes the Primrose Pit, would seem to be rather detrimental to Porter's claim.

Complicating matters further is Paragraph 7 of the lease, which provides in part that,

> Lessor [Kocher Coal, Rausch Creek's predecessor] shall retain the right to deposit coal re[f]use in the Holmes Pit and abandoned Primrose stripping as is described in Surface Mining Permit 54890105.

Rausch Creek says that this language, particularly in combination with Exhibit A, provides further support for its claim that only refuse may be used to backfill the Primrose Pit and only Rausch Creek's refuse may be used to do so. Porter counters that Rausch Creek's reservation is not exclusive. In Porter's view, the fact that the lease does not appear to give Porter the *exclusive* right to use the Primrose Pit does not necessarily mean that it has *no* right to use that pit.

Still further, at least one of the lawsuits pending in the Court of Common Pleas alleges that the leasehold should be terminated because of Porter's allegedly substantial violations of the lease terms. *Rausch Creek Land v. Porter Associates*, Schuylkill C.C.P. Docket No. § 2166-2008. There is no evidence that the Department considered this lawsuit in deciding whether Porter continues to have an express grant to use the Primrose Pit.

At this point in the discussion it should be abundantly clear that Porter, in the words of Commonwealth Court, does not enjoy an "express grant" to go into the Primrose Pit. *Empire Coal*, 678 A.2d at 1223. To the contrary, its grant is clearly the subject of legitimate dispute. This is where the Department's analysis should have ended. The Court of Common Pleas must resolve this dispute, not the Department and not this Board. Porter, as an applicant with a doubtful grant, "is free to seek a declaration in common pleas court concerning the precise nature of the estate it holds." *Empire Coal*, 678 A.2d at 1223.

Porter continues to argue that no credence should be given to Rausch Creek's claim because Rausch Creek is a competitor of Porter in the ash disposal business and thus has ulterior motives. Rausch Creek may be a competitor, but it is also the landowner of the site where the ash placement is occurring. As the landowner, Rausch Creek may have potential liability for future environmental problems at the site long after Porter is gone. *See* 35 P.S. §§ 691.315, 691.316, and 691.401; *Diess v. PennDOT*, 935 A.2d 895, 910-11 (Pa. Cmwlth. 2007); *Ingram v. DER*, 595 A.2d 733, 739 (Pa. Cmwlth. 1991). Rausch Creek is also an adjacent operator and as such may have potential liability for pollutional discharges from its site that are originating from the Porter operation. *North Cambria Fuel Co. v. DER,* 621 A.2d 1155, 1159-60 (Pa. Cmwlth. 1993), *aff'd.*, 648 A.2d 775 (Pa. 1994).

The Department relies heavily upon the consent of landowner that it received from Kocher Coal before issuing the original permit to Porter in 1990. However, the regulations require a consent of landowner *and* documentary proof of a right to mine. 25 Pa. Code § 86.64(a). That is because the consent of landowner does not by itself create a right to mine if such a property right does not otherwise exist, and the landowner consent form "shall not be construed to alter or constrain the contractual agreements and rights of the parties thereto." 52 P.S. § 1396.4(a)(2)(F)(ii). Furthermore, and as previously noted, the Department must go beyond the permit application itself when presented with evidence of a legitimate access dispute. *Coolspring Spring Stone, supra.*

We are informed that the Court of Common Pleas decided not to issue a preliminary injunction in one of Rausch Creek's lawsuit against Porter regarding the Primrose Pit. The Court, however, very clearly did not rule that Porter has a right of legal access to the Primrose Pit. To the contrary, it simply ruled that an equitable remedy was not necessary because an

adequate remedy was available in damages if Porter wrongfully fills the pit. (P. Ex. 5, 6a.) The Court's preliminary injunction ruling obviously does not represent the Court's final resolution, and it does not provide the Department with a basis for concluding that there is not a legitimate dispute between the parties.

The Department attempts to distinguish *Empire Coal* by arguing that the doubtful claim in that case arose because it was not clear that the operator had a valid lease, while in this appeal, there is no doubt that Porter has a valid lease. This is actually not true. As previously mentioned, at least one of the lawsuits apparently claims that the lease has been or should be terminated and Porter ejected due to Porter's breach thereof. In any event, the Department's posited distinction is meaningless. The key inquiry is whether the operator has the legal right to mine on the property. Whether that right derives from a deed or a lease and whether the doubt associated with the claim relates to the existence or the terms of the deed or lease is not determinative.

There is some suggestion in the record that Rausch Creek is hindering the progress of the lawsuits in the Court of Common Pleas. If that is true, the remedy lies with that Court. Issuing the permit while this legitimate private dispute is unresolved is not a proper solution to the allegedly dilatory conduct, and it is not one that is in the long term interests of the Commonwealth.

The Department argues that the *permit* has always contemplated that the Primrose Pit would be reclaimed with coal ash. Even if this is true, it misses the point completely. The permit does not establish or confirm any property rights. The property right to mine must be based on a legal document of ownership or tenancy. To the extent the Department and Porter contend that the 1991 lease should be interpreted in light of the tortuous historical context of this

site, we agree, but again, that misses the point. The interpretation of the lease, which Porter admits "is not a model of clarity," is for the Court, not the Department or this Board.

Prior litigation before this Board put at issue (but never resolved) whether Kocher, Rausch Creek's predecessor, owned the land and had the ability to enter into a lease with Porter. *Reading Anthracite Co. v. DEP and Kocker Coal Co.*, 1998 EHB 728. Porter referred us to that appeal, but does not explain why. We do not know whether that issue is implicated in the pending lawsuits.

In sum, if ever there was a case in which the Department should ensure that there is an "express grant" establishing a clear right to use the pit, this is it. Having concluded that the Department should not have, in effect, adjudicated Porter and Rausch Creek's legitimate lease dispute, we will suspend and remand the permit to the Department to consider whether to postpone taking any action on the renewal application, include a condition prohibiting the use of Primrose Pit until Porter's legal right of access has been established or is no longer in dispute, or take other measures consistent with this Opinion.

**AOC**

We cannot say that the Department's conclusion that the 2011 permit renewal's final contours constitute approximate original contour is wholly unreasonable. We acknowledge that Terry Schmidt, Rausch Creek's qualified and credible expert witness, with considerable justification disagrees. (T. 181-184, 186, 192, 201.) However, all of the other expert and Departmental witnesses testified that the final contours as set forth in the permit satisfy the requirement that the site be returned to AOC if they are met.

Rausch Creek's main argument is that the Department approved so many different depictions of AOC at this site that none of them are credible, but in its view, the 2002 most

closely conform to AOC. It argues that all of the adjustments have been more about keeping Porter's bonding costs low than a legitimate analysis of the best final contours for the site. The Department acknowledges the changes and the motivation behind them but responds that dramatically different reclamation contours can *all* represent AOC at a given site. Porter admits that this site has had no fewer than six different depictions of final reclamation grades, (Porter Proposed FOF 36), and that the myriad iterations of so-called final reclamation grades are confusing. (Porter Proposed FOF 54). There is no serious dispute that over the life of this permit the Department in defining AOC has contradicted itself, committed "administrative oversights" (Porter Proposed FOF 64), "collaborated" with Porter primarily through the unpublished bond review process (Porter Proposed FOF 104), allowed Porter to exceed whatever final grades were approved at the time and adjusted those grades after the fact, and defined AOC based at least in part on the operator's desire to keep its bond low and "not put Porter out of business." The Department recognized that there were "numerous discrepancies" in the permit file. (S.T. 249, 352.) The change from the 2002 contours to the 2011 contours was not needed to reclaim the site and bring it into AOC. The change was made to justify the overfill of the site relative to the 2002 contours after the fact. However, in the final analysis, we cannot disagree that reclaiming the site to the final grades contained in the 2011 renewal would meet the AOC requirement, regardless of the tortuous path that got us to where we are today.

That said, it is also universally agreed among the experts in this case that the site at the time of permit renewal does not reflect AOC, which is to say it does not conform to the final contours that were reviewed and approved in the 2011 permit renewal. Put simply, the top of the fill at its northern perimeter, and to some extent at the western perimeter of the fill, extends out too far. Instead of a triangle that blends into the hillside, picture a rectangle that protrudes above

the natural contour of the hillside. As a result, the northern end of the fill is too high. This in turn creates a very steep drop-off. It is cliff-like in some places. It is unsafe, environmentally unsound, and aesthetically unacceptable. The deviation is substantial and may involve tens of thousands of cubic yards of fill. As Schmidt accurately testified, the activity at the site represents building a pile or mountain in contrast to reclaiming an abandoned pit to AOC.

The regulations at 25 Pa. Code § 86.55(g) prohibit the Department from renewing a permit if the terms of the existing permit are not being satisfactorily met, the present mining activities are not in compliance with the environmental protection standards of the Department, or the renewal substantially jeopardizes the operator's continuing ability to comply with the law on the existing permit. The Department's renewal was designed to bring the site into compliance after the fact, but it was not successful in even doing that because Porter had already deviated from the newly approved grades. It would also seem that the Department should not renew a permit that immediately puts the operator in violation of the permit as renewed.

Porter and the Department argue that it was not an error for the Department to renew the permit with the site in a state that significantly exceeds AOC, even as defined in the renewed permit, because Porter can simply remove the overfill at the northern end of the site as part of the reclamation, which is still underway. There are several problems with this argument. First, the permit expressly authorized Porter to continue to accept ash at the site notwithstanding the substantial overfill problem. Second, proper reclamation does not entail overfilling portions of a site and then redistributing substantial volumes of compacted ash from overfilled areas. What may be acceptable redistribution of backfill at a traditional mining operation is not necessarily acceptable at an ash reclamation site. Deviations from final grades within a narrow range are common and acceptable, *Clancy v.* DEP, EHB Docket No. 2011-110-R slip op. at 27-28

(Adjudication, Oct. 11, 2013), but the deviations at the Porter Stripping fall well outside that narrow range. Ash placement above what is necessary to attain reclamation arguably no longer constitutes beneficial use. *See*, 25 Pa. Code § 290.104.

It is not clear how the Department expects that the final contours it approved can be attained. There is no room at the bottom of the slope because the ash extends right up to the haul road, which constitutes the permit boundary. The Department says that some ash might be able to be moved to the west, but the limit of the approved ash disposal appears to have been reached at that edge as well. The southern end of the fill already meets AOC and blends in well. It is not clear to what extent dried out, commingled, and compacted ash can be moved and still satisfy the criteria that allowed it to be used on the site in the first place. 25 Pa. Code §§ 290.101 and 290.104. The Department assumed that the fill could simply be moved to the Primrose Pit (S.T. 541), but that is not a forgone conclusion as discussed above. Finally, neither the site in its condition at the time of renewal (or now) nor the approved final grades make any accommodation for erosion and sedimentation control on the northern side of the fill. The final grades as described in the permit may satisfy AOC, but they do not allow for any E&S control in the area of the site that, now due its steepness, is most prone to accelerated erosion. E&S control must be added, and this will involve at least some change in the grades, as the Department has acknowledged. (S.T. 287.) The permit must be suspended and remanded to the Department so that these issues can be resolved. The Department will also need to determine on remand whether any modifications in the approved reclamation plan that prove to be necessary require a change in the bond.

**E&S Controls**

There is no need to dwell on this issue. The Department has acknowledged that the reclamation plans need to be revised to provide for proper E&S control on the northern side of the permitted area. (S.T. 487.) Correction of the E&S problem and correction of the overfilling in the northern end of the permit are inextricably intertwined. The extent to which the correction of the E&S issue will have a ripple effect on the broader reclamation of the site remains to be seen. There is no doubt that the permit should be suspended and remanded for resolution of this issue.

**Pit Water**

If Porter's right to use the Primrose Pit under its lease is cleared up, and Porter is otherwise able to use the pit, one of the first things it will need to do is discharge the accumulated water in the pit. The NPDES permit issued as part of Porter's 2011 permit renewal does not approve a point source discharge for mine drainage treatment facilities under Group A of the permit because there are no mine drainage treatment facilities located at the site and there is no anticipated need for such facilities. The permit as it now stands only approves the passing of surface water runoff through the E&S ponds. However, if the water in the Primrose Pit turns out to be acid mine drainage, it may not be passed through an erosion and sedimentation pond. Instead, Porter will be required to provide treatment. The existing permit would need to be amended. 25 Pa. Code § 88.92.

Although all preliminary indications are that the pit water will not turn out to have the characteristics of mine drainage, no one knows for sure whether that will be the case, particularly at depth. There is undoubtedly a potential that the water has been contaminated due to the ubiquitous acid-forming pyritic materials on the site. Therefore, there is no disagreement in this

case that this pit water discharge should be monitored and managed carefully to ensure that it can safely be discharged through the E&S facilities under dry weather conditions in accordance with the existing Part A effluent limits in the permit. 25 Pa. Code § 88.92. There is no disagreement, for example, that Porter should sample the water prior to discharge, and then resample as the water lowers in the pit if there is a significant volume of water in the pit. The effluent should be sampled as well. Porter should give the Department advance notice of the pumping. The E&S facilities, currently in poor condition or nonexistent, should be in good working order and capable of handling the water at an approved pumping rate.

Rausch Creek's complaint is that none of these prudential measures are included in the permit and they are unenforceable. In response to Rausch Creek's complaint, the Department relies on a few rather vague permit provisions such as the requirement to give advance notice to the Department of any planned changes to the permitted activity. (Permit, Part 1 Sec. II, 3.c. (2)(a).) The Department says that it has had and will continue to have "discussions," "conversations," and meetings with Porter at which it has "instructed" Porter that it will need to take the prudential measures.

In reality, it is our sense that the Department did not specifically consider or account for the pit water issue when it renewed the permit. It should have. Although this issue standing alone might not have necessitated a remand, given the remand to address the other issues discussed above, we will direct the Department to consider on remand whether the prudential measures that all agree are appropriate regarding the pit water discharge should be addressed in the permit by way of special condition or otherwise.

**Relief**

Rausch Creek has asked us to revoke Porter's permit and ensure through our order that enough ash is removed from the site to return it to the 2002 reclamation grades. The site only needs to be brought into conformance with the 2011 grades (as modified to provide for E&S control). Moving hundreds of thousands of cubic yards of ash off site would probably do more harm than good. Revoking the permit is too extreme. There is no doubt, however, that the renewed permit needs more attention. The Department has admitted that the reclamation plan needs to be revised to address E&S control, and in fact that process is already underway. That revision will necessarily require some modification of the final grades approved in the permit. In addition, the Department needs to address the fact that Porter as of now has no clear right to use the Primrose Pit, that a significant amount of ash may need to be relocated as part of an acceptable reclamation plan, that potentially contaminated water may need to be discharged from the Primrose Pit, and that these changes may dictate a different bond amount.

## CONCLUSIONS OF LAW

1. The post-hearing brief of each party must contain proposed findings of fact (with references to the appropriate exhibit or page of the transcript), an argument with citation to supporting legal authority, and proposed conclusions of law. 25 Pa. Code § 1021.131(a).

2. Issues not adequately preserved in the post-hearing brief are waived. 25 Pa. Code § 1021.131(a). *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004).

3. No party is entitled to depend on the Board to search the record for support of its proposed findings of fact or to perform its legal research. *GSP Management Co. v. DEP*, 2010 EHB 456, 468.

4. Rausch Creek bears the burden of proving by a preponderance of the evidence that the Department's renewal of Porter's permit was unreasonable, unlawful, or not supported by the facts. 25 Pa. Code § 1021.122 (a).

5. Although the Department must ensure that a permit applicant has the legal right to enter and commence coal mining activities within a permit area, the Department may not actually resolve contract disputes or questions of title. *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229; *Pond Reclamation Company v. DEP*, 1997 EHB 96, 474.

6. Once the Department is advised of a dispute regarding a permittee's legal right to enter land, the Department must assess whether the dispute is legitimate; i.e. whether the dispute puts the applicant's right of entry in doubt. If the right to mine is doubtful, the Department may not issue the permit, or it may not issue it without an appropriate condition. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-1223 (Pa. Cmwlth. 1996).

7. The Department erred by renewing Porter's permit and granting Porter access to the Primrose Pit despite the fact that there is a legitimate dispute regarding Porter's right of access to that pit under its lease with Rausch Creek, the landowner.

8. A permit must include an acceptable reclamation plan. 25 Pa. Code § 88.46; 25 Pa. Code §§ 88.81 – 88.130.

9. A mine must be reclaimed to its approximate original contour (AOC). 25 Pa. Code §§ 87.1 and 88.1.

10. AOC means the site closely resembles the general surface configuration of the land prior to mining, blends into the surrounding terrain, compliments the drainage pattern of the surrounding terrain, does not have highwalls, spoil piles, or depressions to accumulate water, and makes adequate provision for drainage. *Clancy v. DEP*, EHB Docket No. 2011-110-R, slip op.

at 27-28 (Adjudication, Oct. 11, 2013); *Riddle v. DEP*, 2002 EHB 283; *Lucchino v. DEP*, 1998 EHB 473.

11. The Porter Stripping at the time of permit renewal (and now) substantially deviated from AOC as defined in the final contours. The Department erred in approving Porter's reclamation plan, which does not describe how this violation will be corrected.

12. 25 Pa. Code § 86.55(g) reads in the pertinent part as follows:

> (g) A permit will not be renewed if the Department finds one of the following:
>
> (1) The terms and conditions of the existing permit are not being satisfactorily met.
>
> (2) The present mining activities are not in compliance with the environmental protection standards of the Department.
>
> (3) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the acts, this title and the regulatory program on existing permit areas.

13. The Department erred by renewing Porter's permit when the terms and conditions of the existing permit were not being satisfactorily met, the ongoing mining activities were not in compliance with environmental protection standards, and the renewal substantially jeopardized the operator's continuing ability to comply with the law.

14. The amount of bond on a mine site must reflect the estimated cost to the Department if it needed to complete the reclamation. 25 Pa. Code § 86.149.

15. A mine site must include appropriate sediment control measures. 25 Pa. Code § 88.96.

16. The Department erred by renewing Porter's permit without actual or planned appropriate sediment control measures.

17. The treatment requirements and effluent limitations established under 25 Pa. Code § 88.92 may not be violated. 25 Pa. Code § 88.91(c).

18. An operator shall conduct mining in a way that prevents water pollution. 25 Pa. Code § 88.91(d).

19. Rausch Creek succeeded in proving by a preponderance of the evidence that the Department acted unreasonably and unlawfully when it renewed Porter's permit.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **RAUSCH CREEK LAND, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-137-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee** | : | |

## ORDER

AND NOW, this 11th day of October, 2013, it is hereby ordered that Surface Mining Permit 54890105 is **suspended** and **remanded** to the Department for further review in accordance with this Adjudication.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: October 11, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **ELG METALS, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2009-091-R** |
| | : | |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: October 22, 2013** |

# ADJUDICATION

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis:**

Where there is strong circumstantial evidence to indicate that the appellant's metal recycling operation is the source of oil found to be present in a culvert which runs underneath its property and discharges to the Youghiogheny River, the Department acted within the scope of its authority under the Clean Streams Law to order the appellant to take corrective action with regard to the discharge.

**Background:**

ELG owns and operates a metal recycling facility located along the Youghiogheny River in the Boroughs of Port Vue and Liberty in Allegheny County. Its facility borders property owned by CSX Railroad and is situated downhill from various businesses located along Joy Avenue in Port Vue, including a truck repair facility. An unnamed tributary flows from an uphill location in Port Vue and enters a stormwater pipe, or culvert, that passes underground beneath the ELG site and discharges to the Youghiogheny River. The culvert varies in diameter but at its



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largest point is 72 inches ("the 72 inch culvert.") The culvert carries stormwater runoff from Port Vue uphill of the ELG site.

On July 8, 2008, the Department received a complaint about an oily sheen on the Youghiogheny River near the point where the 72 inch culvert discharges to the river. After several site visits by the Department and an investigation by ELG, the Department concluded that ELG was the source of the discharge and issued an Administrative Order directing ELG to take certain corrective measures. It is ELG's contention that the Department has not demonstrated that ELG is the source of the oil discharge and that the likely source is either CSX Railroad or the truck repair facility located uphill on Joy Avenue.

A three day hearing was held and the parties filed post hearing and reply briefs. Following our review of the record, we make the following Findings of Fact:

**FINDINGS OF FACT**

1. The Pennsylvania Department of Environmental Protection (Department) is the agency of the Commonwealth charged with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1 et seq., and the regulations promulgated thereunder.

2. ELG Metals, Inc. (ELG) is a Pennsylvania business corporation with a mailing address of 369 River Road, McKeesport, Pennsylvania 15132 (Exhibit C-1)[1] ELG owns and operates a metals recycling facility located along the Youghiogheny River in Port Vue and Liberty Borough, Allegheny County. (Ex. C-1)

[1] Commonwealth exhibits are designated as "Ex. C" followed by the exhibit number, and Appellant ELG exhibits are designated as "Ex. ELG" followed by the exhibit number. References to the transcript of the hearing in this matter are designated as "T." followed by the page number.

3. The ELG facility is adjacent to railroad tracks owned by CSX. (Ex. C-2; Ex. ELG-8) Uphill from the ELG site is a truck repair facility that sits on Joy Avenue in Port Vue. (T. 179; Ex. ELG-3)

4. An unnamed tributary flows from uphill in Port Vue and travels into a stormwater pipe or "underground culvert" that passes beneath the ELG site. The underground culvert discharges to the Youghiogheny River. (Ex. C-2; Ex. C-18, Figure 1 (Investigation Plan); T. 22-23)

5. The underground culvert is approximately 36 inches in diameter where the unnamed tributary first enters the ELG site and then expands to 48 inches in diameter and subsequently to 72 inches in diameter (hereinafter referred to as "the 72 inch culvert.") (Ex. C-2; Ex. C-18, Figure 1 (Investigation Plan); T. 278)

6. Storm water runoff from the Borough of Port Vue passes through the 72 inch culvert. (T. 164-66)

7. On July 8, 2008, the Department responded to a complaint about an oily sheen on the Youghiogheny River. (Ex. C-13; T. 30)

8. During their inspection on July 8, 2008, Department personnel observed an oily sheen on the Youghiogheny River that appeared to be emanating from the 72 inch culvert; they also observed sheen along the river wall upstream of the 72 inch culvert. (T. 30)

9. During the July 8, 2008 visit, Department personnel walked around the ELG site and did not observe any source of oil that could be causing the discharge. (T. 30)

10. By letter dated August 19, 2008, the Department notified ELG that they believed the oil from the 72 inch culvert originated from the ELG site and requested ELG to provide a written

plan and schedule to eliminate the unauthorized discharge of oily waste and abate the formation of sheen on the Youghiogheny River. (Ex. C-15)

11. In response to the Department's August 19, 2008 letter, ELG retained the firm of Skelly & Loy. (T. 148)

12. By letter dated September 17, 2008, Skelly & Loy submitted a plan to the Department for investigating the 72 inch culvert, which the Department approved. (Ex. C-17; T. 35)

13. Skelly & Loy conducted an investigation of the 72 inch culvert underneath the ELG site and submitted the result of their findings to the Department in a report dated December 5, 2008. (Ex. C-18)

14. As part of their investigation, personnel from Skelly & Loy entered the 72 inch culvert from its outlet at the Youghiogheny River. (Ex. C-18) They took photographs and sediment samples inside the culvert. (T. 275, 317-23; Ex. C-18)

15. During the investigation Skelly & Loy identified a 24 inch pipe and a 16 inch pipe opening into the culvert. The 24 inch pipe was located approximately 432 feet inside the culvert, on the left side of the culvert, and the 16 inch pipe was located approximately across from the 24 inch pipe, on the right side of the culvert. (Ex. C-18; T. 322-23)

16. Water was flowing out of the 24 inch and 16 inch pipes. (T. 339) Oil sheen was visible in the water in the culvert at this location. (T. 323)

17. There was no flow into the culvert further inland of where the 24 inch and 16 inch pipes were located. (T. 323)

18. Analysis of samples taken from sediment in the culvert at the location of the 24 inch and 16 inch pipes showed it to be contaminated with diesel, bio-diesel and/or lube oil. (Ex. C-18, p. 2)

19. Sediment samples located downstream of the 24 inch and 16 inch pipes (i.e. in the direction of the Youghiogheny River) also contained petroleum compounds, whereas samples of sediment located upstream of the 24 inch and 16 inch pipes (i.e., in the direction of the CSX railroad tracks and the Joy Avenue truck repair facility) did not contain petroleum compounds. (T. 324 ; Ex. C- 18, p. 2)

20. The December 5, 2008 Skelly & Loy report recommended further investigation of the 24 inch pipe. (Ex. C-18)

21. The 24 inch pipe runs parallel to the property line between ELG and CSX Railroad and runs toward the ELG press building. (T. 276; Ex. C-20, p. 1)

22. ELG contracted with Hydro-Tech to conduct a camera survey of the 24 inch pipe. (Ex. C-20)

23. An attempt was made to camera the 16 inch pipe but there was a bend in it and the camera could not get around the bend. (T. 324)

24. The camera survey identified a 12 inch tap into the 24 inch pipe approximately 30 feet up from the culvert. (Ex. C-20, p. 1; T. 47) Cracks and decay were visible at the point where the 12 inch tap was identified. (Ex. C-20) There is no evidence that the 12 inch pipe was further investigated.

25. Cracks and decay in a pipe can provide a potential pathway for groundwater to move into the pipe. (T. 49)

26. At 56.9 feet into the 24 inch pipe a blockage was discovered and the camera could proceed no further. (Ex. C-20, p. 1; T. 284) The blockage appeared to be mud and soil material. (T. 284)

27. Despite the blockage, water was visible flowing through the 24 inch pipe. (Ex. C-20, p. 1) An oily sheen was visible in the culvert at the location where the 24 inch pipe was discharging. (T. 323)

28. No flow of water into the culvert was found in the direction of the CSX Railroad or the uphill Port Vue locations. (Ex. C-18, p. 4)

29. On December 29, 2008, the Department sent a letter to ELG stating in relevant part as follows:

> The sheen originating from the large storm water culvert appears to be emanating from contaminated sediments that have accumulated in an area below a 2-foot diameter pipe within the culvert systems. No obvious source of oily waste from the ELG facility could be determined.
>
> The letter went on to state as follows:
>
> ELG's unauthorized releases of oily waste to the Youghiogheny River are violations of the Clean Streams Law and therefore must be addressed. The Department requests that ELG provide a written plan and schedule, within thirty days, to eliminate the unauthorized discharge of oily waste and to abate the formation of sheen on the Youghiogheny River. The plan and schedule shall include an investigation of the soil and groundwater beneath the ELG facility in order to determine the source of the oily waste within the culvert and the River bottom.
>
> The letter concluded as follows:
>
> This letter is neither an order nor a final action of the Department of Environmental Protection. (Ex. ELG-10)

30. On January 15, 2009, Department representatives met with ELG representatives at the ELG site. Following the meeting, the Department and ELG representatives inspected the ELG site. (Ex. C-19; T. 213-14)

31. On that date, January 15, 2009, Department personnel observed sheen on the river and along the river wall above the culvert. (T. 44)

32. The January 15, 2009 inspection of the ELG site included inspection of a building that houses the hydraulic controls for a metal press, known as the press room or press building. (T. 44-45)

33. Hydraulic equipment runs on oil. (T. 125)

34. Department personnel observed oil staining around the press and the waste oil tank. (T. 44)

35. It appeared to Department inspector Kevin Halloran that the waste oil tank had overflowed because the outside of the tank was completely stained. It also appeared to him that the containment tank containing water and oil had overflowed because it too was completely stained. (T. 44-45)

36. The entire floor of the press building around the waste oil tank was stained with oil. (T. 45)

37. The 24 inch pipe runs in the direction of the press building. (T. 48)

38. On March 18, 2009, Skelly & Loy personnel excavated a portion of the 24 inch pipe. The pipe appeared to be full of industrial fill, but no water or oil was observed. (T. 50)

39. Department personnel conducted another inspection of the press room on March 18, 2009. There was still oil on the floor, although ELG had placed concrete around breaks in the floor. (T. 50; Ex. C-32)

40. On March 18, 2009, the Department issued a Notice of Violation to ELG. (Ex. C-21)

41. On various dates in July 2009, Skelly & Loy personnel collected sediment and soil samples from the following locations on and near the ELG site: a) two storm water catch basins on Joy Avenue in the Borough of Port Vue located downgradient from the truck repair facility on Joy Avenue; b) the sediment of an unnamed tributary to the Youghiogheny River that receives storm water from two catch basins in Port Vue; c) a storm water catch basin between the CSX Railroad tracks southwest of the ELG facility; d) two test pits at the ELG site; and e) soil adjacent to the southwest corner of the ELG press building. (Ex. ELG-3)

42. The samples were analyzed for total petroleum hydrocarbons and diesel range organics (TPH-DRO). (Ex. ELG-3)

43. The purpose of this investigation was to look for possible off-site sources of oil. (T. 56)

44. The results of this investigation were reported in a document from Skelly & Loy to the Department dated August 19, 2009. (Ex. ELG-3)

45. The highest concentration of TPH-DRO was found in one of the catch basins on Joy Avenue. (T. 57; Ex. A-3) It had a reading of 7,150 milligrams per kilogram (mg/kg). (T. 312; Ex. ELG-3)

46. Skelly & Loy's investigation showed a hydraulic connection between Joy Avenue and the 72 inch culvert. (T. 229)

47. However, Department inspector, Kevin Halloran, walked the stream channel between Joy Avenue and the ELG site and saw no oil in the stream channel. (T. 58)

48. If Joy Avenue were the source of the oil in the culvert there would have been evidence of oil in the stream channel leading to the culvert. (T. 58)

49. Test pit 1 on ELG's property was dug at the 24 inch pipe approximately 12 feet below the ground surface. Soil samples from Test pit 1 showed no presence of TPH-DRO. (T. 313; Ex. ELG-3)

50. Test pit 2 on ELG's property was dug at the exterior corner of the press room. (T. 314; Ex. ELG-3) Although no oil staining or odor was observed or detected at this location, the soil samples did show a presence of TPH-DRO (Ex. ELG-3)

51. One of the samples taken at Test pit 2 had a reading of 24.1 mg/kg. A second sample had a reading of 608 mg/kg. (T. 292, 301, 314 ; Ex. ELG-3)

52. During the excavation of Test pit 2, a 6 inch pipe that connected to an 18 inch pipe was observed at approximately four feet below the ground. (Ex. ELG-3, p. 2)

53. Test pit 2 was closer to the river than Test pit 1. (T. 314) Groundwater normally flows in the direction of the river. (T. 314)

54. The Department issued an Administrative Order to ELG on May 28, 2009. (Ex. C-1) The Order required ELG to "cease the discharge of oil from the Site into waters of the Commonwealth," to submit a plan and schedule "to determine the source and the extent of soil and groundwater contamination at the Site and to eliminate any unauthorized discharges from the Site," to implement a Site Characterization and Discharge Elimination Plan and submit monthly written progress reports. (Ex. C-1)

55. Skelly & Loy prepared a Soil Investigation Plan dated September 3, 2009. (Ex. C-24)

56. On January 7, 2010, Skelly & Loy submitted a progress report to the Department on behalf of ELG, describing actions taken in response to the Department's Administrative Order. (Ex. C-26) According to the report, ELG cleaned the floor area in the press building, placed a rubberized membrane over the floor and in the sump pits and poured a protective layer of concrete over the rubberized membrane. (Ex. C-26, p. 2)

57. ELG spent a total of $131,000 complying with the Department's order. (T. 229)

58. By letter dated April 20, 2011, the Department notified ELG that it had complied in full with the Administrative Order and that the Department was withdrawing the Order. (Ex. C-30)

59. During the course of the investigation, neither Skelly & Loy nor the Department ever observed an actual release of oil from the ELG site to the culvert or to the river. (T. 328)

## DISCUSSION

The Department bears the burden of proof in this matter and must demonstrate by a preponderance of the evidence that it had the authority to issue the May 28, 2009 Administrative Order requiring ELG to cease and desist unauthorized discharges of oil from its site and to implement a Site Characterization and Discharge Elimination Plan and monthly progress reports. 25 Pa. Code § 1021.122(b)(4). The Department asserts that it has demonstrated that ELG is the source of the unauthorized discharges of oil to the 72 inch culvert and the Youghiogheny River and, therefore, the Department acted under the authority of Sections 5 and 610 of the Clean Streams Law by issuing the Administrative Order to ELG. In the alternative, the Department argues that even if ELG is not the source of the oil contamination, it may still be held liable under the strict liability provision of Section 316 of the Clean Streams Law.[2]

[2] The Department also argues that this appeal is moot since the Administrative Order was ultimately withdrawn after the Department determined that ELG had complied with it. However, the Board denied

**Has the Department demonstrated that a condition on ELG's property is causing oil to enter the culvert?**

Section 5(b)(7) of the Clean Streams Law grants the Department the authority to "[i]ssue such orders as may be necessary to implement the provisions" of the act. 35 P.S. § 691.5(b)(7). Section 610 further grants the Department the authority to issue such orders as are necessary to aid in the enforcement of the act. Specifically, Section 610 states as follows:

> Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act. . . .The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act.

*Id.* at § 691.610.

ELG correctly points out that there is no direct evidence of oil-contaminated water flowing from the press building to the culvert. Nonetheless, there is strong circumstantial evidence to conclude that the oily sheen in the culvert and the river resulted from conditions on the ELG site. The Board has in many instances relied on circumstantial evidence in reaching the conclusion that a party has proven its case. *See, e.g., UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 805-06 (Board found it was appropriate to rely on biological information "as circumstantial evidence" of a stream's continuous flow); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 696 (Board found there was "abundant circumstantial evidence" that the appellant was not performing leak detection as required by the regulations); *Concerned Citizens of Earl Twp. v. DER*, 1994 EHB 1525, 1603 (Where direct evidence is not available, "circumstantial evidence must suffice.")

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the Department's motion to dismiss for mootness on the basis that this matter was capable of repetition yet evading review. *ELG Metals, Inc. v. DEP*, 2011 EHB 741.

During the investigation conducted by ELG's expert, Skelly & Loy, a 24 inch pipe was discovered discharging into the culvert. Water was flowing out of the pipe and an oily sheen was visible in the culvert at this location. There was no flow from pipes into the culvert further inland, i.e. in the direction of the CSX property and the truck repair facility. In addition, sediment was found in the culvert at this location, and sampling showed that it was contaminated with diesel, bio-diesel and/or lube oil. From this point in the culvert, all the way down to the outlet to the Youghiogheny River, sediment was found to be contaminated with petroleum compounds. Sediment found upstream of the 24 inch pipe, i.e., in the direction of CSX and Joy Avenue, did not contain any evidence of petroleum contamination.

The 24 inch pipe runs from the culvert toward the press building on ELG's site which contains the hydraulic press. Oil is stored and used at this location. During an inspection of the press building on January 15, 2009, Department personnel observed oil staining around the base of the metal press and around a tank holding waste oil, and it appeared that the waste oil tank had overflowed. At trial, the Department introduced a series of photographs which clearly showed oil staining on the press room floor. The conditions in the press room had the potential to cause pollution. On the date of the Department's inspection, oily sheen was observed on the river and along the river wall above the culvert. Following ELG's clean up of the press building, which included the installation of a new floor covering, there were no more reports of an oily sheen on the Youghiogheny River.

It is ELG's contention that the oily discharges were caused by its neighbor, CSX, or by a truck repair facility located uphill on Joy Avenue. Although ELG makes references to CSX in its post hearing brief, it provides no evidence in support of its claim. ELG provides a stronger argument in support of its claim that the truck repair facility on Joy Avenue is a likely source of

the oil pollution. For instance, ELG's investigation found a high level of petroleum contamination in a catch basin on Joy Avenue, where the truck repair facility is located. Surface flow from this location enters the channel leading to the 72 inch culvert. However, the Department's inspection of the stream channel leading from Joy Avenue to the culvert showed no evidence of oil contamination. If the truck repair facility had been the source of the oil found in the culvert, there would have been evidence of oil in the stream channel leading to the culvert.

ELG also offered a theory that the oil-contaminated sediment at the location of the 24 and 16 inch pipes in the culvert was due to the diameter of the culvert increasing in size and causing the water flow to slow down and sediment to drop out. We did not find the testimony in support of this theory persuasive. Moreover, no evidence of oil appeared in the culvert until the location of the 24 inch pipe that runs in the direction of ELG's press room.

Soil samples taken on the ELG site confirm the presence of oil. A sample taken from Test pit 2, located at the corner of the press building, had a reading of 608 mg/kg when tested for the presence of Total Petroleum Hydrocarbons – Diesel Range Organics (TPO-DRO). Although this reading was significantly lower than the reading taken from one of the catch basins on Joy Avenue, it was higher than samples taken from the CSX catch basin and from the unnamed tributary to which the Joy Avenue catch basins discharge.

The evidence of record indicates that the only possible source of the oil in the culvert was ELG. On this basis, we find that the Department had ample authority to issue the May 28, 2009 Administrative Order to ELG.[3]

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[3] The Department also makes the following argument on page 20 of its post hearing brief: "Even if it were true that the CSX Railroad or the small truck repair facility at the top of the hill on Joy Avenue in Port Vue were the sources of the oil and sheen, ELG would still be properly liable under the Clean Streams Law for this discharge of industrial waste into the Youghiogheny River." (Department's Post Trial Brief Argument Section, p. 20) This appears to us to be an extreme interpretation of Section 316 of the Clean Streams Law, 35 P.S. § 691.316, which accords strict liability to a landowner or occupier of a

## CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter. 25 Pa. Code § 1021.122(b)(4).

2. The Department must demonstrate by a preponderance of the evidence that it had the authority to issue the May 28, 2009 Administrative Order. *Id.* at § 1021.122(a).

3. The Board's duty is to make a *de novo* determination as to whether the Department's Administrative Order is supported by the evidence taken by the Board at trial. *Berks County v. DEP*, 2012 EHB 404, 427.

4. Although neither the Department nor ELG's consultants were able to identify the actual point of discharge to the culvert, there is strong circumstantial evidence in this case that supports the Department's position that ELG is the source of the oil discharge.

5. The Clean Streams Law authorizes the Department to issue such orders as are necessary to enforce the provisions of the act when it finds that a condition existing on or in the operation in question is causing pollution or a danger of pollution. 35 P.S. §§ 691.5 and 691.610.

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site for a polluting condition that exists on their property and provides that the Department may order the landowner or occupier to correct the condition. The Department takes the position that even if CSX Railroad or the truck repair facility were the only source of the oil in the culvert that flows to the Youghiogheny River, ELG would be legally responsible for the discharge simply by virtue of the fact that the culvert runs through its property. Actions taken by the Department must be lawful and reasonable, *Weaver v. DEP*, EHB Docket No. 2013-041-L (Opinion and Order issued on August 29, 2013), *slip op.* at 5; *Gadinski v. DEP*, EHB Docket No. 2009-174-M (Opinion and Order issued May 31, 2013), *slip op.* at 51, and there are limits as to what constitutes a lawful and reasonable exercise of the Department's authority under Section 316 of the Clean Streams Law. The Department's position in this case certainly pushes up against and potentially crosses those limits. However, because we find that ELG is the likely source of the oil discharge in the culvert, the issue of whether the Department could properly hold ELG liable under Section 316 of the Clean Streams Law, as asserted by the Department, is not presented here.

6. The Department has met its burden of proving that the May 28, 2009 Administrative Order issued to ELG was a reasonable and lawful exercise of its discretion under the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **ELG METALS, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2009-091-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 22nd day of October, 2013, it is hereby **ORDERED** that the appeal of ELG Metals, Inc. is **dismissed.**

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: October 22, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

**For the Commonwealth of PA, DEP:**
Mary Martha Truschel, Esquire
Southwest Region – Office of Chief Counsel

**For Appellant:**
Frederick L. Tolhurst, Esq.
COHEN & GRIGSBY, PC
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Pittsburgh, PA 15222

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2011-114-CP-C** |
| **FRANK COLOMBO d/b/a GLENBURN SERVICES** | : | **Issued: October 28, 2013** |

# ADJUDICATION

**By Michelle A. Coleman, Judge**

**Synopsis:**

The Board assesses a civil penalty against the Defendant, Mr. Frank Colombo d/b/a Glenburn Services, in the amount of $9,500 for violations of the Dam Safety and Encroachments Act and the Clean Streams Law. Mr. Colombo does not dispute that he conducted unpermitted dredge and fill activities, and did so without implementing erosion and sediment control Best Management Practices or developing an Erosion and Sedimentation Control Plan, the absences of which are in violation of the Dam Safety and Encroachments Act and the Clean Streams Law.

## FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 35 P.S. § 693.1 *et. seq.* (Dam Safety and Encroachments Act, or the "Act"), the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et. seq.* (Clean Streams Law), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code.



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http://ehb.courtapps.com

2. The Defendant is an individual, Frank Colombo, with a registered fictitious name of Glenburn Services Company (hereinafter, "Mr. Colombo"). (Admitted, Colombo Answer to Complaint ¶ 3; Department Post Hearing Brief ¶ 2).

3. In 1976, Mr. Colombo constructed a sewage treatment plant along Ackerly Creek to service the residents of Glenburn Township. (Notes of Transcript ("T.") page 129, 132).

4. Sometime around 2006, work was conducted in Ackerly Creek that involved the construction of a dike to slow the flow of the Creek, which has resulted in Mr. Colombo experiencing flooding issues at his sewage treatment plant upstream. (Mr. Colombo's October 24, 2012 Letter, incorporated into documents submitted as his Pre-Hearing Memorandum).

5. On February 18, 2009, Mr. Colombo and a Glenburn Township, Lackawanna County Supervisor ("Township Supervisor") met with a Department representative in Glenburn Township at a site along Ackerly Creek ("Ackerly Creek Site") regarding Mr. Colombo's request for an emergency permit to dredge portions of Ackerly Creek to abate the flooding occurring at Mr. Colombo's sewage treatment plant. (Department's Exhibit ("DEP Ex.") No. 3; T. 10-12).

6. During the February 18, 2009 meeting and site visit, the Department representative informed Mr. Colombo that an emergency permit was not appropriate for his proposed project but he could apply for an individual permit for his proposed project through the normal permitting process. (DEP Ex. 3; T. 12-13, 15).

7. The Department representative informed Mr. Colombo and the Township Supervisor that the Department maintains the Pennsylvania State Programmatic General Permit No. 3 ("GP-3 permit"), which pertains to the removal of gravel bars from within waterways, a feature characteristic of the segment of Ackerly Creek immediately upstream and downstream of Mr. Colombo's sewage treatment plant (DEP Ex. 3; T. 15).

8. At that time, the Township Supervisor expressed interest in submitting a registration form and obtaining a GP-3 permit for Glenburn Township for the purpose of removing gravel bars from Ackerly Creek. (DEP Ex. 3; T. 16).

9. The Department representative explained to Mr. Colombo and the Township Supervisor that the GP-3 permit applies only to stream bank rehabilitation, stream bank protection, and gravel bar removal; it does not authorize any dredging activities, or the placement of any material along the stream or in the wetland. (DEP Ex. 2; T. 15, 18).

10. During the February 18, 2009 meeting and site visit, the Department representative provided substantial assistance to Glenburn Township, completing all or nearly all, of the General Permit Registration Form ("Registration Form") for the GP-3 permit. (DEP Ex. 1; T. 16, 19).

11. Later that day, the Department representative provided additional assistance in completing the Registration Form for Glenburn Township, including searching the Pennsylvania Natural Diversity Index (PNDI), as required by the GP-3 permit. (DEP Ex. 1; T. 19).

12. The attached PNDI form indicates the existence of wetlands on the Ackerly Creek Site. (DEP Ex. 1).

13. However, there is no indication of the existence of wetlands on the Sketch Plan portion of the Registration Form, either in the sketch of the Ackerly Creek Site, or in the checkbox that requests acknowledgement of any onsite wetland acreage. (DEP Ex. 1).

14. On February 24, 2009, Glenburn Township's GP-3 Registration Form was officially submitted to the Department for gravel bar removal and stream bank protection in and along Ackerly Creek. (DEP Ex. 1).

15. The next day, February 25, 2009, the Department acknowledged Glenburn Township's submission of the GP-3 Registration Form and authorized it as permit number GP033509402. (DEP Ex. 1; T. 27-28).

16. On March 30, 2009, in response to two complaints, a Department representative inspected the area of Ackerly Creek that related to Glenburn Township's gravel bar removal project. (DEP Ex. 4a; T. 28-29).

17. During the March 30, 2009 inspection, the Department representative observed that approximately 300 linear feet of the Ackerly Creek stream channel had been dredged and approximately one to two feet in depth had been dredged from the streambed. (DEP Ex. 4a-f; T. 29, 30, 40, 65).

18. The Department representative also observed that material removed from the streambed of Ackerly Creek was placed along the bank of the Creek in wetland and floodway areas. (DEP Ex. 4a; T. 32).

19. The dredging of Ackerly Creek and the placement of material along the bank noted during the March 30, 2009 inspection were both done without the implementation of erosion and sediment ("E&S") control Best Management Practices ("BMPs"). (DEP Ex. 4a; T. 36).

20. On April 16, 2009, Department representatives conducted a follow-up inspection of the Ackerly Creek Site. During this inspection it was confirmed that Mr. Colombo had conducted the unauthorized work in and along Ackerly Creek. (DEP Ex. 5a; T. 37-38, 45).

21. During the April 16, 2009 inspection, Department representatives noted that the Ackerly Creek Site was substantially the same as it was on March 30, 2009, but some additional fill material had been placed within the floodway of Ackerly Creek. (DEP Ex. 5a; T. 39-40).

22. During the April 16, 2009 inspection, Department representatives again observed that inadequate E&S controls were implemented at the Ackerly Creek Site. (T. 44-45).

23. During this inspection, a Department representative determined the general boundary of the wetland adjacent to the Ackerly Creek floodway. (T. 71).

24. After determining the wetland boundary, the Department representative observed that fill material had been placed in the wetland area of the Ackerly Creek Site. (DEP Ex. 13; T. 71).

25. At the time of the April 16, 2009 inspection, the Department representative estimated that approximately 6,625 square feet of wetlands had been impacted by Mr. Colombo's activities. (T. 78).

26. During this inspection, a Department representative observed that approximately 700 to 800 feet of stream banks were affected by Mr. Colombo's activities. (T. 46).

27. At the time of the April 16, 2009 inspection, the Department determined that Mr. Colombo's activities had caused sediment pollution to Ackerly Creek and the following adverse impacts to the wetlands: decreased flood flow attenuation and storage, elimination of wild life habitat, diminution of sediment toxicant removal, and decreased groundwater recharge to Ackerly Creek. (DEP Ex. 4a-4f, 5a-5j, 6a-6c; T. 82-83, 91-91).

28. During the April 16, 2009 inspection, Mr. Colombo admitted that he knew he was not authorized to conduct the dredging activities in Ackerly Creek and stated that he would do it again if necessary. (DEP Ex. 13; T. 46, 78-79, 111).

29. On April 16, 2009, the Department issued a Compliance Order to Mr. Colombo for (1) modifying an encroachment without a proper permit under the Dam Safety and Encroachments Act and (2) failing to implement an E&S Plan while modifying the

encroachment. The Compliance Order required Mr. Colombo to cease his dredge and fill activities in and along Ackerly Creek and to immediately begin restoration of the site, which involved stabilization of the stream banks and all disturbed areas, removal of fill from the wetland area, and the restoration of the dredged channel in the wetlands. (DEP Ex. 7; T 107).

30. Neither Mr. Colombo nor Glenburn Township obtained an individual permit that would authorize the dredging and fill activities of Mr. Colombo at the Ackerly Creek Site. (DEP Ex. 4a, 5a; T. 15, 32-33).

31. Additionally, Mr. Colombo's dredging of Ackerly Creek and placing of fill within the floodway and adjacent wetlands exceeded the scope of Glenburn Township's authorization under its GP-3 permit. (DEP Ex. 1, 2, 4a-f, 5a-j, 6a-c, 7; T. 15, 17-18, 29-35).

32. On May 1, 2009, during a follow-up inspection, a Department representative determined that Mr. Colombo had "performed the work that was required of him [in the Compliance Order] and that the site was currently in compliance." (DEP Ex. 8a; T. 85).

33. On June 11, 2009, the Department issued a Notice of Violation ("NOV") to Mr. Colombo, charging him with two violations for his activities in Ackerly Creek, the impacts of which were observed on March 30 and April 16, 2009. Specifically, the NOV charges Mr. Colombo with (1) dredging approximately 300 linear feet of Ackerly Creek and placing the material within the floodway without the requisite permit under the Act, and (2) placing the dredged material into a wetland area.

34. The June 11, 2009 NOV requested Mr. Colombo's presence at an enforcement conference with Department representatives. (DEP Ex. 9; T. 106-09).

35. On July 10, 2009, the Department held an enforcement conference with Mr. Colombo at the Department's Northeast Regional Office in Wilkes-Barre, PA to discuss a

proposed civil penalty for Mr. Colombo's violations. No settlement was reached (DEP Ex. 9, 10; T. 108-09).

36. The Department initiated this action by filing a complaint. The Department has asked the Board to assess a civil penalty of $19,560: $9,780 for unpermitted encroachments into Ackerly Creek and nearby wetlands and $9,780 for failure to install adequate E&S controls.

37. The Department developed its proposed civil penalty using its civil penalty worksheet and guidance document for the calculation of civil penalties. (DEP Ex. 11, 12; T. 111-21).

38. The Department seeks a base penalty for each violation and then incorporates various aggravating factors and cooperation with the Department in remedying the violations. The Department did not consider the cost of the violations to the Commonwealth. (DEP Ex. 12, 12; T. 114-22).

39. The Department's Compliance Specialist characterizes Mr. Colombo's two violations as "minor" violations and asks for a base civil penalty at the maximum point of the range suggested by Departmental guidance—$6,000 per violation, for a total base civil penalty of $12,000. (DEP Ex. 11, 12; T. 114-15, 120-22).

40. The Department's Compliance Specialist adjusted the proposed civil penalty to account for the fact that the damages resulting from Mr. Colombo's violations were high, that Mr. Colombo's willfulness met a recklessness standard, that Mr. Colombo's prior compliance history warrants a maximum penalty factor for violation history, and that Mr. Colombo's cooperation with the Department in restoring the Ackerly Creek site warrants a mid-level reduction in penalty. Considering these adjustments, the Department seeks a penalty of $9,780 for each violation. (DEP Ex. 11, T. 114-22).

41. The Department's records indicate that on a prior occasion Mr. Colombo has been in violation of the programs which the Department administers for activities in wetland areas. (T. 13-14, 87-88, 118).

42. Mr. Colombo acted recklessly when he encroached upon the stream without a prior written permit from the Department. (DEP Ex. 13; T. 46, 78-79, 111).

43. Mr. Colombo's failure to develop an E&S Control Plan and install adequate E&S control BMPs was negligent. (DEP Ex. 1, 4a, 5a; T. 16, 19, 35-36, 50, 106).

44. Mr. Colombo caused a high degree of damage and injury to the waters of the Commonwealth. (DEP Ex. 4a-4f, 5a-5j, 6a-6c; T. 82-83, 91-91).

45. Mr. Colombo's unlawful conduct resulted in an unpermitted discharge of sediment pollution into the waters of the Commonwealth. (DEP Ex. 4a; T. 32).

46. Mr. Colombo's unauthorized dredging of Ackerly Creek changed the course of the stream. (DEP Ex. 4a-4f; T. 29-30, 40, 65).

47. Although Mr. Colombo enjoyed cost savings by not preparing a permit application or E&S Control Plan and not implementing appropriate BMPs for his project, such as diverting stream flow around an active work area. There is no evidence regarding the amount of those savings.

48. Mr. Colombo restored the impacted wetland in accordance with the April 16, 2009 compliance order. (DEP Ex. 8a; T. 92-93, 107, 119-20).

## DISCUSSION

### Introduction

This matter began with the Department filing a Complaint with the Environmental Hearing Board ("Board") requesting an assessment of civil penalties against Mr. Frank Colombo

for conducting dredge and fill activities without a permit in violation of Pennsylvania's Dam Safety and Encroachments Act and the Clean Streams Law, and failing to develop and implement an E&S Control Plan. Mr. Colombo does not contest that he committed the violations set forth in the complaint. Instead, Mr. Colombo primarily argues that his actions were necessary to abate flooding problems he was experiencing at the sewage treatment plant he owns and operates in Glenburn Township and to prevent alleged uncontrolled sewage discharges resulting from that flooding. His defense also seems to be situated in confusion over what the Department had authorized Glenburn Township to do under its GP-3 permit, what the Township asked Mr. Colombo to do (if anything), and how to prevent his sewage treatment plant from flooding.[1]

The Board will first analyze each count of the Department's Complaint to determine whether the Department meets the burden of proof it bears in complaints for civil penalties. 25 Pa. Code § 1021.122(b)(1). We will then discuss the appropriate civil penalty assessment for the identified violations. For reasons that will be set forth more completely below, we assess a total civil penalty assessment of $9,500.

**Count I: Failure to Acquire a Chapter 105 Permit for Dredge and Fill Activities, or, Alternatively, Exceeding the Scope of Glenburn Township's GP-3 Permit**

In Count I of its Complaint, the Department alleges that Mr. Colombo failed to acquire a permit for his dredge and fill activities under Section 6(a) of the Dam Safety and Encroachments Act and Chapter 105 of Title 25 of the Pennsylvania Code. The Department argues in the

[1] The Board acknowledges that as a pro se Defendant, Mr. Colombo proceeded without legal counsel and assumed the risk involved in that action. However, parties proceeding pro se are not exempt from following the Rules of Practice and Procedure found at 25 Pa. Code § 1021 *et. seq.* Mr. Colombo's Prehearing Memorandum did not adhere to the requirements of § 1021.104 and his Posthearing Brief did not follow the outline of § 1021.131. Failure to conform to the Rules reduces the utility of the brief as an aid to use in the preparation of this Adjudication. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2011-137-L, slip op. at 13 n.1 (Adjudication, Oct. 11, 2013).

alternative that if Mr. Colombo was in fact acting on behalf of Glenburn Township, and pursuant to the Township's GP-3 permit (GP033509402), then Mr. Colombo exceeded its scope and failed to adhere to the terms and conditions of that permit.

At the outset, the Board notes that neither the Department nor Mr. Colombo clearly established the relationship between Glenburn Township and Mr. Colombo in this matter. None of the registration materials associated with the Township's GP-3 permit contain any mention of Mr. Colombo. (DEP Ex. 1). None of the provided testimony explained the nature of Glenburn Township's relationship to Mr. Colombo. Glenburn Township was not named in the Complaint and was not a party to the case. Accordingly, the Board will not infer an agency relationship between Mr. Colombo and Glenburn Township when no such relationship is established by the parties. The Board is left to conclude that Mr. Colombo's activities were not undertaken pursuant to the Township's GP-3 permit, or any permit, and therefore all of his activities were done without authorization.

The Dam Safety and Encroachments Act, in pertinent part, applies to "all water obstructions and encroachments other than dams, located in, along, across or projecting into any watercourse, floodway, or body of water, whether temporary or permanent." 32 P.S. § 693.4(4). The Act defines "encroachment" as "any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3. "Watercourse" is defined as "any channel of conveyance of surface water having a defined bed and banks, whether natural or artificial, with perennial or intermittent flow." *Id.* "Body of water" is defined as "any natural or artificial lake, pond, reservoir, swamp, marsh or wetland." *Id.* Although "floodway" is not specifically defined in the Act, the regulations adopted pursuant to the Act define "floodway" as "the channel of the watercourse

and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood ... [I]t is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream." 25 Pa. Code § 105.1.[2]

Section 6(a) of the Dam Safety and Encroachments Act imposes a permit requirement upon persons wishing to undertake any obstruction or encroachment activity within watercourses, floodways, or bodies of water: "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department." 35 P.S. § 693.6(a). Further, the Act makes it unlawful for a person to violate any provision of the Act, or any regulation adopted pursuant to the Act, and also to "construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to the terms and conditions of a general or individual permit or the rules and regulations of the department." 32 P.S. §§ 693.18(1), 693.18(3).[3] The Board is authorized to assess civil penalties against persons found to be in violation of any provision of the Act, or any regulation promulgated under the Act. 32 P.S. § 693.21(a).

There is no dispute that Ackerly Creek meets the definition of a watercourse in terms of the Act. It contains defined banks and conveys surface water with perennial flow. (DEP Ex. 16). Therefore, any water obstruction and encroachment activity undertaken in and along Ackerly

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[2] The regulations contained in Chapter 105 of Title 25 of the Pennsylvania Code were amended January 7, 2011 and became effective January 8, 2011. The Chapter 105 regulations cited in this Adjudication are in the form as they existed before these amendments and therefore the form of the regulations that applied to Mr. Colombo's activities at the time they were carried out in February through April of 2009. The amendments were minor and would not affect the outcome of the case.

[3] The Department's Complaint references an additional provision of this section, which makes it unlawful for a person to "attempt to obtain a permit by misrepresentation or failure to disclose all relevant facts." 32 P.S. § 693.18(4). The Board finds this provision inapplicable to Mr. Colombo's case. The Board does not find support for the contention that Mr. Colombo attempted to obtain a permit by misrepresentation and the Department does not offer anything to substantiate the charge.

Creek is covered by the Act. Mr. Colombo's dredging of Ackerly Creek with his excavation equipment meets the definition of an encroachment on a watercourse. His dredging of several hundred feet of the stream channel of Ackerly Creek changed and/or expanded its course. (DEP Ex. 4a-4f; T. 29, 40). Additionally, his dredging of one to two feet of the streambed also changed and/or expanded the course of Ackerly Creek. (DEP Ex. 4a-f; T. 30, 65). These activities were done without the authorization of a permit, contrary to the provisions of the Act, and therefore are appropriate for a civil penalty assessment.

Mr. Colombo also conducted activities in the floodway and wetlands adjacent to Ackerly Creek, which also fall under the penumbra of the Act. His excavation machinery was situated within the 50-foot area that is defined as the floodway. (DEP Ex. 4b, 4d; T. 32). Mr. Colombo stripped the vegetation from the stream bank for 700 to 800 feet, much of which extended into the floodway. In addition to his activity in the floodway, Mr. Colombo also placed a significant amount of fill within the wetlands, permanently impacting their ecological value. The impacts to the wetlands resulted in decreased flood flow attenuation and storage, elimination of wild life habitat, diminution of sediment toxicant removal, and decreased groundwater recharge to Ackerly Creek. Both of these types of activities require permits under the Act and Mr. Colombo did not have the authorization of a permit. Consequently, Mr. Colombo's unpermitted dredge and fill activities in the floodway and wetlands adjacent to Ackerly Creek were done in violation of the requirements of the Act.

**Count II: Failure to Implement Erosion and Sediment Control Best Management Practices and Failure to Develop an Erosion and Sediment Control Plan**

In Count II of its Complaint, the Department alleges that Mr. Colombo engaged in earth disturbance activities without implementing E&S control BMPs and without having an E&S Control Plan.

Section 5 of the Dam Safety and Encroachments Act authorizes the promulgation of regulations and standards to further its implementation and enforcement. These regulations have been codified as Chapter 105 of Title 25 of the Pennsylvania Code. Specifically, 25 Pa. Code § 105.46(a) requires a person undertaking water obstruction and encroachment activities to "follow the erosion and sedimentation control plan prepared in accordance with Chapter 102 (relating to erosion and sediment control) and submitted with and approved as part of his application." Section 105.46(b) further requires that such activity be done in a way "so as to minimize erosion of banks and bed of the stream and disturbance of the regimen of the stream."

The regulations in Chapter 102 of Title 25 of the Pennsylvania Code are pursuant to the Clean Streams Law.[4] Section 5 of the Clean Streams Law grants the Department the authority to promulgate the regulations to further the implementation and enforcement of the Clean Streams Law. Section 611 of the Clean Streams Law makes it unlawful to violate any of its provisions and to fail to comply with any rule or regulation that has been promulgated to pursuant to the Clean Streams Law. 35 P.S. § 691.611.

The Clean Streams Law regulation found at section 102.4 of Title 25 of the Pennsylvania Code imposes certain requirements upon persons engaging in earth disturbance activities. These requirements include:

> (b) For earth disturbance activities other than agricultural plowing or tilling, the following erosion and sediment control requirements apply:
>
> (1) The implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation, including for those activities which disturb less than 5,000 square feet (464.5 square meters).

[4] The regulations contained in Chapter 102 of Title 25 of the Pennsylvania Code were amended August 20, 2010 and became effective November 19, 2010. The Chapter 102 regulations cited in this Adjudication are in the form as they existed before these amendments and therefore the form of the regulations that applied to Mr. Colombo's activities at the time they were carried out in February to April of 2009. Again, the amendments were minor and would not affect the outcome of the case.

> (2) A person proposing earth disturbance activities shall develop a written Erosion and Sediment Control Plan under this chapter if one or more of the following criteria apply:
> ...
> (ii) The person proposing the earth disturbance activities is required to develop an Erosion and Sediment Control Plan pursuant to this chapter under Department regulations other than those contained in this chapter.

25 Pa. Code § 102.4(b)(1), (b)(2)(ii). The regulations define Best Management Practices (BMPs) as "activities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing and designated uses of waters within this Commonwealth." 25 Pa. Code § 102.1. Additionally, Erosion and Sediment Control Plan is defined as "a site-specific plan identifying BMPs to minimize accelerated erosion and sedimentation." *Id.*

As noted above, 25 Pa. Code § 105.46 requires that anyone undertaking water obstruction and encroachment activities comply with the provisions of the Chapter 102 regulations. Therefore, any water obstruction and encroachment activity that fails to implement E&S control BMPs, and any person conducting such activities without an adequate E&S Control Plan, are in violation of Chapter 105 and Chapter 102 regulations. Accordingly, violations of those regulations constitute unlawful conduct under the Dam Safety and Encroachments Act and the Clean Streams Law.

Mr. Colombo did not implement any E&S controls, let alone BMPs, during his dredge and fill activities in and along Ackerly Creek. Typical BMPs for activities in and along stream beds include temporary stream channel diversion to prevent sediment pollution. (T. 31, 37). However, those precautions were not taken during Mr. Colombo's activities and Ackerly Creek had visible sediment pollution, appearing turbid and muddy. He also failed to develop an E&S Control Plan for his activities at the Ackerly Creek Site. When conducting earth disturbance

activities one is required to develop an E&S Control Plan detailing the control measures and to have it available on site. Such a plan was never developed by Mr. Colombo. Consequently, Mr. Colombo's failure to implement E&S control BMPs and failure to develop an E&S Control Plan are violations of Chapter 102 and Chapter 105 regulations, which in turn constitute violations of the Clean Streams Law and the Dam Safety and Encroachments Act, respectively. These violations warrant a civil penalty.

**Civil Penalty Assessment**

Having determined that the Department clearly met its burden of proof for both of the counts alleged against Mr. Colombo, the Board now turns to the civil penalty assessment. The Board's authority in civil penalty assessment matters is well-settled. The Board has greater latitude in reviewing a Departmental complaint seeking a civil penalty assessment than it does in an appeal of a civil penalty already assessed by the Department. The Board summarized this difference in *DEP v. Leeward Construction*, 2001 EHB 870. In short, in an appeal from a civil penalty assessment, the Board will evaluate the Department's penalty assessment for reasonableness, and only if the Board finds the penalty unreasonable will it substitute its judgment for the Department's. *Leeward*, 2001 EHB 870, 885. However, in a complaint action, "the Board must make an independent determination of the appropriate penalty amount ... The Department suggests an amount in the complaint, but the suggestion is purely advisory." *Id.*; *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Commw. Ct. 1998); *DEP v. Whitemarsh Disposal Corp.*, 2000 EHB 300, 346; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787. Here, where the action involves a complaint for civil penalty, the Board may take into account the Department's suggested penalty amount, but the Board is not bound by that determination.

Both the Dam Safety and Encroachments Act and the Clean Streams Law empower the Board to assess civil penalties and provide the Board with direction in what to consider when choosing the penalty amount to assess. Section 21 of the Dam Safety and Encroachments Act grants the Board the authority to assess civil penalties upon persons in violation of the act, "whether or not the violation was willful" and mandates that the Board "consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors." 32 P.S. § 693.21(a). The assessed penalty must not be greater than $10,000 plus $500 for each day the person continues to be in violation of the Act. *Id.*

The Clean Streams Law, at Section 605, also contains a provision authorizing the Board to assess civil penalties against persons in violation of the Clean Streams Law and requires the Board to consider the "willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." 35 P.S. § 691.605(a). The assessed penalty must not be greater than $10,000 per day for each violation. *Id.* In both statutes, the civil penalties calculation is dependent upon the willfulness of the violation, the damage to the waters of the Commonwealth, the cost of repairing the damage, and any other factors that may be relevant. The Dam Safety and Encroachments Act requires the additional consideration of costs to the Commonwealth in undertaking enforcement.

The Department has requested a total civil penalty assessment of at least $19,560 for two violations committed by Mr. Colombo: (1) conducting water obstruction and encroachment activities without a permit under Chapter 105 of Title 25 of the Pennsylvania Code, and/or conducting such activities in excess of the scope defined in Glenburn Township's GP-3 permit,

and (2) conducting water obstruction and encroachment activities without the implementation of E&S control BMPs and without developing an E&S Control Plan. The Department has evenly apportioned the civil penalty between the two violations, requesting that each violation be assessed a civil penalty of at least $9,780. The Department arrived at this amount by using its guidance document for the calculation of civil penalties and the accompanying civil penalty worksheet.

When reviewing the Department's suggested civil penalty assessments, we

> must be wary of placing too much emphasis on the Department's internal guidance documents. We do not view it as our responsibility to evaluate whether the Department has followed its own guidance document in calculating a suggested penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent. *DEP v. Hostetler*, 2006 EHB 359; *Leeward*, 2001 EHB 870, 913.

*DEP v. Pecora*, 2007 EHB 545, 551 (citing *DEP v. Kennedy*, 2007 EHB 15, 25). The standard by which the Board assesses the willfulness of a violation is well-defined in Board case law:

> [A]n intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

*Whitemarsh Disposal Corp.*, 2000 EHB 300, 349 (citations omitted) (citing *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, 475). Further, the Board notes that in determining willfulness, it may take into account the level of sophistication of the violator in terms of knowledge of applicable statutory and regulatory schemes in relation to one's course of conduct. *Phillips v. DER*, 1994 EHB 1266, 1277.

In applying these standards to Mr. Colombo's course of action, the Board determines that Mr. Colombo was reckless in conducting his activities without a permit. Mr. Colombo admitted that he knew he didn't have a permit for his dredge and fill activities, yet he continued anyway. He also stated that he would do it again if it was necessary. It is less clear whether Mr. Colombo knew that he should have developed an E&S Control Plan and should have complied with E&S control BMPs. Through testimony, Mr. Colombo indicated that he believed that by keeping his excavating equipment out of Ackerly Creek itself and only on the bank of the creek he was doing what was necessary to comply with any environmental requirements. (T. 49-50).

It is also unclear whether Mr. Colombo knew about the existence of the floodway and the wetlands at the Ackerly Creek Site and whether he knew that he was conducting activity within either of these areas. Even though the Board has determined that Mr. Colombo was not affiliated with the GP-3 permit issued to the Township, he was present at the February 18, 2009 meeting with the Department representative and the Township Supervisor where the GP-3 permit was first proposed and discussed. Although Mr. Colombo was informed during the February 18, 2009 site visit that he could not place any fill within wetlands and would have to place the material in the uplands, it is uncertain whether the boundaries of the wetlands and uplands were ever distinctly conveyed to Mr. Colombo, particularly since the wetlands delineation was not conducted until April 16, 2009. Indeed, although it is difficult to determine the boundary of the wetlands and uplands in the photographs taken after Mr. Colombo had conducted his activities, it appears as if the wetlands and uplands abut without any significant features separating the two. (DEP Ex. 5d, 5e, 5j).

Moreover, the GP-3 Registration Form, which was almost entirely completed by a representative from the Department, indicates that there is *no* wetland acreage onsite. (DEP Ex.

1). The Sketch Plan page of the Registration Form makes clear that any wetlands are to be noted on the sketch: "To ensure the sketch plan is complete, include the following on the site plan in the immediate vicinity of the project. ([check] all that apply)." (*Id.*). However, on the filled out Sketch Plan the "Not Applicable" box is checked both for "Wetland Impacts" and "Wetland Acreage Onsite." Nowhere on the Sketch Plan is there any notation designating the wetlands that fall immediately outside the 50 foot floodway on the left side of Ackerly Creek. The only acknowledgment of wetlands occurs on the attached PNDI Project Planning & Environmental Review Form under number three of the Project Description section.

Although it is unclear to what extent Mr. Colombo may have reviewed the GP-3 Registration Form, it would have provided him little notice of the existence and location of wetlands on the Ackerly Creek Site. These inconsistencies, at the very least, create an unresolved ambiguity in whether Mr. Colombo had notice that there were wetlands in the area, the extent of the wetlands in the area, and whether he knew or should have known that the area in which he was placing the material consisted of wetlands and that such activity was a violation of applicable Chapter 105 regulations.

Accordingly, although it is clear that Mr. Colombo was reckless in conducting his activities without a permit, it is less clear as to his willfulness regarding the implementation of E&S control BMPs and the lack of an E&S Control Plan. When considering Mr. Colombo's level of familiarity and sophistication with Department permitting and environmental statutes and regulations, per *Philips v. DER*, *supra*, a finding of negligence, not recklessness, appears more appropriate for Mr. Colombo's second violation.

Having discussed Mr. Colombo's willfulness, we now turn to the other criteria. The damage to the waters of the Commonwealth, when looking at the aggregate impact of Mr.

Colombo's activity to Ackerly Creek itself, to the floodway along the creek, and to the wetlands adjacent to the floodway, is significant. Mr. Colombo dredged approximately 300 feet of the streambed of Ackerly Creek, impacted 700 to 800 feet of the stream bank, and impacted 6,625 square feet of wetlands through his dredge and fill activities. The wetlands impacts resulted in decreased flood flow attenuation and storage, elimination of wild life habitat, diminution of sediment toxicant removal, and decreased groundwater recharge to Ackerly Creek. In addition, Mr. Colombo caused visible sediment pollution to Ackerly Creek. The Board agrees with the Department that Mr. Colombo caused a high degree of damage to the waters of the Commonwealth and that any civil penalty assessed must reflect that. Additionally, the Department presented credible testimony that by filling the wetlands he caused harm to those wetlands and impacted their function and value.

The cost of repair in this circumstance was largely borne by Mr. Colombo himself. He undertook the measures identified by the Department in its April 16, 2009 Compliance Order to remedy his violations. On May 1, 2009, the Department deemed the measures to be adequate and the restoration of the site to be complete.

The statutes also direct the Board to consider any other relevant factors, which could encompass Mr. Colombo's violation history and his cooperation with the Department. The Board does not find very significant Mr. Colombo's one previous violation in Newtown Township involving wetlands. There was little evidence presented on this prior violation. The Board will, however, consider Mr. Colombo's cooperation in restoring the site and that he completed the restoration in only two weeks.

The Dam Safety and Encroachments Act also requires the Board to consider the costs to the Commonwealth in enforcing the provisions of the Act against the person in violation.

However, there was no evidence presented that indicates the costs that may have been incurred by the Commonwealth in enforcing the provisions of the Act against Mr. Colombo. Along the same lines, although Mr. Colombo clearly enjoyed substantial cost savings by not applying for a permit or preparing an E&S Control Plan, and by not implement appropriate BMPs, we have no evidence to support the amount of those savings.

Weighing all of the statutory criteria and considerations detailed above, the Board concludes that a penalty of $6,000 for Mr. Colombo's unpermitted encroachments and $3,500 for his failure to develop and implement an E&S Control Plan with proper BMPs, for a total penalty of $9,500, is a fair and reasonable amount to impose upon Mr. Colombo.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this appeal. 32 P.S. § 693.21.

2. The Department has the burden of proof when it files a complaint for a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department has satisfied that burden in this case.

3. Mr. Colombo recklessly encroached upon Ackerly Creek, a regulated watercourse, without a permit in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a).

4. Mr. Colombo negligently failed to implement erosion and sediment control Best Management Practices while conducting his dredge and fill activities along Ackerly Creek, in violation of Sections 402(b) and 611 of the Clean Streams Law, 35 P.S. §§ 691.402(b) and 691.611 and 25 Pa. Code § 102.4(b)(1), and in violation of Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18 and 25 Pa. Code § 105.46(b).

5. This failure resulted in a discharge of sediment pollution into Ackerly Creek, a water of the Commonwealth, in violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401.

6. Mr. Colombo negligently failed to develop or maintain an Erosion and Sediment Control Plan for his dredge and fill activities along Ackerly Creek, in violation of Section 611 of the Clean Streams Law, 35 P.S. § 691.611 and 25 Pa. Code § 102.4(b)(1), and in violation of Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18 and 25 Pa. Code § 105.46(a).

7. The Board sets the amount of civil penalties pursuant to Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21(a) and Section 605 of the Clean Streams Law, 35 P.S. § 691.605.

8. The violations of the Dam Safety and Encroachments Act and the Clean Streams Law documented by the Department warrant a civil penalty assessment of $9,500.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2011-114-CP-C** |
| **FRANK COLOMBO d/b/a GLENBURN SERVICES** | : | |

## ORDER

AND NOW, this 28th day of October, 2013, it is hereby **ORDERED** that the Board assesses a civil penalty against Frank Colombo d/b/a Glenburn Services in the amount of $9,500.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: October 28, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

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Lance H. Zeyher, Esquire
Northeast Region – Office of Chief Counsel

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BUCKS COUNTY WATER & SEWER AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2013-107-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: October 30, 2013** |

**OPINION AND ORDER**
**ON MOTION TO QUASH APPEAL**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board grants the Department's motion to quash the appeal because Bucks County Water and Sewer Authority's appeal of a Department letter issued to Newtown Township is not an appeal of a final, appealable decision. The letter is but one of many interim decisions made by the Department during the Act 537 Plan review process. The Department's letter is not final as to its recipient, Newtown Township, nor is it final as to anyone else, including Bucks County Water and Sewer Authority.

**O P I N I O N**

On May 10, 2013, Newtown Township submitted to the Department of Environmental Protection (the "Department") a planning module for land development to revise its official plan ("Act 537 Plan") under the Sewage Facilities Act, 35 P.S. §§ 750.1—750.20a ("Act 537" or the "Act"). The planning module concerned the sewer connections of a development project, the Promenade at Sycamore Street. Presumably, although not made clear by the parties, sewage from the Promenade at Sycamore Street would eventually flow to Bucks County Water and



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Sewer Authority's (the "Authority's") Neshaminy Interceptor and Totem Road Pump Station facilities.

On June 21, 2013, the Department issued a letter to Newtown Township stating that the Township's submitted planning module was "administratively and technically incomplete." In the letter, the Department listed seven items that the Township would need to address to resolve the administrative and technical incompleteness issues before the planning module would undergo further review. One of the seven items concerns a previously determined projected hydraulic overload at the Authority's Neshaminy Interceptor and Totem Road Pump Station facilities and the corrective action plan that the Authority submitted to address the projected overloads.[1] The Authority takes issue with this part of the letter. The specific language in the letter follows:

> 4. ... Because of the projected hydraulic overload, [the Authority] must comply with the requirements of 25 Pa. Code Section 94.22, which requires a sewer permittee to submit a Corrective Action Plan (CAP) and to limit new connections to and extensions of the sewerage facilities based upon remaining available capacity in accordance with the CAP. [The Authority] has submitted a CAP to DEP, and it is under review. Until the review is complete and the submission is deemed consistent with 25 Pa. Code Section 94.22, we cannot consider the proposal to be consistent with 25 Pa. Code Section 71.21(a)(5)(i)(B) and the project will remain administratively incomplete.

Copies of the letter were sent to a number of different persons and entities, one of which was the Authority. Neither Newtown Township nor the developer of the project in question appealed from the letter. However, the Authority did appeal, arguing, among other things, that although the letter is not directed at the Authority, the Authority is nonetheless a person aggrieved by an action of the Department. The Authority then enumerated specific objections to the substantive contents of the letter.

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[1] The Department determined that a projected hydraulic overload existed at these two facilities and noted it in a letter sent to the Authority on July 25, 2012. This determination is being appealed before the Board at EHB Docket No. 2012-138-L (consolidated with 2012-146-L, 2012-152-L, and 2012-155-L).

The Department has now filed a motion to quash the appeal, asserting that the Board lacks jurisdiction to hear the appeal because the letter does not constitute a final action of the Department with respect to its recipient, Newtown Township, let alone the Authority.[2] The Authority responds that the letter did not simply advise Newtown Township of administrative and technical incompleteness, rather, it "memorialize[d] the Department's decision that the Department cannot approve the planning module for this project pending its approval of [the Authority's] CAP." Accordingly, the Authority asserts that it "was required to appeal [the letter] so as not to waive its right to do so later pursuant to the doctrine of administrative finality."

We agree with the Department that the letter is an intermediary step that does nothing more than inform Newtown Township of administrative and technical incompleteness in its proposed Act 537 Plan revision. We have consistently held that we "will not review the many interim decisions made by the Department during the processing of a permit application." *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750. As we have explained,

> it was never intended that the Board would have jurisdiction to review the many provisional, interlocutory 'decisions' made by [the Department] during the processing of an application. It is not that these 'decisions' can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of [the Department's review] process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past...and see no sound reason for entering it now.

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[2] Although termed a motion to quash an appeal, the Board's standard of review, for all intents and purposes, comports to that utilized in a motion to dismiss. A motion to dismiss is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612. The Board evaluates motions to dismiss in the light most favorable to the nonmoving party. *Dobbin v. DEP*, 2010 EHB 852, 857; *Cooley v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

*Id.* The letter at issue in this case is nothing more than an interlocutory decision made by the Department. Indeed, the letter represents but one step in the sometimes long and extensive review process, a process that "always involves a certain amount of interplay between the Department and the person who has submitted the application to the Department." *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646; *New Hanover Corporation v. DER*, 1989 EHB 1075.

Although Newtown Township is not pursuing a permit but an Act 537 Plan revision, the process of interacting with the Department and obtaining approval to implement the measures specified in the revision is essentially the same as that involving a permit. Like a permit application, an Act 537 Plan revision must meet statutory and regulatory requirements, contain all necessary components, and satisfy one or more reviews by the Department before it can be approved and the municipality can undertake the actions encompassed by the plan revision. If the Department finds during the review process that one or more of the statutory or regulatory requirements are not met, or that the submission is incomplete, the Department sends a letter, much like the letter at issue, informing the municipality of the deficiency and providing an opportunity to correct it. *See* 35 P.S. § 750.10(19).

The component decisions are analogous to the many subsidiary decisions the Department makes along the way in the course of reviewing a permit application. The Department's letter informing Newtown Township that its proposed revision was administratively and technically incomplete is essentially only "one small part of a much more complex review." *HJH, LLC v. DEP*, 949 A.2d 350, 353 (Pa. Commw. Ct. 2008). Therefore, in keeping with our well-established precedent, we require the prospective appellant to wait until the Department makes a final decision, in this case on an Act 537 Plan revision, before filing an appeal. *Lower Salford*

*Twp. Auth. v. DEP*, 2011 EHB 333, 338. This is true not only for the recipient of the letter but for any third party allegedly affected by the letter as well.

The Authority also argues that if it did not appeal Newtown Township's incompleteness letter now, the Department could potentially argue in a future proceeding that the decision affecting the Authority memorialized within the letter was final as to the Authority and, accordingly, the Authority would lose its right to appeal the decision. This concern is not warranted. Because the Department's letter to Newtown Township is not a final, appealable action, it has no administrative finality for purposes of collateral estoppel in *any* future proceeding, including any future proceeding involving the Authority. *Chesapeake Appalachia, LLC v. DEP*, EHB Docket No. 2012-016-L, slip op. at 13 (Opinion and Order, Aug. 15, 2013). We would also add that, as noted above, the underlying decision mentioned in the letter has already been appealed by the Authority. Finally, it would be neither appropriate nor practical to address the Authority's concerns regarding its corrective action plan, or to fashion any relief regarding the Authority in the context of an appeal from the Department's letter to Newtown Township.

For all of the above reasons, we conclude that the Department's June 21, 2013 letter is not a final action and it cannot be appealed. Therefore, we have no jurisdiction to review the letter.

Accordingly, we issue the following Order.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **BUCKS COUNTY WATER & SEWER AUTHORITY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-107-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 30th day of October, 2013, it is hereby ordered that the Department's Motion to Quash Appeal is **granted**. This appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: October 30, 2013**

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

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| **MELVIN RINGER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-173-R** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | **Issued: November 1, 2013** |

## OPINION AND ORDER
## ON MOTIONS IN LIMINE

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Issues not raised in a notice of appeal are waived. Therefore, the Appellant is precluded from presenting evidence unrelated to the sole objection raised in his notice of appeal.

## OPINION

This matter involves an appeal filed by Melvin Ringer challenging a November 11, 2011 letter sent to him by the Department of Environmental Protection (Department). The Department's letter responded to a series of complaints made by Mr. Ringer regarding damage allegedly caused by underground mining conducted by Consol Pennsylvania Coal Company, LLC (Consol). The letter advised Mr. Ringer, *inter alia*, that the Department had determined that Consol had provided him with an adequate replacement water supply. (Exhibit to Notice of Appeal)

On December 12, 2011, Mr. Ringer appealed the Department's letter. A hearing on this matter is scheduled before the Pennsylvania Environmental Hearing Board on November 6 - 8, 2013.



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The sole objection stated in the notice of appeal is the following: "Consol has not supplied adequate drinking water." However, in his pre-hearing memorandum, Mr. Ringer raises issues pertaining to alleged subsidence to his driveway and other issues unrelated to his water supply. Consol and the Department have filed motions in limine seeking to preclude Mr. Ringer from offering evidence on any issues other than the adequacy of the replacement water supply system provided by Consol.

The law on this matter is clear. Any issues not raised in the notice of appeal (either the original notice of appeal or any amendments) are waived and cannot be raised for the first time in a party's pre-hearing memorandum. *Fuller v. Department of Environmental Resources*, 599 A. 2d 248 (Pa. Cmwlth. 1991); *Pennsylvania Game Commission v. Department of Environmental Resources,* 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Michael D. Rhodes v. DEP*, 2009 EHB 325, 327; *Moosic Lakes Club v. DEP*, 2002 EHB 396.

Accordingly, the Department's and Consol's motions in limine are granted.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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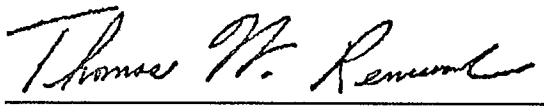
| **MELVIN RINGER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-173-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee** | : | |

## ORDER

AND NOW, this 1st day of November, 2013, it is hereby **ORDERED** that the Motions in Limine filed by the Department of Environmental Protection and Consol Pennsylvania Coal Company are **granted**, and Mr. Ringer is precluded from introducing any evidence unrelated to the issue of whether Consol has provided him with an adequate water supply.

**ENVIRONMENTAL HEARING BOARD**



**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**DATED: November 1, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURENCE HARVILCHUCK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-013-M** |
| | : | **(Consolidated with 2013-014-M,** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-015-M, 2013-016-M, and** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **2013-017-M)** |
| **PROTECTION and WPX ENERGY** | : | |
| **APPALACHIA, LLC, Permittee** | : | **Issued: November 8, 2013** |

**OPINION AND ORDER ON**
**APPELLANT'S REVISED MOTION FOR LEAVE TO**
**AMEND CONSOLIDATED APPEAL 2013-013-M**

**By Richard P. Mather, Sr., Judge**

**Synopsis**

The Board grants the Appellant's Revised Motion for Leave to Amend Consolidated Appeal 2013-013-M. A motion for leave to amend an appeal to add an objection is granted where no undue prejudice will result to the opposing parties under 25 Pa. Code § 1021.53(b).

**O P I N I O N**

Before the Environmental Hearing Board (the "Board") is a Revised Motion for Leave to Amend Consolidated Appeal 2013-013-M (the "Motion to Amend") filed by Laurence Harvilchuck (the "Appellant").[1] The Permittee, WPX Energy Appalachia, Inc. ("WPX Energy

[1] The Appellant previously filed a Motion for Leave to Amend Consolidated Appeal 2013-013-M, which the Board denied because it was not verified and supported by affidavits as required by the Board's Rules at 25 Pa. Code § 1021.53(c). *See Harvilchuck v. DEP*, EHB Docket No. 2013-013-M (Amended Opinion and Order issued Oct. 11, 2013).



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Appalachia"), opposes the Motion to Amend. The Department of Environmental Protection (the "Department") filed a response letter indicating it is not opposed to the Motion to Amend.[2]

On January 28, 2013, the Appellant appealed five Well Permits issued by the Department authorizing WPX Energy Appalachia to drill and operate wells in Silver Lake Township, Susquehanna County. The appeals of those Well Permits have been consolidated at EHB Docket No. 2013-013-M.

Recently, the Board denied the Appellant's Motion for Leave to Join WPX Energy, Inc. as Permittee ("Motion to Join"). *See Harvilchuck v. DEP*, EHB Docket No. 2013-013-M (Opinion and Order issued Sept. 20, 2013). The Appellant, in his Motion to Join, asserted that WPX Energy, Inc. ("WPX Energy") is the actual party-in-interest and that WPX Energy is using the identity of WPX Energy Appalachia as its alter ego. The Appellant based his Motion to Join on a number facts that the Appellant asserted were sufficient to pierce the corporate veil. The Appellant also argued that the Board's May 7, 2013 Order granting admission *pro hac vice* of Lisa A. Decker constituted a de facto joinder of WPX Energy.

The Board, in denying the Motion to Join, explained that it lacks the authority to join a non-party in an appeal before the Board.[3] The Board also held that the error in the Board's May

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[2] The Department stated in its October 29, 2013 response letter that it does not oppose the Motion to Amend "[b]ecause of the Board's precedent establishing that the underlying merits of the objection to be added through a motion to amend a notice of appeal is not an issue properly set forth in a response to such motion . . . ." The Board interprets this rather nebulous statement as the Department's acknowledgement that the underlying merits of a proposed objection are not at issue in the context of a motion for leave to amend an appeal. The Department did not, however, address in any manner whether undue prejudice would result if the Motion to Amend is granted, an issue which comprised the overwhelming majority of the Appellant's argument in support of his Motion to Amend. The Department's failure to address this issue leads the Board to assume that the Department does not believe undue prejudice will result if the Motion to Amend is granted.

[3] The Board's Rules contain no provision addressing joinder or authorizing the Board to involuntarily join parties to an appeal. In *Ferri Contracting Company, Inc. v. DEP*, 506 A.2d 981 (Cmwlth. 1986), the Commonwealth Court affirmed the Board's interpretation of its regulations that the Board lacks the authority to involuntarily join parties. 506 A.2d at 985; *see also Parker Twp. Bd. of Supervisors v. DER*,

7, 2013 Order was not a de facto joinder of WPX Energy. The Board noted that the Appellant's Motion to Join may have been implicitly arguing that the Department issued the Well Permits to the wrong corporate entity, and if the Motion to Join in fact raised that issue, the Board declined to address it in the context of ruling on the Motion to Join and reserved judgment on that issue until a later date. The Board also indicated that it was not apparent from the Appellant's Notice of Appeal that the Appellant had objected to the Department's issuance of the Well Permits to WPX Energy Appalachia rather than to WPX Energy.

Now, the Appellant moves to amend his Notices of Appeal to include the following objection:

> 4. The Department abused its discretion and acted arbitrarily, capriciously, and contrary to law by failing to perform due diligence to ascertain whether or not the person named as Permittee, WPX Appalachia, was the proper person to which the Permits should have been issued pursuant to 58 Pa. C.S. §3211(a) which states that no person shall drill or alter a well without having first obtained a well permit.
>
> (a) The Department did not perform any inquiry or investigation, beyond the identification of Permittee as a duly established corporate entity that is authorized to do business in Pennsylvania, as to whether or not the named Permittee was, in fact, the person responsible for causing or conducting operations or other activities involving the wells and/or sites identified in the Permits issued by the Department.

Appellant's Motion to Amend at 1.

As factual support for the Motion to Amend, the Appellant claims that at the time of filing the Notices of Appeal, he was unaware (1) "of additional facts, later disclosed in the course of discovery, which demonstrate the extent and further involvement of persons, other than Permittee, directly responsible for causing or conducting operations or other supporting activities involving the wells and/or sites identified in the Permits that are subject of this consolidated

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1991 EHB 1724, 1725-26; *Lower Paxton Twp. Auth. v. DER*, 1995 EHB 131, 138; *Thomas v. DEP*, 2000 EHB 452, 458.

Appeal;" (2) that "David Freudenrich, Regulatory and Construction Manager, was in fact an employee of WPX Energy, Inc., not Permittee;" and (3) that "multiple employees of WPX Energy, Inc., including its Senior Counsel, would be directly involved in litigating this consolidated Appeal." *Id.* at 2.

As the Board has explained on more than one occasion,

> [a] notice of appeal can be amended as of right within 20 days of its filing. 25 Pa. Code § 1021.53(a). After that, we may grant leave for further amendment "if no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment. *Id.* Our rule, with a heavy emphasis on a determination of prejudice,
>
> > was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult. *Groce v. DEP*, 2006 EHB 289, 291. So long as a party is seeking to amend its grounds or objections to a timely appealed action and not seeking to extend the Board's jurisdiction, "[r]egardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379.
>
> *Henry v. DEP*, 2012 EHB 324, 325. The *Official Comment* to the Rule reads as follows:
>
> > In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a nunc pro tunc standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986).
>
> In assessing whether the parties opposing the amendment will suffer undue prejudice, we consider such factors as (i) the time when amendment is requested relative to other developments in the litigation (including but not limited to the hearing schedule); (ii) the scope and size of the amendment; (iii) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (iv) the reason for the amendment; and (v) the extent to which the amendment diverges from the original appeal. *Rhodes v. DEP*, 2009 EHB 325, 328-29. *See also Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres*

*Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Robachele v. DEP,* 2006 EHB 373, 379; *Tapler v. DEP*, 2006 EHB 463, 465.

*Weaver v. DEP*, EHB Docket No. 2013-041-L, slip op. at 3-4 (Opinion issued July 9, 2013) (quoting *Borough of St. Clair v. DEP*, EHB Docket No. 2012-148-L, slip op. at 2-3 (Opinion issued Feb. 28, 2013)).

We agree with the Appellant that granting the Motion to Amend will not unduly prejudice the Department or WPX Energy Appalachia, particularly at such an early stage in the litigation. *See, e.g.*, *Weaver*, slip op. at 4. Although the discovery period has recently ended, neither the Appellant in his Motion to Amend, nor WPX Energy Appalachia in its response, has requested any further extension of the discovery period. *See, e.g.*, *Borough of St. Clair*, slip op. at 3. Further, a hearing has not yet been scheduled, and any hearing, if needed, would likely not be held until many months from now. *See, e.g.*, *id.* In addition, the amendment should come as no surprise to the Department or to WPX Energy Appalachia considering the history between the parties, the documents exchanged during discovery, and that this issue was raised months ago in the context of the Appellant's Motion to Join. *See, e.g.*, *Weaver*, slip op. at 4. Lastly, the amended objection does not diverge dramatically from the objections set forth in the original Notices of Appeal. *See, e.g.*, *id.*; *Borough of St. Clair*, slip op. at 3. While the Board feels that the second *Rhodes* factor, the scope and size of the amendment, may weigh in favor of WPX Energy Appalachia, given that, as WPX Energy Appalachia identifies and the Appellant admits, the amended objection may present a novel legal issue, the aggregate weight of all five factors overwhelmingly indicates that no undue prejudice would result to the opposing parties if the Motion to Amend is granted.

The Appellant argues that he was unaware of the extent of the relationship between WPX Energy and WPX Energy Appalachia until he was served with particular documents through the

discovery process, while WPX Energy Appalachia claims that the Appellant was aware of this relationship as much as nine months prior to the filing of his Notices of Appeal. We do not see how the fact that the Appellant may have known enough information to include the objection in his original Notices of Appeal is relevant to determining whether undue prejudice would result *to the opposing parties*. Certainly if the Appellant was withholding an objection in an attempt to abuse the appeal process, the Board could, in its discretion, take action to prevent that abuse, but that does not appear to be the case here.

Finally, WPX Energy Appalachia's attempt to engage the Appellant in a debate over the merits is premature and out of place in the context of a motion for leave to amend an appeal. *See Borough of St. Clair*, slip op. at 3. Judge Bernard A. Labuskes, Jr. announced in *Borough of St. Clair* that "[a] motion to amend does not provide an occasion for debating the underlying merits of the objections that are the subject of the proposed amendment. The merits of the new objections are not a factor in considering whether to allow an amendment." *Id.* at 3-4. WPX Energy Appalachia will have ample opportunity to debate the merits of the Appellant's amended objection, but it may not do so in the context of opposing a motion for leave to amend an appeal.

For the foregoing reasons, the Board grants the Appellant's Revised Motion for Leave to Amend Consolidated Appeal 2013-013-M. Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **LAURENCE HARVILCHUCK** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-013-M** |
| | : | **(Consolidated with 2013-014-M,** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **2013-015-M, 2013-016-M, and** |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **2013-017-M)** |
| **PROTECTION and WPX ENERGY** | : | |
| **APPALACHIA, LLC, Permittee** | : | |

## ORDER

AND NOW, this 8th day of November, 2013, it is hereby **ORDERED** that the Board grants the Appellant's Revised Motion for Leave to Amend Consolidated Appeal 2013-013-M.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: November 8, 2013**

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

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Denver, CO 80202

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **MARIA SCHLAFKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-186-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: November 12, 2013** |

## OPINION AND ORDER ON MOTIONS FOR SANCTIONS

**By Steven C. Beckman, Judge**

**Synopsis:**

The Board grants the Department's unopposed motion for discovery sanctions and precludes the Appellant from introducing as evidence at the hearing any documents other than those identified by the Department and included in the Department's prehearing memorandum. In addition, the Appellant is precluded from calling any witnesses other than herself at the hearing on the merits, as a sanction for failure to identify any witnesses or other persons with knowledge of the matters at issue in response to written discovery and a Board order compelling discovery responses.

## OPINION

Maria Schlafke filed this *pro se* appeal from an administrative order issued by the Department of Environmental Protection (the "Department") on November 13, 2012. The order alleged violations of the PA Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.*, and the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, at a mobile home park in Summit Township, Crawford County. During the course of this appeal, Ms. Schlafke has repeatedly failed to



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comply with the Department's various discovery requests. On June 21, 2013, the Department filed a Motion to Compel and for Sanctions with the Board for Ms. Schlafke's failure to respond to the Department's First Request for Admissions and Admission Interrogatories, Interrogatories, and Production of Documents ("Department's Requests"). The Department also filed a Motion to Deem Admitted Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories, Interrogatories, and Production of Documents for Ms. Schlafke' s failure to respond to the admissions in the Department's Request. Ms. Schlafke failed to respond to either motion. On July 15, 2013, the Board issued an Order that, among other things, granted the Department's request to deem the admissions admitted and compelled Ms. Schlafke to serve the Department with responses to the interrogatories and the request for production of documents within 20 days. On August 1, 2013, the Department received a response to the Department's Requests from Ms. Schlafke by facsimile.

On October 17, 2013, the Department moved for sanctions, requesting that the Board dismiss Ms. Schlafke's appeal, preclude her from introducing evidence and documents in support of this appeal or impose some other appropriate sanction. The Department asserts that Ms. Schlafke's August 1, 2013, response fails to comply with the Board's Order dated July 15, 2013, and the Board's Rules of Practice and Procedure, that Ms. Schlafke failed to provide responsive answers to certain interrogatories and failed to provide any documents in response to the request for production of documents. As a result, the Department asserts that it is prejudiced in its ability to proceed with this appeal and is prevented from identifying the specific nature of the claims raised in this case. Ms. Schlafke has not responded to the motion for sanctions.

Under Section 1021.161 of the Board's Rules, sanctions may be imposed upon a party for failure to abide by a Board order or Board rule of practice and procedure, including those

pertaining to discovery. 25 Pa. Code § 1021.161; *DEP v. Frank Colombo d/b/a/ Glenburn Services*, 2012 EHB 370; *Smith v DEP*, 2010 EHB 547; *DEP v. Tate*, 2009 EHB 295; *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477. These sanctions may include dismissal of the appeal, entrance of adjudication against the offending party, disallowing introduction of evidence or documents not disclosed, precluding witnesses that were not identified as such, or other appropriate sanctions, including those allowed under Rule 4019 of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.161. Rule 4019 also authorizes the Board to impose sanctions for noncompliance with discovery rules. Specifically, Rule 4019(i) addresses the failure of a party to disclose potential witnesses, stating "a witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action" unless the failure to disclose the witness is "the result of extenuating circumstances beyond the control of the defaulting party." Pa.R.Civ.P. 4019(i).

Review of the record in this case clearly shows Ms. Schlafke's repeated failure to comply with the Board's discovery rules and the July 15th Order. She failed to respond to the Department's Requests, prompting the Department to file a Motion to Compel and for Sanctions. The Board declined to impose sanctions at that time but issued an order compelling Ms. Schlafke to serve the Department with responses to the interrogatories and the request for production of documents in the Department's Interrogatories within 20 days. In her response, Ms. Schlafke failed to identify any potential witnesses other than herself to testify at the hearing on the matter and did not produce any requested documents. As such, Ms. Schlafke's response was incomplete and failed to comply with the Board's Order. Ms. Schlafke's refusal to provide the information requested by the Department during discovery prejudices the Department's case. Pursuant to Section 1021.161 of the Board's Rules and Rule 4019(i) of the Pennsylvania Rules

of Civil Procedure, we will preclude Ms. Schlafke from introducing as evidence any documents other than those identified by the Department in its prehearing memorandum and will further preclude her from calling any witnesses other than herself at the upcoming hearing on the merits.

Accordingly, we issue the order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **MARIA SCHLAFKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-186-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 12th day of November, 2013, it is hereby ordered that the Department's unopposed motion for sanctions is **granted** and Ms. Schlafke will not be permitted to introduce as evidence any documents other than those identified by the Department in its prehearing memorandum. It is further ordered that Ms. Schlafke will not be permitted to call any witnesses other than herself at the upcoming hearing on the merits.

**ENVIRONMENTAL HEARING BOARD**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: November 12, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CONSOL PENNSYLVANIA COAL COMPANY, LLC** | : | |
| **v.** | : | **EHB Docket Nos. 2013-011-R and 2013-018-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CITIZENS COAL COUNCIL, Intervenor** | : | **Issued: November 18, 2013** |

## OPINION AND ORDER
## ON JOINT MOTION TO WITHDRAW APPEAL

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Where the language of a Consent Order and Agreement states that any decision made by the Department under the provisions of the Consent Order and Agreement is not intended to be a final action and preserves the appellant's rights to appeal those decisions until such time as the Consent Order and Agreement is enforced, letters issued by the Department pursuant to the Consent Order and Agreement are not final, appealable actions.

## OPINION

On June 11, 2008, Consol Pennsylvania Coal Company, LLC (Consol) and the Department of Environmental Protection (Department) entered into a Consent Order and Agreement (known as the Global Streams Consent Order and Agreement), providing for the restoration of seven streams that the Department contends were adversely affected by underground mining at Consol's Bailey Mine in Greene County. Under the terms of the Global Streams Consent Order and Agreement, Consol is required to perform certain stream restoration



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activities and submit Annual Reports documenting the status of those activities. (Stipulation and Joint Motion, p. 1)[1]

On December 27, 2012, the Department issued two letters to Consol, stating that it had completed its review of Consol's 2012 Annual Report and, based on its review, concluded that six of the streams had not recovered from the effects of underground mining activities at the Bailey Mine. Letter 1 pertains to Polly Hollow, Unnamed Tributary 32511, Unnamed Tributary 32595, the Crows Nest and Unnamed Tributary 32534 and states as follows:

> 1) Consol has performed various remediation efforts over the past 48 months on the affected streams. (2) The Department is unaware of any additional efforts that Consol could be required to take to remediate the affected streams. (3) The Department now requires Consol to perform compensatory mitigation or enhancement measures pursuant to Paragraph 7 [of the Global Streams Consent Order and Agreement].

(Exhibit to Appeal, Docket No. 2013-011-R) Consol appealed the letter to the Pennsylvania Environmental Hearing Board (Board) and the appeal was docketed at EHB Docket No. 2013-011-R. Letter 2 pertains to Unnamed Tributary 32596 and states as follows: "We feel any additional remediation activities on UT 2596 would be futile; therefore, we are requiring Consol to provide appropriate mitigation and/or compensation for the loss of Commonwealth resources." (Exhibit to Appeal, Docket No. 2013-018-R) Consol appealed this letter to the Board and the appeal was docketed at EHB Docket No. 2013-018-R.

On July 1, 2013, Citizens Coal Council petitioned to intervene in both appeals, and on July 16, 2013 the Board granted the petitions.

On August 15, 2013, the Board issued an Opinion and Order in the case of *Chesapeake Appalachia, LLC v. DEP*, EHB Docket No. 2012-016-L (Consolidated) (Opinion and Order on

[1] "Stipulation and Joint Motion" refers to the "Stipulation for Settlement and Joint Motion to Withdraw Appeal" filed with the Board by Consol and the Department on August 27, 2013.

Motion for Summary Judgment issued August 15, 2013), which addressed the issue of the appealability of decisions made by the Department under a Consent Order and Agreement.

Shortly thereafter, on August 27, 2013, Consol and the Department filed a Stipulation for Settlement and Joint Motion to Withdraw Appeal (Stipulation and Joint Motion, or simply Joint Motion) in both of Consol's appeals. According to the Stipulation, paragraph 22 of the Global Streams Consent Order and Agreement states as follows:

> Any decision which the Department makes under the provisions of this Consent Order and Agreement is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa. C. S. § 101. Any objection which Consol may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

(Stipulation and Joint Motion, p. 3)

Based on this language in the Global Streams Consent Order and Agreement and the Board's recent decision in *Chesapeake,* the Department and Consol contend that the Department's December 27, 2012 letters are not final actions and, therefore, they request that the Board enter an Order allowing Consol to withdraw its appeals without prejudice. (Stipulation and Joint Motion, p. 4, para. 1-3)

On September 5, 2013, Intervenor Citizens Coal Council filed a Response urging the Board to deny the Joint Motion and to adjudicate this matter. Citizens Coal Council contends that the Department's December 27, 2012 letters constitute modifications of the remedial action required of Consol and, thus, are final, appealable actions. Citizens Coal Council also contends that the Joint Motion is procedurally defective since Citizens Coal Council is not a party to it. Finally, Citizens Coal Council contends that the Joint Motion constitutes a dispositive motion and, as such, should have been accompanied by a supporting memorandum of law as required by Board Rule 1021.94, 25 Pa. Code § 1021.94.

Consol filed an immediate Reply to the Citizens Coal Council Response. In it, Consol states that it filed its appeals at a time when the issue of whether letters or decisions made by the Department pursuant to a Consent Order and Agreement containing language such as that contained in Paragraph 22 of the Global Streams Consent Order and Agreement could be deemed final was not yet resolved. However, in light of the Board's recent decision in *Chesapeake*, Consol believes that any issues raised by the parties will be preserved for the future. Consol also asserts that the Stipulation and Joint Motion is not a settlement, but simply a mechanism for implementing the Board's *Chesapeake* decision. Consol also disputes Citizens Coal Council's assertion that the Stipulation and Joint Motion is a dispositive motion.

The language of the Consent Order and Agreement which the Board considered in *Chesapeake* was nearly identical to the language of Paragraph 22 of the Global Streams Consent Order and Agreement at issue here. It stated in relevant part as follows:

> . . .any decision which the Department makes under the provisions of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101.

*Chesapeake, slip op.* at 9. Also, as in the present case, the letters issued by the Department in *Chesapeake* contained corrective actions that the Department required the appellant to take. As we held in that case, the doctrine of administrative finality holds that "a party that *can* appeal *must* appeal or it forfeits its right to appeal." *Id.* at 13 (emphasis in original). However, "if a person *cannot* appeal, it necessarily follows that the action is not final. A person who is deprived of an opportunity to appeal an action is not bound by that action, and that action can have no preclusive effect against the person now or at any time in the future." *Id.* at 13-14 (emphasis added).

Here, the language of Paragraph 22 of the Global Streams Consent Order and Agreement makes it clear that any decision made by the Department under the Consent Order and Agreement is *not* final and, therefore, cannot be appealed by Consol. Any objections that Consol has to the Department's decisions under the Consent Order and Agreement are preserved until such time as the Department enforces the Consent Order and Agreement. Thus, the December 27, 2012 letters of the Department have no administratively final effect. As we held in *Chesapeake*:

> A Departmental action is either final or it is not. If it is final for purposes of the doctrine of administrative finality, it is final for purposes of appealability. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124-25. Here, the fact that the Department's letter has no finality for purposes of precluding future appeals means that it is also not final for purposes of an immediate appeal. Because it is not final, the Board has no jurisdiction.

*Id.* at 14. As in *Chesapeake*, the Department letters at issue here have no finality pursuant to the terms of the Consent Order and Agreement.

Citizens Coal Council takes the view, however, that the regulatory program that governs this appeal requires the Board to distinguish *Chesapeake* from this case and to conclude that the Board has jurisdiction over this appeal.[2] Whereas *Chesapeake* involved the Department's oil and gas program, this case involves the Department's surface mining program. Pennsylvania holds primary jurisdiction (primacy) for enforcing the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.*, pursuant to approval granted by the federal Office of Surface Mining. 30 C.F.R. § 938.10. Citizens Coal Council asserts that federal law[3], and thereby Pennsylvania's federally approved surface mining program,

[2] Citizens Coal Council does not set forth this argument in its response to the Stipulation and Joint Motion but, rather, references its motion for partial summary judgment filed on August 30, 2013, in which this argument was raised.

[3] Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq.

prohibits the Department and Consol from delaying the rights of interested parties to bring an appeal at this time.

Both Consol and the Department dispute the argument of Citizens Coal Council that federal law is at issue here. They point to the decision of the Third Circuit Court of Appeals in *Pa Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 1987), which holds that once a state has been granted primacy, that state has exclusive jurisdiction and its laws and regulations govern. *Id.* at 316-17.

Moreover, the provisions of federal law cited by the Citizens Coal Council simply provide that Pennsylvania law must afford "'any person having an interest which is or may be adversely affected by a notice or order'" the opportunity for administrative review. (Citizens Coal Council Motion for Partial Summary Judgment, p. 4-5, citing provisions of the federal regulations). That right is guaranteed by virtue of an appeal to the Pennsylvania Environmental Hearing Board. As we held in *Consol Pennsylvania Coal Co. v. DEP, DCNR and Center for Coalfield Justice*, 2011 EHB 571, 575:

> The Environmental Hearing Board Act provides that no action of the Department is final if appealed to the Board until the Board decides the objections raised by the party. 35 P.S. § 7514. Due Process is provided by the Pennsylvania Environmental Hearing Board; not the Department of Environmental Protection. *See Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982). As a matter of law, the opportunity to appeal a DEP action to the Environmental Hearing Board, which Consol has done, satisfies due process requirements regarding the Department's actions. *See Commonwealth of Pennsylvania v. Derry Township*, 351 A.2d 606 (Pa. 1976).

Here, the opportunity to appeal has not been denied, but simply preserved to such time as the Department enforces the provisions of the Global Streams Consent Order and Agreement.

For these reasons, we conclude that the Department's December 27, 2012 letters are not appealable actions, and, therefore, the Board has no jurisdiction to review the letters.[4] We, therefore, grant the Stipulation and Joint Motion filed by the Department and Consol.

[4] Because we find that we have no jurisdiction over these appeals, we do not reach the remaining arguments made by Citizens Coal Council with regard to alleged procedural deficiencies.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CONSOL PENNSYLVANIA COAL COMPANY, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket Nos. 2013-011-R and 2013-018-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS COAL COUNCIL, Intervenor** | : | |

## ORDER

AND NOW, this 18th day of November, 2013, it is hereby **ORDERED** that the Stipulation and Joint Motion filed by the Department of Environmental Protection and Consol Pennsylvania Coal Company, LLC is granted, and the appeals docketed at 2013-011-R and 2013-018-R are dismissed without prejudice.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chairman and Chief Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: November 18, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

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Office of Chief Counsel – Southwest Region

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CONSOL PENNSYLVANIA COAL COMPANY, LLC** | : | |
| **v.** | : | **EHB Docket Nos. 2013-011-R and 2013-018-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CITIZENS COAL COUNCIL, Intervenor** | : | **Issued: November 18, 2013** |

**OPINION AND ORDER**
**ON JOINT MOTION TO WITHDRAW APPEAL**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Where the language of a Consent Order and Agreement states that any decision made by the Department under the provisions of the Consent Order and Agreement is not intended to be a final action and preserves the appellant's rights to appeal those decisions until such time as the Consent Order and Agreement is enforced, letters issued by the Department pursuant to the Consent Order and Agreement are not final, appealable actions.

**OPINION**

On June 11, 2008, Consol Pennsylvania Coal Company, LLC (Consol) and the Department of Environmental Protection (Department) entered into a Consent Order and Agreement (known as the Global Streams Consent Order and Agreement), providing for the restoration of seven streams that the Department contends were adversely affected by underground mining at Consol's Bailey Mine in Greene County. Under the terms of the Global Streams Consent Order and Agreement, Consol is required to perform certain stream restoration



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activities and submit Annual Reports documenting the status of those activities. (Stipulation and Joint Motion, p. 1)[1]

On December 27, 2012, the Department issued two letters to Consol, stating that it had completed its review of Consol's 2012 Annual Report and, based on its review, concluded that six of the streams had not recovered from the effects of underground mining activities at the Bailey Mine. Letter 1 pertains to Polly Hollow, Unnamed Tributary 32511, Unnamed Tributary 32595, the Crows Nest and Unnamed Tributary 32534 and states as follows:

> 1) Consol has performed various remediation efforts over the past 48 months on the affected streams. (2) The Department is unaware of any additional efforts that Consol could be required to take to remediate the affected streams. (3) The Department now requires Consol to perform compensatory mitigation or enhancement measures pursuant to Paragraph 7 [of the Global Streams Consent Order and Agreement].

(Exhibit to Appeal, Docket No. 2013-011-R) Consol appealed the letter to the Pennsylvania Environmental Hearing Board (Board) and the appeal was docketed at EHB Docket No. 2013-011-R. Letter 2 pertains to Unnamed Tributary 32596 and states as follows: "We feel any additional remediation activities on UT 2596 would be futile; therefore, we are requiring Consol to provide appropriate mitigation and/or compensation for the loss of Commonwealth resources." (Exhibit to Appeal, Docket No. 2013-018-R) Consol appealed this letter to the Board and the appeal was docketed at EHB Docket No. 2013-018-R.

On July 1, 2013, Citizens Coal Council petitioned to intervene in both appeals, and on July 16, 2013 the Board granted the petitions.

On August 15, 2013, the Board issued an Opinion and Order in the case of *Chesapeake Appalachia, LLC v. DEP*, EHB Docket No. 2012-016-L (Consolidated) (Opinion and Order on

[1] "Stipulation and Joint Motion" refers to the "Stipulation for Settlement and Joint Motion to Withdraw Appeal" filed with the Board by Consol and the Department on August 27, 2013.

Motion for Summary Judgment issued August 15, 2013), which addressed the issue of the appealability of decisions made by the Department under a Consent Order and Agreement.

Shortly thereafter, on August 27, 2013, Consol and the Department filed a Stipulation for Settlement and Joint Motion to Withdraw Appeal (Stipulation and Joint Motion, or simply Joint Motion) in both of Consol's appeals. According to the Stipulation, paragraph 22 of the Global Streams Consent Order and Agreement states as follows:

> Any decision which the Department makes under the provisions of this Consent Order and Agreement is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa. C. S. § 101. Any objection which Consol may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

(Stipulation and Joint Motion, p. 3)

Based on this language in the Global Streams Consent Order and Agreement and the Board's recent decision in *Chesapeake,* the Department and Consol contend that the Department's December 27, 2012 letters are not final actions and, therefore, they request that the Board enter an Order allowing Consol to withdraw its appeals without prejudice. (Stipulation and Joint Motion, p. 4, para. 1-3)

On September 5, 2013, Intervenor Citizens Coal Council filed a Response urging the Board to deny the Joint Motion and to adjudicate this matter. Citizens Coal Council contends that the Department's December 27, 2012 letters constitute modifications of the remedial action required of Consol and, thus, are final, appealable actions. Citizens Coal Council also contends that the Joint Motion is procedurally defective since Citizens Coal Council is not a party to it. Finally, Citizens Coal Council contends that the Joint Motion constitutes a dispositive motion and, as such, should have been accompanied by a supporting memorandum of law as required by Board Rule 1021.94, 25 Pa. Code § 1021.94.

Consol filed an immediate Reply to the Citizens Coal Council Response. In it, Consol states that it filed its appeals at a time when the issue of whether letters or decisions made by the Department pursuant to a Consent Order and Agreement containing language such as that contained in Paragraph 22 of the Global Streams Consent Order and Agreement could be deemed final was not yet resolved. However, in light of the Board's recent decision in *Chesapeake*, Consol believes that any issues raised by the parties will be preserved for the future. Consol also asserts that the Stipulation and Joint Motion is not a settlement, but simply a mechanism for implementing the Board's *Chesapeake* decision. Consol also disputes Citizens Coal Council's assertion that the Stipulation and Joint Motion is a dispositive motion.

The language of the Consent Order and Agreement which the Board considered in *Chesapeake* was nearly identical to the language of Paragraph 22 of the Global Streams Consent Order and Agreement at issue here. It stated in relevant part as follows:

> . . .any decision which the Department makes under the provisions of this Consent Order and Agreement, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa.C.S. § 101.

*Chesapeake, slip op.* at 9. Also, as in the present case, the letters issued by the Department in *Chesapeake* contained corrective actions that the Department required the appellant to take. As we held in that case, the doctrine of administrative finality holds that "a party that *can* appeal *must* appeal or it forfeits its right to appeal." *Id.* at 13 (emphasis in original). However, "if a person *cannot* appeal, it necessarily follows that the action is not final. A person who is deprived of an opportunity to appeal an action is not bound by that action, and that action can have no preclusive effect against the person now or at any time in the future." *Id.* at 13-14 (emphasis added).

Here, the language of Paragraph 22 of the Global Streams Consent Order and Agreement makes it clear that any decision made by the Department under the Consent Order and Agreement is *not* final and, therefore, cannot be appealed by Consol. Any objections that Consol has to the Department's decisions under the Consent Order and Agreement are preserved until such time as the Department enforces the Consent Order and Agreement. Thus, the December 27, 2012 letters of the Department have no administratively final effect. As we held in *Chesapeake*:

> A Departmental action is either final or it is not. If it is final for purposes of the doctrine of administrative finality, it is final for purposes of appealability. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124-25. Here, the fact that the Department's letter has no finality for purposes of precluding future appeals means that it is also not final for purposes of an immediate appeal. Because it is not final, the Board has no jurisdiction.

*Id.* at 14. As in *Chesapeake*, the Department letters at issue here have no finality pursuant to the terms of the Consent Order and Agreement.

Citizens Coal Council takes the view, however, that the regulatory program that governs this appeal requires the Board to distinguish *Chesapeake* from this case and to conclude that the Board has jurisdiction over this appeal.[2] Whereas *Chesapeake* involved the Department's oil and gas program, this case involves the Department's surface mining program. Pennsylvania holds primary jurisdiction (primacy) for enforcing the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.*, pursuant to approval granted by the federal Office of Surface Mining. 30 C.F.R. § 938.10. Citizens Coal Council asserts that federal law[3], and thereby Pennsylvania's federally approved surface mining program,

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[2] Citizens Coal Council does not set forth this argument in its response to the Stipulation and Joint Motion but, rather, references its motion for partial summary judgment filed on August 30, 2013, in which this argument was raised.

[3] Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq.

prohibits the Department and Consol from delaying the rights of interested parties to bring an appeal at this time.

Both Consol and the Department dispute the argument of Citizens Coal Council that federal law is at issue here. They point to the decision of the Third Circuit Court of Appeals in *Pa Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 1987), which holds that once a state has been granted primacy, that state has exclusive jurisdiction and its laws and regulations govern. *Id.* at 316-17.

Moreover, the provisions of federal law cited by the Citizens Coal Council simply provide that Pennsylvania law must afford "'any person having an interest which is or may be adversely affected by a notice or order'" the opportunity for administrative review. (Citizens Coal Council Motion for Partial Summary Judgment, p. 4-5, citing provisions of the federal regulations). That right is guaranteed by virtue of an appeal to the Pennsylvania Environmental Hearing Board. As we held in *Consol Pennsylvania Coal Co. v. DEP, DCNR and Center for Coalfield Justice*, 2011 EHB 571, 575:

> The Environmental Hearing Board Act provides that no action of the Department is final if appealed to the Board until the Board decides the objections raised by the party. 35 P.S. § 7514. Due Process is provided by the Pennsylvania Environmental Hearing Board; not the Department of Environmental Protection. *See Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982). As a matter of law, the opportunity to appeal a DEP action to the Environmental Hearing Board, which Consol has done, satisfies due process requirements regarding the Department's actions. *See Commonwealth of Pennsylvania v. Derry Township*, 351 A.2d 606 (Pa. 1976).

Here, the opportunity to appeal has not been denied, but simply preserved to such time as the Department enforces the provisions of the Global Streams Consent Order and Agreement.

For these reasons, we conclude that the Department's December 27, 2012 letters are not appealable actions, and, therefore, the Board has no jurisdiction to review the letters.[4] We, therefore, grant the Stipulation and Joint Motion filed by the Department and Consol.

[4] Because we find that we have no jurisdiction over these appeals, we do not reach the remaining arguments made by Citizens Coal Council with regard to alleged procedural deficiencies.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CONSOL PENNSYLVANIA COAL COMPANY, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket Nos. 2013-011-R and 2013-018-R** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS COAL COUNCIL, Intervenor** | : | |

## ORDER

AND NOW, this 18th day of November, 2013, it is hereby **ORDERED** that the Stipulation and Joint Motion filed by the Department of Environmental Protection and Consol Pennsylvania Coal Company, LLC is granted, and the appeals docketed at 2013-011-R and 2013-018-R are dismissed without prejudice.

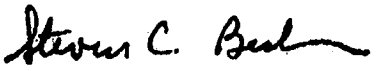
**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chairman and Chief Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**



**STEVEN C. BECKMAN**
**Judge**

**DATED: November 18, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

**For the Commonwealth of PA, DEP:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **HILCORP ENERGY COMPANY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-155-SA-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: November 20, 2013** |

**OPINION AND ORDER DISMISSING**
**HILCORP ENERGY'S SPECIAL ACTION FOR LACK OF JURISDICTION**

**By Thomas W. Renwand, Chief Judge and Chairman**

**Synopsis**

Applications for well spacing Orders in the Utica Formation should be submitted to the Pennsylvania Department of Environmental Protection. After the Department of Environmental Protection takes final action on the Application, an Appeal to the Pennsylvania Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act.

**Introduction**

Presently before the Pennsylvania Environmental Hearing Board (Board or EHB) is the Complaint and Application (Application) of Hilcorp Energy Company (Hilcorp) requesting that the Board issue an order establishing well spacing and drilling units[1] covering 3,267 acres of the Utica Formation[2] in Lawrence and Mercer Counties. The Application is filed pursuant to the Oil

[1] DEP's regulations implementing the Oil and Gas Conservation Act are found at 25 Pa. Code § 79.1 *et. seq.* A "spacing unit" is defined as "a drilling unit." 25 Pa. Code § 79.1. A "drilling unit" is defined as "[t]he term includes spacing unit and means the area designated in a spacing order as a unit and within which all operators have the opportunity to participate in the well or wells drilled thereon on a just and equitable basis." 25 Pa. Code § 79.

[2] The Utica Formation is located below the Marcellus Shale Formation. The Oil and Gas Conservation Law of 1961 applies to the Utica Formation but not to the Marcellus Shale.



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and Gas Conservation Law of 1961 (Conservation Law). Alternatively, Hilcorp seeks an order from the Board directing the Pennsylvania Department of Environmental Protection (Department or DEP) to issue an order establishing well spacing and drilling units.

Hilcorp originally filed its Application with the Department on July 17, 2013. *See* Hilcorp's Response to DEP's Proposed Case Management Order, Docket Entry #14, Paragraph 1 (filed on October 17, 2013). In response, the Department advised Hilcorp that "it did not have the authority to act on Hilcorp's application and that an application seeking an order for well spacing or drilling units must be submitted to the Pennsylvania Environmental Hearing Board." Hilcorp's Response, Paragraph 2. Subsequently, on August 26, 2013 Hilcorp filed its Complaint and Application for Well Spacing Units with the Environmental Hearing Board. The Board docketed the Special Action at EHB Docket No. 2013-155-SA-R.

Following the filing of the Application, the Board scheduled and conducted a prehearing conference in Pittsburgh with Counsel for the Department and Hilcorp. Not being convinced that the Board had original jurisdiction in this matter, the Board requested that the parties brief the issue as to whether the Board had original jurisdiction to issue well spacing orders requested by Hilcorp. Both parties have submitted legal memoranda on this interesting and important legal issue.

We conclude, after a careful and detailed review and analysis of the law, that the Pennsylvania Environmental Hearing Board does not have original jurisdiction to issue such well spacing orders. Instead, the Application should be submitted to the Pennsylvania Department of Environmental Protection for its consideration and action. After the Department takes final action on the Application, an Appeal to the Pennsylvania Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act.

**Background**

The Pennsylvania Department of Environmental Resources (DER) was created by the Act of December 3, 1970, P.L. 834, 71 P.S. § 510-1 *et. seq.* When the Department of Environmental Resources was created the General Assembly abolished several other departments, boards, and commissions, and transferred their powers and duties to the new Department of Environmental Resources.[3] These included, *inter alia*, the Department of Forests and Water, Department of Mines and Mineral Industries, Water and Park Resources Board, Geographic Board, Pennsylvania State Park and Harbor Commission of Erie, Washington Crossing Park Commission, Valley Forge Park Commission, Anthracite Mine Inspectors Examining Board, Mine Inspectors Examining Board for the Bituminous Coal Mines of Pennsylvania, Oil and Gas Inspectors Examining Board, and Oil and Gas Conservation Commission. The creation of the Pennsylvania Department of Environmental Resources established a comprehensive environmental agency which had both a legislative arm—the Environmental Quality Board (EQB)—and a judicial arm---the Environmental Hearing Board. The Environmental Hearing Board, initially comprised of three members, was given the power to hear and decide appeals from actions of the Department of Environmental Resources.

In 1987, the Commonwealth Court affirmed the constitutionality of the legislation creating the DER and found that both the EQB and the EHB were sufficiently independent of the DER. Commonwealth Court also held that there was no commingling of their functions with those of the DER. *See Pennsylvania Independent Petroleum Producers v. Department of Environmental Resources,* 525 A.2d 829 (Pa. Cmwlth. 1987):

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[3] One of the commissions whose powers and duties were transferred to the Department of Environmental Resources was the Oil and Gas Conservation Commission. The parties are silent as to whether the Oil and Gas Conservation Commission ever issued a well spacing order. Our research found that the Oil and Gas Conservation Commission "may have met one time."

> Pennsylvania Independent Petroleum Producers argues that since the Environmental Quality Board and the Environmental Hearing Board are placed under DER in § 202 of the Code, 71 P.S. § 62, impermissible commingling occurs. We disagree. Our review of the statutory composition and authority of each of the three entities reveals that no commingling of legislative, executive and judicial authority exists...The Environmental Hearing Board, composed of three[4] gubernatorial appointees to serve six-year terms is an independent board administratively placed in DER, § 472 of the Code. 71 P.S. 180-2...The structure and composition clearly establishes specific and separate duties for each entity.

525 A.2d at 836 (footnote added).

**The Environmental Hearing Board Act**

Nevertheless, partly to emphasize the specific and separate duties and responsibilities of the Environmental Hearing Board and the Department, the next year the Legislature enacted the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511-7516, which became effective January 1, 1989. The EHB Act made it clear that the two agencies had separate and distinct missions. The Act established the Pennsylvania Environmental Hearing Board as an *independent quasi-judicial agency*, making the Environmental Hearing Board completely independent of the Department of Environmental Resources. 35 P.S. § 7513(a) (emphasis added). It also increased the size of the Board to five members all of whom were full-time administrative law judges (judges) with a minimum of five years of relevant experience.

The Board's jurisdiction is set forth in Section 7514 of the EHB Act. The Board was given the "the power and duty to hold hearings and issue adjudications...on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). In addition, the Board was given the responsibility to continue "to exercise the power to hold hearings and issue adjudications which powers were vested in agencies... [under] The Administrative Code of 1929." 35 P.S. § 7514(b). The next subsection provides that "the department may take an action initially without

[4] The Environmental Hearing Board now consists of five appointees. 35 P.S. § 7513(b).

regard to 2 Pa. C.S. Ch. 5, Subch. A[5] but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person." 35 P.S. § 7514 (c).

Subsection (f) provides that the Board may subpoena witnesses, records and papers. Subsection (g) sets forth that "[h]earings of the board shall be conducted in accordance with the regulations of the Board in effect at the effective date of this Act, *until new regulations are promulgated under section 5.*" 35 P.S. § 7514 (g) (emphasis added). Importantly, the Environmental Hearing Board Act created the Environmental Hearing Board Rules Committee which proposes regulations to the Board. Since the Committee's establishment, detailed Rules of Practice and Procedure have been promulgated. *See* 25 Pa. Code § 1021.1 *et. seq.*

Actions before the Environmental Hearing Board are heard *de novo*. In the oft-cited and seminal case of *Smedley v. DEP,* 2001 EHB 131, 156, the Board succinctly explained what that means.

> The Board conducts its trials *de novo.* We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that "*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case." *Young v. Department of Environmental Resources,* 600 A.2d 667, 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.

[5] This subchapter of the Administrative Agency Law, Act of April 28, 1978, P.L. 202, *as amended,* 2 Pa. C.S. § 101 et. seq., deals with practice and procedure of Commonwealth Agencies.

The Environmental Hearing Board Act sets forth that no action of the Department is final if appealed to the Board until the Board decides the objections raised by the party. The *de novo* review of the Board affords the Department the ability to establish relatively short time lines to decide many regulatory actions. This allows the Department to issue orders, permits, licenses, and decisions in many instances very promptly.

In practice, the vast majority of the Department's regulatory actions are not appealed to the Board. However, as a matter of law, it is the opportunity to appeal a Department action to the Board that satisfies due process requirements regarding the Department action. *Commonwealth of Pennsylvania v. Derry Township,* 351 A.2d 606 (Pa. 1976). Indeed, due process is provided by the Environmental Hearing Board, not the Department of Environmental Protection. *Einsig v. Pennsylvania Mines Corporation,* 452 A.2d 558 (Pa. Cmwlth. 1982); *Consol Pennsylvania Coal Company, LLC v. Department of Environmental Protection et al.,* 2011 EHB 571, 575.

Importantly, the parties have not provided us with what, if any, rules and regulations governed the practice before the Oil and Gas Conservation Commission (Conservation Commission). Interestingly, Hilcorp is adamant that the Conservation Law requires the scheduling of a hearing within 45 days and then the issuance of a well spacing order after hearing. Hilcorp contends there is no discovery whatsoever provided by the Conservation Law and that neither our case law, appellate case law, nor our Rules of Practice and Procedure have any role in implementing the Conservation Law.

If Hilcorp is correct in its contention, it further supports our ruling that its Application should be submitted to the Department of Environmental Protection rather than to the Board. Otherwise, the process envisioned by Hilcorp would not afford adequate due process safeguards.

The lack of discovery, coupled with the rush to the "public hearing" could act as a severe impediment to any other parties who might be "interested" under the Conservation Law or who might otherwise demonstrate standing to participate in the case. If the next step in the process would be an Appeal to Commonwealth Court then the parties, including Hilcorp, would not be afforded the type of due process guaranteed by the Environmental Hearing Board Act.

Parties before the Environmental Hearing Board are afforded prehearing discovery which is even broader than the discovery provided by federal courts under the Federal Rules of Civil Procedure. 25 Pa. Code § 1021.102. The Board has not only adopted its own Rules of Practice and Procedure specific to the unique environmental litigation matters filed before the Board, but has adopted the Discovery Rules of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102 (a). Therefore, parties before the Board are assured that they will be afforded the right to conduct liberal discovery, partake in a robust motion practice, and participate in a detailed hearing process.

The Board issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing. No other court or tribunal in Pennsylvania, state or federal for that matter, provides the parties with as many opportunities to file briefs setting forth their positions on the law and the facts as the Pennsylvania Environmental Hearing Board. Our Rules of Practice and Procedure not only mandate that the parties file comprehensive Pre-Hearing Memoranda but after the parties obtain the transcript of the trial, they then *must* file Post-Hearing Briefs. *See* 25 Pa. Code §§ 1021.104 and 1021.131. This requires that they cite to the specific testimony or evidence supportive of their legal positions and arguments which in turn assures that the Board's Adjudication will be

specifically grounded in the official record and not someone's notes or memory of the testimony and evidence. Our Adjudications are required to contain detailed findings of fact and conclusions of law to legally support any decisions of the Board. 25 Pa. Code § 1021.134; *Consol Pennsylvania Coal Company, supra,* at 575-576.

The Pennsylvania Environmental Hearing Board began operations in February 1972. Over the past forty-one years, a rich precedent of Board decisions and Pennsylvania appellate law have discussed the role and jurisdiction of not only the Board but the Department. The vast majority of Board cases involve appeals from Department actions. These actions include permits, decisions, licenses, and orders. In addition, the Department files Complaints before the Board recommending civil penalties for environmental harms. Although under the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 7556, as amended, 35 P.S. §§ 6020.101-6020.1305, a private party can file a "citizen suit" if the Department fails to act within a time frame, that provision has rarely if ever been used. (Even then it involves some action or inaction of the Department).

In the vast majority of these instances, the Board's jurisdiction is invoked to review a final action of the Department. Even in a Complaint seeking a civil penalty the Board's decision is made after the Board conducts a hearing and following review of the Department's recommendation as to what the civil penalty should be.

**The Department's and Hilcorp's Arguments**

In the current matter, the Department and Hilcorp are contending that the Board should in the first instance decide what is basically a highly technical permitting decision pursuant to the Conservation Law. Their argument is based on a very shaky legal foundation.

Both Hilcorp and the Department contend that this was a decision that would have been made by the Conservation Commission after "a public hearing." They equate the reference to "public hearing" to mean the court hearings that the Board conducts. The parties further contend that the Board has original jurisdiction to decide these highly technical matters since the decision by the Conservation Commission to issue the well spacing orders and drilling units was to be made after a "public hearing" where technical materials such as plats would be used to help the Conservation Commission reach its decision. The Department contends that the Board is the proper entity to issue these well spacing orders since the Department of Environmental Resources was created in 1970 and the Board was part of DER. Both parties currently contend that the duties of the Conservation Commission which were transferred to the Department of Environmental Resources were transferred in fact to the Environmental Hearing Board. Hilcorp contends that when the Board was established as a completely independent agency in 1988 it was given this duty and responsibility. These contentions, as summarized so forcefully and eloquently in Judge Mather's excellent concurring Opinion, have been made for the first time in this case.

**Discussion**

We respectfully disagree with both of these positions. Although we found in our own research an indication that the Conservation Commission may have held one meeting, neither Hilcorp nor the Department have provided us with any information that the Conservation Commission actually issued well spacing orders. However, whether the Conservation Commission issued such orders or not does not mean that the Board was given this power under the applicable law.

There is nothing in the enabling legislation or in the parties' arguments that leads us to believe that this now abolished entity was in any way similar to the Pennsylvania Environmental Hearing Board. A review of the Conservation Law indicates that the Conservation Commission was a very specialized and technical agency. It was authorized to appoint not only attorneys and hearing officers, but also "additional experts, engineers, geologists, inspectors, investigators...and other employees as may be necessary for the proper conduct of the work of the commission." 58 P.S. § 415.[6] The Board does not employ such "additional experts, engineers, geologists, inspectors or investigators." Instead, the Department of Environmental Protection does. Indeed, the Department specifically employs engineers in various disciplines, geologists, inspectors, investigators and other employees as may be necessary for the proper conduct of its work. This work includes highly technical oil and gas work.

Unlike the Environmental Hearing Board, the Conservation Commission was given no power to review the actions of any other administrative agencies. The Conservation Commission's functions were not judicial, or quasi-judicial. Instead, they were to function as an executive regulatory agency not a quasi-judicial agency which is the Board's role.

The Commission was given a host of executive regulatory duties such as requiring the identification on the premises of ownership of oil and gas wells, making sure drillers logs were kept, filed, and accurate, and overseeing the drilling, casing, operation and plugging of oil and gas wells. The Commission was charged with performing any necessary inspections and investigations to discharge its duties and responsibilities in this regard. *See* 58 P.S. § 403. These are all Executive Branch regulatory functions.

Moreover, the Commission was given the power to file enforcement actions against any person violating the Oil and Gas Conservation Law. 58 P.S. § 414. Likewise, the Department of

[6] The Legislature authorized an appropriation of $50,000 to hire all of these professionals!

Environmental Protection is charged with filing enforcement actions or referring criminal violations to either the local district attorney or the Pennsylvania Office of Attorney General. These are all DEP duties and responsibilities rather than Board duties and responsibilities.

Enforcement actions are regulatory actions undertaken by the Executive Branch. Prosecuting actions before courts and administrative bodies is one of the core duties and responsibilities of the Department of Environmental Protection. It has never been a duty or responsibility of the Environmental Hearing Board, nor has the Board ever taken an enforcement action against anyone. The Board functions as Pennsylvania's environmental court and dispenses judicial type relief.

If the Board issued such well spacing orders in the first instance it would be performing basically a permitting function. It could be argued that performing such a function in the first instance and not after the Department had already acted would be an impermissible commingling of the duties of the Department with the Environmental Hearing Board. As set forth in *Pennsylvania Independent Petroleum Producers, supra,* there should not be any commingling of the executive and judicial authority in the administrative law process. A vast mosaic of legislation and regulations have followed this rule of law and have established bright and clear lines setting forth the duties and responsibilities of the Department of Environmental Protection and the Environmental Hearing Board.

Both the Department and Hilcorp focus on the technical information on which the Conservation Commission should make its decision as somehow supporting its argument that the Board has original jurisdiction to issue well spacing orders. But this same type of technical information is considered and reviewed by the Department every day in deciding whether to issue permits and orders under a myriad of statutes including the Oil and Gas Act. *See* 58 Pa.

C.S.A. § 3201 *et. seq.* For example, 58 Pa.C.S.A. § 3211 sets forth detailed technical information the DEP should review when deciding whether to issue permits under the Oil and Gas Act and contains detailed notification procedures not unlike those found in the Conservation Law. Detailed information is required with the permit application including "a plat prepared by a competent" engineer or surveyor. 58 P.S. § 3211 (b)(1). Unless the Department decides that the permit fails to meet the regulatory or other legal requirements, it "shall issue a permit within 45 days of submission of a permit application."[7] Parties can appeal Department decisions under the Oil and Gas Act by filing an appeal with the Board in accordance with the Environmental Hearing Board Act. *See* 58 Pa. C. S. A. § 3211 (e.1)(5)(i).

There are a host of additional reasons which support our ruling that well spacing orders should be issued by the Department of Environmental Protection rather than the Environmental Hearing Board. In the present case there is no action of the Department currently involved in the review of Hilcorp's Application for a well spacing order. And what type of process would the Board employ to issue such an order? Hilcorp is insistent that the 45 day time period to issue such an order is a ministerial act and the time frame should be closely followed. Therefore, Hilcorp contends that there would be no discovery and thus no interrogatories or depositions or production of documents. Such a process is not consistent with Board Practice and Procedure not to mention forty one years of court and Board decisions.

Even more problematic is how any party aggrieved by a well spacing order issued by the Board would be able to obtain due process. Appeals from Board orders go directly to the Pennsylvania Commonwealth Court, an appellate court. Commonwealth Court does not review

[7] Interestingly, the time limitation for issuing oil and gas drilling permits is exactly the same as the time frame contained in the Conservation Law. This is further support that this is a permitting or otherwise a regulatory decision and thus a duty and responsibility of the Department rather than the Environmental Hearing Board.

Board decisions *de novo*. The Commonwealth Court can only reverse Board decisions if they are not supported by substantial evidence, contain an error of law, or violate the Constitution.

Our process is the epitome of both procedural and substantive due process. Hilcorp's proposed process would upend decades of carefully developed law without any legal precedent. Such a position is based on a flawed reading of the Conservation Law and on administrative law jurisprudence "freeze framed" to 1961.[8]

The Department has filed a proposed Case Management Order which provides only minimal due process safeguards. The Department contends that there should be some limited written discovery but no depositions and that the parties should proceed quickly to a hearing. Any interested parties, such as citizens who own property which would be affected by any well spacing orders, or potentially other oil and gas companies, would be at a great disadvantage in either one of these truncated hearing processes proposed by Hilcorp and the Department.

The Board is comprised of Judges, attorneys, and administrative personnel (currently a total of thirteen people down from twenty four in 1995). It functions as a court not a regulatory agency. The Board does not issue permits, licenses, or other regulatory type actions in the first instance. It reviews Department actions in these matters and then dispenses judicial type relief after reviewing the evidence presented to it in a court proceeding. This is what the Environmental Hearing Board Act, the Board's Rules of Practice and Procedure, and numerous statutes provide. No statute or regulation provides the Pennsylvania Environmental Hearing Board with the authority to issue such well spacing orders in the first instance.

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[8] We do not disagree with counsel for Hilcorp's statement that the Oil and Gas Conservation Law of 1961 needs to be updated. "[B]ecause the [Conservation Law] has not been updated since 1961 it doesn't contemplate modern horizontal drilling techniques...Modernization of Pennsylvania's [Conservation Law] is long overdue...." Colosimo, *Modernize Pennsylvania's Oil and Gas Conservation Law,* **Pittsburgh Business Times,** January 11, 2013.

Moreover, the "public hearings" the Board holds are formal court hearings in one of its five court rooms situated across the Commonwealth. Parties present their cases before the Board just as they would in the state and federal trial courts of the Commonwealth. The Board hears the evidence according to the law and the testimony is transcribed by court reporters. As noted earlier, the parties file extensive Pre-Hearing and Post Hearing briefs. The Board then issues written Adjudications which contain detailed findings of fact, discussion, and conclusions of law. Appeals of Board decisions go directly to the Pennsylvania Commonwealth Court which can only reverse Board decisions if its decisions are not supported by substantial evidence, contrary to law, or violative of the Constitution.

We believe the "public hearings" referenced in the Conservation Law are not adversarial court type hearings such as those conducted by the Pennsylvania Environmental Hearing Board or the Courts of Common Pleas. Instead they are public hearings such as the Department of Environmental Protection holds regularly to help it reach decisions on various permits. For example, if a company seeks a permit for a landfill or the operation of a coal mine or for a host of other activities affecting the environment, various statutes and the Department's own regulations require or allow the Department of Environmental Protection to hold a "public hearing." [9] These are not court hearings or adversarial hearings although frequently competing views are aired. These public hearings are often held at schools or fire halls where testimony is taken, transcribed, and various technical information is presented. These hearings are advertised in newspapers and by mail which is what the Conservation Law also provides.

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[9] *See, e.g.,* Section 7 of the Air Pollution Control Act, 35 P.S. § 4007, entitled "Public hearings," which states, "Public hearings shall be held by the board [here, the Environmental Quality Board] or by the department, acting on behalf and at the direction or request of the board. . . ." Other examples of the Department's authority to hold hearings include Section 5(g) of the Bituminous Mine Subsidence Act, 52 P.S. § 1406.5(g) and Section 508(c) of the Oil and Gas Act, 58 P.S. § 601.508(c).

This should be compared with how the Board gives notice of its court hearings. The Board gives notice to the parties by order, issued either by mail or electronically on its website docket. It does not circulate the notice in newspapers nor is it required to do so. Although at times the Board is required to give notice of certain actions in the *Pennsylvania Bulletin*, there is no process involving the Board which is identical to the process set forth in the Conservation Law. Again, the notice provisions of the Conservation Law are a strong indication that the Department should be performing the functions of the Conservation Commission rather than the Environmental Hearing Board.

Finally, the Department has extensive regulations governing the issuance of well spacing orders under the Conservation Law. *See* 25 Pa. Code § 79.1 *et seq*. These regulations are not new. On the contrary, they have been in effect since 1971. These regulations provide that the well spacing orders will be issued by the Department.

The Department, as pointed out by Judge Mather, surprisingly ignores these regulations in its Legal Memorandum even though they have been in existence for over forty years. Moreover, the regulations have been amended several times during this period but they have never been modified so that Applications for well spacing orders would be submitted to the Board rather than the Department.

The Environmental Quality Board, the Department's legislative arm and drafter of its regulations, is expert at drafting regulations to support the Department's statutory duties and responsibilities. It certainly knows the difference between the Board and the Department and if the Department thought the regulations were wrong, confusing, or misleading, as it evidently does now, we have no doubt that the regulations would have been amended quickly. No regulatory changes have ever been proposed let alone promulgated which would shift this duty

and responsibility to the Environmental Hearing Board. These regulations remain binding on both the Department and the Board.

In addition, these regulations have not only been in place for decades, they have also been followed. The Department is silent as to how many well spacing orders it has issued since 1971, but over the years there have been several cases before the Board involving well spacing orders issued by the Department. In only the first case was the issue of *who* should issue the well spacing order even raised, and the Board quickly resolved it by ruling that the DER should issue the order. *Pennzoil Co. v. DER*, 1974 EHB 252, 254-55. None of the other cases even raised the issue.

The Board has never had any filing fees and the Department's regulations clearly set forth that there is a $1,000 filing fee that should accompany every Application filed with the Department which seeks the issuance of well spacing orders. The parties cite no authority for the Board to collect this filing fee. The Department's own regulations clearly state that the filing fee should be paid to the Department. This is but another reason which makes it quite clear that the Application for well spacing orders should be filed with the Department of Environmental Protection and not with the Environmental Hearing Board.

As the Utica formation is developed in the years ahead it is imperative that the regulatory framework is clear. Although we disagree with Hilcorp's legal position that the Environmental Hearing Board has original jurisdiction to issue well spacing orders in the first instance, we are aware that it initially filed its Application for well spacing orders with the Department and only filed with the Board after being directed to do so by the Department. We are hopeful that our Opinion will clarify the law in this area and that the process will operate much more smoothly in the future.

Accordingly, we will issue an order dismissing Hilcorp's Application because the Pennsylvania Environmental Hearing Board lacks original jurisdiction to issue well spacing orders under the Conservation Law. Instead, the Application should be submitted to the Department of Environmental Protection for its consideration and action. Once the Department takes final action on the Application, an Appeal to the Environmental Hearing Board may be filed in accordance with the Environmental Hearing Board Act.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **HILCORP ENERGY COMPANY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-155-SA-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 20th day of November, 2013, following review of the Complaint and Application and Legal Memoranda, it is ordered as follows:

1) The Pennsylvania Environmental Hearing Board does not have Original Jurisdiction to issue well spacing orders pursuant to the Conservation Law, the implementing regulations set forth at 25 Pa. Code Chapter 79, and the Environmental Hearing Board Act.
2) Such requests are required to be submitted to the Pennsylvania Department of Environmental Protection for its consideration.
3) The Complaint and Application is therefore **dismissed without prejudice.**
4) Appellant's check in payment of the filing fee is being returned to its Counsel.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

BERNARD A. LABUSKES, JR.
**Judge**

RICHARD P. MATHER, SR.
**Judge**

STEVEN C. BECKMAN
**Judge**

**DATED: November 20, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

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Bureau of Regulatory Counsel – 9th Fl RCSOB

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**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **HILCORP ENERGY COMPANY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-155-SA-R** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## CONCURRING OPINION OF JUDGE RICHARD P. MATHER, SR.

I am in full agreement with the majority opinion written by Chief Judge Renwand that correctly decides that the Board lacks original jurisdiction to consider Hilcorp's Complaint and Application for Well Spacing Units under the 1961 Oil and Gas Conservation Law ("Conservation Law"), 58 P.S. §§ 401-419. I write this concurring opinion to address what I believe is a glaring omission in the Department's Memorandum of Law to discuss, briefly mention or even cite to the duly promulgated and currently effective and binding regulations in Chapter 79 of Title 25 of the Pennsylvania Code. 25 Pa. Code Chapter 79. At the Board's direction, the Department filed a nineteen-page Memorandum of Law, that I can only describe as Orwellian, in which the Department attempted to ignore or rewrite the Department's forty-two year regulatory history of its implementation of the Conservation Law.[1]

In its 2013 Memorandum of Law, the Department announced a new legal argument that is inconsistent with the longstanding and binding regulations in Chapter 79 and the Department's forty-two year implementation of those regulations and the Conservation Law. In its Memorandum, the Department asserts that the Board, not the Department, has original jurisdiction to issue orders establishing well spacing and drilling units under the Conservation

[1] The Conservation Law is more than fifty years old, but it was administered by a Commission created by the Law until 1971. 58 P.S. § 405(a).

Law. The Department asserts that the 1970 state law that created the Department of Environmental Resources[2] ("DER") transferred this authority under the Conservation Law to the Board. The Department further asserts in its 2013 Memorandum that in 1988 the General Assembly again "recodified" this transfer of authority to the Board when it enacted the Pennsylvania Environmental Hearing Board Act ("EHBA"), 35 P.S. §§ 7511-7516. Both of these related assertions are inconsistent with the regulatory history of Chapter 79 and the currently effective and binding requirements set forth in Chapter 79.

In 1971, shortly after the General Assembly created the DER, the Environmental Quality Board ("EQB") adopted the regulations in Chapter 79. 1 Pa. B. 1726 (Aug. 12, 1971). The Department's regulations in Chapter 79, which were promulgated in 1971, contain binding requirements that are inconsistent with the Department's newly announced legal position reflected in its 2013 Memorandum. In 1989, shortly after the General Assembly enacted the EHBA, the EQB revised the Department's regulations in Chapter 79. 19 Pa. B. 3229 (July 29, 1989). The preamble to the 1989 revisions to Chapter 79 states:

Chapter 79. Oil and Gas Conservation

> Chapter 79, which governs wells subject to the Oil and Gas Conservation Law, is amended to update the chapter, to make the requirements consistent with the act and to remove provisions which have been made redundant by that act and the regulations in Chapter 78. No significant comments were received on the proposed revisions to Chapter 79. After review, the EQB recognized that Chapter 78 and § 79.12(d) and (e) are not redundant, and therefore, should not be deleted.

19 Pa. B. at 3235. The timing of these historical rulemakings highlights the complete lack of merit for the Department's new 2013 legal position. Shortly after each of the legislative actions

[2] In 1995, the Department of Environmental Resources was renamed the Department of Environmental Protection, but the Department has been in continuous existence since 1971. 71 P.S. §§ 1340.101 and 1340.501.

that the Department now asserts transferred authority to the Board, the EQB, the Department's rulemaking body, promulgated and then revised the regulations in Chapter 79 that clearly direct the Department to issue orders establishing well spacing and drilling units, in the first instance, that can then be appealed to the Board. Nowhere in its nineteen-page Memorandum does the Department discuss, briefly mention or even recognize in any manner these applicable rulemaking decisions.

In addition, the Department's newly announced 2013 legal position ignores several longstanding and basic principles of administrative law. It is well-settled that when an agency adopts a regulation pursuant to its legislative rulemaking power as opposed to its interpretive rulemaking power, it "is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006) (quoting *Rohrbaugh v. Pa. Pub. Util. Comm'n,* 727 A.2d 1080, 1085 (Pa. 1999)). In addition, it is equally well-settled that

> a properly adopted substantive rule establishes a standard of conduct which has the force of law . . . The underlying policy embodied in the rule is not generally subject to challenge before that agency.

*Lopata v. UCBR*, 493 A.2d 657, 660 (Pa. 1985) (quoting *PHRC v. Norristown Area Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977)). The duly promulgated regulations in Chapter 79 of Title 25 of the Pennsylvania Code therefore establish binding standards of conduct that have the force of law. They are binding on the Department and the Board under the well-established case law cited above.

There is no doubt that the Department's duly promulgated and currently effective regulations in Chapter 79 implement the Conservation Law. *See* 25 Pa. Code §§ 79.1-79.33. The codification of Chapter 79 in the Pennsylvania Code lists the Conservation Law as statutory

authority for these regulations. *Id.* These regulations are clearly applicable to the issues before the Board regarding the Board's original jurisdiction to consider Hilcorp's Complaint and Application for an order establishing well spacing and drilling units. The Department failed to discuss, briefly mention or even cite to these clearly applicable regulations, and its failure to do so does not advance its new legal position. To the contrary, the Department has not given the Board any reason not to apply these duly promulgated and currently effective regulations to deny Hilcorp's Complaint and Application. These regulations remain binding on the Department and the Board, notwithstanding the Department's failure to discuss, briefly mention or even cite to them in its Memorandum.

The authority under the Conservation Law has been rarely used since the General Assembly transferred implementation authority to the Department in 1971 as evidenced by the existence of only a few appeals of Department actions under the Conservation Law to the Board. *See* Department's Memorandum of Law at 15-18. It is apparent that the Department has little or no recent experience with its implementation. The Board also recognizes that the Department has a rather full plate with implementation of its regulatory programs governing Marcellus Shale and Utica Shale development. Rather than re-learning how to apply this longstanding but seldom used regulatory authority to issue orders establishing well spacing and drilling units to the new circumstances involving the development of the Utica Shale, it now appears that the Department has decided to abdicate its authority to the Board.[3] Because the Conservation Law

[3] The General Assembly enacted the Conservation Law in 1961 to provide authority to address circumstances in 1961, and the EQB promulgated the Department's regulations in Chapter 79 in 1971, which were most recently amended in 1989. The Law and the regulations were enacted or promulgated well before there were plans to develop the Utica Shale in Pennsylvania. If there are concerns with applying this longstanding authority to the recent development of the Utica Shale, which were not anticipated when the authority was created forty to fifty years ago, the Department needs to look to the EQB or the General Assembly for changes to the statutory requirements and the still binding regulatory requirements.

and the regulations promulgated thereunder clearly direct that the Department makes the initial decision regarding well spacing and drilling units, which can be appealed to the Board, I cannot support such an abdication of regulatory authority.

**ENVIRONMENTAL HEARING BOARD**

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: November 20, 2013**

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **RICHARD A. BARBER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-209-B** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee** | : | **Issued: November 20, 2013** |

**OPINION AND ORDER THE TIMELINESS OF THE NOTICE OF APPEAL AND REQUEST TO AMEND NOTICE OF APPEAL**

**By Steven C. Beckman, Judge**

**Synopsis**

Because of a mistake of the Board, Richard A. Barber's Notice of Appeal is deemed to be filed on October 25, 2013. Richard A. Barber's request to appeal *nunc pro tunc* is treated as a request to amend his appeal after the time to amend as of right had expired. Because no prejudice would result to opposing parties, that request is granted.

**OPINION**

The Board's rule on the timeliness of appeals states, in part, that "jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and filed with the Board in a timely manner." 25 Pa. Code § 1021.52(a). Third-party appeals must be filed within "[t]hirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*." 25 Pa. Code § 1021.52(a)(2)(ii).

On October 25, 2013, Nicholas J. Barber filed via overnight mailing a Notice of Appeal seeking review of several oil and gas well permits issued by the Department of Environmental Protection to EQT Production Company ("EQT"). That appeal was docketed at 2013-193-B. In the



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

same envelope was the Notice of Appeal of Richard A. Barber ("the Richard Barber Appeal"), identical in nearly all respects to that of Nicholas Barber, except for the appellant's contact information. An oversight by the Board resulted in a failure to docket the Richard Barber Appeal. It appears that both the Department and EQT were served copies of the appeal as required by the Board's Rules. *See* 25 Pa. Code § 1021.51(g), (h). In *Falcon Oil Co. v. DER*, we dismissed an appeal as untimely where the appellant served the Department a copy of it appeal, but did not file the appeal with the Board until the 30-day period had expired. *See Falcon Oil Co. v. DER*, 1991 EHB 1503, 1991 Pa. Envirn. LEXIS 147 at *1–2, 5, *aff'd*, 609 A.2d 876 (Pa. Commw. Ct. 1992). Here, the Richard Barber Appeal was received by the Board, but, due to the Board's mistake, it was not entered on the docket. There is nothing in the record that indicates that the appeal would have been untimely, but for a breakdown in the operation of the Board. We therefore deem Richard A. Barber's Notice of Appeal to have been filed on October 25, 2013.

On November 20, 2013, the Board received a letter on behalf of Richard Barber, requesting that the Board accept the attached Notice of Appeal ("the November 20th Appeal") "*nunc pro tunc*, for good cause shown." The November 20th Appeal differs from the Richard Barber Appeal in that it identifies counsel of record as well as clarifies that Richard Barber's objections apply to all six well permits listed in Section 2(a) of the appeal form. An appeal may be amended as of right within 20 days, but thereafter, the Board may permit amendment "if no undue prejudice will result to the opposing parties." *See* 25 Pa. Code § 1021.53(a), (b). Additionally, "[t]he Board may grant a petition to appeal *nunc pro tunc* where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Thomas v. DEP*, 2000 EHB 598, 2000 Pa. Envirn. LEXIS 37 at *20 (internal quotes omitted); 25 Pa. Code § 1021.53a.

We find that the Board's failure to docket Richard Barber's October 25, 2013 appeal constituted a breakdown in the administrative process. Furthermore, DEP and EQT will not be prejudiced by Richard Barber's appeal because it contains the exact same objections to the exact same well permits as the appeal of Nicholas J. Barber. The Board treats the Richard Barber's November 20, 2013 letter as a request to amend his appeal. For the reasons just stated, that request is granted.

Accordingly, we enter the following order:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **RICHARD A. BARBER** | : | |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee** | : | |

**ORDER**

AND NOW, this 20th day of November, 2013, IT IS ORDERED as follows:

1. Richard A. Barber's Notice of Appeal is deemed filed on October 25, 2013.

2. Appellant Richard A. Barber's letter, received November 20, 2013, requesting acceptance of an amended notice of appeal is **granted**.

**ENVIRONMENTAL HEARING BOARD**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: November 20, 2013**

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

**For the Commonwealth of PA, DEP:**
Michael A. Braymer, Esquire
Office of Chief Counsel – Northwest Region

**For Appellant:**
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Dubois, PA 15801

**For Permittee:**
Stephanie K. Gallogly, Esquire
EQT Production Company
625 Liberty Avenue, Suite 1700
Pittsburgh, PA 15222

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **MANN REALTY, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-153-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: November 25, 2013** |

**OPINION AND ORDER**
**ON MOTION TO COMPEL**

**By Richard P. Mather, Judge**

**Synopsis**

The Board grants an unopposed motion to compel answers to the Department's first set of interrogatories and request for production of documents where the appellant has failed to respond to interrogatories and a request for production of documents within thirty days as required by the Pennsylvania Rules of Civil Procedure.

## OPINION

Before the Board is a Motion to Compel Answers to First Set of Interrogatories and Request for Production of Documents ("Motion to Compel") filed by the Department of Environmental Protection ("Department"). The Appellant, Mann Realty, Inc. ("Mann Realty") has appealed an Administrative Order issued by the Department alleging that Mann Realty has engaged in the unauthorized disposal and storage of solid waste at a site in Adams County, Pennsylvania. Mann Realty did not respond to the Department's Motion to Compel.



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On September 23, 2013, the Department served on Mann Realty a first set of interrogatories and a request for production of documents. In proceedings before the Board, answers to interrogatories and requests for production of documents must be served within thirty days after service. Pa.R.C.P. Nos. 4006(a)(2) and 4009.12(a).[1] As such, Mann Realty's answers were due October 23, 2013. The Department, at Mann Realty's request, however, agreed to extend that deadline until November 1, 2013. The Department did not receive Mann Realty's answers by November 1, 2013, and the Department still had not received answers at the time it filed its Motion to Compel on November 4, 2013. The Department subsequently filed its Motion to Compel under 25 Pa. Code § 1021.93.

The Board has the authority to compel a party to respond to discovery requests. *DER v. U.S. Steel Co.*, 1977 EHB 323. The Board views Mann Realty's failure to respond to the Motion to Compel as an admission that it has indeed failed to comply with the Department's discovery request in a timely manner. 25 Pa. Code § 1021.91(f); *Barton v. DEP*, 2012 EHB 441, 442.

In consideration of the Department's Motion to Compel and in light of Mann Realty's failure to respond to the Motion to Compel, we issue the following order.

[1] Under the Board's Rules, discovery proceedings must conform to the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a).

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **MANN REALTY, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-153-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 25th day of November, 2013, it is hereby ordered that the Department of Environmental Protection's Motion to Compel Answers to First Set of Interrogatories and Request for Production of Documents is **granted**, and the Appellant shall answer the Department's first set of interrogatories and request for production of documents by **December 6, 2013**.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: November 25, 2013**

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

**For the Commonwealth of PA, DEP:**
Beth Liss Shuman, Esquire
Office of Chief Counsel – Southcentral Region

**For Appellants:**
Robert B. Eyre, Esquire
FOEHL & EYRE, P.C.
27 East Front Street
Media, PA 19063

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **MARIA SCHLAFKE** | : | |
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| **v.** | : | **EHB Docket No. 2012-186-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: November 26, 2013** |

**OPINION AND ORDER**
**ON DISMISSING APPEAL AS A SANCTION**

**By Steven C. Beckman, Judge**

**Synopsis:**

The Board dismisses a *pro se* appeal wherein Appellant, after a prolonged history of non-compliance with Board Rules, has failed to file a pre-hearing memorandum as required by the Board's Order of September 30, 2013.

## OPINION

Maria Schlafke filed this *pro se* appeal on November 13, 2012, from an administrative order issued by the Department of Environmental Protection (the "Department"). The order alleged violations of the PA Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.*, and the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, at a mobile home park in Summit Township, Crawford County. During the course of this appeal, Ms. Schlafke has repeatedly failed to comply with orders of the Board and follow Board Rules.[1]

[1] In a case consolidated with this one, EHB Docket No.: 2012-187-B, Ms. Schlafke was the managing partner of Appellant Property One LLC. The case was dismissed on January 14, 2013, after Ms. Schlafke failed to comply with two separate Board orders directing her to secure counsel for Property One LLC pursuant to 25 Pa. Code § 1021.25(b).



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On May 3, 2013, the Department mailed its First Request for Admissions and Admission Interrogatories, Interrogatories, and Production of Documents ("Request") to Ms. Schlafke's address of record via First Class and Certified Mail. Ms. Schlafke did not respond to the Department's Request. On June 13, 2013, the Department sent Ms. Schlafke a letter asking for responses to the Request by the close of business on June 20, 2013 in an effort to resolve this matter. Ms. Schlafke again failed to submit her answers to the Request to the Department. On June 21, 2013, the Department filed a Motion to Compel and for Sanctions and requested that the Board order Ms. Schlafke to answer the interrogatories and produce the documents contained within the Department's Request and impose any sanctions this Board deemed appropriate. The Department also filed a Motion to Deem Admitted Matters Set Forth in the Department's First Request for Admissions and Admission Interrogatories, Interrogatories, and Production of Documents for Ms. Schlafke's failure to respond to the admissions in the Department's Request. Ms. Schlafke did not respond to this motion.

On July 11, 2013, Ms. Schlafke filed a Motion for Protective Order, Motion Objecting to Appelle's (sic) Motion to Compel and for Sanctions, and Motion to Dismiss. The Motion Objecting to Appelle's (sic) Motion to Compel and for Sanctions was filed after the time provided in the Board's Rules and was therefore, untimely. *See* 25 Pa. Code § 1021.93(c). On July 15, 2013, the Board issued an Order that, among other things, granted the Department's request to deem the admissions admitted and compelled Ms. Schlafke to serve the Department with responses to its Request within 20 days. On August 1, 2013, the Department received a response to the Department's Requests from Ms. Schlafke by facsimile. This response failed to provide any documents in response to the request for production of documents and failed to provide responsive answers to certain interrogatories within the Department's Request. As such,

Ms. Schlafke's response failed to comply with the Board's July 15th Order. On October 17, 2013, the Department moved for sanctions, requesting that the Board dismiss Ms. Schlafke's appeal, preclude her from introducing evidence and documents in support of this appeal or impose some other appropriate sanction. Ms. Schlafke did not respond to the motion for sanctions. On November 12, 2013, the Board issued an opinion and order granting the Department's motion for discovery sanctions and precluding Ms. Schlafke from introducing witnesses other than herself and certain evidence at the hearing.

In addition to these other filings, on September 30, 2013, Prehearing Order No. 2 was issued by the Board scheduling a hearing in the matter and establishing deadlines for pre-hearing submissions. Ms. Schlafke was ordered to file a pre-hearing memorandum on or before November 19, 2013. To date, Ms. Schlafke has not filed a pre-hearing memorandum and has again failed to comply with a Board order.

Under its Rules of Practice and Procedure, the Board may impose sanctions for failure to comply with Board rules and orders. Section 1021.161 provides:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161. Under this rule, the Board has the authority to dismiss an appeal as a sanction for failing to comply with Board orders. A sanction of this nature is justified when an appellant fails to comply with Board orders and demonstrates a lack of intent to pursue the appeal. *Earl's Cleaners v. DEP,* 2011 EHB 423, 424, *Walker v. DEP,* 2011 EHB 328, 329, *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.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54. Review of the record in this case clearly shows Ms. Schlafke's repeated failure to comply with the Board's rules and orders. In addition, her failure to file a pre-hearing memorandum by the November 19th deadline clearly demonstrates her lack of intent to pursue the appeal.

We are aware that Ms. Schlafke is representing herself in this matter. However, *pro se* appellants are not excused from following the Board's rules of procedure. *Goetz v. DEP*, 2002 EHB 976. It must also be noted that during the course of this appeal, Ms. Schlafke participated in multiple telephone conversations with assistant counsel for the Board regarding the practices and procedures of the Board and the requirements for compliance with both. Therefore, the Board dismisses this appeal for Appellant's repeated failures to comply with Board orders as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the order that follows:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **MARIA SCHLAFKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2012-186-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 26th day of November, 2013, it is hereby ordered that this appeal is **dismissed** pursuant to 25 Pa. Code § 1021.161. The hearing previously scheduled on December 10, 2013 through December 12, 2013 is hereby **cancelled.**

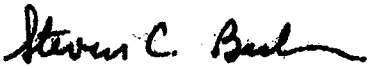
**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**



**STEVEN C. BECKMAN**
**Judge**

**DATED: November 26, 2013**

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

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Office of Chief Counsel – Northwest Region

**For Appellant, *Pro Se:***
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Gainesville, FL 32605

**Court Reporter:**
Adelman Reporters
302 Torrey Pine Drive
Mars, PA 16046-2631

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CITIZENS FOR PENNSYLVANIA'S FUTURE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-168-M** |
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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee** | : | **Issued: December 12, 2013** |

**OPINION AND ORDER ON**
**APPELLANT'S APPLICATION FOR FEES**
**UNDER SECTION 307(b) OF CLEAN STREAMS LAW**

**By: Richard P. Mather, Sr., Judge**

**Synopsis**

The Board denies the Application for Fees filed by the Appellant, Citizens for Pennsylvania's Future, which it filed under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). It is not apparent that the appeal of three related approvals for the construction of a temporary aboveground waterline, which was discontinued before the Board addressed the merits of the appeal, is a proceeding under the Clean Streams Law triggering the Board's discretionary authority under Section 307(b) under the facts of this appeal. Even if the appeal were a proceeding under the Clean Streams Law, the facts of this appeal do not support a finding that PennFuture met its burden to establish the Permittee's voluntary surrender of the approvals and the subsequent Department decision to cancel the approvals in question were in any way related to the appeal. PennFuture is not entitled to attorney's fees where its appeal was not a significant or substantial cause of the Department's action to cancel the permit and approvals under appeal.



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## OPINION

**Background**

The Appellant, Citizens for Pennsylvania's Future ("PennFuture" or "Appellant") filed an appeal of three related actions which it claims the Department took to approve the Chesapeake Appalachia, LLC ("Chesapeake") Benspond-Brule waterline project ("Project") in Elkland Township, Sullivan County. PennFuture, in its Amended Notice of Appeal, states that there are three components of the Department action to approve the Project. According to PennFuture's Notice of Appeal, the approval includes the issuance of the Water Obstruction and Encroachment Joint Permit Number E-5720-014, the Pennsylvania State Programmatic General Permit 4 ("PASPGP-4") Number 752938 and the Water Quality Certification under Section 401 of the Federal Water Pollution Control Act 33 U.S.C. § 1341 ("401 Water Quality Certification" or "Certification") that authorized Chesapeake to construct and maintain two temporary aboveground waterlines to support gas well development and operations on two well sites in Elkland Township, Sullivan County. PennFuture's Notice of Appeal further states that it received notice of the Department's actions by means of a *Pennsylvania Bulletin* Notice dated October 29, 2011. 41 Pa. B. 5810 (Oct. 29, 2011).

Earlier in this appeal, Chesapeake filed a motion to dismiss two of the three components of PennFuture's appeal. The Board denied the motion to dismiss in an opinion and order dated July 9, 2012. *See Citizens for Pennsylvania's Future v. DEP*, 2012 EHB 260.

On December 14, 2012, PennFuture filed a document with the Board entitled "Suggestion of Mootness." This document contained PennFuture's suggestion to the Board that the appeal was now moot, other than the possible future recovery of costs and fees under Section 307(b) of the Clean Streams Law. In support of its suggestion, PennFuture stated that Chesapeake had

surrendered its state permit under appeal as well as the two other related approvals in a letter dated July 26, 2012. In response to Chesapeake's surrender of its permit and related approvals, the Department cancelled the underlying state permit by letter dated August 6, 2012, which also had the effect of cancelling the related approvals. The Board scheduled a call with the Parties to discuss PennFuture's suggestion. Following the call, PennFuture filed a Notice of Withdrawal in which it reserved its right to seek fees under Section 307(b) of the Clean Streams Law. In response, the Board entered an order on February 12, 2013 discontinuing the appeal.

On March 14, 2013, PennFuture filed an Application for Fees under Section 307(b) of the Clean Streams Law. In its Application, PennFuture asserted that it was entitled to fees under Section 307(b) because the appeal was a proceeding pursuant to the Clean Streams Law and that the appeal satisfied the requirements of the catalyst test thereby making fees available. The Department and Chesapeake filed responses to PennFuture's Application in which they contested PennFuture's eligibility for fees. Chesapeake also asserted that it was not subject to fees under Section 307(b), as a permittee in a third-party permit appeal.

On May 2, 2013, the Board held a conference call with the Parties to determine whether there was a need for a hearing to resolve factual disputes among the Parties. As a result of the call, the Board determined that a hearing was necessary and scheduled a hearing for June 19, 2013. The purpose of the hearing was to receive evidence on those disputed issues identified during the conference call.

The Board held a hearing on June 19, 2013. PennFuture, bearing the burden of proof, proceeded first and called three witnesses: Anna Pinca, a member of PennFuture; Eric Haskin, a Chesapeake representative (as on cross); and Mark Szybist, a PennFuture attorney. The Department called one witness, Brian Bailey, a Department employee. Chesapeake briefly

examined Mr. Haskin at the end of PennFuture's examination and did not call any other witnesses. Having held a hearing to take evidence on the disputed facts, the Board is now in a position to resolve the factual disputes and to rule on the pending Application for Fees.

## DISCUSSION

### Standards for Awarding Fees under Section 307(b) of the Clean Streams Law

Parties are generally required to bear their own attorney's fees and costs of litigation, and fees are not awarded absent explicit statutory authority. *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Here, PennFuture cites Section 307(b) of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.801, as the basis for its fee petition.

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

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

35 P.S. § 691.307(b) (emphasis added). This provision provides the explicit statutory authority for the Board, in its discretion, to award costs and attorney's fees to any party in a proceeding pursuant to the Clean Stream Law.

Both the Pennsylvania Supreme Court and Commonwealth Court have held on numerous occasions that Section 307(b) provides the Board with broad discretion regarding an award of costs or fees. *Solebury Twp. v. Department of Environmental Protection*, 928 A.2d 990, 1003 (Pa. 2007); *Chalfont-New Britain Joint Sewage Auth. v. Department of Environmental Protection*, 24 A.3d 470, 474 n.10 (Pa. Cmwlth. 2001); *Kwalwasser v. Department of Environmental Resources*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990). The Board's exercise of that

discretion will not be overturned in the absence of fraud, bad faith or a flagrant abuse of discretion. *Chalfont-New Britain Joint Sewage Auth.*, 24 A.3d at 474 n.10.

There are, however, limits on the Board's exercise of its discretion under Section 307(b) as the Pennsylvania Supreme Court held in *Solebury Township*. In *Solebury Township*, the Pennsylvania Supreme Court agreed with the Commonwealth Court which had reversed the Board's decision that a formal judgment is necessary to find that a party has prevailed on the merits. The Pennsylvania Supreme Court decided that the practical relief sought should be considered by the Board when evaluating whether a party seeking fees under Section 307(b) is a prevailing party for purposes of awarding fees. *Solebury Twp.*, 928 A.2d at 1004. Under *Solebury Township*, the Board may award fees to a party even if the Board has not yet issued a formal judgment on the merits, as is the case in this appeal.

Since the Pennsylvania Supreme Court decided *Solebury Township* in 2007, the Board has had numerous opportunities to identify standards for awarding fees under Section 307(b). In *Crum Creek Neighbors v. DEP*, Judge Labuskes described the Board's analysis:

> We employ a three-step process in deciding whether to award fees and costs under Section 307(b) of the Clean Streams Law. Step one is a determination of whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law. *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R, slip op. at 5 (Opinion and Order Feb. 22, 2013). Step two is a determination of whether the applicant has satisfied the threshold criteria for an award. If we determine that a party seeking fees meets the requirements of the first two steps, we then move to step three, a determination of the amount of the award.
>
> The determination of whether an applicant has satisfied the threshold criteria for an award of fees varies depending upon whether the applicant obtained a final ruling on the merits. Where fees are being sought in a case in which we did not issue a final ruling on the merits, we use the catalyst test. *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). That test essentially requires us to assess whether there is a causative link between the EHB appeal and some benefit gained by the fee applicant. *Upper Gwynedd-Towamencin Mun. Auth. v. DEP*, 9 A.3d 255, 265 (Pa. Cmwlth. 2010). A catalyst is a stimulus that brings about or hastens an action or reaction between two or more persons, forces, or things that are separate

> from the catalyst itself. WEBSTER'S NEW WORLD DICTIONARY (2d Ed. 1984). Thus, the EHB appeal is said to be the catalyst that brings about an action on the part of the Department that somehow benefits the fee applicant.
>
> The catalyst test does not apply where, as here, a party obtains a successful result on the merits in the appeal itself. In such cases the threshold test for awarding fees is much more straightforward. In such cases we will continue to use the criteria set forth in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990), in deciding whether fees can be awarded. *See Solebury Twp. v. DEP*, 928 A.2d 990, 1003 (Pa. 2007) ("[I]t is within the scope of the EHB's prerogative to channel its discretion in awarding attorneys' fees based upon considerations such as the *Kwalwasser* criteria..."). In order to be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:
>
> 1. The Board issued a final order;
> 2. The applicant for fees and expenses must be the prevailing party;
> 3. The applicant must have achieved some degree of success on the merits; and
> 4. The applicant must have made a substantial contribution.
>
> *Kwalwasser*, 1988 EHB at 1310.

*Crum Creek Neighbors v. DEP*, EHB Docket No. 2007-287-L, *slip op.* at 5-6 (Opinion and Order dated December 12, 2013). In this case, the Board is faced with an application for fees in an appeal that was closed and discontinued before the Board determined the merits of the Appellant's objections. Under the second step of the process outlined above, the Appellant may still be entitled to an award of fees if it can satisfy the catalyst test.[1]

In its Application for Fees, PennFuture has asserted that it is entitled to fees under these standards and criteria. First, PennFuture asserts that its appeal of the Water and Encroachment Permit Number E5729-014 is a proceeding pursuant to the Clean Streams Law. PennFuture also asserts that its appeal of the related Department decision to issue a Section 401 water quality certification as part of the Water Obstruction and Encroachment Permit is a proceeding pursuant

[1] The Board's catalyst test is the means the Board uses to comply with the Pennsylvania Supreme Court's direction to the Board to consider the practical relief sought by a party, rather than just a formal judgment on the merits, when evaluating whether a party seeking fees is a prevailing party for purposes of awarding fees under Section 307(b). The Board's catalyst test is not dependent upon a formal judgment to find that a party seeking fees has prevailed.

to the Clean Streams Law.[2] In its Application, PennFuture explained that the "main purpose" of the litigation was to prevent the Project from adversely affecting Exception Value waters of the Commonwealth . . . ." Application for Fees, Paragraph 30. PennFuture also argues that the Department's cancellation of the Water Obstruction and Encroachment Permit Number E5729-014, which also cancelled the Section 401 water quality certification for the Project, provided the practical relief which PennFuture sought in its appeal. Finally, PennFuture asserts that the rates and amounts of charges for fees in its Application are reasonable. PennFuture requests that the Board award it $23,100 in fees under Section 307(b).

The Department and Chesapeake make similar arguments in opposition to PennFuture's Application for Fees. First, they assert that the appeal of the Water Obstruction and Encroachment Permit Number E5729-014 is not a proceeding under the Clean Streams Law under the facts of this appeal. Second, they assert that PennFuture is not entitled to an award of fees under the Pennsylvania Supreme Court's decision in *Solebury Township* because PennFuture did not obtain the practical relief it sought. Under the facts of this appeal, they assert that the appeal was not a substantial or significant cause of the Department's action to cancel the surrendered permit or approvals and that PennFuture has not "prevailed" in any sense in this appeal. The Department also individually challenged the reasonableness of PennFuture's charges. Chesapeake also individually challenged PennFuture's attempt to collect fees from it as a permittee, or in the alternative challenged the standards to award fees against a permittee, in a third-party permit challenge.

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[2] PennFuture also asserts that the Department's actions to verify Chesapeake's coverage under the U.S. Army Corps of Engineers' permit, PASPGP-4, is a proceeding under the Clean Streams Law. The Board rejects this assertion. PASPGP-4 is a federal general permit issued by a federal agency under federal law, and the Department's yet undefined verification role, and PennFuture's appeal related to that role, is not a proceeding under the Clean Streams Law.

**A Proceeding Pursuant to the Clean Streams Law**

In evaluating whether a particular appeal is a proceeding under the Clean Streams Law, the Board has considered a variety of factors. In the Board's *Angela Cres Trust* decision, Chief Judge Thomas Renwand, citing *Wilson v. DEP*, 2010 EHB 911, listed "a variety of factors, including the following:"

- The reason the appeal was filed; the purpose of the litigation.
- Whether the notice of appeal raised objections under the Clean Streams Law.
- Whether Clean Streams Law objections were pursed throughout the appeal.
- Whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law.
- Whether the case implicates the discharge of pollutants to waters of the Commonwealth.

*Angela Cres Trust*, EHB Docket No. 2006-086-R, *slip op.* at 6-7 (citing *Wilson v. DEP*, 2010 EHB 911, 914-915). Chief Judge Renwand further explained:

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

*Id.* at 7.

The Board declines to apply these factors to the limited record before the Board because, as discussed later in this opinion, the Board has determined that PennFuture is not entitled to fees for other reasons. It is not apparent from the face of the Notice of Appeal that this appeal, or any component of it, is a proceeding under the Clean Streams Law. The lack of clarity in PennFuture's objections in its Notice of Appeal coupled with the premature termination of the appeal as moot presents the Board with a difficult issue to decide on a very limited and contested record. The Board does not have to resolve this difficult question in this appeal because even if the Board were to decide that this appeal is a proceeding under the Clean Streams Law, the facts presented at the June 19, 2013 hearing do not support PennFuture's request for fees. *See* Opinion *infra* pp. 9-12.

**Application of Catalyst Test**

Assuming that its appeal was a proceeding pursuant to the Clean Streams Law, PennFuture would still not be entitled to fees as a prevailing party because under the facts of this appeal, the appeal played no role in Chesapeake's decision to surrender the permit for the temporary waterline and the Department's decision to cancel the permit and related approvals. The record before the Board shows that Chesapeake surrendered the permits because the temporary waterline was no longer needed due to operational changes that were not related to the pending appeal.

To resolve whether PennFuture has satisfied the threshold criteria for an award of fees and costs, where the Board has not issued a final ruling on the merits, as previously stated, the Board uses the catalyst test. Under the Board's catalyst test, to be eligible for an award of fees and costs under Section 307(b) in the absence of bad faith or vexatious conduct, a party must first satisfy three criteria:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;

2. The applicant must show that the appeal stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and

3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

*Hatfield*, 2010 EHB at 587 (citing *Lower Salford Township Authority v. DEP*, 2009 EHB 633, 638 and *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718). We explained that some of the principles that inform our application of these eligibility criteria are as follows:

1. A formal judgment, adjudication, or Board-approved settlement agreement is not a prerequisite to an award of fees. *Lower Salford*, 2009 EHB at 638-39; *Solebury*, 2008 EHB at 672.

2. The Board is not required to hold a hearing on every fee petition. *Lower Salford* (Opinion and Order Denying Reconsideration, January 5, 2010). *Accord, UMCO Energy, Inc. v. DEP*, 2009 EHB 24.

3. Even those cases where we determine that a hearing is necessary to resolve genuine, material issues of disputed fact, we will not hold mini-trials on the merits of the underlying appeal. *Lower Salford*, 2009 EHB at 642-43. *Solebury*, 2008 EHB at 675. It is enough that the applicant's claim was colorable.

4. "The important point is that the agency changes it conduct at least in part as a result of the appeal. The appeal caused the change, not necessarily the 'merits' of the appeal. Causation is the key; motive is not." *Solebury*, 2008 EHB at 675-76.

5. Fees incurred in successfully pursuing fees ("fees on fees") are generally recoverable. *Solebury*, 2008 EHB at 725.

*Hatfield*, 2010 EHB at 588. The parties dispute whether PennFuture has satisfied the catalyst test criteria.

PennFuture asserts that its appeal was in fact a substantial or significant cause of the Department's action to cancel the surrendered permits and related approvals. The Department

and Chesapeake disagree and assert that the appeal played no role in Chesapeake's decision to surrender the permit and related approvals and the Department's decision to cancel the permit and approvals under appeal. The facts of this appeal as presented at the hearing on June 19, 2013 do not support PennFuture's assertion. The Board finds that PennFuture's appeal was not a substantial or significant cause of the Department's action to cancel the permit. The Board finds that Chesapeake decided to surrender its permit and related approvals as a result of operational changes and other factors unrelated to PennFuture's appeal as described in more detail below. PennFuture has therefore failed to satisfy the catalyst test based on the factual record before the Board.

At the June 19, 2013 hearing, PennFuture called Eric Haskin,[3] a Chesapeake employee, as a witness and examined Mr. Haskin regarding Chesapeake's July 26, 2012 letter in which Chesapeake voluntarily surrendered its Water Obstruction and Encroachment Permit Number E5729-014 as well as the related coverage under the federal permit PASPGP-4 and its related approval of a Section 401 water quality certification for the federal general permit for the Project. In its letter, Chesapeake stated:

> Chesapeake, as a result of operational changes and other factors will not be proceeding with the Project and, therefore, is surrendering the permit (Water Obstruction and Encroachment Permit No. E520-014.)

Appellant's Exhibit No. 2.

At the hearing, Mr. Haskins described the operational changes and other factors. Mr. Haskin stated that there were several operational changes that Chesapeake was referencing in its July 26, 2012 letter. (N.T. 28.) First, Chesapeake began to re-evaluate the merits of using

[3] Mr. Haskin is the Supervisor of Regulatory Compliance at Chesapeake for its operations in Pennsylvania. (N.T. 19.) He is responsible for reviewing and signing all well permits, location permits, temporary and permitted waterline projects in the entire state of Pennsylvania. (N.T. 19-20.)

temporary waterlines and tanks to supply water from one well pad to another, where there was a greater distance to transport the water. (N.T. 28-30.) Mr. Haskin stated that the greater expense to use a temporary waterline was a factor to discontinue the use of temporary waterlines to supply water to certain well pads around the first quarter of 2012. (N.T. 29-30.) In addition, Mr. Haskin testified that around the first quarter of 2012, Chesapeake changed its drilling approach to focus on drilling core-of-the-core areas only. (N.T. 31.) The Brule well pad is not in the core-of-the-core area, and Chesapeake has placed development of the Brule well pad on hold. (N.T. 31.) When Chesapeake goes back to the Brule well pad site, Mr. Haskin indicated that water will be supplied by tanker trucks. (N.T. 32.) Mr. Haskin testified that the primary operational change that prompted Chesapeake to surrender its permit and related approvals was a change in costs and the conclusion that it was not cost effective to run the 1.79 mile temporary pipeline from the Benspond well pad to the Brule well pad. (N.T. 34.) The Board finds that Mr. Haskin's testimony was credible, including his conclusion that PennFuture's appeal of the permit and related approvals had no bearing on Chesapeake's decision not to proceed with the Benspond-Brule temporary waterline project. (N.T. 35-36.) The Board also finds Mr. Haskin's testimony credible that Chesapeake did not consider the costs of defending this appeal as a consideration when determining the economic viability of the Project. (N.T. 38-39.)

Mr. Haskin also testified that Chesapeake did not consult with the Department in deciding to surrender the permit and related approvals under appeal. (N.T. 39.) The Department also testified that it had no role in Chesapeake's decision to surrender the permit and related approvals under appeal. (N.T. 86-87.) Based upon the testimony at the June 19, 2013 hearing, the Board finds that the appeal was not a substantial or significant cause of the Department's

decision to cancel the permit and other approvals under appeal following Chesapeake's decision to voluntarily surrender them.

**Additional Issues**

The parties raised a number of additional issues that the Board does not have to address because it has decided to not award fees as set forth above. The additional issues include the reasonableness of the fees incurred; standards for awarding fees against permittees in third-party permit appeals; and whether the financial resources of a "well-funded" appellant is a proper consideration in awarding fees. The Board does not reach these issues in deciding that PennFuture's appeal was not a significant or substantial cause of the Department's action to cancel the Water Obstruction and Encroachment Permit and related approvals.

Accordingly, the Board issues the following order.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CITIZENS FOR PENNSYLVANIA'S FUTURE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-168-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee** | : | |

## ORDER

AND NOW, this 12th day of December, 2013, it is hereby **ORDERED** that the Appellant's Application for Fees is **denied**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 12, 2013**

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

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**For Permittee:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **CRUM CREEK NEIGHBORS** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-287-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee** | : | **Issued: December 12, 2013** |

**OPINION AND ORDER ON**
**APPLICATION FOR ATTORNEY'S FEES AND COSTS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board awards $121,472 in attorney's fees and costs to a citizens' group that successfully challenged the Department's issuance of an NPDES permit for construction of a housing development.

**OPINION**

**Background**

On November 8, 2007, the Department of Environmental Protection (the "Department") issued National Pollutant Discharge Elimination ("NPDES") Permit PAI012306006 to Pulte Homes of PA, L.P. ("Pulte") for earth disturbance activities and postconstruction stormwater associated with a residential development in Marple Township, Delaware County. Crum Creek Neighbors ("Crum Creek"), a local citizens' group, filed this appeal from the permit. On October 22, 2009, we issued an Order and Adjudication suspending the permit and remanding the matter to the Department for further fact-finding and analysis regarding the project's impact



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on an Exceptional Value ("EV") stream. *Crum Creek Neighbors v. DEP*, 2009 EHB 548. We found that Crum Creek had satisfied its burden of proving that the Department acted unlawfully and unreasonably by analyzing the site as a "nondischarge site" when in fact there would be direct discharges to an EV stream, and by failing to conduct an adequate investigation regarding the impact of the project on the water flow of the stream. The Department's inadequate investigation failed to show that the EV stream would not be degraded as a result of the project.

Pulte filed an appeal of the Board's Order with the Commonwealth Court. CCN intervened in the case. Briefs were filed and oral argument was held. The Court held that it lacked jurisdiction to hear the matter because there was no "final order" or interlocutory order subject to court review. *Sentinel Ridge Development, LLC v. DEP*, 2 A.3d 1263 (Pa. Cmwlth. 2010).

Meanwhile, Crum Creek filed an application with us seeking to recover its fees and costs from the Department under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). That section provides that the Board, "upon request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." The Department filed a response to the fee petition arguing among other things that the Board lacked jurisdiction to address the fee petition because there was no "final order" as required by the Board's Rules at 25 Pa. Code § 1021.182(c). We suspended the fee petition because: (1) the Board's Adjudication was under appeal to Commonwealth Court and (2) the Adjudication remanded certain issues to the Department for further consideration. *Crum Creek Neighbors v. DEP*, 2010 EHB 67.

On remand to the Department, a consultant working on behalf of the permittee submitted a report to the Department entitled "Hydrologic and Water Quality Analysis of Stormwater

Impacts on Holland Run." Another consultant working for the permittee submitted a "Hydrogeological Evaluation Report for the Ravens Cliff Subdivision." The Department eventually approved the project and lifted the permit suspension for the site. The Department was satisfied based on the hydrological and hydrogeological studies that the EV stream would not be degraded. No appeals were filed from the lifting of the permit suspension for the site.

On June 10, 2013, Crum Creek filed a motion to reopen the fee petition. After we granted that motion, *Crum Creek Neighbors v. DEP* (Opinion and Order July 19, 2013), the parties submitted and we approved a procedure and schedule for addressing Crum Creek's fee application. Neither party requested an evidentiary hearing.

**Discussion**

We employ a three-step process in deciding whether to award fees and costs under Section 307(b) of the Clean Streams Law. Step one is a determination of whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law. *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R, slip op. at 5 (Opinion and Order Feb. 22, 2013). Step two is a determination of whether the applicant has satisfied the threshold criteria for an award. If we determine that a party seeking fees meets the requirements of the first two steps, we then move to step three, a determination of the amount of the award.

The determination of whether an applicant has satisfied the threshold criteria for an award of fees varies depending upon whether the applicant obtained a final ruling on the merits. Where fees are being sought in a case in which we did not issue a final ruling on the merits, we use the catalyst test. *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). That test essentially requires us to assess whether there is a causative link between the EHB appeal and some benefit gained by the fee applicant. *Upper Gwynedd-Towamencin Mun. Auth. v. DEP*, 9 A.3d 255, 265

(Pa. Cmwlth. 2010). A catalyst is a stimulus that brings about or hastens an action or reaction between two or more persons, forces, or things that are separate from the catalyst itself. WEBSTER'S NEW WORLD DICTIONARY (2d Ed. 1984). Thus, the EHB appeal is said to be the catalyst that brings about an action on the part of the Department that somehow benefits the fee applicant.

The catalyst test does not apply where, as here, a party obtains a successful result on the merits in the appeal itself. In such cases the threshold test for awarding fees is much more straightforward. In such cases we will continue to use the criteria set forth in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990), in deciding whether fees can be awarded. *See Solebury Twp. v. DEP*, 928 A.2d 990, 1003 (Pa. 2007) ("[I]t is within the scope of the EHB's prerogative to channel its discretion in awarding attorneys' fees based upon considerations such as the *Kwalwasser* criteria..."). In order to be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:

1. The Board issued a final order;
2. The applicant for fees and expenses must be the prevailing party;
3. The applicant must have achieved some degree of success on the merits; and
4. The applicant must have made a substantial contribution.

*Kwalwasser*, 1988 EHB at 1310.

An award of fees under *Kwalwasser* (or the catalyst test for that matter) is not automatic. *Angela Cres Trust, supra*, slip op. at 5-6. Section 307(b) of the Clean Streams Law does not create an entitlement. Instead, it provides the Board with a "broad grant of discretion," such that a "narrow application" of the *Kwalwasser* criteria will not always be appropriate. *Solebury Twp.*, 928 A.2d at 1004. In considering whether to award fees and deciding upon the amount of the fees, in addition to the threshold criteria we may also consider such things as whether the appeal involved multiple statutes, the extent to which the fees claimed relate to the litigation

itself, the size, complexity, importance, profile, and behavior of the parties in the case, and of course, the reasonableness of the hours billed and the rates charged. 35 P.S. § 691.307(b); *Angela Cres Trust, supra*, slip op. at 5; *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 72-73.

There is no dispute that Crum Creek's fees were incurred in a proceeding pursuant to the Clean Streams Law. Applying the *Kwalwasser* threshold criteria, the Board has issued a final order and Crum Creek unquestionably prevailed in this appeal. We ruled in its favor on the merits in an Adjudication. Based on its efforts, the challenged permit was suspended and remanded to the Department for performance of an antidegradation analysis that should have been done in the first place. Protection of the special protection stream was a major component of Crum Creek's case. Crum Creek obviously made more than a substantial contribution to achieving the favorable result; it achieved the result on its own. This was an important and complex case well litigated by a skilled and seasoned advocate who did not know if he would ever get paid for his efforts, and it established a precedent that will hopefully inspire the Department to take greater care in similar situations in the future. Crum Creek advanced the goals of the Clean Streams Law, and it has been required to wait an inordinate amount of time for its fee application to be resolved.

All of the claims raised by Crum Creek shared a common core of facts and were based on interrelated legal theories, so we see no need to apportion fees among the various claims. *See Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 705, 708; *Harmar Twp. v. DER*, 1994 EHB 1107, 1136-38. An award of fees is appropriate even where, as here, the attorney and expert witnesses work on a contingency-fee basis. *Raymond Proffitt Foundation v. DEP*, 1999 EHB 124, 143-44. Crum Creek is entitled to reimbursement for its fees and costs incurred in Pulte's appeal of our Adjudication to Commonwealth Court, which was quashed, as well as its

considerable but justified effort to recover its fees. The fact that few if any changes to the actual project were made after years of study on remand does not mean that Crum Creek failed to prevail in this appeal. *Chalfont-New Britain Joint Sewage Auth. v. DEP*, 24 A.3d 470, 474-75 (Pa. Cmwlth. 2011) (actions following final order not relevant); *Upper Gwynedd-Towamencin Mun. Auth.*, 9 A.3d at 269 (same). The important victory sought and achieved was an appropriate and scientifically sound application of the antidegradation requirements. This is no mere procedural technicality. The fact that we suspended rather than revoked the permit during the pendency of the Department's review is not a material distinction that justifies a reduction of the fee award under the circumstances of this particular case.

Having determined that Crum Creek satisfies the eligibility requirements under the first two steps of our process and that an award of fees is appropriate, we now exercise our discretion and determine the amount of the fee award. The Board's Rules at 25 Pa. Code § 1021.182(b) govern what evidence a party must provide to the Board in support of its fee request and state that:

> (b) A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:
>
> (1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.
>
> (2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.
>
> (3) An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of such costs and fees.
>
> (4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of the party from whom costs and fees are sought.

The Board may deny an application sua sponte if an applicant fails to provide all of the information required by our Rules in sufficient detail to enable the Board to grant the relief requested. 25 Pa. Code § 1021.182(d).

Although the Department has challenged the fees charged by Attorney John Wilmer, Esq. on several grounds, it has not complained that either Wilmer's rate of $150 per hour or the number of hours he charged per task were excessive. It has not cited Crum Creek for failing to comply with 25 Pa. Code § 1021.182(b)(3) or (4). We have carefully reviewed the fees and costs charged by Wilmer for his own time and find that they were entirely reasonable. If anything, Crum Creek has been undercharged. Wilmer's rate of $150 per hour is well below market, and Wilmer did not charge (or charged a reduced rate) for work that reasonably could have been billed at his normal rate. The amount of time billed compared to the tasks performed shows that he did quality work very efficiently. The charges are adequately explained and we see no reason to make any adjustment to the hours claimed by Wilmer. Therefore we determine that the lodestar (representing the reasonable hourly rate multiplied by the reasonable number of hours) for Attorney Wilmer is $45,455.

In addition to the requested attorney fees, Crum Creek also seeks costs for its experts. Crum Creek's expert engineer, Michele Adams, P.E., has 23 years of experience in stormwater management, and we accepted and relied upon her expert opinion in our Adjudication. The Department does not challenge her hourly rate of $150 an hour or the $70 an hour rate that she charged for nine hours of work performed by her subordinates and we agree that the rates are reasonable. The Department does not complain that Adams's work on any particular task was excessive, but it does complain that Adams's "Time by Job Detail" and her invoices are

"incongruous" and "confusing." The Department has not explained why it is necessary to correlate the job detail with the invoices. The job detail is quite clear and easy to follow and we have no reason to believe that the job detail is not a fair and accurate representation of the fees incurred. We do not find them to be confusing and conclude that the hours expended were fair and reasonable.

Crum Creek's other expert witness, James Schmid, Ph.D., has been a practicing ecologist since 1973. He is well qualified and we accepted and relied upon his opinions in our Adjudication. The Department does not challenge his billing rate of $200 per hour. Dr. Schmid has reduced his bill by 306.5 hours, which leaves 258.5 hours he spent working on this case for a total of $51,700. Despite the reduction, this amount still strikes us as excessive. Among other things, Dr. Schmid's reports contain voluminous polemic on issues that went far beyond the issues fairly implicated in the appeal. Although Dr. Schmid reduced the hours claimed to account for this fact, the reduction is not sufficient. In addition, Dr. Schmid's charges for report preparation, data analysis, project coordination, testimony preparation, and attendance at trial strike us as somewhat duplicative. Although we have no doubt regarding Dr. Schmid's dedication or that he did the work, his bills go beyond what the Commonwealth should be required to pay. An award of two-thirds of Dr. Schmid's claimed fees is reasonable and appropriate.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CRUM CREEK NEIGHBORS** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-287-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee** | : | |

## ORDER

AND NOW, this 12th day of December, 2013, we hereby order the Department to pay Crum Creek Neighbors, care of Attorney Wilmer, $121,472 based upon the following attorney fees and costs reasonably incurred in the successful prosecution of its appeal:

John Wilmer, Esquire fees .....$45,455
Michele Adams, P.E. fees .....$38,355
James Schmid, Ph.D. fees .....$34,639
Costs .....$ 3,023

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 12, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.** | : | |
| **v.** | : | **EHB Docket No 2004-046-B (Consolidated with 2004-045-B and 2004-112-B)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: December 12, 2013** |

**OPINION AND ORDER ON REMAND ON APPELLANTS' APPLICATIONS FOR ATTORNEYS' FEES AND COSTS UNDER SECTION 307(b) OF THE CLEAN STREAMS LAW**

**By Steven C. Beckman, Judge**

**Synopsis**

In evaluating the Appellants' applications for attorneys' fees and costs under Section 307(b) of the Clean Streams Law, the Board applies a three-part test to determine, first, whether the appeals are proceedings pursuant to the Clean Streams Law; second, whether the Appellants are eligible for awards of attorneys' fees and costs; and third, what awards are appropriate given all the facts and circumstances of the case. The Board finds that the Appellants' appeals are proceedings under the Act, and that Appellants have demonstrated their eligibility for awards of attorneys' fees and costs under the catalyst theory. Because not all of the fees and costs requested were reasonably incurred, the Board grants awards of attorneys' fees and costs to the Appellants, subject to the adjustments made in this opinion. Appellants' pending motions to supplement or amend their applications are granted. The Department's motion to dismiss is denied.



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## OPINION

### Background

Now before the Pennsylvania Environmental Hearing Board ("Board"), on remand from the Commonwealth Court, are pending attorneys' fees petitions (and multiple motions to amend those petitions) from Appellant Borough of Lansdale ("Lansdale"), Appellants Hatfield Township Municipal Authority, Horsham Water and Sewer Authority, Bucks County Water & Sewer Authority, Warrington Township Water & Sewer Department, and Warwick Township Water and Sewer Authority (collectively, "Hatfield" or "Hatfield Appellants"), and Appellant Chalfont-New Britain Township Joint Sewage Authority ("Chalfont"). We adopt the Findings of Fact contained in the Board's August 25, 2010 Opinion and Order. *See Hatfield Township Municipal Authority v. DEP*, 2010 EHB 571. The Commonwealth Court summarized those findings, which we quote, in part, solely for the convenience of the reader:

> [Appellants] own and operate publicly owned sewage treatment works in the Neshaminy Creek watershed. In 1996, the Commonwealth listed Neshaminy Creek and its tributaries as impaired waters, identifying nutrients as the cause of the impairment. Pursuant to a federal consent decree, the Environmental Protection Agency (EPA) was required to ensure that Total Maximum Daily Load Assessments (TMDLs) be established for impaired waters by 2007.
>
> In December 2003, the Department of Environmental Protection (DEP) submitted for review and approval to the EPA a TMDL for the Neshaminy Creek Watershed. The EPA approved the TMDL, but [Appellants] challenged the TMDL by filing appeals with the EHB. In their appeals, [Appellants] express the concern that the TMDL should be scientifically sound and that permit limits should not be revised in short order because making changes to publicly owned sewage treatment works can be expensive.
>
> On April 14, 2004, DEP met with all [Appellants], except [Chalfont][4] (the non-Chalfont [Appellants]), pursuant to an EHB order to discuss settlement. DEP offered to stipulate that, if the non-Chalfont [Appellants] agreed to dismissal of their appeals,

DEP would agree not to object to their raising similar issues in any later appeal of the TMDL or in an appeal of a permit containing the TMDL. The non-Chalfont [Appellants] raised concerns that, if they withdrew their appeals or agreed to their dismissal, the EHB may lack jurisdiction in a later appeal, and/or the doctrine of administrative finality would restrict their ability to raise the same issues.

> 4 Chalfont was a member of the PA Periphyton Coalition, which was attempting to work independently with DEP and the EPA on the development of a new TMDL for the Neshaminy Creek watershed. DEP and Chalfont had separate settlement discussions.

On June 8, 2004, DEP met again with the non-Chalfont [Appellants]. DEP stated at the meeting that, in the course of responding to discovery requests, DEP had discovered a modeling error involving the "k-rate," which is a variable and calibration parameter in the model that measures the phosphorus loss rate. DEP further stated that it intended to revise the TMDL to correct the error and that the process would take approximately six months. The parties again discussed settlement, but DEP would not agree to withdraw the flawed TMDL or postpone issuance of permits based on the flawed TMDL. As a result, the EHB stayed litigation pending revision of the TMDL and ordered the parties to continue to make reasonable efforts to resolve disputed issues during the stay.

DEP held additional meetings with the non-Chalfont [Appellants]. In September 2004, DEP informed Chalfont about the revision efforts. Then, from October to December 2004, DEP exchanged information and comments with the [Appellants]. On December 15, 2004, DEP informed the EHB that DEP was in a position to begin drafting the revised TMDL.

In February 2005, DEP provided the non-Chalfont [Appellants] with a proposed settlement document. During an April status conference with the EHB, the non-Chalfont [Appellants] raised as a concern that, under DEP's proposal, DEP would not withdraw the admittedly erroneous TMDL. DEP believed that it could not withdraw the TMDL without the approval of the EPA.[6] The non-Chalfont [Appellants] also were concerned about administrative finality should they withdraw their appeals and argued that the EHB should dismiss the litigation without prejudice. The EHB entered an order continuing the stay of proceedings.

> 6 The EPA had informed DEP that it preferred the submission of a replacement TMDL rather than simply the withdrawal of the current TMDL.

In December 2005, DEP submitted a status report to the EHB, stating that it had not done a revised TMDL because data analysis of three rounds of sampling from the Neshaminy watershed taken during the summer of 2005 was not complete. In January 2006, DEP provided [Appellants] with the Hunter Carrick Report containing the data analysis and advised that new model runs for the revised TMDL were in the process of being completed.[7]

> 7 In February 2006, the non-Chalfont [Appellants] requested raw data for the Hunter Carrick Report, the new modeling data and information about any other work being conducted. DEP complied with the request.

In June 2006, DEP filed a status report with the EHB stating that a draft TMDL was circulating internally. The EHB vacated the stay, and the parties held settlement discussions, but, in August 2006, the EHB reinstated the stay pending completion of the TMDL revision process. On August 26, 2006, DEP released a draft TMDL for public comment.

The draft TMDL was based on the methodology used to formulate the TMDL for the adjacent Skippack Creek watershed, which TMDL the EPA had nearly completed. The Skippack TMDL used a different methodology and different endpoint determination from the Neshaminy TMDL and from the work-in-progress revision to the Neshaminy TMDL. Thus, DEP did not ultimately adopt any of the proposed revisions discussed with [Appellants] because DEP wanted the Neshaminy TMDL to be consistent with the Skippack TMDL.

During the public comment period, DEP learned from comments by some of the [Appellants] that the "Dodds equation," which was used by the EPA in establishing the Skippack TMDL, had been revised due to an error. The error meant that the endpoint in the Skippack TMDL was incorrect. Thus, the EPA decided that the best course of action was to withdraw the nutrient portion of the Skippack TMDL.

Because the Neshaminy TMDL was based on the same equations as the Skippack TMDL, DEP abandoned its efforts to revise the Neshaminy TMDL. DEP proposed to the EPA the withdrawal of

> the nutrient portion of the Neshaminy TMDL and the August 26, 2006, draft revision of the Neshaminy TMDL.
>
> On August 18, 2007, DEP published notice of the proposed withdrawal of the nutrient portion of the Neshaminy TMDL. In September 2007, DEP submitted its rationale for the withdrawal to the EPA. In February 2008, DEP received approval from the EPA. In April 2008, DEP published notice of the withdrawal. The parties negotiated and submitted a stipulation of settlement to the EHB, and, in October 2008, the EHB entered an order of dismissal. [Appellants]' efforts in connection with their appeals were a substantial factor in bringing about DEP's voluntary withdrawal of the nutrient portion of the Neshaminy TMDL.
>
> In November 2009, [Appellants] filed applications for attorney's fees and costs pursuant to section 307(b) of the Law.

*Chalfont-New Britain Joint Sewage Auth., et al. v. DEP*, 24 A.3d 470, 471–74 (Pa. Commw. Ct. 2011) ("*Chalfont-New Britain*") (citations and footnotes omitted). Since the Commonwealth Court remanded this matter to the Board, all parties have committed significant time in the form of letters, motions to amend fee petitions, briefing and argument on the question of the Board's jurisdiction, and various other filings with the Board. Therefore, we make these Additional Findings of Fact on Remand ("FOR"):

**Additional Findings of Fact on Remand**

**A. Timeline Following the Commonwealth Court's Remand of the Appeals**

1. On November 20, 2012, the non-Chalfont Appellants and the Department each filed a letter with the Board seeking a conference call following the Commonwealth Court's remand.

2. In December of 2012, the Board ordered all parties to brief the question whether the Board has subject matter jurisdiction over the appeals and specifically whether the 2003 Total Maximum Daily Load Assessment was an appealable action triggering the Board's jurisdiction.

3. All parties submitted the requested briefing on January 31, 2013, and the Board held *en banc* oral arguments on the issue of jurisdiction on April 3, 2013.

4. On April 8, 2013, the Board ordered parties to file any additional pleadings or supplemental briefs (including supplemental fee petitions) within 60 days. The order also granted the parties approximately three weeks to file responses, if any, to the supplemental briefs and pleadings.

5. All Appellants filed amended or supplemental fee petitions in response to the April 8, 2013 Order.

6. The Department filed a supplemental brief arguing that the Appellants were still ineligible to receive attorneys' fees and costs, and in the alternative, the Board still retained broad discretion to limit any award. (Dept. Supp'l Br. filed June 11, 2013.) The Department also filed a motion to dismiss and memorandum of law arguing that the TMDL was not an appealable action triggering the Board's jurisdiction. (Dept. Mot. to Dismiss filed June 11, 2013.)

7. On June 17, 2013, the Board held a conference call with all parties, and then issued an order extending the deadline for responses to supplemental briefs and fee petitions to July 31, 2013.

8. All parties filed responses on July 31, 2013.

9. On August 7, 2013, the Borough of Lansdale filed its Amended Supplemental Application for Attorneys' Fees and Costs to make a correction in the supplemental fee petition it filed on June 10, 2013.

10. On August 15, 2013, the Department moved for leave to file a reply brief to Appellants' responses to the Department's motion to dismiss.

11. After another conference call with all parties, the Board issued an order on August 16, 2013 accepting for consideration the Department's reply brief, and permitting the Hatfield Appellants and Lansdale to file a final response.

12. The Hatfield Appellants and Lansdale filed those responses on August 30, 2013.

**B. The Appellants' Pending Motions to Amend Fee Petitions and Supplemental Applications for Attorneys' Fees and Costs**

13. In addition to their pending supplemental motion to amend their application for fees (filed May 14, 2010), the Hatfield Appellants filed a Second Supplemental Motion to Amend Their Application for Attorneys' Fees and Costs ("Hatfield's Second Supplemental Motion") on June 11, 2013. Hatfield's Second Supplemental Motion encompasses fees and costs incurred from May 14, 2010 through the end of May, 2013. The request totals $142,607.28—$125,790.50 in attorneys' fees, $2,181.96 in general costs and $14,634.82 in costs associated with consultants. (Hatfield Second Supp'l Mot., June 11, 2013.)

14. The Hatfield Appellants claim to seek an award of $530,675.81 for fees and costs incurred from the initiation of their appeal through the end of May, 2013. (Hatfield Second Supp'l Mot., June 11, 2013.)

15. Upon review of the documentation and all the invoices supporting the Hatfield's supplemented application for attorneys' fees and costs, however, the Board finds that Hatfield's request totals $525,491.81.

16. In addition to its pending motion to amend its petition for attorneys' fees and cost (filed May 14, 2010), Lansdale filed a Supplemental Application for Attorneys' Fees and Costs on June 10, 2013, which was replaced by its Amended Supplemental Application for Attorneys' Fees and Costs filed on August 7, 2013 ("Lansdale's Amended Supplemental Application"). Lansdale's Amended Supplemental Application encompasses fees and costs incurred from April

1, 2010 through May 29, 2013, totaling $155,488.70. Of that amount, $147,396.00 represents attorneys' fees and $8,092.70 represents general costs. (Lansdale Am. Supp'l Appl., August 7, 2013.)

17. Lansdale claims to seek an award of $651,184.34 for fees and costs incurred from the initiation of its appeal through May 29, 2013. (Lansdale Am. Supp'l Appl., August 7, 2013.)

18. Upon review of the documentation and all the invoices supporting the Lansdale's amended and supplemented application for attorneys' fees and costs, however, the Board finds that Lansdale's request totals $651,228.98.

19. After its initial fee petition, Chalfont moved to amend its petition for attorneys' fees and costs three times—first on March 20, 2009, then on April 19, 2010, and then on May 18, 2010. In addition, Chalfont filed its Third Supplemental Motion to Amend Its Petition for Attorneys' Fees and Costs on June 3, 2013 ("Chalfont's Third Supplemental Motion"). Chalfont's Third Supplemental Motion encompasses fees and costs totaling $45,186.70 which were incurred from May 31, 2010 through May 30, 2013. Of that amount, $43,760.00 represents attorneys' fees and $1,426.70 represents general costs. (*See* Chalfont Third Supp'l Mot., Ex. A, June 3, 2013.)

20. Chalfont claims to seek an award of $142,122.03 for fees and costs incurred from the initiation of the appeal through May 30, 2013. (Chalfont Third Supp'l Mot., June 3, 2013.)

21. Upon review of the documentation and all the invoices supporting Chalfont's amended application for attorneys' fees and costs, however, the Board finds that Chalfont's request totals $140,742.77.

## DISCUSSION

On remand from the Commonwealth Court are pending attorneys' fees petitions from the Appellants. We begin with the issue of the Board's jurisdiction over these petitions.

## I. Jurisdiction

On December 5, 2012, the Board *sua sponte* ordered the parties to submit briefs "addressing the question whether the Board has subject matter jurisdiction over this appeal and specifically whether there has been a final appealable action that has aggrieved the appellants." (Order of December 5, 2012.) In response to a Board order dated April 8, 2013, that invited the parties to file "any additional pleadings and/or supplemental briefs that they wish the Board to consider in this matter," the Department filed a motion to dismiss the fees proceeding raising, among other arguments, that the Board lacked jurisdiction over the underlying appeal. Specifically, the Department argues that "(1) the Neshaminy TMDL never was an appealable action triggering the Board's jurisdiction; and (2) because the Board did not have subject matter jurisdiction in the underlying appeals, the Board is not empowered to award fees now." (Dept. Mem. in Supp. of Its Mot. to Dismiss Fees Proceeding at 2, June 11, 2013.)

The fee petition phase is an ancillary matter of the case that only comes into play after a final order of the Board. *See* 25 Pa. Code § 1021.182(c). Though the Board's rules do not define "final order," we have looked approvingly to the Rules of Appellate Procedure for the authority that such orders fully dispose of all claims by all parties. *See Crum Creek Neighbors v. DEP*, 2010 EHB 67, 69–70; Pa.R.A.P. 341(b). We note that this matter was closed and discontinued by Order of the Board *over five years ago*, after all parties stipulated to settlement.[1] As in *Crum Creek*, once a final order has been issued, any jurisdiction of the Board in this matter has terminated—other than over the pending fee petitions. Section 307(b) of the Clean Streams Law allows parties to seek attorneys' fees and costs reasonably incurred in proceedings before

[1] We have previously assumed, without deciding, that the Board would have jurisdiction where a TMDL was issued by the Department. *See, e.g., Lower Salford Twp. Auth. & Upper Gwynedd-Towamencin Mun. Auth. v. DEP*, 2009 EHB 633, 634 ("*Lower Salford*").

the Board. Because the underlying proceeding in this matter has been settled and the matter thus closed and discontinued, we find that the jurisdiction question raised is no longer germane. The only analysis left to do is to evaluate the Appellant's eligibility for an award of fees, and to award an appropriate amount of fees, if the facts and circumstances of this matter warrant any award. The Board previously issued an order stating that it would treat the Department's Motion to Dismiss as supplemental briefing. To the extent there is any question whether the Department's motion is still pending, we deny the Motion to Dismiss.

As noted in our Additional Findings of Fact on Remand ("FOR"), the Appellants have moved to amend or supplement their fee petitions on multiple occasions. (*See* FOR 13–18.) The Board grants those motions and will use the amounts reflected in the amended and supplemental filings in considering Appellants' fee petitions.

## II. The Award of Attorneys' Fees and Costs Under Section 307(b) of the Clean Streams Law

### A. The Board Has Broad Discretion in Considering Appellants' Fee Petitions.

We begin by looking to the statute. Section 307(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1–691.1001 ("Clean Streams Law" or "the Act"), states that "[t]he Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b). Our courts "have construed these statutory sections liberally to justly compensate parties who have been obliged to incur *necessary* expenses" in litigating their claims. *Lucchino v. Commonwealth*, 809 A.2d 264, 269 (Pa. 2002) (emphasis added, internal quotes omitted). To this end, the Pennsylvania Supreme Court notes that Section 307(b) "clearly vests broad discretion in the EHB." *Lucchino*, 809 A.2d at 269.

"Section 307 provides the EHB with broad discretion to award fees in appropriate proceedings. . . . [T]he plain language of Section 307 does not specify on what basis petitions for counsel fees may be granted or denied, nor does that statute mandate that any such standards be created." *Solebury Twp. v. DEP*, 928 A.2d 990, 1003 (Pa. 2007) ("*Solebury I*"); *cf. Hoy v. Angelone*, 720 A.2d 745, 751 (Pa. 1998) ("Use of the term 'may' signals the legislature's intention to rest the award of counsel fees and costs within the discretion of the trial court."). "[T]he discretion to award attorneys' fees granted to the EHB by Section 307 encompasses its ability to adopt standards by which applications for counsel fees may be decided." *Solebury I*, 928 A.2d at 1004; *see also Upper Gwynedd Towamencin Mun. Auth. v. DEP*, 9 A.3d 255, 264 (Pa. Commw. Ct. 2010) ("*Upper Gwynedd*"). The Board is cognizant that Pennsylvania has a "strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions." *Solebury I*, 928 A.2d at 1004 (citing *Lucchino*, 809 A.2d at 269). Standards for deciding attorneys' fees petitions adopted by the Board "cannot be interpreted to eliminate the availability of attorneys' fees . . . solely on the basis of a restrictive interpretation of a federal statute." *Solebury I*, 928 A.2d at 1004.[2]

The Board uses a three-step process when analyzing a claim for costs and attorneys' fees under Section 307(b) of the Clean Streams Law. Step one is a determination of whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law. *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R, slip op. at 5 (Opinion issued Feb. 22, 2013). Step two is a determination whether the applicant has satisfied the threshold criteria for an award. If we

[2] At the same time, "both the federal and Pennsylvania [water pollution control] statutes provide for awards of attorneys' fees so as to diminish the deterrent effect of litigation costs on parties seeking to challenge agency actions. *See, e.g.*, 33 U.S.C. §§ 1365(d), 1369(b)(3); 35 P.S. §§ 691.307(b), 691.601(g)." *Solebury I*, 928 A.2d at 1004. Accordingly, "it is appropriate to analogize Pennsylvania statutes to federal enactments and regulations when considering the goal to improve water quality, as both legal systems seek to achieve this objective in a coordinated fashion." *Id.* at 1003–04.

determine that a party seeking fees meets the requirements of the first two steps, we then move to the third step, a determination of a reasonable amount of an award under the facts and circumstances of the case.

**B. The Appeals Are Proceedings Pursuant to the Clean Streams Law.**

Proceedings before the Board must be "pursuant to" the Clean Streams Law for any of the Appellants to be awarded fees and costs under Section 307(b). 35 P.S. § 691.307(b). Our Supreme Court has observed that the fee award provision is "broadly phrased," implicating "provisions of the Clean Streams Law [and] accompanying regulations." *Solebury I*, 928 A.2d at 998. The Department correctly points out some of the factors that the Board uses to evaluate whether an appeal is pursuant to the Clean Streams Law, including:

1. The reason the appeal was filed; the purpose of the litigation;
2. Whether the notice of appeal raised objections under the Act;
3. Whether the Act's objectives were pursued throughout the appeal;
4. Whether regulations at the center of the controversy were promulgated pursuant to the Act; and
5. Whether the case implicates the discharge of pollutants to waters of the Commonwealth.

(*See* Dept. Supp'l Br. at 6 filed June 11, 2013 (citing *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R, slip op. at 6–7 (Opinion issued Feb. 22, 2013); *Wilson v. DEP*, 2010 EHB 911, 914–15).) The Department argues that Appellants' lawsuits were not proceedings pursuant to the Clean Streams Law because "none of the notices of appeal [cite or reference]" the Act, because the "appeals do not directly implicate the discharge of pollutants to waters of the Commonwealth," and because "the goals of the litigation were inconsistent with the Clean Streams Law." *Id.* at 6–7. We disagree.

The appeals filed by Appellants were clearly pursuant to the Act. The Department itself admits that the appeals implicate the discharge of pollutants to the waters of the Commonwealth by acknowledging in its Supplemental Brief that a TMDL "outlines a pollutant budget for a

watershed." *Id.* at 6. More importantly, Clean Streams Law regulations are at the center of the controversy. The Neshaminy TMDL was developed by the Department for total phosphorous (a nutrient) to address water quality impairments. In its Rationale for Withdrawal of the Neshaminy TMDL, the Department states:

> The Department does not have numeric criteria for nutrients. Therefore, the Department developed an interpretation of the narrative standard contained in 25 Pa. Code § 93.6(a). This narrative standard requires that point and nonpoint source contributions to Waters of the Commonwealth not contain substances in amounts sufficient to be inimical or harmful to the water's protected uses.

38 Pa. Bull. 1640 (April 5, 2008). The narrative standard, implemented through the TMDL that the Appellants appealed, was promulgated pursuant to the Clean Streams Law. *See* 25 Pa. Code § 93.6; 35 P.S. §§ 691.5(b)(1), 691.402.[3]

**C. The Appellants Have Demonstrated Their Eligibility for an Award of Attorneys' Fees Under the Catalyst Theory.**

Having determined that all Appellants brought proceedings pursuant to the Clean Streams Law, and therefore that each satisfies the first step in our process, the Board must now determine whether any of the Appellants are eligible for an award of fees. *See Hatfield Twp. Mun. Auth., et al. v. DEP*, 2010 EHB 571, 587–88. Where there has been no adjudication of the merits, as in this matter, the Board uses the catalyst theory, an approach set out in the dissenting opinion of Justice Ginsburg in *Buckshannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (Ginsburg, J. dissenting), to determine

[3] We think the Department makes too much of the Appellants not citing the Clean Streams Law in their initial notices of appeal. The Board's process for filing a Notice of Appeal is not the same as filing a complaint in a general court of law. While the Board certainly considers the nature of the objections stated by appellants, the citation or lack thereof to a specific provision of the Act or its regulations is not a talisman that definitively settles the question of whether an appeal is a proceeding pursuant to the Act.

whether a party is eligible to be awarded attorneys' fees and costs. *See Lower Salford*, 2009 EHB at 638. Under this test, to determine a party's eligibility for a fee award, the Board considers (1) whether the applicant has shown that the appeal stated a genuine claim, (2) whether the applicant has received from the Department some of the benefit sought in the appeal, and (3) whether the applicant has shown that its appeal was a *substantial cause* of the Department's action providing relief. *See id.*

In considering the three eligibility criteria, the Board will not hold mini-trials on the merits of the underlying appeal. "The important point is that the agency changes its conduct at least in part as a result of the appeal. . . . Causation is key." *Solebury Twp. v. DEP*, 2008 EHB 658, 675–76 ("*Solebury II*"). A formal judgment, adjudication, or Board-approved settlement agreement is not a prerequisite for an award of fees under Section 307. In its opinion remanding this matter to the Board, the Commonwealth Court further clarified when a party is eligible for an award of attorneys' fees and costs. *See Chalfont-New Britain*, 24 A.3d 470. The practical relief sought by the party is relevant, but speculation that such relief may be temporary is not. *Id.* at 474–75. If a party has secured the relief sought in its appeal, the Board will not consider speculative future actions which may undermine that success. *See id.* Furthermore, while none of the Appellants' appeals resulted in any actual improvements to the waterways, the Board recognizes that, at least under the circumstances presented in this case, the Appellants' appeals served to improve the scientific basis for any TMDL which is eventually promulgated for the Neshaminy Watershed. *See id.* at 475.

Regarding the first criteria under the catalyst test, the Board previously found that Appellants' appeals stated genuine claims. *Hatfield*, 2010 EHB at 591. We stated, "[t]he Appellants had legitimate objections and legitimate concerns, at least some of which ultimately

proved to have considerable merit, as demonstrated by the Department's ill-fated attempts to revise the TMDL." *Id.* We see no reason to reconsider that finding now.

The second question under the catalyst test is whether the Department provided the benefit sought in the appeal. This issue remained undecided after the Board's August 25, 2010 Opinion. *See id.* at 591–92. The Department vigorously argues that it could not have unilaterally withdrawn the TMDL. (*See, e.g.*, Dept. Supp'l Br. at 7–9, June 6, 2011). The Department attempts to establish a parallel between the *Lower Salford/Upper Gwynedd* line of cases, in that the EPA's responsibilities with respect to TMDLs prevent the issuance of the Neshaminy TMDL from being an action of the Department. Those opinions, however, concerned the Skippack TMDL, which was promulgated and subsequently withdrawn by EPA. *Lower Salford Twp. Auth. v. DEP*, 2012 EHB 160, 161 ("[T]here is no question that EPA, not the Department, promulgated and withdrew the TMDL . . . .") The Neshaminy TMDL is distinct in that the Department had the primary responsibility in developing the TMDL, and was the agency that ultimately withdrew it. *See Hatfield*, 2010 EHB 571, Findings of Fact ("FOF") 1, 72, 81; (*see also* Hr'g Tr. 222:2–4, January 12, 2010 (testimony of Thomas Henry)). Though the Department argues that it needed EPA's approval before it could withdraw the Neshaminy TMDL, nothing in the record convinces the Board that the Department could not have withdrawn the TMDL in the absence of EPA's approval. Indeed, one former EPA employee indicated that it was merely EPA's *preference* that a new TMDL be ready to replace the one being withdrawn. *Hatfield*, 2010 EHB 571, FOF 80(f); (*see also* Hr'g Tr. 241:24–25, January 12, 2010.) Even if EPA needed to approve the withdrawal of the TMDL, the fact that the Department was the agency implementing and then withdrawing the TMDL indicates to the Board that the Department provided the benefit sought, notwithstanding EPA's involvement.

Finally, the Board has already found that "the Appellants have shown that their appeals were a substantial or significant cause of the Department's action providing relief." *Hatfield*, 2010 EHB at 592. The parties stipulated to the fact "that the Department discovered the first modeling error (the k-rate issue) in the course of responding to . . . Appellants' discovery." *Id.* at 592–93. "The Department has not suggested any reason why its employees would have gone back and revisited the k-rate for a TMDL that had already been approved but for the Appellants' appeal." *Id.* at 593. Perhaps most importantly, the Department admitted in an e-mail to the EPA that it was "in the process of revising the Neshaminy TMDL *as a result of* the appeal for that TMDL." *Id.* at 592 (internal citations and quotations omitted). Because each criteria of the catalyst test has been met, Appellants have demonstrated their *eligibility* for an award of attorneys' fees under Section 307(b) of the Clean Streams Law.

### D. When a Party Is Eligible for an Award of Attorneys' Fees, the Board Uses Its Reasoned Discretion to Determine the Appropriate Amount of the Award.

As the Board stated in its earlier Opinion and Order, "[t]he fact that a party is eligible to receive reimbursement of some of its fees will rarely end our inquiry." *Hatfield*, 2010 EHB at 588. "Thus, we may decide that an award of fees is inappropriate even if a party satisfies the eligibility criteria. In other circumstances, we may decide that particular fees should be disallowed, or that an across-the-board percentage reduction is appropriate." *Id.*; *Pine Creek Watershed Ass'n v. DEP*, 2008 EHB 237; 2008 EHB 705. If it is determined that a party is eligible, the Board will use its broad discretion to award only such fees as are appropriate and reasonably incurred under the facts of the case. *See* 35 P.S. § 691.307(b); *see also Lucchino*, 809 A.2d at 285. The method used by the Board and other courts in determining the reasonableness of a fee is the lodestar: "the number of hours *reasonably* expended on the litigation multiplied by a *reasonable* hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added);

*see also Solebury II*, 2008 EHB at 682; *Medusa Aggregates Co. v. DEP*, 1995 EHB 415, 427; *Twp. of Harmar v. DER*, 1994 EHB 1107.

*1. The Party Petitioning for Fees has the Burden of Providing Evidence Supporting a Reasonable Fee, and the Party Opposing the Petition for Fees has the Burden of Contesting the Petition with Specificity.*

It is the burden of the party seeking an award of fees to *provide evidence* supporting the hours worked and the rates claimed. 25 Pa. Code § 1021.182(b)(4); *see also Solebury II*, 2008 EHB at 682 (stating that the initial burden is on the party seeking fees to present credible evidence of the fees sought using the lodestar method). The Board has a rule discussing what must be submitted in an application for fees and costs. Section 1021.182(b)(4) specifically requires that where attorneys' fees are claimed, the party seeking fees must submit "evidence concerning the hours expended in the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services." 25 Pa. Code § 1021.182(b)(4). Thus, where the evidence provided by the party seeking fees fails to comply with the Board's Rule or is otherwise inadequate, it is within the Board's discretion to reduce the award accordingly. Our Rules further provide that "[t]he Board may deny an application *sua sponte* if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested." 25 Pa. Code § 1021.182(d).

Though issued prior to our revised Rules, and thus not determinative, our opinion in *Medusa* is instructive on what sort of evidence the Board will find sufficient to support a fee petitioner's request:

> In calculating the reasonable market value of the services rendered, or the "reasonable hourly rate" for such services, we must consider, *inter alia*, the prevailing market rate for work of a similar nature in the legal community in question; the level of skill, experience, and reputation of the attorney handling the case; and the level of skill

> necessary to bring the case to trial. Thus, the petitioner must submit evidence of such in support of its petition. Such evidence may consist of data as to rates billed by other practitioners in the legal community in question for work of a similar nature. It may also consist of an affidavit from an attorney in the legal community in question who is qualified to render an expert opinion on the reasonableness of the rates and hours billed by the petitioner's counsel.

*Medusa*, 1995 EHB at 427–28.

Once the fee petitioner has submitted sufficient evidence, it is incumbent on the party opposing the fee petition, here the Department, to challenge any part of the fee petition it deems to be improper. We stress that the Department has the burden of contesting *with specificity* any hours, rates, and other fees that it believes were unreasonably incurred by the opposing party. *See Solebury II*, 2008 EHB at 682. The Department here broadly challenges the rates and hours requested by the Appellants, but provides very limited counter-evidence of what rates it believes would be reasonable. The Department does specifically challenge certain hours claimed by the Appellants. We will discuss the evidence presented and the Department's challenges to that evidence in detail later in this Opinion.

*2. The Board Will Use Its Broad Discretion to Ensure Any Fee Award Is Reasonable.*

We have previously noted that we will consider a number of factors in determining the appropriate amount of fees to be awarded including, but not limited to:

1. The degree of success;
2. The extent to which the litigation brought about the favorable result;
3. The fee applicant's contribution in bringing about the favorable result;
4. The extent to which the favorable result matches the relief sought;
5. Whether the appeal involved multiple statutes;
6. Whether litigation fees overlap fees unrelated to the litigation itself;
7. How the parties conducted themselves in the litigation, including in regards to settlement;
8. The size, complexity, importance, and profile of the case;
9. The degree of responsibility incurred and risk undertaken.

Hatfield, 2010 EHB at 589.[4] While these factors are likely to arise in the context of most fee petitions, they are by no means an exclusive list; other factors will apply as the facts of a given case warrant. *See, e.g., DER v. PBS Coals, Inc.*, 677 A.2d 868, 874-75 (Pa. Commw. Ct. 1996) (noting that a contingency fee arrangement is one of many factors that could be considered in determining an award of reasonable attorneys' fees).

Factors such as these serve to guide our inquiry as to whether the fees and costs sought by Appellants are reasonable. The statute only gives the Board discretion to order an award of fees and costs that we determine to have been "reasonably incurred." 35 P.S. § 691.307(b); *cf. McMullen v. Kutz*, 985 A.2d 769, 777 (Pa. 2009) (holding that, in contracts providing for attorneys' fees in case of breach, "the trial court may consider whether the fees claimed to have been incurred are reasonable, and to reduce the fees claimed if appropriate"). Without a reasonableness inquiry, courts—or here, the Board—"would be required to award attorney fees even when such fees are clearly excessive." *McMullen*, 985 A.2d at 776. With reasoning that applies equally to this Board, the federal Supreme Court articulates the value of vesting with the trial court this discretion of excluding hours that were not reasonably expended:

> Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.

[4] The Board has previously listed the reasonableness of the rates and hours as an additional factor, but we think that, in a complex attorneys' fees case such as this, it is better to treat it separately as part of our initial determination of the lodestar.

*Hensley*, 461 U.S. at 434 (internal quotes and citations omitted). Accordingly, after determining the lodestar, the Board will bring its reasoned discretion to bear using factors such as we have outlined above to determine what award of attorneys' fees and costs is appropriate under Section 307(b) of the Clean Streams Law.

### E. Fees Reasonably Incurred in Pursuing an Award of Fees Are Generally Recoverable.

This Board has previously awarded reasonable fees associated with pursuing a petition for attorneys' fees and costs. *See, e.g.*, *Pine Creek Valley Watershed Ass'n, Inc., v. DEP*, 2008 EHB 705 ("*Pine Creek*"); *Solebury Twp. & Buckingham Twp. v. DEP & PennDOT*, 2008 EHB 658.[5] This is in line with the Commonwealth's policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions. *See Pine Creek*, 2008 EHB at 713. The Third Circuit similarly notes that in cases involving statutorily-authorized fee awards, attorneys may be entitled to recover for time spent preparing fee petitions "to the extent that time was *reasonably necessary to obtaining a reasonable fee award.*" *Parandini v. National Tea Co.*, 585 F.2d 47, 54 (3d Cir. 1978) (emphasis added).

The evaluation of fees in the underlying appeal is a process that "is separate and apart" from determining an appropriate award of fees to recover fees. *Solebury Twp. & Buckingham Twp. v. DEP & PennDOT*, 2008 EHB 718, 725. We nevertheless note that the same reasonableness inquiry applies to amounts sought in connection with filing and litigating the fee petition: "an award for fees on fees does not extend to time spent attempting to be awarded fees

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[5] For example, in the *Pine Creek* case, we awarded fees and costs associated with efforts to recover attorneys' fees and costs for the underlying appeal. *Pine Creek*, 2008 EHB at 712-13. In that case, the appellant's two attorneys spent approximately 263.7 hours on the underlying appeal, and an additional 38.5 hours on petitioning and litigating its claim for fees and costs. The Board found that the 32.7 hours spent in connection with preparing the petition were reasonable, as were the additional 5.8 hours of work done to counter the Department's dispute of the fee petition. *Id.* at 712.

that are ultimately found unreasonable." *Id.* at 726 (citing *In re Ciaffoni*, 584 A.2d 410, 414 (Pa. Commw. Ct. 1990)). This inquiry, however, does not result in a hard and fast rule that fees to recover fees are awarded in the same proportion as the fees recovered for the underlying appeal.[6] As we would in evaluating fee petitions regarding the underlying appeals, the Board will consider factors such as success and the reasonableness of rates and hours for fees sought in litigating a fee petition.

## III. Application of the Law to the Appellants' Fee Petitions

Having determined that the Appellants are eligible to receive attorneys' fees and costs under Section 307(b), the Board must complete the third step of our analysis and determine the amount of attorneys' fees and costs to award. This requires us to review each of the fee petitions submitted by the Appellants in detail along with any specific objections to those petitions raised by the Department. There were four major phases of activity in this case and it will be helpful to our analysis to review the attorneys' fees and costs requested by the Appellants by phase. The four major phases of this case for which attorneys' fees and costs are sought are: Phase One, the litigation of the TMDL before the Board; Phase Two, the initial fee litigation before the Board; Phase Three, the appeal of the Board's opinion denying attorneys' fees to the state appellate courts; and Phase Four, the post-appeal activities before the Board.[7]

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[6] To the extent that *In re Ciaffoni* and *Sampaolo v. Cheltanham Twp. Zoning Hearing Bd.*, 629 A.2d 229 (Pa. Commw. Ct. 1993) establish the principle that proportional reductions are appropriate; they are distinguishable from this case. First, both cases involved a fee-shifting provision of the Pennsylvania Rules of Appellate Procedure concerning "frivolous" appeals or "dilatory, obdurate, or vexatious" conduct. Pa.R.A.P. 2744. We have already rejected the notion that any of the parties in this matter acted in bad faith or unreasonably with respect to delaying the appeals process. 2010 EHB 571, 590–91. Furthermore, as *Ciaffoni* recognizes, simply using proportional reductions "may not be appropriate" in other circumstances "because of the complexity of the issues involved." 548 A.2d at 415.

[7] The timeframes we used for these phases do not correspond directly with the way the Appellants filed their fee petitions, so the numbers in the petitions do not necessarily line up to the numbers used in this Opinion.

### A. Phase One — Litigation of the TMDL before the Board

For the purposes of our review of the fee petitions, Phase One covers the period of time from the research, drafting and filing of the initial Notice of Appeal by each of the Appellants through the Stipulation of Settlement and dismissal of the appeals in October 2008. During this timeframe, the case proceeded pursuant to orders issued by the Board. The order that is most relevant to this discussion was issued by the Board on July 6, 2004 (hereinafter "July 2004 Order"), approximately four and a half months after the start of the case. The July 2004 Order stayed all of the pre-hearing deadlines, required the parties to meet during the stay to exchange technical and other information pertaining to the revision of the Neshaminy TMDL, to make reasonable efforts to resolve disputed issues concerning the TMDL and to provide periodic status reports to the Board. The stay of the proceedings was lifted for a short period of time by Board order in late June of 2006 and reinstated by a subsequent Board order on August 22, 2006. The case continued to be stayed and the main docket activity consisted of periodic status reports until the Department informed the Board in early April 2008 that the Neshaminy TMDL was going to be withdrawn. The parties subsequently negotiated a settlement and the Board appeals were dismissed and the dockets marked closed and discontinued in October 2008. As evidenced by this timeline, the case was stayed during the majority of the time comprising Phase One of this litigation.

#### *1. Hatfield's Phase One Claim*

Hatfield's fee petition requests $145,818.60 in attorneys' fees, $2,974.52 in general costs and $90,449.88 in engineering fees and costs for a total of $239,243.00 incurred during Phase One. Hatfield and the Department entered into a stipulation regarding these fees and costs. The stipulation states that "[T]he costs and fees incurred in the instant appeal of the TMDL by Appellant Borough of Lansdale and the Hatfield Appellants, prior to the filing of the instant fee

petition, are $287,245.27 and $239,243.00 respectively . . . . The parties reserve the right to argue the recoverability of these costs and fees." (Joint Stip., ¶ 59.) The amount reflects a ten-percent reduction from the actual billings by the attorneys and consultants for Hatfield. The Department and Hatfield agreed to the ten-percent reduction to eliminate the need for a detailed examination of the billing invoices by the parties and the Board. We understand this reduction to also reflect the use of "billing judgment" by the Hatfield Appellants (and Lansdale). *See Hensley*, 461 U.S. at 434. We read the stipulation as covering the overall amount of fees and costs as well as the reasonableness of the hours and rates requested. Therefore, there is no need for the Board to do a lodestar calculation for the portion of the Hatfield fee petition covering the work for Phase One. However, the stipulation reserves the right of the Department to argue about the recoverability of the fees and costs and the Department has done so in its filings with the Board.

The Department's principal argument is that Hatfield (and the other Appellants) failed to properly apportion its attorneys' fees and costs for work completed in Phase One and, therefore, Hatfield has requested fees and costs for non-recoverable activities. The Department argues that these fees and costs were incurred for activities that more closely resemble routine non-litigation activities that occur when the Department and interested parties are involved in planning and implementing new policies, documents and/or regulations. In fact, the Department presented testimony at the January 2010 hearing that a number of entities that were not parties to this litigation engaged in identical activities, such as participating in meetings and filing comments, for which Hatfield is claiming fees. (Hr'g Tr. 313–317, January 12, 2010.) Hatfield argues that the fees and costs it incurred during Phase One, including those of its consultants, were directly related to its appeal of the Neshaminy TMDL and were principally the result of efforts to comply

with the Board's July 2004 Order to meet, discuss, and exchange technical information with the Department regarding the Neshaminy TMDL. While both parties discuss this issue as a question of apportionment, we think that this issue is better characterized in the language of one of the factors used by the Board as part of its consideration of a fee petition. *See* discussion *supra*, Part II.D.2. The question, as we see it, is whether the fees and costs requested by Hatfield are best characterized as litigation fees and costs or as fees and costs that are largely unrelated to the litigation itself.

While Hatfield raises some valid points, we find the Department's position on this issue more persuasive. The litigation was stayed for much of the time period that makes up Phase One. A portion of the fees and costs sought by Hatfield do not involve classic litigation activities and are at best only tangentially related to the litigation itself. Some of the fees and costs would have been incurred by Hatfield regardless of whether there was an appeal pending with the Board. A review of Hatfield's fee petition, and its specific descriptions of work completed during this phase, uncovers numerous instances of interaction with people and entities that were not parties to the litigation and the completion of tasks that are unrelated to this specific litigation. Hatfield's position, that its activities were principally part of complying with the Board's July 2004 Order, unreasonably stretches the meaning and intent of the July 2004 Order. It is important to understand the context in which the Board's July 2004 Order was issued. It was issued based, in part, on information that the Department was in the process of revising the Neshaminy TMDL and anticipated that the revision process would be completed by the Department in approximately six months. *Hatfield*, 2010 EHB 571, FOF 18. Neither the Board nor the parties could have anticipated that the process would take several more years to be resolved. Furthermore, given the more restrictive understanding of the legal basis for the award

of attorneys' fees pursuant to Section 307(b) that existed at the time of the July 2004 Order[8], the Board did not contemplate—nor intend—for the July 2004 Order to function as an umbrella under which Hatfield could take routine non-litigation activities and convert them to the basis for a significant attorneys' fees and costs claim.

At the same time, we are cognizant that while the case was stayed, Hatfield, as required, filed status reports, participated in conference calls with the Board, discussed settlement with the Department, and engaged in other traditional litigation activities. These types of activities appear to account for approximately 25% of the fees and general costs during the time of the stay. The fees and costs associated with these activities are clearly litigation fees that Hatfield may be awarded by the Board. Accordingly, we find that an award of 25% of the requested amount is a reasonable award for the attorneys' fees and general costs for the portion of the work completed during the time that the case was stayed. We also find that 100% of the fees and general costs incurred before and after the stay, including those associated with the filing of the Notice of Appeal, the initial litigation activities up to the time of the stay, and the negotiation of the stipulation of settlement and resolution of the case are litigation fees that also are properly awarded by the Board.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Hatfield for Phase One of the case:

1. Attorneys' Fees: Attorneys' fees were calculated based on an award of $45,515.00 for the attorneys' fees for the initial work on the appeal until the Board's July 2004 Order and the work involved in settling the case after DEP's announcement of the

[8] The PA Supreme Court's 2007 opinion in *Solebury I* liberalized the test for the award of attorneys' fees. At the time of the July 2004 Order, the Board would have viewed an attorney fee request under a more restrictive standard than the catalyst standard first applied by the PA Supreme Court in *Solebury I*.

withdrawal of the TMDL, plus an award of $25,075.90 representing an award of 25% of the attorneys' fees requested for work during the time period of the stay during Phase One. The total award of attorneys' fees to the Hatfield Appellants for Phase One is $70,590.90.

2. General Costs: General costs were calculated based on an award of $617 for the costs for the initial work on the appeal until the Board's July 2004 Order and the work involved in settling the case after DEP's announcement of the withdrawal of the TMDL plus an award of $589.38 representing an award of 25% of the costs requested for work during the time period of the stay during Phase One. The total award of general costs to the Hatfield Appellants for Phase One is $1,206.38.

3. Engineering Fees and Costs: Hatfield's claim for these fees involves two separate engineering firms who appear to have served two separate functions in the case. Hatfield claims $73,857.88 in fees and costs for the work performed by Carroll Engineering Corporation (CEC). CEC invoices lack significant detail regarding the work completed, instead providing limited descriptions such as "STATUS REPORTING," "LEGAL CONSULTATION," "SITE RESEARCH" and "ENVIRON IMPACT ANALY". The party claiming fees is responsible to provide sufficient detail to allow the Board to evaluate whether the fees were reasonably incurred. 25 Pa. Code § 1021.182; *Solebury II*, 2008 EHB at 682. To the extent that the Board can determine CEC's activities from the invoices, it appears the majority of the work is not directly related to the litigation at hand. It seems clear that CEC initially played a role in identifying the issues with the 2003 TMDL issued by the Department. CEC then continued to provide feedback to the Department as the issues

around the TMDL progressed over the years. CEC's activities after the July 2004 Order, however, are common engineering activities and do not include more typical litigation activities such as producing an expert report. The fact that the activities occurred during the stay does not automatically convert them into litigation activities. Therefore, we have the same issue with CEC's fees and their relationship to the litigation that we discuss above when considering Hatfield's attorneys' fees for this portion of the litigation. After reviewing the CEC invoices, the Board, in exercising its discretion to ensure a reasonable award, awards Hatfield $18,464.47 in fees and costs for the work completed by CEC, an amount equal to 25% of the requested amount.

Hatfield seeks additional fees of $16,592.00 for work completed by Conestoga-Rovers & Associates ("CRA") during Phase One. Hatfield describes the work completed by CRA as assisting Hatfield "in providing comments on the draft revised Neshaminy TMDL." (Hatfield Appl. for Att'ys' Fees & Costs ¶ 52, November 19, 2008.) A review of the invoices from CRA provides very little detail on the work completed by CRA, and no one from CRA testified at the hearing regarding those invoices. Accordingly, it is challenging for the Board to determine that the fees requested are not excessive, redundant, and unnecessary. CRA's work appears to be more typical of that which any regulated party may engage in, and therefore not typical litigation work. Consistent with the approach we took in considering the CEC invoices, the Board, in exercising its discretion to ensure a reasonable award, awards Hatfield $4,148.00 in costs for work completed by CRA, an

amount equal to 25% of the requested amount. The total award of engineering fees and costs to the Hatfield Appellants for Phase One is $22,612.47.

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| Hatfield – Phase One Amount Requested | $239,243.00 |
| Attorneys' Fees Awarded | $70,590.90 |
| General Costs Awarded | $1,206.38 |
| Engineering Fees and Costs Awarded | $22,612.47 |
| **Hatfield – Phase One Total Award** | **$94,409.75** |

*2. Lansdale's Phase One Claim*

Lansdale's fee petition requests $231,111.45 in attorneys' fees, $3,719.24 in general costs and $51,758.70 in engineering fees and costs for a total of $286,589.39 incurred during Phase One.[9] Lansdale entered into the same stipulation with the Department regarding these fees and costs as Hatfield and, therefore, we have no need to calculate a lodestar for Lansdale's requested attorneys' fees and costs.

The Department raises the same argument regarding the lack of apportionment with regard to Lansdale's fee petition that we discussed in addressing Hatfield's petition. Lansdale responds with the same general arguments in opposition to the Department's position, that is, that the work was all related to the Neshaminy TMDL litigation and is in accordance with the Board's July 2004 Order. For the same reasons discussed above in addressing Hatfield's claim, we find that Lansdale should receive fees and costs for a portion of the work in Phase One but the Board does not award fees and costs for portions of the work that we determine are not sufficiently related to the litigation. As we did with Hatfield, we will award 100% of the attorneys' fees and costs for the work on the appeal prior to the stay and in resolving the case

[9] This amount is slightly less than the amount stipulated to by Lansdale and the Department because the time period the Board uses for Phase One is different from the time period included in the stipulation.

following the Department's announcement of its intent to withdraw the TMDL. Based on a review of the fee petitions submitted by Lansdale, we find that an award of 25% of the attorneys' fees and general costs incurred during the time period that the case was stayed reasonably approximates the amount of hours spent by Lansdale's counsel in traditional litigation activities including, but not limited to, filing status reports and participating in conference calls with the Board during the stay.

In Lansdale's case, we find that there is an additional reason to award less than the total amount of fees and costs requested for Phase One. One of the factors we are to consider is how the parties conducted themselves in the litigation. The Notices of Appeal filed by Hatfield and Lansdale were filed within a day of each other and are very similar—right down to some of the specific language.[10] It is not surprising, then, that these two appeals were consolidated by the Board less than two months after the filing of the notices. Hatfield's and Lansdale's activities and approach to the litigation remained largely identical throughout the entire case. Counsel for Hatfield and Lansdale communicated extensively during the course of the case and it is clear that they worked closely together in addressing substantive issues. This close cooperation is a reflection of, first, the fact that each of these Appellants' fundamental issue was with the process of developing a watershed-wide TMDL and, more importantly, that the claimed problems were *not unique to any one entity.*[11]

We do not fault the counsel for Hatfield and Lansdale for their close cooperation. However, we further note that, while we refer repeatedly to Hatfield, in fact, counsel for Hatfield

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[10] Compare, for instance, the heading on page 11 of Hatfield's Notice of Appeal and the language in the numbered paragraphs that follow this heading with the language of the heading found on page 8 in Lansdale's Notice of Appeal and the paragraphs following that heading.

[11] The 2003 TMDL shows that the facilities represented by Lansdale and Chalfont would be affected in *exactly the same way* as the facilities represented by the Hatfield Appellants. (Lansdale Rep. Ex. A, at 251, Table D3.6, March 23, 2009.)

represents five separate entities—encompassing eight permitted facilities—that choose to share the fees and costs resulting from their joint appeal. Those eight facilities constitute approximately a third of all permittees affected by the Neshaminy TMDL. *See supra* note 11. On the other hand, counsel for Lansdale and for Chalfont-New Britain each represent only a single permitted facility. (*Compare* Hatfield Notice of Appeal ("NOA") at 2–3, February 25, 2004, *with* Lansdale NOA at 1, February 25, 2004, *with* Chalfont NOA at 2, May 12, 2004.) Lansdale, as is its right, decided to proceed in a separate appeal and retained its own counsel throughout the entire appeal even after it was consolidated with Hatfield's, and ultimately, Chalfont's appeals. Parties are certainly free to choose their own counsel. However, given that there was nothing unique about Lansdale's (or any other party's) interests in appealing the TMDL, it would be fundamentally unfair—and furthermore, unreasonable—to require the Department to fully pay the attorneys' fees and costs necessitated by Lansdale's choice to go its own way.[12] We find that under the facts and circumstances of this case, some of the work done by Lansdale's counsel for which it is seeking fees was excessive, redundant, and unnecessary. *See* discussion *supra*, Part II.D.2.; *Hensley*, 461 U.S. at 434. We do not think that all of these fees and costs were reasonably incurred as required by the statute and therefore, we will reduce our overall award of attorneys' fees and costs to Lansdale in this phase and the subsequent phases by an additional 20% to reflect that determination.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Lansdale for Phase One of the litigation:

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[12] As an example, if all five of the parties that made up the Hatfield Appellants had decided to appeal separately using their own attorneys and, as a result, we had separate fee petitions from each of the five Hatfield Appellants, including significant time for their attorneys to consult with each other, we think the Board would rightly question whether an award of all of those fees was appropriate. Given that the Hatfield Appellants' full request totals over $500,000, this would mean a fee request of around *$2.5 million.*

1. Attorneys' Fees: Attorneys' fees were calculated based on an award of $70,673.00 for the attorneys' fees for the initial work on the appeal until the Board's July 2004 Order and the work involved in settling the case after DEP's announcement of the withdrawal of the TMDL plus an award of $40,109.61 representing an award of 25% of the attorneys' fees for the remaining activities during Phase One. We then further reduced that amount ($110,782.61) by an additional 20% for excessive, redundant, and unnecessary work created by Lansdale's decision to continue to retain its own counsel. The total award of attorneys' fees to Lansdale for Phase One is $88,626.09.
2. General Costs: General costs were calculated based on an award of $838 for the costs for the initial work on the appeal until the Board's July 2004 Order and the work involved in settling the case after DEP's announcement of the withdrawal of the TMDL plus an award of $720.31 representing an award of 25% of the costs for the remaining activities during Phase One. We then further reduced these costs ($1,588.31) by an additional 20% for the costs associated with excessive, redundant, and unnecessary work. The total award of general costs to Lansdale for Phase One is $1,246.65.
3. Engineering Fees and Costs: Lansdale's claim for these fees involves three separate engineering firms. Lansdale claims $40,918 in fees and costs for the work performed by SC Engineers Inc. ("SCE"). SCE played a role in identifying the issues with the 2003 TMDL issued by the Department and continued to provide feedback to the Department as the issues around the TMDL progressed over the years. However, the majority of SCE's activities, particularly after the stay was put in place, again are typical engineering activities more akin to the routine discussions between the

Department and regulated parties. *See* discussion *supra*, Part III.A.1. Accordingly, consistent with our Hatfield analysis above, we award 25% of the amount requested for work completed by SCE. Twenty-five percent of $40,918 is $10,229.50.

Lansdale further claims fees of $3,600.00 for its share of work completed by Conestoga-Rovers & Associates ("CRA") for multiple parties including Lansdale and Hatfield. This is the same work that Hatfield described as assisting Hatfield "in providing comments on the draft revised Neshaminy TMDL." *See* discussion *supra*, Part III.A.1. As discussed above, this type of work is the type of routine activity that occurs between regulated entities and the Department and not the type of activity that is typical of litigation. Accordingly, we will treat this portion of the request for engineering fees and costs consistently with our analysis of Hatfield's request. Twenty-five percent of the requested amount for the work completed by CRA is $900.00.

Lansdale also seeks $7,240 in fees and costs for work completed by Normandeau Associates, Inc. ("Normandeau Associates"). Lansdale, by way of the affidavit submitted by Mr. Miano, states that Normandeau Associates assisted the Borough in conducting scientific and technical data analysis from June 2004 to October 2005. (Lansdale Appl. for Costs & Att'ys' Fees at 13–14, November 19, 2008.) The Normandeau Associates invoices describe the work as "Lansdale WWTP Data Analysis." No testimony regarding Normandeau Associates' activities was provided at the hearing. The limited information presented simply fails to provide the Board with adequate evidence to determine how these fees relate to this case and whether they were reasonably incurred. Accordingly, pursuant to Section

1021.182(d) of the Board's Rules, we deny Lansdale's request for costs associated with Normandeau Associates' work.

As we have previously discussed in depth, Lansdale's decision to maintain separate counsel throughout the appeal process created duplicative work. It is unreasonable, where Lansdale had no unique stake in the litigation, to shift all of those costs to the Department. In exercising its discretion to ensure a reasonable award, the Board further reduces the award by an additional 20% for excessive, redundant, and unnecessary work. Given all of the factors discussed above, the total award of engineering fees and costs to Lansdale for Phase One is $8,903.60.

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| Lansdale – Phase One Amount Requested | $286,589.39 |
| Attorneys' Fees Awarded | $88,626.09 |
| General Costs Awarded | $1,246.65 |
| Engineering Fees and Costs Awarded | $8,903.60 |
| **Lansdale – Phase One Total Award** | **$98,776.34** |

*3. Chalfont's Phase One Claim*

Chalfont clearly took a different approach to this case than Lansdale and the Hatfield Appellants. This is particularly apparent in the amount that Chalfont claims for its attorneys' fees and costs in Phase One. Chalfont claims $18,282.36 in total for this phase ($18,029 in attorneys' fees and $253.36 in costs), a number which is less than 10% of the amount claimed by either Hatfield or Lansdale. Unlike the other Appellants, Chalfont did not stipulate with the Department regarding the amount of its fees and costs in Phase One. Therefore, the Board will first review the evidence presented by Chalfont to see that it complies with the Board's requirements. *See* 25 Pa. Code § 1021.182. The party seeking fees must submit "evidence concerning the hours expended in the case, the customary commercial rate of payment for such

services in the area and the experience, reputation and ability of the individual or individuals performing the services." 25 Pa. Code § 1021.182(b)(4). Furthermore, the Board may deny an application *sua sponte* if it fails to provide all of the information required by this section in sufficient detail to enable the Board to grant the relief requested. 25 Pa. Code § 1021.182(d). We find two instances where the evidence provided by Chalfont fails to provide sufficient information to allow the Board to determine the reasonableness of requested fees.

Chalfont claims 0.4 hours of time resulting in a fee of $24.00 for an individual identified as DR Pierson and 1.2 hours resulting in a fee of $150.00 for an individual identified as MJ Hook but provides no information regarding the experience, reputation and ability of the individual or individuals performing the services as required under Section 1021.182(b)(4). The lack of this information makes it impossible for the Board to determine the reasonableness of the requested hourly rate and, therefore, we will deny these fees. Aside from these two circumstances, we find that the fee petition provides sufficient evidence for the Board to evaluate the remaining attorneys' fees and costs claimed by Chalfont for Phase One. Subtracting the unsupported hours, Chalfont's petitions request the following hours and rates for Phase One: Paul A. Logan - $200 per hour / 85.3 hours; Richard Abell - $200 per hour / 0.9 hours; Anthony Potter - $150 per hour / 1.5 hours and George Reynolds - $150 per hour / 2.6 hours.

Taking this information, we then consider any challenges to the hours or rates made by the Department and determine the lodestar for this phase. *See* discussion *supra*, Part II.D.1. The Department has not challenged the requested hourly rates for any of Chalfont's counsel in Phase One. This is not surprising since the requested hourly rate for the work performed in Phase One is $200 per hour for partners and $150 for associates. Given the level of experience, the reputations, and abilities of the attorneys involved, particularly Mr. Logan who performed the

vast majority of the work, and the customary commercial rates in the location where the work was performed as evidenced by the various rates requested by all of the attorneys in this matter, we find the requested rates to be reasonable.

We next review the hours requested by Chalfont for the legal work performed by its counsel in Phase One to determine whether the hours were reasonably incurred and not excessive, redundant, or unnecessary, and therefore unreasonable. *See* discussion *supra*, Part II.D.2. The Department's Post-Hearing Brief challenges some of the hours requested by Chalfont. (Dept. Post-Hr'g Br. ¶¶ 92–94, April 20, 2010.) Chalfont was a member of the PA Periphyton Coalition ("Coalition") that interacted with the Department and EPA on issues surrounding the general TMDL development process and the development of a new TMDL for the Neshaminy. *Hatfield*, 2010 EHB 571, FOF 63. The Department questions the fees claimed for some work involving the Coalition as well as fees associated with a FOIA request to EPA. We agree with the Department and find that the 8.2 hours of work by Mr. Logan related to these matters were not reasonably incurred in support of this litigation and therefore are not properly awarded in this case. The resulting lodestar for the attorneys' fees portion of Chalfont's Phase One claim is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Paul Logan | $200.00 | 77.1 | $15,420.00 |
| Richard Abell | $200.00 | 0.9 | $180.00 |
| Anthony Potter | $150.00 | 1.5 | $225.00 |
| George Russell | $150.00 | 2.6 | $390.00 |

Once we have determined the appropriate lodestar, we then need to determine whether there are any other factors that we should consider in our award of attorneys' fees. One of the factors that the Board considers in exercising its discretion to award fees is how the party

conducted itself during the litigation. Chalfont, like Lansdale, decided to proceed in this matter on its own, a decision that resulted in work that was excessive, redundant, and unnecessary.[13] Consistent with our approach on this issue with regard to Lansdale, we will reduce our award of attorneys' fees and costs in this phase by an additional 20% to reflect our determination that certain fees were not reasonably incurred as required by the Act. Chalfont requests $253.36 in general costs for copying, filing, and similar tasks. The Board finds no reason to adjust those costs beyond the 20% reduction just discussed.

For the reasons stated above and in the exercise of our discretion to ensure a reasonable award, we award Chalfont the following for Phase One of the litigation:

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| Chalfont – Phase One Amount Requested | $18,282.36 |
| Attorneys' Fees Awarded | $12,972.00 |
| General Costs Awarded | $202.69 |
| **Chalfont – Phase One Total Award** | **$13,174.69** |

### B. Phase Two — Initial Attorneys' Fees Litigation Before the Board

For purposes of our review of the fee petitions, Phase Two covers the attorneys' fees and costs claimed for the initial fee litigation before the Board. This phase encompasses time from approximately October 2008 to September 2010 and incorporates the research and filing of the initial fee petitions through the issuance and analysis of the Board's Opinion and Order of August 25, 2010 denying Appellants' fee petitions. There was no stipulation between any of the Appellants and the Department covering the amount of attorneys' fees and costs requested in

[13] The record indicates that Chalfont did not file any of the periodic status reports that were required by the Board's July 2004 Order staying this matter. While this likely resulted in fewer attorneys' fees and costs, we caution the parties, and their counsel, that the Board will impose sanctions, up to and including dismissal of an appeal, for failing to abide by Board orders or rules of practice and procedure. 25 Pa. Code § 1021.161.

Phase Two, or any of the subsequent phases of the litigation. With no stipulation in place, the Department challenges both the reasonableness of the rates charged by some of the Appellants' counsel and the reasonableness of some of the claimed hours. The Board therefore must determine the lodestar for each of the Appellants for this and subsequent phases by determining the reasonable hourly rates and the reasonableness of the hours claimed by Appellants. Once the proper lodestar has been determined, the Board can then consider whether there are any other factors that should be applied to further adjust the award.

The Department's primary challenge to the hourly rates sought by the Appellants is based on the Board's decision in *Medusa Aggregates v. DER*, 1995 EHB 414. The Department contends that the Appellants have not satisfied their burden of proof with respect to their requested hourly rates. While the evidence *Medusa Aggregates* contemplates is still relevant given its consistency with the Board's Rules, the failure to strictly follow its requirements cannot be used to exclude fee petition claims, as argued by the Department. Overall, the Board's rule found at 25 Pa. Code Section 1021.182 and *Medusa Aggregates* should be read as placing a meaningful burden on parties seeking attorneys' fees and costs to provide sufficient evidence of those fees to the Board. We do not create a hard and fast rule as to what exactly that evidence must be. Nevertheless, we caution future petitioners that the Board will look closely at the evidence presented by petitioners and may, under appropriate circumstances, reject evidence that consists solely of limited affidavits from the counsel requesting its own fees. Here, we think that, collectively, there is sufficient evidence available to the Board to make a reasoned determination of the lodestar for each of the Appellants.

While we do not deny entirely Appellants' fee petitions based on the Department's *Medusa* argument, we acknowledge that the Department has raised additional legitimate issues

regarding some of the specific fee requests. The Board finds a number of specific instances where Appellants have not complied with the Board's Rules because they have failed to "provide all of the information required . . . in sufficient detail to enable the Board to grant the relief requested." 25 Pa. Code § 1021.182(d). We will address these issues in our discussion of each individual Appellant below.

*1. Hatfield's Phase Two Claim*

Hatfield's fee petitions request $128,140.00 in attorneys' fees, $3,770.53 in general costs and $29,540.25 in costs for engineering fees for a total of $161,450.78 incurred during Phase Two. In order to evaluate Hatfield's request, we first need to evaluate the evidence provided by Hatfield. We find two instances regarding the requested attorneys' fees where the information provided by Hatfield lacks sufficient detail to allow us to grant the requested fees pursuant to the Board's Rules. *See* 25 Pa. Code § 1021.182(b). First, Hatfield appears to claim fees during Phase Two for two individuals identified as Karen T. Albright and Mark S. Elion but provides no information regarding their experience, reputation and ability. (*See* Hatfield Pre-Hr'g Mem. Ex. 67, December 9, 2009.) Furthermore, Hatfield fails to provide an hourly rate for either Ms. Albright or Mr. Elion. Therefore, we deny any award for the 58.1 hours of time claimed for Ms. Albright and the 7.1 hours of time claimed for Mr. Elion. Second, Hatfield's invoice dated August 21, 2009 consists of one page and does not provide any information beyond the date, a description of the work and the time involved in the work. *Id.* There is no information regarding who completed the work or the hourly rate charged for the work. The lack of this information makes it impossible for the Board to evaluate any fees that may be requested in association with that invoice and therefore we deny any fees associated with that invoice.

We find that there is sufficient evidence for the Board to evaluate the remaining Phase Two fee petition claim, which we determine is as follows: Steven A. Hann - $360 per hour /

266.6 hours; William G. Roark - $165 per hour / 98.3 hours; $175 per hour / 24.9 hours; and Matthew L. Erlanger - $95 per hour / 40.8 hours; $135 per hour / 4.9 hours.

The first part of determining the lodestar is to evaluate the hourly rates requested in the fee petition. We find that Mr. Hann's requested hourly rate of $360 per hour is in excess of the customary commercial rate for municipal clients. We do not question his experience or skill; however, the only evidence offered by Hatfield supporting the requested rate is an affidavit from Mr. Hann himself. Because there are multiple parties in this case, however, we have the benefit of similar affidavits from two other parties setting out their requested hourly rates for their counsel. The lead attorneys for all three parties, including Mr. Hann, all have similar backgrounds and experience in representing municipal parties; yet their requested hourly rates vary over a wide range. For example, Mr. Logan represented Chalfont-New Britain in this matter at an hourly rate of $200 per hour. Mr. Logan's recent representations included parties in the seminal Clean Streams Law/TMDL/attorneys' fees cases of *Solebury Township v. DEP*, EHB Docket No. 2002-323-L, and *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-L. Mr. Miano represented Lansdale in this matter at an hourly rate of $345 per hour. Based on our review of this information, as well as our general knowledge regarding hourly rates of counsel who appear before the Board, we find that the requested rate for Mr. Hann exceeds the customary commercial rate. We determine that a reasonable hourly rate for his services during Phase Two and the subsequent phases is $300 per hour, and we will use that rate to calculate the lodestar for Mr. Hann. Based on the Board's review of hourly rates requested for the various counsel in this matter, and given Mr. Roark's and Mr. Erlanger's experience, we find that the hourly rates requested for them are reasonable and will use those rates in calculating the lodestar with regard to those attorneys.

Now that we have determined the reasonable hourly rates, the next step is to review the reasonableness of the hours requested by Hatfield. In its Response to the Supplemental Fee Petitions, the Department raised several arguments regarding the reasonableness of specific hours requested by Hatfield (and the other Appellants). Some of those issues are addressed by the Board's determinations regarding excessive, redundant, and unnecessary hours. However, there are specific issues that we want to address separately. The Department raises an issue regarding redacted work descriptions and we agree that redacted descriptions make it difficult for the Board to evaluate the reasonableness of the requested hours and, furthermore, that it fails to satisfy the burden placed on parties seeking attorneys' fees to provide sufficient evidence of those fees to the Board. *See* 25 Pa. Code § 1021.182(d). In Phase Two, there is only one partially redacted entry that can be tied to a specific individual. The entry, dated May 3, 2010, shows 4.2 hours of work by William G. Roark described as: "Drafting Reply Brief; Research re REDACTED – ATTORNEY WORK PRODUCT." Hatfield did not request an opportunity to present this information in a non-redacted form.[14] Because of the redaction and the lack of any effort to apportion time, the Board cannot determine the reasonableness of the requested time nor what part of the requested time is the result of drafting the reply brief as opposed to the redacted research. Therefore, we find that Hatfield has not provided sufficient information in support of the 4.2 hours in this time entry and we will remove them from the requested hours for Mr. Roark.

There are 10.1 additional hours on the portions of the petitions covering Phase Two where some or all of the work description is redacted. However, the billing invoices do not reflect who completed the specific work making it impossible for the Board to assign those hours to particular individuals. Because we cannot deny these fees specifically, we will treat this as

[14] The parties could have requested the Board to conduct an in camera review in such circumstances, but did not do so here.

further support for reducing the overall number of hours we determine to be reasonable in our calculation of the lodestar as we discuss further below.

In addition to the specific issues raised by the Department, we also look at the overall reasonableness of the hours claimed by Hatfield. According to Hatfield's fee petition, in Phase Two, counsel for Hatfield spent 500.3 hours in pursuit of the attorneys' fees and costs from Phase One. To put this in perspective, Hatfield's counsel spent only slightly more time, 550.8 hours, in the underlying TMDL litigation. The courts have routinely cautioned parties that fee petitions and hearings are not meant to be a significant new phase of the case or a mini-trial on the merits of the underlying dispute. *Lower Salford*, 2009 EHB at 642–43; *Solebury II*, 2008 EHB at 675. The Board issued a specific warning to that effect to the parties in this case. Because there was no decision on the merits in this litigation, it is clear to us that some percentage of the hours expended by Hatfield and the other Appellants were the result of the Board's adoption of the catalyst theory, which required that Hatfield demonstrate that it played a substantial role in the Department's decision to withdraw the Neshaminy TMDL.

The Board also notes that the Department strongly and repeatedly opposed Hatfield and the other Appellants' applications for fees. It is certainly the Department's right to challenge a request for attorneys' fees but this obviously creates a need for Hatfield and the others to respond, resulting in further fees and costs. "A party cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the other party in response." *Krebs v. United Refining Company*, 893 A.2d 776, 793 n. 26 (Pa. Sup. 2006) (internal quotes and brackets omitted). It is an unfortunate fact that fee litigation of this nature becomes a type of arms race with ever-increasing fees on all sides as the parties lob discovery, briefs, response briefs, sur-

reply briefs and new motions for additional fees back and forth. This is especially unfortunate in a case like this where it is ratepayers and taxpayers footing the bill on both sides.

We do not believe that Hatfield, the other Appellants, or the Department are exclusively responsible for the substantial and ultimately disproportionate amount of fees and costs claimed in this second phase of the litigation. All share in that responsibility and the Board's award should so reflect. Taking into account all of the factors discussed above, we still find that the amount of hours expended by Hatfield in Phase Two of this case greatly exceeds the reasonable amount that should have been required to pursue its fee petition. A review of the work described on the invoices that make up Hatfield's fee petition reveal work that is excessive, redundant, and unnecessary. Therefore, we reduce the amount of hours requested by 50% to reflect what the Board concludes is the reasonable number of hours under all of the facts and circumstances of this case. The resulting lodestar for the attorneys' fees portion of Hatfield's claim is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven A. Hann | $300.00 | 133.3 | $39,990.00 |
| William G. Roark | $165.00 | 49.2 | $8,118.00 |
| William G. Roark | $175.00 | 10.4 | $1,820.00 |
| Matthew L. Erlanger | $95.00 | 20.4 | $1,938.00 |
| Matthew L. Erlanger | $135.00 | 2.5 | $337.50 |

Having determined the lodestar, we find no basis for a further reduction in the attorneys' fees award.

In addition to attorneys' fees, Hatfield seeks to recover two types of costs under the statute. First, Hatfield seeks general costs in the amount of $3,770.53 for items such as court reporting and copying. The Department does not challenge any of these general costs and we find them reasonable and will award them as requested. After removing a duplicated charge of

$4,286.00, Hatfield's claim for reimbursement for CEC's fees and costs during this phase totals $24,925.25. Based on our review of the invoices submitted by Hatfield in support of this claim, all of the requested fees for work performed by CEC during Phase Two fall into five categories described on CEC's invoices as follows: (1) Base Mapping - $686.00; (2) Environmental Impact Analysis - $17,119.00; (3) Status Reporting - $1,586.25; (4) Legal Consultation - $1,822.50 and (5) Professional Testimony - $3,711.50. The Department does not challenge the rates requested, but does question the need for technical work by an engineering firm in this phase of the case. (*See* Department Resp. to Supp'l Fee Pets.) The first two categories of work are technical in nature. This technical work occurred well after the Department had already formally stated that it was going to withdraw the TMDL and the majority of it occurred after the stipulation of settlement between the parties was signed and Hatfield's appeal was dismissed. Thus, we agree with the Department that there is no basis for the recovery of fees for technical work at this stage of the litigation, where the only issue in front of the Board was the recovery of attorneys' fees and costs. Furthermore, we find the third category of requested fees, Status Reporting, too vague to make a determination of whether it was reasonably related to the effort to recover attorneys' fees and costs or was, as we think more likely, related to the technical issues in the first two categories. Because Hatfield has failed to provide the Board with adequate information supporting this claim, we will not award any of the requested fees in this category. *See* 25 Pa. Code § 1021.182(d).

The final two categories of costs claimed by Hatfield for CEC's work, Legal Consultation and Professional Testimony, more clearly relate to the effort to recover attorneys' fees and costs and therefore warrant further consideration. The Board's use of the catalyst theory to determine whether a party is eligible for a fee award makes central the issue of whether the party was a

"substantial cause" of the Department's action providing relief. *See Lower Salford*, 2009 EHB at 638. Hatfield's position that its appeal caused the Department to withdraw the Neshaminy TMDL was disputed by the Department. This dispute resulted in the parties conducting discovery during Phase Two and appears to have resulted in limited involvement by CEC in hearing preparation and the hearing. The Board cautioned the parties about the use of the engineering firms to provide expert testimony in the hearing and a review of the transcript from the hearing shows that CEC's testimony was principally fact testimony regarding the events surrounding the TMDL dispute. Since the CEC personnel were not testifying as experts, we find that the requested hourly rate which is clearly based on their engineering expertise is not warranted for their legal consultation or for the time they testified at the hearing. We will reduce that requested amount by 50% and award the requested fees in categories 4 and 5 as follows: Legal Consultation - $911.25 and Professional Testimony - $1,855.75.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Hatfield for Phase Two of the litigation:

| | |
|---|---|
| Hatfield – Phase Two Amount Requested | $161,450.78 |
| Attorneys' Fees Awarded | $52,203.50 |
| General Costs Awarded | $3,770.53 |
| Engineering Fees and Costs Awarded | $2,767.00 |
| **Hatfield – Phase Two Total Award** | **$58,741.03** |

*2. Lansdale's Phase Two Claim*

Lansdale's fee petitions request a total of $223,262.89 in attorneys' fees and costs for Phase Two of this litigation broken down as follows: $206,174.05 in attorneys' fees, $5,871.24 in general costs and $11,217.60 in costs arising from work by an engineering firm. There was no stipulation between Lansdale and the Department regarding these fees and costs. Therefore, we

begin by evaluating the sufficiency of Lansdale's fee petition under Section 1021.182. Lansdale provided detailed invoices providing information on the date, work description, hours and person performing the work and the hourly rate of the person. The evidence regarding the customary commercial rate of payment for these types of services in the area and the experience, reputation and ability of the individual or individuals performing the services, however, consists only of affidavits from Lansdale's counsel, Mr. Miano. Reviewing those affidavits, we note one issue. Lansdale claims fees for 26.0 hours of work by Jennifer Stein, but the affidavits provide no information regarding her experience, reputation and ability as required by the Board's rules. Therefore, because we lack the necessary information in sufficient detail to grant the fees requested for Ms. Stein, we will deny that portion of the fee petition. *See* 25 Pa. Code § 1021.182(d). We find there is sufficient evidence presented to evaluate the remaining Phase Two fee petition claim. We determined that it is as follows: Steven Miano – $345 per hour / 282.1 hours; Michelle Hangley - $270 per hour / 110.1 hours; Kelly Gable - $240 per hour / 47.1 hours; $270 per hour / 191.4 hours Patricia Tallent - $185 per hour / 4.8 hours; Robert Hrouda - $185 per hour / 89.4 hours; and Barbara McBride - $185 per hour / 2.1 hours.

We now proceed to determine the first part of the lodestar by evaluating the hourly rates requested by Lansdale. For the same reasons set forth in our prior discussion when reviewing the hourly rates requested by Hatfield, we find that Mr. Miano's hourly rate is in excess of the customary commercial rate and not sufficiently supported by the limited evidence provided by Lansdale. We find that a reasonable hourly rate for his services in this phase of the litigation and the subsequent phases is $300 per hour. Michelle Hangley is described in the affidavit as a shareholder but we are provided no further information regarding her experience, reputation or ability other than the statement by Mr. Miano that her hourly rate of $270 per hour is "reasonable

given Ms. Hangley's skills and experience in the market where she practices (Philadelphia County) and given the complexity of the matter". We don't find this evidence particularly helpful. Given the market rates evidenced by the affidavits presented by the various attorneys in this case, we find that an adjustment to Ms. Hangley's hourly rate similar to the adjustment made to Mr. Miano's rate is warranted and therefore we find an hourly rate of $225 per hour is reasonable. Ms. Gable is an associate with an initial requested hourly rate of $240 per hour which rises during this phase to $270 per hour. The only information provided to the Board regarding Ms. Gable is that she practices in Philadelphia County and she has between three and four years of experience in environmental law. We are provided no information about the basis for her rate increase. Reviewing the rates requested for other associates involved in this case, we find the reasonable rate for Ms. Gable to be $200 per hour. The three remaining individuals for which Lansdale requests fees in this phase are all paralegals and are each billed at a rate of $185 per hour. Given the hourly rates for attorneys as previously discussed, we find that this rate exceeds the reasonable customary commercial hourly rate. We find that an hourly rate of $150 per hour for these individuals is reasonable for the work completed in this and subsequent phases.

We next review the reasonableness of the hours requested by Lansdale in order to assist in determining the appropriate lodestar. The Department sets forth various challenges to the hours claimed by Lansdale. We think an adjustment needs to be made to the requested hours because of the excessive number of hours expended by Lansdale in Phase Two. According to the fee petitions it submitted, Lansdale's counsel spent a total of 750 hours (627.7 hours of attorney time and 122.3 hours of paralegal time) on its pursuit of the attorneys' fees and costs incurred in the underlying litigation. The time expended by Lansdale in pursuit of its fee claim

was only marginally less than the time (980.5 hours) Lansdale claimed for the initial TMDL litigation and was significantly higher than the amount of time spent by the other Appellants. The discussion set forth above with regard to our determination that Hatfield spent excessive time on Phase Two applies with equal vehemence to Lansdale's claim in this phase. We will not repeat that discussion here; however, on its face, 750 hours is clearly excessive. We note two instances that adequately demonstrate the excessive nature of the hours claimed by Lansdale's attorneys.

In January 2009, the Department filed its response opposing Lansdale's claim for attorneys' fees. Based on the invoices presented, Lansdale expended in excess of 100 hours in preparing and filing its response to the Department's brief in opposition. Having reviewed Lansdale's response, and given the sort of work necessary to adequately respond to the Department's brief, the Board fails to understand how Lansdale's counsel could spend that number of hours. As a second example, Lansdale presented two witnesses at the Board's hearing in January 2010. The witnesses' testimony took approximately two hours and Lansdale additionally cross-examined other parties' witnesses. Reviewing the invoices presented, Lansdale's attorneys spent well in excess of 100 hours preparing for this hearing. The Board certainly appreciates counsel being well prepared for a hearing. Under the circumstances of this case, however, where the Board has repeatedly cautioned parties against turning fee petitions into significant new litigation—and where the issues under consideration at the January 2010 hearing were limited—the time Lansdale's counsel spent in hearing preparation was unwarranted.

We find that the amount of time claimed for Phase Two is excessive and therefore unreasonable. Overall, we reduce the amount of hours requested in Phase Two by Lansdale by

50% to reflect the Board's determination of the reasonable number of hours given all the facts and circumstances of this case. The resulting lodestar for the attorneys' fees portion of Lansdale's claim is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven Miano | $300.00 | 141.1 | $42,330.00 |
| Michelle Hangley | $225.00 | 55.1 | $12,397.50 |
| Kelly Gable | $200.00 | 119.3 | $23,860.00 |
| Patricia Tallent | $150.00 | 2.4 | $360.00 |
| Robert Hrouda | $150.00 | 44.7 | $6,705.00 |
| Barbara McBride | $150.00 | 1.1 | $165.00 |

Having determined the lodestar, we evaluate whether there are any other factors that support a further adjustment to the fee request. As we discussed above in reviewing Lansdale's claim in Phase One, we find that Lansdale's decision to proceed on its own created excessive and unnecessary work resulting in fees that we find are unreasonable. Consistent with the approach outlined previously, we therefore will reduce the lodestar by an additional 20% to reach what we find is a reasonable award of attorneys' fees and costs for Phase Two. We do not find any other factors that require any further adjustment by the Board.

In addition to attorneys' fees, Lansdale requests two types of costs in Phase Two: (1) general costs for items such as court reporting and copying and (2) engineering fees and costs. Lansdale requests $5,871.24 in general costs, and the Department does not assert any specific challenge to the general costs. The Board will apply the same 20% reduction to the requested general costs for the reasons discussed above. Lansdale claims $11,217.60 for fees and costs incurred by an engineering firm, SCE, based on 118 hours of work by a project engineer. The SCE invoices provided with the fee petition describe the work completed as review and comment on various legal documents including depositions and interrogatories, preparation of responses to

DEP interrogatories, detailed trial preparation, attendance at meetings and participation in the trial as a witness. Unfortunately, the invoices do not provide a breakdown of how many hours were spent on each enumerated task. We find that this does not comport with the requirement of Section 1021.182(d) to provide information in sufficient detail to allow the Board to grant the relief requested. The lack of specific detail regarding how many hours were spent on specific tasks prevents the Board from evaluating the reasonableness of the hours requested. Any award by the Board would be based purely on speculation regarding the amount of time spent on work that could possibly be an appropriate part of a fee award. The lack of necessary detail, in conjunction with our concern that there is—at best—limited justification for the services of an engineering firm during a portion of the case focused on the award of attorneys' fees and costs, leads us to deny all of Lansdale's claim for costs associated with SCE's work.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Lansdale for Phase Two of the litigation:

| | |
|---|---|
| Lansdale – Phase Two Amount Requested | $223,262.89 |
| Attorneys' Fees Awarded | $68,654.00 |
| General Costs Awarded | $4,696.99 |
| Engineering Fees and Costs Awarded | $0 |
| **Lansdale – Phase Two Total Award** | **$73,350.99** |

*3. Chalfont's Phase Two Claim*

Chalfont's fee petitions claim $79,238.26 in attorneys' fees and costs for Phase Two of this litigation. Looking at the evidence provided by Chalfont in support of its fee petition, we find one issue. Chalfont claims attorneys' fees for an individual identified in the invoices as DT Bolger but provides no information in its petition regarding Mr./Ms. Bolger's experience, reputation or ability. Therefore, with regard to the requested fees for DT Bolger, the petition

does not comply with the requirements of Section 1021.182(b)(4). Accordingly, we will not grant any of the requested fees associated with that attorney.

Aside from hours associated with DT Bolger, there is sufficient evidence, as required by Section 1021.182, to evaluate Chalfont's remaining fee petition claim for Phase Two which we determine is as follows: Paul Logan - $200 per hour / 188.3 hours and Marsha Flora - $200 / 192.5 hours. We previously found the rate of $200 reasonable for Mr. Logan. Based on our review of the evidence presented by Chalfont concerning the experience, reputation and ability of Ms. Flora, as well as all of the information about hourly rates of all of the attorneys presented in this case, we find the hourly rates requested by Chalfont for Ms. Flora reasonable and will use it to calculate the lodestar in this and all subsequent phases.

We now review the reasonableness of the hours requested by Chalfont in Phase Two. The Department raises an objection to specific hours for work involving an amicus brief in TMDL litigation unrelated to the Neshaminy TMDL. Because the requested attorneys' fees are unrelated to this case, we reduce Chalfont's claim by 6.1 hours for Mr. Logan and 12.4 hours for Ms. Flora.

We also find the total number of hours (380.8 hours) expended by Chalfont in this phase of the case to be excessive, redundant, and unnecessary. We note that Chalfont's counsel spent a total of only 91.9 hours in the underlying litigation. As we have said previously, the courts, including this Board, have consistently cautioned against turning fee litigation into a major new case. Despite that warning, Chalfont spent more than *four times* as many hours on this phase of the litigation as it did in actually challenging the merits of the Neshaminy TMDL. We acknowledge that some of the hours spent in the effort to recover attorneys' fees and costs were driven higher because of the Department's vigorous opposition to Chalfont's and the other

Appellants' fee petitions. Nevertheless, the amount of time spent by Chalfont's counsel in briefing and preparing for the hearing in this case was excessive. For example, a review of the transcript from the hearing shows that Chalfont called only one witness who testified for a very short time on direct. Chalfont's counsel only cross-examined one witness, again for a very short time. The Board finds that the amount of time requested for that work was excessive and unnecessary. We will reduce the amount of hours requested in Phase Two by Chalfont by 50% to reflect the Board's determination that a portion of the hours expended by Chalfont's counsel were clearly unreasonable given the facts and circumstances of this case. The resulting lodestar for the attorneys' fees portion of Chalfont's claim is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Paul Logan | $200.00 | 91.1 | $18,220.00 |
| Marsha Flora | $200.00 | 90.1 | $18,020.00 |

We find that a further adjustment to the lodestar amount is warranted with regard to Chalfont's fee request. The Board has previously stated it will consider the contribution of each fee applicant to the favorable result, as well as the conduct of that party during the litigation. *See* discussion *supra*, Part II.D.2. Under these factors, we find Chalfont's actions in this matter warrant a further reduction in our award for Phase Two and subsequent phases. As noted previously, Chalfont filed its appeal well after the other two parties had filed their appeals, and maintained separate counsel, despite failing to raise any unique issues that would require it to proceed on its own. Further, as we said in discussing Lansdale, in a case like this, where the issues are not unique to each party, we find it unreasonable to require the Department to pay for

that choice.[15] *See* discussion *supra*, Part III.A.2. It is evident by the amount Chalfont spent in Phase One that Chalfont did not play as active a role in the initial litigation as the other Appellants. Chalfont failed to contribute to the discovery process that unearthed the error with the 2003 TMDL, and did not participate in most of the meetings between the Department and the other Appellants. While we recognize the PA Periphyton Coalition, in which Chalfont was one of many participants, did raise issues concerning the later revisions of the TMDL—and as such, Chalfont was able to meet the initial burden of being a substantial cause of the Department's withdrawal of the TMDL—others, including Hatfield, also contributed to raising those issues. In the context of the Board exercising its discretion to award fees and costs at this stage, we determine that Chalfont's lesser role requires us to make a further adjustment to its award of attorneys' fees and costs. This is particularly true where the lodestar amount of $36,240.00 for the initial fee petition phase is still *twice* the amount spent on the actual underlying litigation. We reduce the lodestar amount determined above by 33%.

In addition to the request for attorneys' fees, Chalfont also requests an award of general costs totaling $2,798.26. The Department does not specifically contest this amount. Nevertheless, for the reasons just discussed, we find the amounts requested unnecessary and duplicative, and thus unreasonable. Therefore, the Board reduces the award of costs by 33%.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Chalfont for Phase Two of this case:

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[15] We note, however, that Chalfont was unique in incurring four times the amount of attorneys' fees and costs in the initial fee petition phase than it incurred in the underlying litigation. The Board finds this is patently excessive.

| | |
|---|---|
| Chalfont – Phase Two Amount Requested | $79,238.26 |
| Attorneys' Fees Awarded | $24,280.80 |
| General Costs Awarded | $1,874.83 |
| **Chalfont – Phase Two Total Award** | **$26,155.63** |

### C. Phase Three — Appeal of the Board Opinion and Order Denying Attorneys' Fees

Phase Three covers the fees and costs related to the Appellants' appeal of the Board's August 25, 2010 Opinion through the Commonwealth Court's reversal and the Pennsylvania Supreme Court's denial of the Department's Petition for Certification. The period of time involved is approximately from September 2010 through June 2012. As with Phase Two, there was no stipulation between the parties governing the attorneys' fees and costs and the Department challenges the Appellants' claims. We will, therefore, review the petitions and the challenges thereto and determine the lodestar for each of the Appellants. We will then determine whether the facts and circumstances of the case support any further adjustments to our award.

#### *1. Hatfield's Phase Three Claim*

Hatfield claims $91,049.50 in attorneys' fees and $5,853.17 in costs for Phase Three of this case. After reviewing the fee petitions, we find that there is sufficient evidence under the requirements of Section 1021.182 to begin evaluating the Phase Three fee petition claim which we determine is as follows: Steven A. Hann - $360 per hour / 90.0 hours; $375 per hour / 73.3 hours; William G. Roark - $175 per hour / 160.9 hours; Matthew L. Erlanger - $135 per hour / 9.1 hours; $145 per hour / 11.6 hours. We have previously determined that a reasonable hourly rate for Mr. Hann's services is $300 per hour and find that rate reasonable for the work he completed in Phase Three. We previously have found the requested rates for Mr. Roark and Mr. Erlanger reasonable and will use those rates.

Turning to the reasonableness of the hours requested, we find that there are two specific issues raised by the Department that we need to address. The first issue involves redacted work descriptions. As we stated previously, when a work description is redacted, the fee petition lacks sufficient detail to support the reasonableness of the hours requested and we will remove the redacted hours from any award. As a result of the redacted work descriptions, we deduct 1.7 hours from Mr. Roark's time and 1.9 hours from Mr. Erlanger's time (at the $145 per hour rate). The second issue involves time claimed by Mr. Hann on November 10, 2010 through November 12, 2010. The description for this work indicates that it involved a permit renewal issue and not issues in the appeal of the Board's denial of attorneys' fees to the Commonwealth Court. We therefore will reduce 2.4 hours from the hours claimed by Mr. Hann.

On a more general level, Hatfield's attorneys' fees and costs in this phase of the litigation again appear to us to be excessive because of the large number of hours (344.9 hours) expended in pursuing the appeal. As an example, while the work descriptions in the invoices make it difficult to make an exact determination, it appears that Hatfield's counsel spent in excess of 100 hours in producing its initial brief and over 50 hours on its reply brief. Having reviewed in detail the filings with the Commonwealth Court and the Pennsylvania Supreme Court, we find them to be largely repetitive of the arguments and briefing previously set out in filings in front of this Board. The amount of time being sought in conjunction with the production and filing of these pleadings is excessive and unnecessarily duplicative. We recognize that the Department put up a stiff defense to the Appellants' appeals to the Commonwealth Court, then sought reconsideration, and finally petitioned the Supreme Court for review. All of these actions by the Department had the effect, of course, of leading to additional hours and corresponding fees for Hatfield and the other Appellants. Therefore, we only reduce the remaining hours requested by

50% to reflect what the Board concludes is the reasonable number of hours under the facts and circumstances of this case. The resulting lodestar for the attorneys' fees portion of Hatfield's claim in this phase is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven A. Hann | $300.00 | 80.5 | $24,150.00 |
| William G. Roark | $175.00 | 79.6 | $13,930.00 |
| Matthew L. Erlanger | $145.00 | 4.9 | $710.50 |
| Matthew L. Erlanger | $135.00 | 4.6 | $621.00 |

We see no basis to make any further reduction to the lodestar in determining the amount of attorneys' fees to award to Hatfield in Phase Three. In addition to attorneys' fees, Hatfield seeks general costs of $5,853.17 related to its work in Phase Three. The Department does not contest these general costs and we find them reasonable and will therefore award the full amount requested.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Hatfield for Phase Three of the litigation:

| | |
|---|---|
| Hatfield – Phase Three Amount Requested | $96,902.67 |
| Attorneys' Fees Awarded | $39,411.50 |
| General Costs Awarded | $5,853.17 |
| **Hatfield – Phase Three Total Award** | **$45,264.67** |

*2. Lansdale's Phase Three Claim*

Lansdale claims $91,859.00 in attorneys' fees and $6,113.94 in costs for Phase Three of this case. Lansdale actually incurred $114,225.00 in attorneys' fees but its counsel provided a $22,428.00 courtesy discount related to the work in Phase Three. Lansdale rightly does not seek recovery of these fees that it was not billed and did not pay. *See Hensley*, 461 U.S. at 434

("Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."). Upon reviewing the evidence provided to the Board by Lansdale in support of its Phase Three fee claim, we find one issue. Lansdale claims attorneys' fees for 3.0 hours of work in May 2011 for an individual named Kenneth Warren. Other than identifying him as a shareholder, Lansdale provides no information regarding Mr. Warren's experience, reputation and ability. This fails to satisfy the requirements of Section 1021.182(b)(4) and therefore we will deny any award related to Mr. Warren.

We find that there is sufficient evidence to evaluate the remaining Phase Three fee petition claim and determine the proper lodestar. However, first we must decide how to deal with the sizeable courtesy discount because Lansdale's counsel does not provide any detail on how it arrived at the amount of the courtesy discount or, for that matter, what attorneys and/or paralegal rates or hours it was discounting. We have determined that the fairest way to calculate the impact on the lodestar is by prorating the discount against the total fees claimed by all individuals on the invoice and then proportionately adjusting their hours downward to account for the fees actually invoiced. After completing this task, we find that the attorneys' fees claim for Phase Three is as follows: Steven Miano - $345 per hour / 111.2 hours; $355 per hour / 0.3 hours; Michelle Hangley - $270 per hour / 118.0 hours; Alva Mather - $270 per hour / 30.9 hours; John Stinson - $210 per hour / 5.9 hours; and Robert Hrouda - $185 per hour / 60.8 hours.

We determined the reasonable rates for Mr. Miano, Ms. Hangley and Mr. Hrouda in our Phase Two discussion and will use those rates in calculating the lodestar in this phase for those individuals. Ms. Mather is listed as an associate with seven years of experience. Based on our review of the rates claimed by all of the attorneys in this matter, we find that $200 per hour is a reasonable rate for Ms. Mather. Mr. Stinson is listed as an associate with two years of

experience. Based on our review of the rates claimed by all of the attorneys in this matter, we find that $175 per hour is a reasonable rate for Mr. Stinson.

We next review the reasonableness of the hours requested by Lansdale. Lansdale expended a total of 408.5 hours in Phase Three. This is excessive given the issues and the work completed during this phase. We note that Lansdale's counsel apparently also recognized that this was excessive and gave its client a large courtesy discount. Even with the discount, however, we find that the total number of hours is the result of work that is excessive, redundant, and unnecessary. For instance, our review leads us to conclude that Lansdale's counsel spent an excessive number of hours on its brief to the Commonwealth Court given the commonality of the issues presented on appeal with those researched and briefed in front of the Board. For these reasons, as well as the reasoning set forth in discussing the fees for this phase sought by Hatfield—which applies equally to Lansdale—we reduce the amount of hours by 50% to reflect what the Board determines are the reasonable number of hours under all the facts and circumstances of this case. The resulting lodestar for the attorneys' fees portion of the Lansdale's claim for Phase Three is as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven Miano | $300.00 | 55.8 | $16,740.00 |
| Michelle Hangley | $225.00 | 59.0 | $13,275.00 |
| Alva Mather | $200.00 | 15.5 | $3,100.00 |
| John Stinson | $175.00 | 3.0 | $525.00 |
| Robert Hrouda | $150.00 | 30.4 | $4,560.00 |

Having determined the lodestar for the attorneys' fees claim, we will, consistent with our reasoning in the prior two phases, make a further adjustment of 20% for excessive and unnecessarily duplicative time resulting from Lansdale's decision to proceed on its own. The

Department pointed out that this led to a significant claim for time for communications between the counsel for Hatfield and Lansdale's counsel. Some of this communication is to be expected, and is even encouraged where the intent is to *efficiently* address potential issues that may arise. However, we agree with the Department that in this case the amount of consultation listed in the work descriptions is excessive and is clearly the result of Lansdale's choice to proceed in this matter by itself. Again, that is a choice it is entitled to make, but where the issues are not unique to each party, we find it unreasonable to require the Department to pay the full amount resulting from that choice.

In addition to attorneys' fees, Lansdale seeks general costs of $6,113.94 related to the work in Phase Three. As we discussed above, we find that Lansdale's decision to proceed on its own created excessive and unnecessary work resulting in fees and costs that are unreasonable. The Board will apply the same 20% reduction to the requested costs for the reasons just discussed.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Lansdale for Phase Three of the litigation:

| | |
|---|---|
| Lansdale – Phase Three Amount Requested | $97,972.94 |
| Attorneys' Fees Awarded | $30,560.00 |
| General Costs Awarded | $4,891.15 |
| **Lansdale – Phase Three Total Award** | **$35,451.15** |

*3. Chalfont's Phase Three Claim*

Chalfont's fee petition for Phase Three seeks $26,240.00 in attorneys' fees and $974.64 in general costs. We first examine the evidence presented by Chalfont in support of its Phase Three claim. We find that Chalfont has presented sufficient evidence to allow the Board to begin

evaluating the requested fees and determine a lodestar. *See* 25 Pa. Code § 1021.182. We find that the Phase Three fee petition claim is as follows: Paul A. Logan - $200 per hour / 24.1 hours and Richard T. Abell - $200 per hour and 106.8 hours.

We determined the reasonable rate for Mr. Logan and Mr. Abell in our Phase One discussion and will use that rate for their time in this phase. We next review the requested hours. Chalfont's counsel spent 130.9 hours on Phase Three. The Board reviewed in detail the billing records submitted for this phase by Chalfont, along with its filings with the Commonwealth Court and Supreme Court. Chalfont, unlike the other Appellants, appears to have recognized that the issues before the appellate courts were largely the same as those before this Board, and thus was prudent in the amount of hours for which it requests attorneys' fees. We find that the hours spent on the appeals and the resulting amounts claimed by Chalfont are reasonable particularly in light of the fact that, as in Phase Two, the Department vigorously contested the appeal to the Commonwealth Court, and ultimately sought review before the Supreme Court. We therefore determine the lodestar for the attorneys' fees claim as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Paul Logan | $200.00 | 24.1 | $4,820.00 |
| Richard Abell | $200.00 | 106.8 | $21,360.00 |

Having determined the lodestar, we next have to determine whether there are any additional factors that convince us a further adjustment is necessary in the proper exercise of our discretion. As we discussed in our Phase Two analysis of Chalfont's actions, we find that Chalfont's lesser role in the underlying litigation and its conduct during the later fee petition phases of the case make a full award inappropriate. Therefore, consistent with our determination in Phase Two, we will reduce the lodestar by 33%.

In addition to the request for attorneys' fees, Chalfont also requests an award of general costs totaling $974.64. The Department does not specifically contest this amount. Nevertheless, for the reasons just discussed, the Board reduces the award of costs by 33%.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Chalfont for Phase Three of this case:

| | |
|---|---|
| Chalfont – Phase Three Amount Requested | $27,214.64 |
| Attorneys' Fees Awarded | $17,540.60 |
| General Costs Awarded | $653.01 |
| **Chalfont – Phase Three Total Award** | **$18,193.61** |

**D. Phase Four — Post-Appeal Activity in Front of Board**

Phase Four covers the attorneys' fees and costs related to the Appellants' activities in front of the Board following the Pennsylvania Supreme Court's denial of the Department's Petition for Certification. The period of time involved is approximately from June 2012 through the dates of the last time presented by each of the parties in their fee petitions, generally the end of May 2013. As with Phases Two and Three, there was no stipulation between the parties governing the fees and costs in this phase and the Department challenges the Appellants' fee claims. We will therefore review the petitions and the challenges thereto and determine the lodestar for each of the Appellants. We will then determine whether the facts and circumstances of the case support any further adjustments.

*1. Hatfield's Phase Four Claim*

Hatfield's fee petition requests $26,662.50 in attorneys' fees and $1,232.86 in general costs for Phase Four of this case. Hatfield's fee petition for Phase Four covers time through an invoice dated June 4, 2013. We find that there is sufficient evidence as required by the Board's

Rules to evaluate the Phase Four fee petition claim which we determine is as follows: Steven A. Hann - $375 per hour / 56.4 hours; William G. Roark - $175 per hour / 31.0 hours and Steven H. Lupin - $175 per hour / 0.5 hours.

We determined the reasonable rates for Mr. Hann and Mr. Roark in our Phase Two discussion and will use those rates in calculating the lodestar in this phase for those individuals. Mr. Lupin requests an hourly rate of $175. The Department does not challenge the requested rate for Mr. Lupin. He is identified as a partner and we find the requested rate of $175 per hour reasonable.

We next turn to the reasonableness of the hours requested by Hatfield. We identified two instances where the description for time for William G. Roark is redacted. As stated previously, where work descriptions are redacted, the Board lacks sufficient detail to allow us to grant the requested fees. Therefore, we will deny an award pursuant to Section 1021.182(d) for the 5.0 hours claimed for these redacted entries. The Department raised one new argument against all of the Appellants when challenging the reasonableness of the hours requested in Phase Four. It argues that because a portion of the requested fees arose from the Board's *sua sponte* decision to consider the issue of jurisdiction, the Department should not be responsible for fees and costs related to that issue. While we are sympathetic to the Department's concern, it is clear that once the issue was raised by the Board, the Department had a choice on how to proceed. It could have conceded jurisdiction and thereby cut off most of the fees and costs of which it now complains. Instead, the Department seized on the jurisdiction question and proceeded to aggressively argue the issue. Having done so, it cannot now claim that it does not bear some responsibility for that choice and the associated fees and costs incurred by all of the parties. Therefore, we do not find the Department's argument on this point persuasive. Nevertheless, given the excessive and

duplicative nature of many of the filings during this phase and the limited number of issues which were germane, we determine that the hours requested by Hatfield include time that is excessive, redundant, and unnecessary. Therefore, we reduce the amount of hours requested by 25% to reflect what the Board concludes is a reasonable number of hours under the facts and circumstances of this case. We determine the lodestar for Hatfield's Phase Four fee claim to be as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven A. Hann | $300.00 | 42.3 | $12,690.00 |
| William G. Roark | $175.00 | 19.5 | $3,412.50 |
| Steven H. Lupin | $175.00 | 0.5 | $87.50 |

We see no basis to make any further reduction to the lodestar in determining the amount of attorneys' fees to award to Hatfield in Phase Four. In addition to attorneys' fees, Hatfield seeks general costs of $1,232.86 related to its efforts in Phase Four. The Department does not contest these general costs. We find them reasonable and therefore award the full amount requested.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Hatfield for Phase Four of the litigation:

| | |
|---|---|
| Hatfield – Phase Four Amount Requested | $27,895.36 |
| Attorneys' Fees Awarded | $16,190.00 |
| General Costs Awarded | $1,232.86 |
| **Hatfield – Phase Four Total Award** | **$17,422.86** |

*2. Lansdale's Phase Four Claim*

Lansdale claims $42,066.00 in attorneys' fees and $1,337.76 in costs for Phase Four of this case. Lansdale actually incurred $48,982.50 in attorneys' fees but its counsel provided a

$6,916.50 courtesy discount related to the work in Phase Four. Lansdale does not seek recovery of these fees that it was not billed and did not pay. Upon reviewing the evidence provided to the Board by Lansdale in support of its Phase Four fee claim, we find that there is sufficient evidence to evaluate the remaining Phase Four fee petition claim and determine the proper lodestar. *See* 25 Pa. Code § 1021.182. However, we again must deal with a sizeable courtesy discount since Lansdale's counsel does not provide any detail on how it arrived at the amount of the courtesy discount or what attorneys and/or paralegal rates or hours it was discounting. Consistent with the way we addressed this issue in Phase Three, we have calculated the impact on the lodestar by prorating the courtesy discount against the total fees claimed by all individuals on the invoice and then proportionately adjusted their hours downward to account for the fees actually invoiced. After completing this task, we find that the fee petition claim is as follows: Steven Miano - $355 per hour / 65.1 hours; Michelle Hangley - $270 per hour / 59.2 hours; Jessica O'Neill - $250 per hour / 1.6 hours; and Robert Hrouda - $185 per hour / 13.8 hours.

We determined the reasonable rates for Mr. Miano, Ms. Hangley and Mr. Hrouda in our Phase Two discussion and will use those rates in calculating the lodestar in this phase for those individuals. Ms. O'Neill is listed as an associate and is described as having four years of experience. Based on our review of the rates claimed by all of the attorneys in this matter, we find that $200 per hour is a reasonable rate for Ms. O'Neill and we will use that rate to determine the lodestar.

We next review the reasonableness of the hours requested by Lansdale. Lansdale expended a total of 164.0 hours in Phase Four. As discussed above, we reject the Department's argument that it should not be required to pay fees and costs related to the Board's *sua sponte* raising of the jurisdiction issue. However, we find that the number of hours requested by

Lansdale in this phase requires further adjustment. The amount requested by Lansdale, 164 hours, is nearly *twice* the requested hours by either Hatfield or Chalfont. Even with the courtesy discount, the amount of time expended on researching and drafting the briefs and other filings in this phase is excessive, redundant, and unnecessary, given the issues relevant during this phase and the nature of the documents filed. Therefore, we will reduce the amount of hours requested by 33% to reflect what the Board concludes is a reasonable number of hours under the facts and circumstances of this case. We determine the lodestar for Lansdale's Phase Four fee claim to be as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Steven Miano | $300.00 | 43.6 | $13,080.00 |
| Michelle Hangley | $225.00 | 39.7 | $8,932.50 |
| Jessica O'Neill | $200.00 | 1.1 | $220.00 |
| Robert Hrouda | $150.00 | 9.2 | $1,380.00 |

As we discussed in Phases One, Two, and Three, we find that Lansdale's decision to proceed on its own created excessive and unnecessary work resulting in fees and costs that are unreasonable. Accordingly, in our reasoned discretion, the Board reduces the amount of attorneys' fees and costs requested by 20%, as we did in prior phases, and based on the same reasoning. Lansdale seeks general costs of $1,337.76 related to its efforts in Phase Four, and we apply the same 20% reduction to these costs for the reasons discussed previously.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Lansdale for Phase Four of the litigation:

| | |
|---|---|
| Lansdale – Phase Four Amount Requested | $43,403.76 |
| Attorneys' Fees Awarded | $18,890.00 |
| General Costs Awarded | $1,070.21 |
| **Lansdale – Phase Four Total Award** | **$19,960.21** |

*3. Chalfont's Phase Four Claim*

Chalfont's fee petition for Phase Four seeks $15,620.00 in attorneys' fees and $387.51 in general costs. We first examine the evidence presented by Chalfont in support of its Phase Four claim. Chalfont claims fees for 6.4 hours of work completed by an attorney identified as DM Abijanac but provides no information about his experience, reputation or ability. The failure to provide this information, as we have stated previously, results in the failure to satisfy the requirements of 1021.182(b)(4) and prevents us from determining the reasonableness of the hourly rate requested for the individual. Therefore, we will deny the requested fees for Mr. Abijanac.[16] We find that Chalfont has presented sufficient evidence to allow the Board to evaluate the remaining requested fees and determine a lodestar. We find that the Phase Four fee petition claim is as follows: Paul A. Logan - $200 per hour / 17.4 hours and Richard T. Abell - $200 per hour / 56.2 hours.

We determined the reasonable rates for Mr. Logan and Mr. Abell in our prior discussions and we will use those rates in this phase. We next review the requested hours. After removing the time claimed for Mr. Abijanac, Chalfont's counsel spent 73.6 hours on this phase of the case. We reviewed in detail the billing records submitted for this phase by Chalfont along with its

[16] Even if we did not deny these fees on this basis, we would find the hours claimed for Mr. Abijanac are unreasonable and would deny them on that basis. Mr. Abijanac's hours relate exclusively to his appearance at the oral argument in Pittsburgh. We acknowledge that he was there to represent Chalfont but consistent with Chalfont's *laissez-faire* approach to this entire matter, he took no meaningful part in the oral arguments presented that day. (Hr'g Tr. 63, April 3, 2013.)

filings with the appeals courts. Given the nature of and the limited number of issues which were germane, we determine that the hours requested include time that is excessive, redundant, and unnecessary. Therefore, in the Board's discretion to ensure a reasonable award, we reduce the hours for Phase Four by 25%. We therefore determine the lodestar for the attorneys' fees claim as follows:

| Attorney | Rate | Hours | Total |
|---|---|---|---|
| Paul Logan | $200.00 | 13.1 | $2,620.00 |
| Richard Abell | $200.00 | 42.2 | $8,440.00 |

Having determined the lodestar, we next have to determine whether there are any additional factors that convince us a further adjustment is necessary in the proper exercise of our discretion. As we discussed in our Phase Two analysis and reiterated in our Phase Three discussion of Chalfont's fee claims, Chalfont's lesser role in the underlying litigation and its subsequent conduct make a full award of the lodestar inappropriate. Therefore, consistent with our determination in Phases Two and Three, we will reduce the lodestar by 33%.

In addition to the request for attorneys' fees, Chalfont also requests an award of general costs totaling $387.51. In the Board's discretion, for the reasons discussed at length in our earlier analysis in Phase Two, we will reduce Chalfont's award of costs by 33%.

For the reasons stated and in the exercise of our discretion to ensure a reasonable award, we award the following to Chalfont for Phase Four of this case:

| | |
|---|---|
| Chalfont – Phase Four Amount Requested | $16,007.51 |
| Attorneys' Fees Awarded | $7,410.20 |
| General Costs Awarded | $259.63 |
| **Chalfont – Phase Four Total Award** | **$7,669.83** |

## TABLE OF TOTALS FOR ALL PHASES FOR ALL PARTIES

| Appellant | Phs. One | Phs. Two | Phs. Three | Phs. Four | Total |
|---|---|---|---|---|---|
| Hatfield Request | $239,243.00 | $161,450.78 | $96,902.67 | $27,895.36 | $525,491.81 |
| **Hatfield Ttl Award** | **$94,409.75** | **$58,741.03** | **$45,264.67** | **$17,422.86** | **$215,838.31** |
| Lansdale Request | $286,589.39 | $223,262.89 | $97,972.94 | $43,403.76 | $651,228.98 |
| **Lansdale Ttl Award** | **$98,776.34** | **$73,350.99** | **$35,451.15** | **$19,960.21** | **$227,538.69** |
| Chalfont Request | $18,282.36 | $79,238.26 | $27,214.64 | $16,007.51 | $140,742.77 |
| **Chalfont Ttl Award** | **$13,174.69** | **$26,155.63** | **$18,193.61** | **$7,669.83** | **$65,193.76** |

## CONCLUSIONS OF LAW

1. The issue of whether the Board had jurisdiction to hear the original appeal was no longer germane following the parties' settlement of the appeal and the Board's issuance of a final order dismissing the appeals and marking the docket closed and discontinued.

2. The Appellants' various motions to amend their applications for attorneys' fees and costs are granted.

3. The Appellants' appeals and the subsequent litigation that culminated in the Parties' settlement of those appeals were proceedings pursuant to the Clean Streams Law as required by Section 307(b) of the Clean Streams Law.

4. Each of the Appellants satisfied the requirements of the catalyst test used by the Board to determine eligibility for an award of costs and attorney fees under Section 307(b) of the Clean Streams Law when there has not been a final decision by the Board on the merits.

5. Even when parties are eligible for an award of costs and attorney fees under Section 307(b), the Board must exercise its discretion to determine what amount of an award, if any, is reasonable under the specific facts and circumstances of the case.

6. The party seeking attorneys' fees is required to provide the Board with certain evidence supporting the fee request in accordance with the requirements of 25 Pa. Code Section 1021.182.

7. Where the party fails to provide adequate evidence in support of its attorneys' fees claim to enable the Board to grant the relief requested, the Board may deny all or part of the attorneys' fees claim pursuant to 25 Pa. Code Section 1021.182(d).

8. The party opposing a request for costs and attorneys' fees should challenge those costs and fees it believes are not appropriate with sufficient specificity to allow the Board to evaluate the basis of the challenge. *See* 25 Pa. Code §§ 1021.183, 1021.184.

9. In cases with significant attorneys' fees claims, the Board determines the reasonable hourly rate and the reasonable number of hours to determine the appropriate lodestar.

10. In cases with significant attorneys' fees claims, after determining the lodestar, the Board considers whether there are any other factors that require adjusting that amount to arrive at the final award, if any award is appropriate.

11. Claims for costs and attorneys' fees resulting from the litigation of the fee petitions ("fees on fees") are subject to the same analysis regarding the reasonableness of the claimed amount as the initial litigation fees.

12. The Board, in the exercise of its discretion to determine a reasonable award, awards the Hatfield Appellants the sum of $215,838.31.

13. The Board, in the exercise of its discretion to determine a reasonable award, awards the Borough of Lansdale the sum of $227,538.69.

14. The Board, in the exercise of its discretion to determine a reasonable award, awards Chalfont-New Britain Township Joint Sewage Authority the sum of $65,193.76.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.** | : | |
| | : | |
| **v.** | : | **EHB Docket No 2004-046-B** |
| | : | **(Consolidated with 2004-045-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **and 2004-112-B)** |

## ORDER

AND NOW, this 12th day of December, 2013, it is hereby **ORDERED** as follows:

1. The Appellants' pending motions to amend or supplement their applications for attorneys' fees and costs are granted.

2. The Board, in the exercise of its discretion to determine a reasonable award under Section 307(b) of the Clean Streams Law, awards the Hatfield Appellants the sum of $215,838.31 for attorneys' fees and costs incurred in this matter.

3. The Board, in the exercise of its discretion to determine a reasonable award under Section 307(b) of the Clean Streams Law, awards the Borough of Lansdale the sum of $227,538.69 for attorneys' fees and costs incurred in this matter.

4. The Board, in the exercise of its discretion to determine a reasonable award under Section 307(b) of the Clean Streams Law, awards Chalfont-New Britain Township Joint Sewage Authority the sum of $65,193.76 for attorneys' fees and costs incurred in this matter.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**STEVEN C. BECKMAN**
**Judge**

**Statement of Judge Bernard A. Labuskes, Jr.**

I respectfully dissent because I have belatedly come to believe that the Board lacks jurisdiction in this appeal, which *ipso facto* precludes us from awarding attorneys' fees and costs. To the extent I am too late to raise that concern, I fully concur with the majority's analysis and conclusions regarding the award of fees and costs.

**BERNARD A. LABUSKES, JR.**
**Judge**

**Judge Richard P. Mather, Sr. recused himself and did not participate in this matter.**

**DATED: December 12, 2013**

**c:** **DEP, Bureau of Litigation:**
Attention: Priscilla Dawson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **CRUM CREEK NEIGHBORS** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-287-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee** | : | **Issued: December 13, 2013** |

**AMENDED OPINION AND ORDER ON**
**APPLICATION FOR ATTORNEY'S FEES AND COSTS**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board awards $122,472 in attorney's fees and costs to a citizens' group that successfully challenged the Department's issuance of an NPDES permit for construction of a housing development.

**O P I N I O N**

**Background**

On November 8, 2007, the Department of Environmental Protection (the "Department") issued National Pollutant Discharge Elimination ("NPDES") Permit PAI012306006 to Pulte Homes of PA, L.P. ("Pulte") for earth disturbance activities and postconstruction stormwater associated with a residential development in Marple Township, Delaware County. Crum Creek Neighbors ("Crum Creek"), a local citizens' group, filed this appeal from the permit. On October 22, 2009, we issued an Order and Adjudication suspending the permit and remanding the matter to the Department for further fact-finding and analysis regarding the project's impact



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on an Exceptional Value ("EV") stream. *Crum Creek Neighbors v. DEP*, 2009 EHB 548. We found that Crum Creek had satisfied its burden of proving that the Department acted unlawfully and unreasonably by analyzing the site as a "nondischarge site" when in fact there would be direct discharges to an EV stream, and by failing to conduct an adequate investigation regarding the impact of the project on the water flow of the stream. The Department's inadequate investigation failed to show that the EV stream would not be degraded as a result of the project.

Pulte filed an appeal of the Board's Order with the Commonwealth Court. CCN intervened in the case. Briefs were filed and oral argument was held. The Court held that it lacked jurisdiction to hear the matter because there was no "final order" or interlocutory order subject to court review. *Sentinel Ridge Development, LLC v. DEP*, 2 A.3d 1263 (Pa. Cmwlth. 2010).

Meanwhile, Crum Creek filed an application with us seeking to recover its fees and costs from the Department under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). That section provides that the Board, "upon request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." The Department filed a response to the fee petition arguing among other things that the Board lacked jurisdiction to address the fee petition because there was no "final order" as required by the Board's Rules at 25 Pa. Code § 1021.182(c). We suspended the fee petition because: (1) the Board's Adjudication was under appeal to Commonwealth Court and (2) the Adjudication remanded certain issues to the Department for further consideration. *Crum Creek Neighbors v. DEP*, 2010 EHB 67.

On remand to the Department, a consultant working on behalf of the permittee submitted a report to the Department entitled "Hydrologic and Water Quality Analysis of Stormwater

Impacts on Holland Run." Another consultant working for the permittee submitted a "Hydrogeological Evaluation Report for the Ravens Cliff Subdivision." The Department eventually approved the project and lifted the permit suspension for the site. The Department was satisfied based on the hydrological and hydrogeological studies that the EV stream would not be degraded. No appeals were filed from the lifting of the permit suspension for the site.

On June 10, 2013, Crum Creek filed a motion to reopen the fee petition. After we granted that motion, *Crum Creek Neighbors v. DEP* (Opinion and Order July 19, 2013), the parties submitted and we approved a procedure and schedule for addressing Crum Creek's fee application. Neither party requested an evidentiary hearing.

**Discussion**

We employ a three-step process in deciding whether to award fees and costs under Section 307(b) of the Clean Streams Law. Step one is a determination of whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law. *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R, slip op. at 5 (Opinion and Order Feb. 22, 2013). Step two is a determination of whether the applicant has satisfied the threshold criteria for an award. If we determine that a party seeking fees meets the requirements of the first two steps, we then move to step three, a determination of the amount of the award.

The determination of whether an applicant has satisfied the threshold criteria for an award of fees varies depending upon whether the applicant obtained a final ruling on the merits. Where fees are being sought in a case in which we did not issue a final ruling on the merits, we use the catalyst test. *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). That test essentially requires us to assess whether there is a causative link between the EHB appeal and some benefit gained by the fee applicant. *Upper Gwynedd-Towamencin Mun. Auth. v. DEP*, 9 A.3d 255, 265

(Pa. Cmwlth. 2010). A catalyst is a stimulus that brings about or hastens an action or reaction between two or more persons, forces, or things that are separate from the catalyst itself. WEBSTER'S NEW WORLD DICTIONARY (2d Ed. 1984). Thus, the EHB appeal is said to be the catalyst that brings about an action on the part of the Department that somehow benefits the fee applicant.

The catalyst test does not apply where, as here, a party obtains a successful result on the merits in the appeal itself. In such cases the threshold test for awarding fees is much more straightforward. In such cases we will continue to use the criteria set forth in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990), in deciding whether fees can be awarded. *See Solebury Twp. v. DEP*, 928 A.2d 990, 1003 (Pa. 2007) ("[I]t is within the scope of the EHB's prerogative to channel its discretion in awarding attorneys' fees based upon considerations such as the *Kwalwasser* criteria..."). In order to be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:

1. The Board issued a final order;
2. The applicant for fees and expenses must be the prevailing party;
3. The applicant must have achieved some degree of success on the merits; and
4. The applicant must have made a substantial contribution.

*Kwalwasser*, 1988 EHB at 1310.

An award of fees under *Kwalwasser* (or the catalyst test for that matter) is not automatic. *Angela Cres Trust, supra*, slip op. at 5-6. Section 307(b) of the Clean Streams Law does not create an entitlement. Instead, it provides the Board with a "broad grant of discretion," such that a "narrow application" of the *Kwalwasser* criteria will not always be appropriate. *Solebury Twp.*, 928 A.2d at 1004. In considering whether to award fees and deciding upon the amount of the fees, in addition to the threshold criteria we may also consider such things as whether the appeal involved multiple statutes, the extent to which the fees claimed relate to the litigation

itself, the size, complexity, importance, profile, and behavior of the parties in the case, and of course, the reasonableness of the hours billed and the rates charged. 35 P.S. § 691.307(b); *Angela Cres Trust, supra*, slip op. at 5; *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 72-73.

There is no dispute that Crum Creek's fees were incurred in a proceeding pursuant to the Clean Streams Law. Applying the *Kwalwasser* threshold criteria, the Board has issued a final order and Crum Creek unquestionably prevailed in this appeal. We ruled in its favor on the merits in an Adjudication. Based on its efforts, the challenged permit was suspended and remanded to the Department for performance of an antidegradation analysis that should have been done in the first place. Protection of the special protection stream was a major component of Crum Creek's case. Crum Creek obviously made more than a substantial contribution to achieving the favorable result; it achieved the result on its own. This was an important and complex case well litigated by a skilled and seasoned advocate who did not know if he would ever get paid for his efforts, and it established a precedent that will hopefully inspire the Department to take greater care in similar situations in the future. Crum Creek advanced the goals of the Clean Streams Law, and it has been required to wait an inordinate amount of time for its fee application to be resolved.

All of the claims raised by Crum Creek shared a common core of facts and were based on interrelated legal theories, so we see no need to apportion fees among the various claims. *See Pine Creek Valley Watershed Ass'n v. DEP*, 2008 EHB 705, 708; *Harmar Twp. v. DER*, 1994 EHB 1107, 1136-38. An award of fees is appropriate even where, as here, the attorney and expert witnesses work on a contingency-fee basis. *Raymond Proffitt Foundation v. DEP*, 1999 EHB 124, 143-44. Crum Creek is entitled to reimbursement for its fees and costs incurred in Pulte's appeal of our Adjudication to Commonwealth Court, which was quashed, as well as its

considerable but justified effort to recover its fees. The fact that few if any changes to the actual project were made after years of study on remand does not mean that Crum Creek failed to prevail in this appeal. *Chalfont-New Britain Joint Sewage Auth. v. DEP*, 24 A.3d 470, 474-75 (Pa. Cmwlth. 2011) (actions following final order not relevant); *Upper Gwynedd-Towamencin Mun. Auth.*, 9 A.3d at 269 (same). The important victory sought and achieved was an appropriate and scientifically sound application of the antidegradation requirements. This is no mere procedural technicality. The fact that we suspended rather than revoked the permit during the pendency of the Department's review is not a material distinction that justifies a reduction of the fee award under the circumstances of this particular case.

Having determined that Crum Creek satisfies the eligibility requirements under the first two steps of our process and that an award of fees is appropriate, we now exercise our discretion and determine the amount of the fee award. The Board's Rules at 25 Pa. Code § 1021.182(b) govern what evidence a party must provide to the Board in support of its fee request and state that:

> (b) A request for costs and fees shall be by verified application, setting forth sufficient grounds to justify the award, including the following:
>
> (1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.
>
> (2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.
>
> (3) An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of such costs and fees.
>
> (4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area and the experience, reputation and ability of the individual or individuals performing the services.

(5) The name of the party from whom costs and fees are sought.

The Board may deny an application sua sponte if an applicant fails to provide all of the information required by our Rules in sufficient detail to enable the Board to grant the relief requested. 25 Pa. Code § 1021.182(d).

Although the Department has challenged the fees charged by Attorney John Wilmer, Esq. on several grounds, it has not complained that either Wilmer's rate of $150 per hour or the number of hours he charged per task were excessive. It has not cited Crum Creek for failing to comply with 25 Pa. Code § 1021.182(b)(3) or (4). We have carefully reviewed the fees and costs charged by Wilmer for his own time and find that they were entirely reasonable. If anything, Crum Creek has been undercharged. Wilmer's rate of $150 per hour is well below market, and Wilmer did not charge (or charged a reduced rate) for work that reasonably could have been billed at his normal rate. The amount of time billed compared to the tasks performed shows that he did quality work very efficiently. The charges are adequately explained and we see no reason to make any adjustment to the hours claimed by Wilmer. Therefore we determine that the lodestar (representing the reasonable hourly rate multiplied by the reasonable number of hours) for Attorney Wilmer is $46,455.[1]

In addition to the requested attorney fees, Crum Creek also seeks costs for its experts. Crum Creek's expert engineer, Michele Adams, P.E., has 23 years of experience in stormwater management, and we accepted and relied upon her expert opinion in our Adjudication. The Department does not challenge her hourly rate of $150 an hour or the $70 an hour rate that she charged for nine hours of work performed by her subordinates and we agree that the rates are

[1] This Opinion and Order is amended to correct a typographical error in the original Opinion and Order. Attorney John Wilmer's fees were stated as $45,455 when they were actually $46,455. This then changes the total fee award from $121,472 to $122,472. No substantive changes were made to the Opinion and Order.

reasonable. The Department does not complain that Adams's work on any particular task was excessive, but it does complain that Adams's "Time by Job Detail" and her invoices are "incongruous" and "confusing." The Department has not explained why it is necessary to correlate the job detail with the invoices. The job detail is quite clear and easy to follow and we have no reason to believe that the job detail is not a fair and accurate representation of the fees incurred. We do not find them to be confusing and conclude that the hours expended were fair and reasonable.

Crum Creek's other expert witness, James Schmid, Ph.D., has been a practicing ecologist since 1973. He is well qualified and we accepted and relied upon his opinions in our Adjudication. The Department does not challenge his billing rate of $200 per hour. Dr. Schmid has reduced his bill by 306.5 hours, which leaves 258.5 hours he spent working on this case for a total of $51,700. Despite the reduction, this amount still strikes us as excessive. Among other things, Dr. Schmid's reports contain voluminous polemic on issues that went far beyond the issues fairly implicated in the appeal. Although Dr. Schmid reduced the hours claimed to account for this fact, the reduction is not sufficient. In addition, Dr. Schmid's charges for report preparation, data analysis, project coordination, testimony preparation, and attendance at trial strike us as somewhat duplicative. Although we have no doubt regarding Dr. Schmid's dedication or that he did the work, his bills go beyond what the Commonwealth should be required to pay. An award of two-thirds of Dr. Schmid's claimed fees is reasonable and appropriate.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CRUM CREEK NEIGHBORS** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-287-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee** | : | |

## ORDER

AND NOW, this 12th day of December, 2013, we hereby order the Department to pay Crum Creek Neighbors, care of Attorney Wilmer, $122,472 based upon the following attorney fees and costs reasonably incurred in the successful prosecution of its appeal:

| | |
|---|---|
| John Wilmer, Esquire fees | $46,455 |
| Michele Adams, P.E. fees | $38,355 |
| James Schmid, Ph.D. fees | $34,639 |
| Costs | $ 3,023 |

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 13, 2013**

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

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Union Meeting Corporate Center
P.O. Box 3037
Blue Bell, PA 19422-0765

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **TAMMY MANNING AND MATTHEW MANNING** | : | |
| **v.** | : | **EHB Docket No. 2013-067-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Intervenor** | : | **Issued: December 16, 2013** |

**OPINION AND ORDER ON**
**MOTION FOR LEAVE TO WITHDRAW APPEARANCE**

**By: Richard P. Mather, Sr., Judge**

**Synopsis**

The Board grants a motion by appellant's counsel requesting leave to withdraw its appearance where appellants directly communicated to an opposing party that they had discharged their counsel and where the withdrawal of appearance will not prejudice the litigants, delay resolution of the case or impede the efficient administration of justice.

## OPINION

The Appellants, Tammy Manning and Matthew Manning ("the Mannings"), filed an appeal before the Environmental Hearing Board (the "Board") objecting to a determination made by the Department of Environmental Protection (the "Department") that gas well drilling has not impacted the Manning's water supply. From at least May 28, 2013, when the Mannings filed their Notice of Appeal, until today, filings made on behalf of the Mannings indicate that they have been represented by William J. Dubanevich of Parker Waichman LLP and Christopher P. Caputo of Caputo & Mariotti.



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http://ehb.courtapps.com

Before the Board, however, is a Motion for Leave to Withdraw Appearance (the "Motion") filed by Mr. Dubanevich and Mr. Caputo on behalf of Parker Waichman LLP pursuant to 25 Pa. Code § 1021.23. The Motion requests leave to withdraw the appearance of Parker Waichman LLP and additionally requests a 30-day extension of all existing deadlines in this matter.

The Department and WPX Energy Appalachia, LLC (the "Intervenor") filed separate responses to the Motion, neither of which opposes the request to withdraw the appearance of Parker Waichman LLP. The Department's and the Intervenor's responses, nevertheless, call into question whether the Motion seeks leave to withdraw the appearance of only Mr. Dubanevich or of both Mr. Dubanevich and Mr. Caputo. Mr. Dubanevich and Mr. Caputo filed a reply on behalf of Parker Waichman LLP clarifying that Mr. Caputo is acting only as local counsel for Parker Waichman LLP in this appeal, and that the Motion seeks leave to withdraw the appearance of both attorneys.

The Motion asserts that the Mannings sent an email to the Intervenor's counsel on November 3, 2013, stating, in part:

> To let you know, Mr. William Dubanevich, Esq. is no longer our attorney. Any agreement made with him is null and void. You will be contacted shortly by our new attorney, who will let you know how we will proceed further from this point on.

*See* Motion, Exhibit No. 1.[1] The Intervenor's counsel forwarded this email on November 4, 2013 to Mr. Dubanevich who promptly requested that the Mannings formally discharge Parker Waichman LLP. *See* Motion, Exhibit Nos. 2, 3. The Mannings have not done so, nor has any attorney other than Mr. Dubanevich and Mr. Caputo entered an appearance before the Board on

[1] This statement is also implicated to Mr. Caputo as local counsel. The Manning's announcement that they will have a "new attorney" is further evidence of their intent to discharge Mr. Caputo.

behalf of the Mannings. Parker Waichman LLP has also been unable to reach the Mannings by phone or email since November 1, 2013.[2]

In ruling on a motion for leave to withdraw appearance, the Board considers the following factors: "the reasons why withdrawal is requested; any prejudice withdrawal may cause to the litigants; delay in resolution of the case which would result from withdrawal; and the effect of withdrawal on the efficient administration of justice." 25 Pa. Code § 1021.23(b).

First, Parker Waichman LLP seeks to withdraw its appearance because the Mannings informed the Intervenor's counsel that Mr. Dubanevich is no longer their attorney and because the Mannings have ceased communicating with Parker Waichman LLP. Second, based on the Mannings' expressed desire to discharge Parker Waichman LLP and their desire to hire a new attorney, the Board does not believe that the withdrawal of Mr. Dubanevich and Mr. Caputo would cause any prejudice to the litigants. Third, withdrawal will likely expedite, rather than delay, resolution of this appeal. The Mannings are no longer communicating with Parker Waichman LLP, and the Mannings informed the Intervenor that it must wait until they hire a "new attorney" to hear how they will proceed. Granting the Motion could serve to revive communication amongst the parties by making way for the Manning's new attorney. Lastly, the withdrawal of Parker Waichman LLP will not impede the efficient administration of justice. Although appellants who proceed *pro se*, or without an attorney, often find difficulty in

[2] Additionally, Parker Waichman LLP claims that the Mannings have undermined its ability to represent them by disclosing confidential information to William Huston, a blogger who subsequently published two posts commenting on Mr. Dubanevich's representation of the Mannings. The first post states that the Mr. Dubanevich told the Mannings, "better just keep quiet about it," the "it" referring to potential water contamination. *See* Motion, Exhibit No. 4. When asked how this advice was working for her, Ms. Manning purportedly replied, "Not so well, I guess." *Id.* The Board does not see how these uncertified and unsubstantiated statements, even if taken as true, are sufficient to show that the Mannings disclosed confidential information to the public to the extent that continued representation by Parker Waichman LLP is compromised. Furthermore, the second blog post cited in the Motion lacks any support whatsoever that the Mannings disclosed confidential information to the public.

complying with the many legal requirements imposed upon parties litigating before the Board, the facts provided in the Motion indicate that the relationship between the Mannings and Parker Waichman LLP has deteriorated to the point where requiring a continued relationship would likely have a deleterious effect on the efficient administration of justice.

Parker Waichman LLP also requests a 30-day extension of all existing deadlines in this matter. The Department does not oppose this request. The Intervenor does oppose this request, but it does so based on its interpretation that the Motion does not request leave to withdraw the appearance of local counsel, Mr. Caputo. But as explained above, Mr. Dubanevich and local counsel, Mr. Caputo, are acting as representatives of Parker Waichman LLP in the context of this appeal, and, therefore, the Motion requests leave to withdraw the appearances of both attorneys. To provide the Mannings with adequate time to retain new counsel, the Board will reopen the discovery period, which closed on December 10, 2013, and extend the deadline for filing dispositive motions. All discovery in this matter shall be completed by January 15, 2014, and the deadline for filing dispositive motions is extended until February 14, 2014.

Although Parker Waichman LLP did not, in the Motion, "provide the Board with a single contact person for future service in all proceedings," as required by 25 Pa. Code § 1021.23(c), it did provide an address and telephone number for the Mannings in the Notice of Appeal. As such, future service will be provided directly to the Mannings at 20784 SR 29, Montrose, PA 18801, until such time as new counsel enters an appearance before the Board on behalf of the Mannings.

Accordingly, the Board issues the following order.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **TAMMY MANNING AND MATTHEW MANNING** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-067-M** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WPX ENERGY APPALACHIA, LLC, Intervenor** | : | |

## ORDER

AND NOW, this 16th day of December, 2013, it is hereby ordered as follows:

1. The Motion for Leave to Withdraw Appearance is **granted**.

2. The period for discovery is reopened, and all discovery in this matter shall be completed by **January 15, 2014**.

3. The deadline for filing dispositive motions is extended until **February 14, 2014**.

**ENVIRONMENTAL HEARING BOARD**

Richard P. Mather Sr.

**RICHARD P. MATHER, SR.**
**Judge**

**DATED: December 16, 2013**

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

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| **RAUSCH CREEK LAND, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-137-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee** | : | **Issued: December 23, 2013** |

**OPINION AND ORDER**
**ON PETITION FOR CERTIFICATION OF APPEAL**

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis**

The Board denies an appellant's petition for certification of an interlocutory appeal because the petition was not timely, and in any event, an appeal would not present a controlling question of law.

**O P I N I O N**

This matter involves Rausch Creek Land, LP's ("Rausch Creek's") appeal of the Department of Environmental Protection's (the "Department's") renewal of Porter Associates, Inc.'s ("Porter's") surface mining permit. After a hearing, we issued an Adjudication on October 11, 2013 remanding the permit back to the Department for further consideration. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2011-137-L (Adjudication, Oct. 11, 2013). One of the issues in the case was whether the final reclamation grades approved by the Department in the permit approximated the original contour of the land before it was mined. The mining regulations generally require reclaimed mine sites to look like the land's approximate original contour



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(AOC). 25 Pa. Code §§ 87.1 and 88.1. Resolving the issue required us to weigh the conflicting opinions of the parties' expert witnesses. We concluded that the reclamation grades in the permit did indeed reflect AOC, but that the site in its current condition impermissibly deviates from those grades and it is unclear how those grades can be achieved. Therefore, we remanded the permit to the Department to, among other things, figure out how the site could be finished consistent with the AOC requirement.

Neither Porter (the mine operator) nor Rausch Creek (the landowner) was particularly happy with our remand order, and on November 12, 2013, both filed separate petitions for review with the Commonwealth Court. Of relevance here, Rausch Creek's sole issue of concern is that the Board accepted the expert testimony presented by Porter and the Department that the final grades approved in Porter's 2011 permit renewal reflect the AOC at the site. In doing so we rejected the contrary testimony presented by Rausch Creek's expert that contours set forth in an earlier version of Porter's permit are the *only* acceptable contours.

On November 18, 2013, the Commonwealth Court *sua sponte* quashed Porter's appeal, stating that the Board's Adjudication was interlocutory and not immediately appealable pursuant to Pa.R.A.P. 311(f) (regarding interlocutory appeals of an administrative remand). On November 26, 2013, the Commonwealth Court also *sua sponte* quashed Rausch Creek's appeal, applying the same reasoning.

On December 5, 2013, Rausch Creek filed with the Board a petition requesting that we issue an order certifying for interlocutory appeal the issue of whether we should have accepted the Department's and Porter's expert opinions regarding the proper final reclamation grades at the mine site. Because Rausch Creek's request is not timely, and because our evaluation of the

expert testimony regarding the final reclamation grades does not involve a controlling question of law, we deny Rauch Creek's petition for certification.

**Discussion**

Generally, appeals to the Commonwealth Court may be taken from a final order of the Board as of right. A final order is defined in the Pennsylvania Rules of Appellate Procedure, Rule 341(b), as any order that (1) disposes of all claims and parties, (2) is statutorily defined as a final order, or (3) is entered as a final order pursuant to Pa.R.A.P. 341(c), which arises when a lower court or government unit (here, the Board) enters a final order as to one or more claims or parties, but not all, and makes an "express determination" that an appeal would "facilitate the resolution of the entire case." Pa.R.A.P. 341(c). Our October 11, 2013 Adjudication remanded Porter's permit back to the Department for further consideration. Specifically, we stated that the revision to the permit

> will necessarily require some modification of the final grades approved in the permit. In addition, the Department needs to address the fact that Porter as of now has no clear right to use the Primrose Pit, that a significant amount of ash may need to be relocated as part of an acceptable reclamation plan, that potentially contaminated water may need to be discharged from the Primrose Pit, and that these changes may dictate a different bond amount.

*Rausch Creek Land, LP*, slip op. at 26. As the Court recognized when it quashed both Rausch Creek and Porter's petitions for review, our Adjudication remanding the permit to the Department for further consideration clearly was not a final order for purposes of an appeal to Commonwealth Court.

Interlocutory orders are an intermediate step in the ultimate resolution of a cause of action. Since they are not final, they are not immediately appealable, except in remarkable circumstances. As we have recognized before, "appeals of Interlocutory Orders are not favored by the law." *Clean Air Council v. DEP*, EHB Docket No. 2011-072-R, slip op. at 4 (Opinion and

Order, Aug. 7, 2013); *BethEnergy Mines, Inc. v. DEP*, 1987 EHB 941, 943. Certain interlocutory orders can be appealed as of right and others may be appealed only by permission of the appellate court. Pa.R.A.P. 311 addresses the circumstances that give rise to an interlocutory appeal as of right. Specifically, Pa.R.A.P. 311(f) concerns orders of administrative remand and is pertinent to the situation before us. The rule states that an appeal may be taken as of right from a remand to an administrative agency when (1) the execution of the adjudication does not require the exercise of discretion, or (2) the matter would ultimately evade appellate review if immediate appeal was not allowed. Pa.R.A.P. 311(f).

As Commonwealth Court was quick to notice, neither of those situations applies here. First, the remand of the surface mining permit back to the Department requires the exercise of discretion. Although we identified issues that the Department needs to reconsider before reissuing the permit, we did not definitively decide those issues, particularly with respect to the final reclamation grades and AOC. It is for the Department to decide how to conform the site to AOC based generally on the grades set forth in the permit after assessing the concerns raised in our Adjudication. Second, there is no indication that the matter would evade appellate review if an immediate appeal was not allowed. The permit *must* be reissued because the site still needs to be reclaimed. If Rausch Creek is still not satisfied with Porter's permit after the Department reconsiders it, Rausch Creek has the opportunity to appeal that permit as revised. Consequently, our Adjudication is not a situation affording interlocutory appeal as of right, but only upon permission.

Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312. Pa.R.A.P. 1311(a) states that an interlocutory

appeal may be taken by permission pursuant to 42 Pa.C.S. § 702(b). That statutory provision provides:

> When a court or other government unit, in making an Interlocutory Order in a matter in which its Final Order would be within the jurisdiction of an appellate court, shall be of the opinion that such Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the matter, it shall so state in such Order. The appellate court may thereupon, in its discretion, permit an Appeal to be taken from such Interlocutory Order.

42 Pa.C.S. § 702(b).

However, as Pa.R.A.P. 1311(b) notes, the interlocutory order must first contain the pertinent language of 42 Pa.C.S. § 702(b) before permission can be sought from the appellate court to appeal the interlocutory order. If the order does not contain the requisite language, a party must submit to the lower court or government unit an application to amend the order to include the language of 42 Pa.C.S. § 702(b). The party must do this within 30 days of the entry of the order. Permission to appeal may be sought from the appellate court within 30 days of the order's amendment. If the lower court or government unit does not act on the application within 30 days of its filing, it will be deemed denied.[1]

In accordance with 42 Pa.C.S. § 702(b), when determining whether we think that an immediate interlocutory appeal is appropriate, we assess three criteria: "(1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter." *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. Our decision of whether to amend the order is

[1] Applications to amend an order are often referred to by parties as a request or petition to certify an interlocutory order for appeal. Regardless of name, they are assessed under the same standard under Pa.R.A.P. 1311(b) and 42 Pa.C.S. § 702(b). Rausch Creek titled its filing "Petition for Certification of Appeal."

discretionary. *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 550; *Mercy Hosp. of Pittsburgh v. Pa. Human Relations Comm'n*, 451 A.2d 1357 (Pa. 1982).

**Timeliness**

We must first observe that Rausch Creek's petition must be denied as untimely. As noted above, Pa.R.A.P. 1311(b) requires that a request to amend an interlocutory order to include the language of 42 Pa.C.S. § 702(b) be filed within 30 days of the entry of the order. *See People United to Save Homes v. DEP*, 2000 EHB 23, 25-26. Our Adjudication was issued on October 11, 2013. The Adjudication did not contain the language of 42 Pa.C.S. § 702(b). To be timely, Rausch Creek needed to file its petition on or before November 12, 2013.[2] Rausch Creek failed to do so. Rausch Creek's December 5, 2013 petition for certification of appeal comes 55 days after the entry of our Adjudication, well beyond the 30-day window.

Rausch Creek's decision to file a petition for review of what it incorrectly interpreted to be a final order for purposes of Commonwealth Court appeal did not excuse compliance with this 30-day requirement. In *Commonwealth v. McMurren*, 945 A.2d 194 (Pa. Super. 2008), the Court considered whether a party could seek *nunc pro tunc* amendment of an interlocutory order to then obtain permission for interlocutory review. In that case, much like here, the appellant filed a petition for review of an interlocutory order directly with the Superior Court without first seeking an amendment of the order with the trial court to include the language of 42 Pa.C.S. § 702(b). *McMurren*, 945 A.2d 194, 196. The Superior Court promptly denied the petition for review because the order lacked the requisite language. The appellant then returned to the trial court, approximately 46 days after the original order, which considered it as a *nunc pro tunc* request to amend the order. The trial court entered a new order, reiterating the decision of the original order, and refused to amend the original order.

[2] The 30th day fell on a Sunday and Monday was a holiday.

The Court on the second appeal noted that the Rules of Appellate Procedure are silent as to extensions of time for amending an order for interlocutory review. *Id.* at 197. However, the Court also noted that Pa.R.A.P. 1311(b), as a whole, "delineates a defined procedure with express time limits to follow when seeking appellate review of an interlocutory order." *Id.* Finding that allowing a lower court to consider a *nunc pro tunc* request "is at odds with the intent and purpose of allowing for interlocutory review of an order[,]" the *McMurren* Court denied the appellant's petition for review. *Id.* at 197-98.

Additionally, *Mente Chevrolet v. Swoyer*, 710 A.2d 632 (Pa. Super. 1998) held that seeking reconsideration of an interlocutory order does not toll the 30-day window of time to file an application to amend the interlocutory order to certify it for appeal under Pa.R.A.P. 1311(b) and that an application filed after 30 days is untimely. And *Stahl v. Redclay,* 897 A.2d 478, 483 n.1 (Pa. Super. 2006) denied certification sought 81 days after the issuance of the subject order. These cases support the concept that the 30-day period for which to request amendment of an interlocutory order to certify it for appeal is a rigid timeframe that is to be applied as such without exception.

**Controlling Question of Law**

Even if Rausch Creek's application to the Board was timely, we would still reject it because it does not involve a controlling question of law. As we have stated before, interlocutory appeals are "primarily designed to allow the Commonwealth Court to consider pure questions of law." *Borough of Danville v. DEP*, 2008 EHB 399, 401. *See also City of Harrisburg v. DER*, 630 A.2d 974 (Pa. Cmwlth. 1993); *DER v. Rannels*, 610 A.2d 513 (Pa. Cmwlth. 1992); *UMCO Energy, Inc.*, 2004 EHB at 837. The legal definition of AOC set forth in the regulations is relatively straightforward and was not the subject of dispute in this case. AOC simply means

contouring the land so that it closely resembles how it existed prior to mining and so that it blends in with the surrounding land. 25 Pa. Code §§ 87.1 and 88.1. Here, whether Rausch Creek's grades or the Department and Porter's grades are the appropriate final grades is not a controlling question of law but a factual dispute that turned on extensive, conflicting expert testimony. A pure question of law can be discussed without reference to the facts of the case at hand. In other words, without reference to any particular site, what does AOC mean? In contrast, Rausch Creek's argument involves facts and expert opinions regarding conditions at a particular site, not a pure question of law.

Having determined that the interlocutory appeal does not involve a controlling question of law, it is unnecessary to determine whether there is substantial ground for difference of opinion on the matter. *UMCO Energy, Inc.*, 2005 EHB at 836. This factor only comes into play when the difference of opinion involves a controlling question of law; it does not come into play where, as here, there is a substantial factual disagreement. Similarly, resolution of a controlling issue of law cannot facilitate the ultimate termination of this matter for the simple reason that there is no unsettled issue of law whose clarification would assist the Department in any way in reevaluating Porter's permit on remand. Furthermore, the Department correctly points out that the issue of AOC is not the only issue that must be addressed on remand. Rausch Creek is not seeking an appeal of those other issues, and as noted above, the issues are all inextricably intertwined. An interlocutory appeal of only one of the issues would only confuse and prolong the resolution of the matter and delay the Department from reevaluating the permit on remand.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **RAUSCH CREEK LAND, LP** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2011-137-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee** | : | |

## ORDER

AND NOW, this 23rd day of December, 2013, it is hereby ordered that Rausch Creek Land, LP's petition for certification of an interlocutory appeal is **denied**. The Board will not amend its October 11, 2013 Adjudication to include the language of 42 Pa.C.S. § 702(b).

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 23, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **PATRICK M. NITZSCHKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-025-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: December 24, 2013** |

**OPINION AND ORDER**
**ON RULE TO SHOW CAUSE**

**By Michelle A. Coleman, Judge**

**Synopsis**

The Board dismisses an appeal in which the appellant has failed to prosecute his case.

**O P I N I O N**

The Department of Environmental Protection (the "Department") issued a compliance order to Patrick M. Nitzschke ("Mr. Nitzschke") on January 22, 2013 for violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101—1003. Proceeding *pro se*, Mr. Nitzschke filed an appeal of that compliance order on February 21, 2013. On February 26, 2013, the Board issued an order to Mr. Nitzschke to perfect his appeal, with which he complied, and we deemed the appeal perfected without prejudice in an order dated March 19, 2013.

On June 13, 2013, the Department filed a motion to dismiss, stating that the Department issued an administrative order on April 2, 2013 that expressly withdrew the January 22, 2013 compliance order, therefore rendering the appeal moot. Mr. Nitzschke did not file a response to the Department's motion to dismiss. We note that a failure to respond to a motion constitutes an admission to all properly pleaded facts contained within the motion under 25 Pa. Code § 1021.91(f).



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On October 3, 2013, we issued to Mr. Nitzschke a Rule to Show Cause to show by October 18, 2013 why the appeal should not be dismissed. Mr. Nitzschke did not respond to the Rule.

Mr. Nitzschke's failure to respond to the Department's motion to dismiss and failure to respond to the Board's Rule to Show Cause indicates that Mr. Nitzschke has no intention of continuing with his appeal. When a party evinces an intent to no longer continue its appeal, we have found it appropriate to consider the dismissal of the appeal. *See Recreation Realty, Inc. v. DEP*, 1999 EHB 697, 698. We note that although Mr. Nitzschke is proceeding *pro se*, he is still not excused from following the Board's rules and from proceeding in an orderly and expeditious manner with the appeal he has filed and perfected. *See Goetz v. DEP*, 2002 EHB 976. Accordingly, since the Department has filed a motion to dismiss and the appellant has filed nothing in opposition to that motion, we dismiss this appeal.

We issue the order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **PATRICK M. NITZSCHKE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2013-025-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 24th day of December, 2013, Patrick M. Nitzschke's appeal is hereby **dismissed** for failing to prosecute his case.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**RICHARD P. MATHER, SR.**
**Judge**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 24, 2013**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **WILLIAM BRAWAND d/b/a BRAWAND OIL COMPANY** | : | |
| **v.** | : | **EHB Docket No 2013-006-B** |
| **COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: December 30, 2013** |

**OPINION AND ORDER ON**
**MOTION FOR SUMMARY JUDGMENT**

**By Steven C. Beckman, Judge**

**Synopsis**

Where there are disputed material facts about whether the Appellant can assert a defense to the presumption of liability under Section 3218(c) of the Oil and Gas Act, and whether Appellant has offered a sufficient replacement water supply, the Board denies the Department's Motion for Summary Judgment.

## OPINION

Before the Board is the Department's motion for summary judgment against William H. Brawand, doing business as Brawand Oil Company. Because we find that there are genuine issues of material fact, the Board denies the motion. William H. Brawand, the owner and operator of Brawand Oil Company, appealed an order of the Department finding him presumptively liable under Section 3218(c) of the 2012 Oil and Gas Act for the pollution of a private drinking water supply near two of Brawand's oil and gas wells located in Jones Township, Elk County. A comparison of a pre-drilling survey of the water supply with post-drilling samples indicates increased concentrations of iron and manganese, as well as a temporary increase in the concentration of dissolved methane, after drilling occurred at the



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Brawand wells. The order requires Brawand to meet with the owners of the water supply "to discuss options reimbursing them for [all] past and future increased operating and maintenance costs" of a treatment system that was independently installed by the water supply owners. It also requires Brawand to submit to the Department a copy of any documents that identify the executed agreement between Brawand and the water supply owners regarding reimbursing the water supply owners for all past and future increased operation and maintenance costs for the installed water treatment system.

In his Notice of Appeal, Brawand objects to the order on the basis that the increases in concentrations of methane, iron, and manganese in the water supply were "caused by factors other than the Appellant." Brawand additionally contends that the order imposes an unreasonable burden in that its requirements are "unlimited in time and scope." Finally, while maintaining that he is not responsible for the increases in methane, iron, and manganese, Brawand also contends that he has made an effort to provide the water supply owners with a replacement water supply that was adequate in quality and quantity.

In its motion for summary judgment, the Department argues there are no genuine issues of material fact. It contends that Brawand provides no evidence to support the affirmative defense that something else caused or contributed to "the contamination" of the water supply. The Department also argues that Brawand's "unreasonable burden" argument fails as a matter of law because Title 25, Chapter 78, Section 51(d)(1)(v) provides for "permanent payment of the increased operating and maintenance costs of the restored or replaced water supply." Finally, the Department contends that Brawand's other argument, that he has already offered a replacement water supply, is irrelevant because "the Department's Order does not require Appellant to provide water" to the water supply owners. In support of its motion, the Department attaches an

affidavit of Anthony C. Oprendek, Environmental Group Manager for the Department, that largely restates the allegations in the Department's original order as well as its statement of undisputed facts.

In support of his opposition to the Department's motion, Brawand offers his own affidavit stating that an (unnamed) representative of the Department told him that the water supply was likely not polluted by drilling at the Brawand wells. Brawand avers, instead, that "the cause of pollution, if any, is faulty casing used in wells in the area drilled before 1920 along with a low water table . . . ." He further disputes whether the Department has proven that the independently installed water treatment system meets the requirements of 25 Pa. Code Section 78.51, and thus whether he should be liable for any increased costs of operation and maintenance.

There appears to have been no discovery exchanged in this matter. The Department states that it served interrogatories and a request for production of documents on June 6, 2013, but alleges that Brawand did not respond to the discovery and has not produced or identified any evidence in discovery to support his objections. The Department did not file a motion to compel or a motion for sanctions regarding the discovery dispute. Brawand appears not to have conducted any discovery at all. Given the lack of discovery by either party, the Board is left with a very limited record consisting of the Notice of Appeal and competing affidavits filed in conjunction with the summary judgment motion.

A motion for summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Rural Area Concerned Citizens v. DEP and Bullskin Stone and Lime, LLC*, EHB Docket No. 2012-072-M (Opinion and Order issued February 8, 2013), *slip op.* at 3, *citing New Hanover Twp. v. DEP*,

2012 EHB 44; *Ehmann v. DEP*, 2008 EHB 325, 326; *Bertothy v. DEP*, 2007 EHB 254, 255. The Board has found that it will grant summary judgment where a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy*, 2007 EHB at 254–255; *CAUSE v. DEP*, 2007 EHB 101, 106. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Bethenergy Mines, Inc. v. DEP*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162. However, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing." 25 Pa. Code § 1021.94a(k).

Viewing the limited record in the light most favorable to Brawand, we find that the record demonstrates that there are disputed material facts. Brawand's affidavit alleges that he was told by a Department representative the he likely was not the cause of the pollution and further points out that there may be older gas and oil wells in the area which contributed to the increased concentrations of methane, iron, and manganese. If proven, Brawand may be entitled to the affirmative defense found at Section 3218(d)(1)(v) of the Act. "In considering a motion for summary judgment, the [Board] must examine the whole record, including the pleadings, . . . [any discovery], if any, and any affidavits filed by the parties." *Snyder v. DER*, 588 A.2d 1001, 1005 (Pa. Cmwlth. 1991). Furthermore, assuming, without deciding, that the Department's finding of the presumption was merited under the facts of this case, Brawand argues that he has already offered a replacement water supply that meets the requirements of Section 78.51(d). The record in front of the Board at this time does not reflect a determination that Brawand's

replacement would be insufficient under the law and raises an issue of whether the remedy required by the Department was appropriate given Brawand's claim that he had provided an acceptable replacement water supply.

We enter the following order.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **WILLIAM BRAWAND d/b/a BRAWAND OIL COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2013-006-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 30th day of December, 2013, it is hereby **ORDERED** that the Department of Environmental Protection's Motion for Summary Judgment is denied for the reasons set forth in this Opinion.

**ENVIRONMENTAL HEARING BOARD**

Steven C. Beckman

**STEVEN C. BECKMAN**
**Judge**

**DATED: December 30, 2013**

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