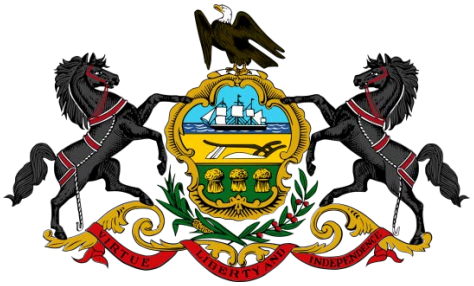
Environmental Hearing Board

Adjudications and Opinions



2017
VOLUME II

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

2017

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

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

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2017 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2017.

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

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2017 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-095-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 15, 2017**

OPINION AND ORDER ON
THE DEPARTMENT'S MOTION TO STRIKE

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion to Strike. The Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Response is neither contemplated nor permitted under Rule 1021.94a without the Board's permission. The Appellant neither sought nor received the Board's permission to file its Response. For this reason, the Board grants the Department's motion and strikes Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Response.

O P I N I O N

United Environmental Group ("UEG" or "Appellant") filed this appeal in response to a notice of hazardous waste and residual waste permit bond forfeiture. On May 25, 2016, the Department served UEG with the notice, which the Department stated was intended to achieve its goal of closing the no longer operational UEG hazardous and residual waste treatment facility. The Department alleged that UEG had numerous violations of regulatory requirements at its facility and has several illegal conditions present on its site including an aboveground storage tank that has been uninspected for 12 years. Drums of hazardous waste have been on the

site for over three years and exposed to the elements. UEG's hazardous waste permit has been expired for three years; and insurance that has been lapsed for over two years.[1] All of these are violations of Pennsylvania environmental laws as well as of UEG's permits.[2]

UEG filed its Notice of Appeal ("NOA") in this matter on June 17, 2016 and argued that the Department had been "incompetent, malicious, and discriminatory" against UEG. (Appellant's NOA at 1). UEG further asserted that the Department failed to provide an explanation regarding what it planned to use the bond for, considering that UEG was no longer operating at full capacity, i.e., the bonding was in place to dispose of 300 plus tons of contaminated soils and 500 plus drums of hazardous and residual waste in liquid and solid form; UEG does not have nearly that amount of waste currently at its facility. (Appellant's NOA at 1).

On January 23, 2017, the Department filed a Motion for Summary Judgment. The Appellant filed its Response on February 3, 2017, and the Department filed its Reply to the Response on February 21, 2017. The Appellant then filed a Response to the Department's Reply on March 13, 2017.[3] The Department subsequently filed the Motion to Strike Appellant's "Response to Appellee's Reply to Appellant's Summary Judgment Response" that is at issue here.

In its Motion to Strike, the Department argued that the Board's Rules contain the rules for motions for summary judgment regarding permissible filings, where they should be filed, what they should contain, and associated page limits. Further, the Department asserted that only three

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[1] *Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 2, 19 (Adjudication, June 9, 2017).

[2] *Id*. at 20.

[3] The Appellant filed a document described as "Appellant's Response to Appellee's Post Hearing Brief" in response to the Department's Motion for Summary Judgment. On the second page of the document, the Appellant stated that the document was "Appellant's Response to Appellee's Motion for Summary Judgment." The Board believes that the second description is the correct description and will view this document as Appellant's Response to the Department's Motion for Summary Judgment.

filings concerning a motion for summary judgment are allowed under the Rules. Therefore, according to the Department, only the following documents were permitted under the relevant rules: (1) the Department's motion for summary judgment; (2) the Appellant's response to the Department's motion for summary judgment; and (3) the Department's reply to Appellant's response to the motion for summary judgment. The Department took the position that the Appellant's final filing: "Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Motion Response" is neither contemplated nor permitted by the Board's Rules and should be stricken from the record.

We agree with the Department. The Board's Rule 1021.94a governs summary judgment. 25 Pa. Code § 1021.94a. As the Department stated, this rule provides specific instruction on what is permitted and expected with respect to motions for summary judgment. It describes what must be contained in a motion for summary judgment. 25 Pa. Code § 1021.94a(b)-(e). It allows for parties that support the motion for summary judgment to file a supporting brief. 25 Pa. Code § 1021.94a(f). The Rule then describes the two additional documents it permits – a response to the motion for summary judgment, filed by the party in opposition, and a reply to the response, filed by the party that filed the motion for summary judgment. 25 Pa. Code § 1021.94a(g) and (k). The Board's Rule does not permit any additional filings beyond these without the Board's permission.[4] The Board grants the Department's Motion to Strike because the Board's Rules do not permit a response filing to a reply to a response without an express grant by the Board.

Even if the Board decided not to strike "Appellant's Response to Appellee's Reply to Appellant's Summary Judgment Motion Response," the unauthorized Response would not

[4] Under the Board's Rules, additional briefing is allowed at the discretion of the Board. 25 Pa. Code § 1021.94a(k). The Appellant neither sought nor received Board approval for additional briefing and, therefore, no additional briefing is allowed under this provision.

change the Board's decision. In this Response, the Appellant repeats his claim that the Department is biased and prejudiced against UEG and Mr. Klesic. The Appellant asserts that the Department allowed other competitors of UEG to operate and handle waste materials without the residual waste and hazardous waste permits possessed by UEG. These claims provided the basis for the Appellant's selective enforcement argument. As the Board decided in the Adjudication associated with the earlier, related appeals, the Appellant has not made out a defense of selective enforcement for the reasons set forth in the Adjudication. *Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 21-25 (Adjudication, June 9, 2017) ("[T]he Board finds that [Mr. Klesic] has not met his burden to show selective enforcement.").

The Appellant did not dispute UEG's violations that support the administrative order and civil penalty assessment that are addressed in the prior appeals. *Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 23 (Adjudication, June 9, 2017). These same undisputed UEG violations support the Department's bond forfeiture action under appeal now. UEG's failure to comply with its obligations prompted the Department to issue the previously challenged administrative order and civil penalty assessment as well as the current bond forfeiture action. Rather than dispute UEG's violations, the Appellant claims that the Department failed to properly enforce its hazardous waste and residual waste regulatory program against UEG's competitors. The Department's alleged failure to take enforcement action against UEG's competitors ensured "UEG's failure in the industry." The Appellant asks the Board to excuse UEG's undisputed violations because the Department destroyed UEG's business when it failed to enforce its hazardous and residual waste programs against UEG's competitors in the manner that the Appellant wished. The Appellant's claims are not a defense to the bond forfeiture action instituted against UEG. UEG has undisputed violations of the Department's hazardous and

residual waste regulations, and these undisputed violations provide support for the Department's bond forfeiture action. Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-095-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 15th day of June, 2017, upon review of the Department's Motion to Strike Appellant's "Response to Appellee's Reply to Appellant's Summary Judgment Motion Response," it is hereby ordered the motion is **GRANTED** and the Appellant's "Response to Appellee's Reply to Appellant's Summary Judgment Motion Response" is stricken from the record.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 15, 2017

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

For the Commonwealth of PA, DEP:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-095-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 15, 2017**

OPINION AND ORDER ON
THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion for Summary Judgment. The Department has demonstrated that there are no genuine issues of material fact and that, when viewed in the light most favorable to the Appellant, the record supports summary judgment for the Department.

O P I N I O N

United Environmental Group ("UEG" or "Appellant") filed this appeal in response to a notice of hazardous waste and residual waste permit bond forfeiture. On May 25, 2016, the Department served UEG with the notice, which the Department stated was intended to achieve its goal of closing the no longer operational UEG hazardous and residual waste treatment facility. The Department alleged that the UEG facility has several illegal conditions present on its site, including an aboveground storage tank that has been uninspected for 12 years. Drums of hazardous waste have been on the site for over three years and exposed to the elements. UEG's hazardous waste permit has been expired for three years, and insurance that has been lapsed for

over two years.[1] All of these alleged conditions are violations of state environmental laws as well as of UEG's permits.[2]

UEG filed its Notice of Appeal ("NOA") in this matter on June 17, 2016 and argued that the Department had been "incompetent, malicious, and discriminatory" against UEG. (Appellant's NOA at 1). UEG further asserted that the Department failed to provide an explanation regarding what it planned to use the bond for, considering that UEG was no longer operating at full capacity, i.e., the bonding was in place to dispose of 300 plus tons of contaminated soils and 500 plus drums of hazardous and residual waste in liquid and solid form. UEG does not have nearly that amount of waste currently at its facility. (Appellant's NOA at 1).

On January 23, 2017, the Department filed a Motion for Summary Judgment. In its Motion, the Department argued that, when taken in the light most favorable to the nonmoving party, there were no genuine issues of material fact for the Board to decide in this matter. The Department supported its position with two arguments. First, Appellant failed to respond to the Department's Requests for Admissions, and second, under the relevant regulations, permit bonds are forfeited upon the occurrence of certain events.

The Department stated that it mailed UEG Requests for Admissions on October 24, 2016, pursuant to Pa.R.C.P. Rule 4014(a).[3] UEG never responded to the Requests for Admission, either to admit or deny, by November 28, 2016, thirty days after issuance.[4] After receiving no

[1] *Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 2, 19 (Adjudication, June 9, 2017).

[2] *Id*. at 20.

[3] "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters . . . set forth in the request that relate to statements or Opinions of fact or of the application of law to fact. . . ." Pa.R.C.P. § 4014(a).

[4] "The date of service is the date the document is mailed, delivered in person or transmitted electronically." 25 Pa. Code § 1021.35(a). Further, "[d]ocuments served by mail shall be deemed served 3 days after the date of actual service." 25 Pa. Code. § 1021.35(b)(2).

response, the Department asserts that it asked UEG whether it would admit to the Requests for Admissions. UEG refused. The Department averred that it included clear instructions to UEG in its Requests for Admissions. The Department advised UEG that the failure to respond to the matters in the Requests would result in their admittance.[5] As of the date of the Department's filing of its Motion for Summary Judgment, January 23, 2017, the Department had received no further response.

In addition to UEG's failure to respond to the Department's Request for Admissions, the Department also argued that UEG's permit bonds would be forfeited upon the occurrence of certain events which have come to pass. This supports the Department's position that it is entitled to judgment as a matter of law. The Solid Waste Management Act authorizes bond forfeiture in cases of facility abandonment and refusal to comply with the law. 35 P.S. § 6018.505. The Department alleged that this is exactly the case here: UEG has abandoned the operation of its permitted residual and hazardous waste treatment facilities at the site, and has failed or refused to comply with various requirements of the Solid Waste Management Act and the associated regulations promulgated under the Act's authority.

The Department also argued that, like the Solid Waste Management Act, the Residual Waste Regulations and Hazardous Waste Regulations also include bond forfeiture requirements. *See* 25 Pa. Code §§ 264.168 and 287.351. Specifically, the Department will forfeit a collateral or surety bond when the operator of a facility fails or refuses to comply with relevant environmental laws or the terms of its permit or closure plan; the Department determines that the operator cannot demonstrate or prove its intention or ability to continue to operate in compliance with the

[5] Under Pa.R.C.P. § 4014(b), the "matter is admitted unless, within thirty days after service of the request, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or any objection, signed by the party or by the party's attorney." Pa.R.C.P. §4014(b).

Act; the operator has failed or continues to fail to take measures to prevent environmental harm; the operator has abandoned the facility; the operator fails or refuses to comply with closure measures; or the operator has become insolvent and cannot prove that it has the ability to continue operation in compliance with the Act. The Department's Request for Admissions included assertions against UEG in all of the aforementioned categories. The Department argued that the bond forfeiture requirements of Pennsylvania's residual waste regulations make clear that bond forfeiture is appropriate – and occasionally required – when just a single basis for forfeiture is shown. The Department further asserted that here, multiple bases for forfeiture exist giving it justification for its action.

On February 3, 2017, UEG filed its Response to the Department's Motion. In it, Mr. Stephen Klesic on behalf of UEG argued that it had responded to the Department's Requests for Admissions in several ways. First, Mr. Klesic asserted that he emailed counsel for the Department on January 16, 2017, stating his amazement at the Department's presentation of the facts and that he hadn't previously agreed to the admissions and would not now agree to them [at the time he sent the email]. Second, Mr. Klesic referred to documents he filed in another related matter before the Board in which he denied the Department's same allegations.[6] Finally, Mr. Klesic cites the hearing transcript from this related matter in which he denied the Department's claims under oath.

The Department filed its Reply to Appellant's Summary Judgment Motion Response on February 21, 2017. In it, the Department argued that UEG admitted in its Response that it did not answer the Department's requests in a timely fashion. The Department also asserted that UEG did not offer evidence to support its position that there are genuine issues of material fact to

[6] *See, e.g. Klesic v. DEP*. EHB Docket No. 2015-150-M. The Adjudication in this matter was issued on June 9, 2017.

be resolved at a hearing. Rather, according to the Department, UEG denies facts without setting forth other specific facts that counter those set forth by the Department. Further, per the Department, even were the Board to hold that the Requests for Admissions were not deemed admitted, UEG has made other admissions in its filings that establish grounds for granting summary judgment. To support its position, the Department refers to UEG's admission that it had less than 150 tons of soil and less than 30 drums of waste material and that it could no longer afford to operate and thereby comply with the bond forfeiture notice or the Department's demands.

The Board agrees with the Department that it is entitled to summary judgment in this matter. As in a related appeal, the Department's bond forfeiture action is against the corporate entity United Environmental Group ("UEG"). UEG is the Pennsylvania corporation that obtained the hazardous and residual waste permits from the Department for its facility. Mr. Stephen W. Klesic is the president of UEG and sole or principal shareholder of UEG. As in the related appeal, Mr. Klesic argued that the Notice of Appeal in this appeal as Stephen W. Klesic, PRO SE, on behalf of UEG. Under the Board's Rules, a corporate appellant must be represented by counsel in an appeal before the Board, but individuals may appeal on their own behalf. 25 Pa. Code § 1021.21. In the related appeals, the Board initially required UEG to secure representation, but ultimately allowed Mr. Klesic to appear on his own behalf to represent his interests. Similarly, the Board has allowed Mr. Klesic to appear in this appeal on his own behalf to represent his interest in the pending bond forfeiture action.

The Board may grant summary judgment when (1) the pleadings, depositions, answers to interrogatories and admissions, and, if available, affidavits, show that there is no genuine issue of material fact, and (2) that the moving party is entitled to judgment as a matter of law. 25 Pa.

Code § 1021.94a(a), (b)(iv), (d), (i); Pa.R.C.P. 1035.1; *Robinson Coal Company v. DEP*, 2011 EHB 895, 905; *Energy Resources, Inc. v. DER*, 1990 EHB 901, 904; *Miller v. DER*, 1988 EHB 538, 541. In coming to its decision, the Board should review the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubts as to the presence of a genuine issue of material fact against the moving party. *Paul Lynch Investments, Inc. v. DEP*, 2016 EHB 845, 847 (quoting *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81).

Under Pennsylvania Rules of Civil Procedure Rule 4014 and Section 1021.102 of the Environmental Hearing Board's Rules and Regulations, unanswered Requests for Admissions will be deemed admitted unless, within 30 days after service, the recipient of the Request serves and files a verified denial or objection. Pa.R.C.P. Rule 4014(b); 25 Pa. Code 1021.102. Further, an adverse party must set forth specific facts showing that there is a genuine issue for hearing. 25 Pa. Code § 1021.94a(1); Pa. R.C.P. 1035.2(1). Under the Board's Rule 1021.94a(1):

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

25 Pa. Code § 1021.94a(1). Admissions are conclusive within the proceeding unless their withdrawal or an amendment to them is permitted on motion. *Poli v. South Union Township Sewage Authority*, 424 A.2d 568, 569 (Pa. Cmwlth. 1981). Each separately set forth request for admission to which the adverse party fails to respond is deemed admitted. *Energy Resources, Inc. v. DER*, 1990 EHB 901, 904. The Board has a history of consistently ruling that the failure to respond to requests for admission results in the automatic deemed admission of each request.

See, e.g., Rockland Natural Gas Co., Inc. v. DEP, 2010 EHB 39, 40; *Langille v. DEP*, 2010 EHB 516, 519; *Pickelner v. DER*, 1995 EHB 359, 360; *Kerry Coal Co. v. DER*, 1991 EHB 73, 77-79.

The Board finds that UEG's failure to properly respond to the Department's Request for Admissions and its lack of factual specificity in its response to the Department's Motion for Summary Judgment warrants the admission of the Department's Requests for Admission in accordance with both Rule 4014(b) of the Pennsylvania Rules of Civil Procedure, and Rule 1021.102 of the Board's Rules. Further, the Board agrees with the Department's interpretation of the Solid Waste Management Act and the Hazardous Waste Regulations, and relies on the Board's adjudication in *Klesic v. DEP*, EHB Docket No. 2016-150-M (Adjudication, June 9, 2017) wherein it determined that UEG was in violation of the regulations and its waste permits.

UEG presented the Board with no evidence that it tried to comply with Rule 4014(b). Its response may be summarized by a single statement present in its Response to the Department's Motion for Summary Judgment: that on January 16, 2017 (well after the November 28, 2016 deadline for UEG's responses), the president of UEG emailed Department counsel and stated that he "never fully agreed to the admissions that have been previously sent, nor will I agree to them." The Board agrees with the Department that, tardiness aside, this email does not fulfill UEG's obligation under the Board's Rules for discovery. Therefore, the Department's Request for Admissions are deemed admitted.

The Department has the authority under the Solid Waste Management Act, the Residual Waste Regulations, and the Hazardous Waste Regulations to forfeit bonds. Section 6018.505 of the Solid Waste Management Act reads as follows:

> If the operator abandons the operation of a municipal or residual waste processing or disposal facility or a hazardous waste storage, treatment or disposal facility for which a permit is required by this section or if the permittee fails or refuses to comply with the

> requirements of this act in any respect for which liability has been charged on the bond, the secretary shall declare the bond forfeited and shall certify the same to the Department of Justice which shall proceed to enforce and collect the amount of liability forfeited thereon, and where the operation has deposited cash or securities as collateral in lieu of a corporate surety, the secretary shall declare said collateral forfeited and shall direct the State Treasurer to pay said funds into the Waste Abatement Fund.

35 P.S. § 6018.505(d). The Board has already decided that UEG had numerous ongoing violations at its facility which warranted the Department's prior challenged actions. *Klesic v. DEP*, EHB Docket No. 2016-150-M, slip op. at 26 (Adjudication, June 9, 2017). These violations still have not been corrected.

The doctrine of collateral estoppel prevents relitigation of the facts already established in that case, which are shared in this matter.[7] The doctrine of collateral estoppel applies to specific issues of fact and law. *Al Hamilton Contracting Company v. DEP*, 1996 EHB 464. More specifically, it "prevents a question of law or an issue of fact that has once been litigated and fully adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit." *Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp.*, 614 A.2d 246, 250 (Pa. Super. Ct. 1992), appeal denied, 617 A.2d 180. Collateral estoppel applies if five factors are present: (1) the issue decided in the prior case was identical to the issue presented in the later case; (2) there was a final judgment on the merits in the earlier case; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination concerning the issue in the prior proceeding

[7] The Findings of Fact in the recent, related Adjudication establish the existence of violations, including lapsed insurance and expired permits. *See Klesic v. DEP*, EHB Docket No. 2016-150-M, slip op. at 1-12 (Adjudication, June 9, 2017).

was essential to the judgment. *Id*. at 251; *see also Office of Disciplinary Counsel v. Kieswetter*, 889 A.2d 47, 50-51 (Pa. 2005). All five factors are present here.

As discussed supra, the Board has already determined the presence of ongoing violations at the UEG facility, which have yet to be corrected. These same violations are at the heart of the Department's Motion for Summary Judgment. The Board issued an Adjudication on the previous matter on June 9, 2017. Additionally, Mr. Klesic was a party in the prior case and had a full and fair opportunity to litigate these issues.[8] Finally, the determination that UEG was in violation of both its permits and the regulations was essential to the Board's judgment. Therefore, we incorporate the facts and issues from the prior case into this matter. As such, given that UEG is a waste processing and disposal facility, in violation of its permits, and failing (or unable) to comply with the requirements of the Solid Waste Management Act, the Board finds that the Department's notice of permit bond forfeiture was reasonable and lawful.

Furthermore, the Residual Waste Regulations direct the Department to forfeit collateral or surety bonds in various situations, many of which are present in this case. 25 Pa. Code § 287.351; *Klesic v. DEP*, EHB Docket No. 2016-150-M, slip op. at 1-12 (Adjudication, June 9, 2017); Department's Brief in Support of Motion for Summary Judgment, 6-14. The list of violations is lengthy. UEG ceased operations and laid off employees in June of 2013. (Requests for Admissions, Exhibit A, ¶ 6). It allowed its liability insurance coverage to lapse in July of 2014. (Requests for Admissions, Exhibit A, ¶ 7). The facility was out of compliance with regulations as well as with the requirements of its permits. (Requests for Admissions, Exhibit A, ¶ 15, 17). UEG remains financially insolvent and the Department determined that it was unable

[8] Mr. Klesic, as President and principal shareholder, is in privity with UEG, and the Board has already recognized their close relationship when it allowed Mr. Klesic to pursue his appeal of his interest in appeals of Department actions issued against UEG.

to operate in compliance with the Act. (Requests for Admissions, Exhibit A, ¶ 29; Department's Motion for Summary Judgment, p. 9). This is a condensed list. Given these facts, the Board finds that the Department's notice of bond forfeiture was lawful and reasonable under the Residual Waste Regulations.

Finally, the Hazardous Waste Regulations, applicable in this case, also lay out bond forfeiture requirements. Like the Residual Waste Regulations, they provide that the Department will forfeit the bond for a hazardous waste storage, treatment, or disposal facility where certain conditions exist. 25 Pa. Code §264a.168(a). Again, many of those conditions exist at the UEG facility. *Id*. For example, UEG's hazardous waste permit expired in 2013 and was never renewed. (Requests for Admissions, Exhibit A, ¶ 3). UEG failed to comply with the mandatory permit conditions found in both its hazardous waste and residual waste permits. (Requests for Admissions, Exhibit A, ¶ 17). The facility was effectively abandoned and never implemented closure procedures. (Requests for Admissions, Exhibit A, ¶ 6, 23). Like the list of violations under the Residual Waste Regulations, the list here is lengthy, too. The Board again finds that the Department's notice of bond forfeiture was lawful and reasonable in light of these facts.

In addition, UEG's Response is lacking under the Board's Rules. *See* 25 Pa. Code § 1021.94a. Under Section 1021.94a, the party opposing a motion for summary judgment shall file a concise statement as to why the motion should not be granted, a response to the statement of undisputed material facts either admitting or denying or disputing them, and a brief containing legal argument. 25 Pa. Code § 1021.94a(g). A response to the statement of undisputed material facts must include citation to the record controverting a material fact. Under the Rules, when a motion for summary judgment is made and supported as provided by the rule, a party may not rest upon the mere allegations or denials, but the adverse party's response must set forth specific

facts showing there is a genuine issue for a hearing. 25 Pa. Code § 1021.94a(1). UEG's Response does not include a response to the Department's Statement of Undisputed Material Facts that admits, denies, or disputes the Department's statement with citations to the record that controvert the Department's version of the facts. Under the Board's Rules, failure to properly respond allows the Board to enter summary judgment against the adverse party who does not so respond. 25 Pa. Code § 1021.94a(1). The Department's Statement of Undisputed Material Facts presents a compelling argument in support of the Department's Motion, and Appellant's failure to properly respond to the statement provides an additional basis to grant the Department's Motion for Summary Judgement.

The Board grants the Department's Motion for Summary Judgment because when viewed in the light most favorable to UEG, the record demonstrates that there are no genuine issues of material fact and the Department is entitled to judgment as a matter of law. UEG never responded to the Department's Request for Admissions. Under both the Pennsylvania Rules of Civil Procedure and the Board's own rules, each request should be deemed admitted. This, in conjunction with the facts and applicable law and regulations, presents a clear example of reasonable and lawful actions taken on the part of the Department. For these reasons, the Board grants the Department's Motion.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED ENVIRONMENTAL GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-095-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 15th day of June, 2017, it is hereby ordered that the Department's Motion for Summary Judgment is **GRANTED** and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

Judge Steven C. Beckman is recused and did not participate in this decision.

DATED: June 15, 2017

c: **For DEP, General Law Division:**
Attention: Maria Tolentino
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Nicole M. Rodrigues, Esquire
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241 McAleer Road
Sewickley, PA 15143

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY A. GREEN	:	
	:	
v.	:	**EHB Docket No. 2017-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DJ & W MINING, INC., Permittee	:	**Issued: June 20, 2017**

OPINION AND ORDER ON MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, STRIKE THE NOTICE OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board denies the Permittee's Motion to Dismiss but grants the Permittee's request to Strike the Notice of Appeal with leave for the Appellant, Gary A. Green, to file a Motion requesting permission of the Board to amend his Notice of Appeal.

O P I N I O N

Background

Gary A. Green filed his appeal on March 3, 2017, wherein he objected to the Department of Environmental Protection's ("DEP" or "Department") approval of a Stage III bond release to DJ & W Mining, Inc. ("DJ&W") for the Green Mine. The March 3, 2017 appeal filed on the Board's Notice of Appeal form was hand-written, marked-up in certain places and difficult to read. Mr. Green also failed to attach a copy of the DEP action that he was seeking to challenge in his appeal. On March 8, 2017, the Board issued an Order for Perfection of the Appeal ordering Mr. Green to submit a copy of the Department action being appealed on or before

March 22, 2017. Mr. Green did not comply with the Board's March 8 Order. On March 31, 2017, the Board issued a Rule to Show Cause ordering Mr. Green to show cause as to why his appeal should not be dismissed as a sanction for failing to comply with the Board's Order, or alternatively, requiring him to file a copy of the Department action being appealed on or before April 17, 2017. On April 14, 2017, Mr. Green filed a copy of the Department's January 24, 2017, letter notifying Mr. Green of the Stage III Bond Release that is the subject of this appeal. On May 9, 2017, DJ&W entered a notice of appearance and filed a Motion to Dismiss Appeal or, in the Alternative, Strike the Notice of Appeal ("Motion"). On June 7, 2017, the Department filed a letter stating that it would not be filing a response to the Motion. Mr. Green has not responded to the Motion and the matter is ready to be decided.

Standard

The Board will grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *West Buffalo Twp. v. DEP*, 2015 EHB 780, 781; *Brockley v. DEP*, 2015 EHB 198, 198-99; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Smedley v. DEP*, 1998 EHB 1281,1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley, supra*; *see also Hanover Twp. v DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. The Board will deem a party's failure to respond to a motion to be an admission of all properly-pled facts contained in the motion. 25 Pa. Code § 1021.91; *Nitzschke v. DEP*, 2013 EHB 861, 862. When a party evinces an intent to no longer continue its appeal, we have found it is appropriate to consider the dismissal of the appeal. 2013 EHB at 862.

Analysis

DJ&W's Motion raises two issues that it argues entitle it to the dismissal of Mr. Green's case. First, it asserts that Mr. Green's appeal is untimely because it was not filed within 30 days of the Department's notice to Mr. Green and therefore, we lack jurisdiction to hear the appeal pursuant to 25 Pa. Code §1021.52. DJ&W notes that the date on the Department's letter to Mr. Green is January 24, 2017 and the appeal was not filed until March 7, 2017.[1] The problem with DJ&W's argument is that under 25 Pa. Code §1021.52(a)(1), the 30 day period for filing an appeal by the person to whom the action was directed (such as Mr. Green) starts after receipt of the written notice of the action by the person. DJ&W states that it is impossible to determine from his filings when Mr. Green received the DEP letter but then notes that his Notice of Appeal "suggests it was 'on or about' 2/10/2017 or more than two weeks after the Department sent notice." (DJ&W's Memorandum in Support of Motion to Dismiss Appeal, p. 2, fn. 1.) While DJ&W implies that this statement is not correct because it is well after the mailing date by the Department, it offers no evidence to contradict Mr. Green's statement on his Notice of Appeal that he received it on or around February 10, 2017. Accepting that date, the filing of the Notice of Appeal was within the 30 day timeframe required under our rules and there is no basis for us to dismiss the appeal for untimeliness. Even if we do not accept that date, what we are left with is a clear issue of material fact regarding the date of receipt that prevents us from granting a Motion to Dismiss for untimeliness.

DJ&W's second argument in favor of granting its Motion to Dismiss is that Mr. Green's Notice of Appeal fails to follow the Board's rules concerning the proper form and content of a

[1] There was an issue with the filing of the Notice of Appeal and our docket shows a different filing date for the Notice of Appeal than the date asserted by DJ&W. The Board's docket shows that the Notice of Appeal was filed on March 3, 2017. The difference between the March 3 or the March 7 date is not determinative to our decision in this case so it is not necessary for us to resolve this factual discrepancy.

notice of appeal found at 25 Pa. Code § 1021.51. DJ&W asserts that these shortcomings should lead the Board to dismiss the appeal as untimely because it is not a "valid appeal." DJ&W further argues that the Board should sanction Mr. Green's actions by dismissing his appeal because the problems with his Notice of Appeal demonstrate Mr. Green's inability and unwillingness to follow Board rules. In support of its argument, DJ&W notes that Mr. Green has been sanctioned for similar problems in the past. DJ&W is correct that the Board has had prior dealings with Mr. Green in a very similar matter. In 2014, Mr. Green appealed the Department's actions in releasing the Stage I and Stage II Bond Release for DJ&W's Green Mine. On September 7, 2016, his appeal was dismissed as a sanction because he had repeatedly failed to follow Board rules and comply with Board Orders. *Green v. DEP*, 2016 EHB 656.

We agree with DJ&W that Mr. Green's Notice of Appeal fails to follow several of the provisions in our rules addressing the proper form and content of a notice of appeal.[2] It is also difficult to read and follow the information and objections set forth therein. We don't think that these issues make it an invalid appeal such that there was no timely appeal. We also acknowledge that as evidenced by the docket in this matter, Mr. Green has had problems complying with the rules of the Board since his initial appeal and has failed to file anything in response to the Motion. [3] Mr. Green should be familiar with the requirements of the Board when

[2] One of the issues raised by DJ&W is that Mr. Green's Notice of Appeal is hand-written and it asserts that our rules require that it be typewritten. DJ&W is correct that our rules do require that notices of appeal be typewritten but the very same section of the rule also states that failure to comply with that requirement will not result in rejection or dismissal of a notice of appeal. See 25 Pa. Code §1021.51(f)(2)(v) and §1021.51(f)(3)(v). The same rule also provides that the Board may request an amended version of the notice of appeal in proper form. The Board routinely accepts hand-written notices of appeal so long as they are legible. Legibility is clearly the overall goal of this provision in our rules, and so long as that goal is satisfied, we believe that it would be unreasonable to dismiss a notice of appeal because it was not typewritten.

[3] Mr. Green has been unable to secure counsel to represent him in this appeal but the Board has repeatedly held that although an Appellant is proceeding *pro se*, "he is still not excused from following the Board's

pursuing an appeal as is evidenced by the Board's prior opinion in *Green v. DEP*, 2016 EHB 656. However, we think that dismissing Mr. Green's appeal is not warranted under these facts at this time. Doing so would be too harsh an outcome for the issues identified by DJ&W.

DJ&W argues that as an alternative to dismissing the appeal, we should strike the Notice of Appeal without prejudice and allow Mr. Green to request leave to amend his appeal in accordance with our rule at 25 Pa. Code § 1021.53(b). We think that is the appropriate step in this case. We will give Mr. Green an opportunity to file a Motion requesting permission from the Board to amend his Notice of Appeal. If the Motion seeking leave of the Board is granted, Mr. Green will have the opportunity to revise his Notice of Appeal so that it is legible and more closely follows our rules concerning the requirement to set forth specific objections to the action of the Department in separate numbered paragraphs. If Mr. Green fails to file the Motion or otherwise follow the Board's Order in this matter, we caution that further sanctions may be appropriate up to and including dismissal of his appeal.

For the reasons stated above, we issue the following Order.

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rules and from proceeding in an orderly and expeditious manner with the appeal he has filed and perfected." *Nitzschke v. DEP*, 2013 EHB 861, 862, *see Goetz v. DEP*, 2002 EHB 976.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY A. GREEN	:	
	:	
v.	:	**EHB Docket No. 2017-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DJ & W MINING, INC., Permittee	:	

O R D E R

AND NOW, this 20th day of June, 2017, it is hereby ordered that DJ & W Mining, Inc.'s Motion to Dismiss Appeal is **denied**. DJ & W's Mining, Inc.'s request to Strike the Notice of Appeal is **granted.** If Mr. Green intends to proceed with his appeal, he shall file a Motion with the Board requesting permission from the Board to amend his Notice of Appeal pursuant to 25 Pa. Code § 1021.53(b) within twenty (20) days of the date of this Order.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 20, 2017

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

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For Permittee:
Samuel H. Clark, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: June 21, 2017**

OPINION AND ORDER ON
PETITION TO REOPEN THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's petition to reopen the record to admit into evidence a recent letter from the Department because the letter pertains to a separate, ongoing permit review, contains cumulative evidence, and would require the record to be left open for the presentation of additional testimony and evidence from the other parties.

O P I N I O N

Friends of Lackawanna ("FOL") has appealed the Department of Environmental Protection's (the "Department's") issuance of a solid waste management permit renewal (Permit No. 101247) to Keystone Sanitary Landfill, Inc. ("Keystone") for the continued operation of a municipal waste landfill in Lackawanna County for another 10 years. The hearing on the merits in this appeal was held over the course of eighteen days. FOL has submitted its posthearing brief, and Keystone's and the Department's posthearing briefs are due in the next few weeks. FOL has now filed a petition to reopen the record for what it says is the limited purpose of including a May 25, 2017 letter from the Department that provides a second environmental

assessment of Keystone's proposed expansion at the same landfill—what is known as the Phase III expansion. The letter is signed by Roger Bellas, the Department's Regional Program Manager for its waste management program. FOL contends that the letter contains admissions from the Department that bear on material facts in this appeal of the permit renewal on topics such as the groundwater underneath the landfill, the leachate generated by the landfill, and the air quality in the area surrounding the landfill. FOL argues that the alleged admissions in the May 2017 letter contradict various statements made by Department personnel during the course of the eighteen-day hearing on the merits.

Keystone and the Department oppose reopening the record. Keystone asserts that the letter was issued solely in connection with its application for the Phase III expansion, which has not been acted upon by the Department and is not currently before the Board, and it should not be included in the record for this appeal of the permit renewal. Keystone also contends that if this particular letter is admitted into evidence then we must allow additional testimony and evidence to be put on in order to allow an appropriate response from Keystone. The Department adds that the letter does not conclusively establish or contradict any material facts and that it instead constitutes cumulative evidence.

Under the Board's rules, the record developed at a hearing on the merits may, under certain circumstances, be reopened prior to the issuance of an adjudication. The pertinent rule provides in part:

> The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b). Reopening the record is a decision within the discretion of the presiding judge. *Wheeling-Pittsburgh Steel Corp. v. Dep't of Envtl. Prot.*, 979 A.2d 931, 943 (Pa. Cmwlth. 2009); *Al Hamilton Contractor Co. v. Dep't of Envtl. Res.*, 659 A.2d 31, 35 (Pa. Cmwlth. 1995). We succinctly summarized the standard for reopening a record in *Perano v. DEP*, 2011 EHB 270:

> Reopening the record is at the discretion of the Board, even where all of the criteria set forth in our rule are met. *M&M Stone Co. v. DEP*, 2010 EHB 227, 235. "Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence." *Id.* (quoting *Lang v. DEP*, 2006 EHB 7, 25-26). We are generally reluctant to give parties "two bites at the proverbial apple," *Noll v. DEP*, 2005 EHB 24, 32 (quoting *Exeter Citizens' Action Comm. v. DEP*, 2004 EHB 179, 181), because hearings, like many other things in life, must eventually come to an end, even if the ending is less than perfectly satisfying to all concerned.

2011 EHB 270, 272-73.

FOL has not established that reopening the record is warranted to admit into evidence the May 2017 letter. The letter from Roger Bellas does not pertain to the renewal of Keystone's permit, but instead concerns the Department's ongoing review of Keystone's application to expand its landfill. Although it is true that the letter touches on broad topics covered at the hearing, this is expected and perhaps inevitable given the fact that the landfill is an ongoing operation. The letter is part of the continued back and forth over Keystone's application, which we presume will eventually culminate in a final action that will be appealable to this Board. Presumably there will be a response to the letter from Keystone, and perhaps an additional response from the Department after that. In this sense the Department makes a legitimate point that, if we were to reopen the record to add this component of the review of the Phase III application, then we might as well wait for the Phase III review to conclude so that any

additional review letters and responses from the Department and Keystone can be included. This is precisely why we should not reopen the record to include documents pertaining to the ongoing Phase III application and its review by the Department—it risks allowing an open-ended evidentiary record that the parties will variously seek to supplement as the Phase III process continues.

In support of its petition, FOL directs us to *Pine Creek Valley Watershed Association v. DEP*, 2011 EHB 579. In *Pine Creek*, we granted a petition to reopen the record in an appeal of an Act 537 plan revision for the limited purpose of admitting a letter from the U.S. Fish and Wildlife Service that reflected the recent discovery of endangered species (two bog turtles) on the site of the proposed development. The new evidence directly contradicted prior argument that there was no evidence of the existence of any threatened or endangered species at the development site. The presence of bog turtles was important to the appellant's argument that the functions and values of the exceptional value wetlands on the site would not be adequately protected, among those being the provision of wildlife habitat. No party disputed the fact that the bog turtles had been discovered on the site, only whether the record should be reopened to allow evidence of that fact.

We find the case to be inapposite. In *Pine Creek*, the record was reopened to admit evidence of a discrete material fact that directly contradicted assertions made by the parties in the appeal. The admission of the U.S. Fish and Wildlife Service letter required no additional testimony to be provided or additional evidence to be considered in conjunction with the letter. That is not the situation here. Although FOL construes the review letter as containing "self-explanatory Department admissions," that is not a fair description of the contents of the letter. The portions of the May 2017 letter highlighted by FOL contain less than definitive statements

that mostly flag items for Keystone's attention, or request additional information, and all but necessitate a response from Keystone after conducting further investigative work. We cannot imagine how any of these statements would not at the very least require further explanation from Roger Bellas. We would also need to allow appropriate examination of Bellas from the Department and Keystone, and potentially the testimony of other witnesses as well, all pertaining to a separate permitting action that has not yet been completed.

Finally, if the letter has any value at all for our current purposes, it is certainly cumulative. We heard significant testimony during the hearing on the merits on all of the issues FOL highlights in the letter—groundwater, leachate generation, and air quality. For instance, while FOL makes much of the fact that the letter contains the statement that Keystone "has an issue with either excess leachate generation or stormwater infiltration into the leachate conveyance system," we already heard a great deal about potential leachate issues during the course of the hearing. FOL devotes more than 180 proposed findings of fact in its posthearing brief to the topic. There is nothing revelatory in the letter. Reopening the record to admit the letter would do little more than pile on evidence of at best incremental value to issues that were already exhaustively litigated by all parties.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 21st day of June, 2017, it is hereby ordered that the Appellant's petition to reopen the record is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 21, 2017

c: **DEP, General Law Division:**
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For Permittee:
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Jeffrey Belardi, Esquire
Christopher R. Nestor, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD CONTURA, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-038-R**
	:	**(Consolidated with 2017-046-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 27, 2017**

OPINION IN SUPPORT OF ORDER
DENYING PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board denies a Petition for Supersedeas following a hearing. The Appellant mining company failed to establish a likelihood of success on the merits. We also find that Appellant failed to prove irreparable harm. Moreover, we cannot rule out the likelihood of injury to the public, if we were to grant the Petition for Supersedeas.

O P I N I O N

Background

Emerald Contura, LLC (Emerald Contura) appealed two Orders issued by the Pennsylvania Department of Environmental Protection (Department). The Orders were necessitated by the release of stray methane gas in a residential neighborhood. The Orders require, among other things, that by June 26, 2017, Appellant "shall submit a report, schedule, and abatement plan (Plan) to abate the public nuisance caused by the expression of methane gas in the Area of Concern to the Department." After approval of the Plan by the Department, the

Orders require Emerald Contura to implement the Plan and permanently abate the public nuisance within sixty days. The Area of Concern is located three miles from Waynesburg, Pennsylvania and impacts approximately a 1,500 linear foot area between Garards Fort Road and Coal Lick Run in Franklin Township, Greene County. The Area of Concern is marked by barren spots and dead grass caused by stray methane gas migration evidently through the soil underlying the area.

The Appeals were filed on May 16, 2017 and June 1, 2017 and were consolidated, *sua sponte,* by the Board on June 6, 2017. Shortly thereafter, on June 13, 2017, Emerald Contura filed an Application for a Temporary Supersedeas and a Supersedeas. After the Department filed Responses to these filings the Board held a conference call with Counsel on Tuesday, June 20, 2017. On that same day, the Board issued an Order denying the Department's Motion to Deny the Supersedeas Without a Hearing and denying Emerald Contura's Motion for Expedited Discovery in Advance of the Hearing on the Petition for Supersedeas (Supersedeas Hearing). Although the Board denied Appellant's Motion for Expedited Discovery in Advance of the Supersedeas Hearing it is our understanding that the Department has produced many of the documents requested by Emerald Contura. Following the conference call with Counsel, the Board issued an Order scheduling the Supersedeas Hearing on Thursday, June 22, 2017.

Supersedeas Hearing

A hearing on the Petition for Supersedeas was held in Pittsburgh on Thursday, June 22, 2017 before the Honorable Thomas W. Renwand. The hearing concluded late in the day following the testimony of three witnesses called by Emerald Contura, three witnesses called by the Department, and closing arguments of Counsel.

At the conclusion of the testimony, the Board indicated that it would issue its ruling on Emerald Contura's Petition for Supersedeas before the end of the business day on Monday, June 26, 2017. Counsel for Appellant requested the Board to extend the deadline for his client to submit its Plan until Wednesday, June 28, 2017. At the Board's request, the Department consented to the extension. Therefore, on June 23, 2017, the Board issued an Order that "[a] temporary supersedeas is issued effective immediately superseding the deadline set forth in the Department Orders under Appeal…until Wednesday, June 28, 2017. The temporary supersedeas will dissolve at that time unless further extended by the Board."

Late in the afternoon of Monday, June 26, 2017, the Board issued an Order denying the Petition for Supersedeas and indicating that this Opinion would follow in support of the Order.

Standard for Granting a Supersedeas

A Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Beardslee v. DEP*, 2016 EHB 198, 202; *Weaver v. DEP*, 2013 EHB 486; *Mountain Watershed Association, Inc. v. DEP & Amerikohl Mining*, 2011 EHB 689, 690; and *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802. Judge Beckman concisely and succinctly set forth the standard for granting or denying a Petition for Supersedeas in *Teska and Mannarino v. DEP and EQT Production Co.,* 2016 EHB 541. The petitioner has the burden of proof to show that a Supersedeas should be issued. *Tinicum Twp. v. DEP*, 2008 EHB 123, 126.

> The Board is guided by relevant judicial precedent and its own precedent, and among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* A Supersedeas will 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. Section 7514(d)(2); 25 Pa. Code Section 1021.63(b).

Teska, 2016 EHB at 543-544.

For the Board to grant a Supersedeas, a credible showing should be made on each of the three requirements, with a strong showing on the likelihood of success on the merits being critical. *Morrison v. DEP and Insurance Auto Auctions, Inc.*, 2016 EHB 149, 152. The issuance of a Supersedeas is up to the Board's sound discretion based upon a review and balancing of all the statutory and regulatory criteria. *Beardslee*, 2016 EHB at 203.

DISCUSSION

Emerald Contura became the owner of the Emerald coal mine in 2016. It is a deep mine using the longwall method of mining. Mr. Noah Beazell, who has worked at the Emerald Mine for over 10 years and is the Environmental Compliance Manager for Contura Energy Services, LLC (Contura Energy) gave a history of the mine and the progression of the longwall mine which was approximately 1,500 feet from the Area of Concern. Emerald Contura also did room and pillar developmental mining much closer to the Area of Concern and Mr. Beazell detailed this mining.

Mr. Beazell was aware of an earlier incident in 2009 where a water well owned by an area resident, Mr. Haines, caught on fire after stray gas was ignited. The mining company vented the water well at that time at the Department's request. He was also aware of the patches of dead grass in the Area of Concern. He believed the Department's investigation over the years had been focused on an oil and gas producer and abandoned gas wells. Longwall mining in this area was completed several years ago and the Emerald mine is currently idle. Mr. Beazell did not become aware of the Department's focus on Emerald Contura as a possible source of the stray gas migration until shortly before the Department issued a report followed two days later by the first Order which is now under Appeal.

Following the receipt of the Department's Order on or about May 12, 2017, Emerald Contura hired its legal Counsel who subsequently retained its mining consultant, Marshall Miller & Associates (Marshall Miller).

Contura Energy's Vice President of Pennsylvania Operations, Eric Salyer, testified as to the costs and expenses that Emerald Contura has incurred because of the Department's Orders. The fees and costs currently are more than $60,000 with no estimation of what the abatement would cost because the investigation of Marshall Miller has just begun.

Counsel for the Department introduced a press release issued by Contura Energy. According to its own press release, Contura Energy had net income of 37 million dollars for the first quarter of 2017. It also had cash reserves of 241 million dollars.

Mr. Ronald Mullennex, an experienced professional geologist employed by Marshall Miller, testified candidly that although he had spotted some issues which led him to question some of the Department's conclusions supporting the Orders, his investigation was not yet completed. He agreed based on the currently available evidence that the stray methane gas appeared to be coal bed methane but he was awaiting more detailed analysis. He testified as to the extensive monitoring sites Marshall Miller had established in conformance with the Orders. He made a strong argument that he believed based on his over forty years as a practicing geologist that if given rather short extensions of time that his company could come up with more definitive answers as to the cause of the stray gas and the best way to abate the problem. He requested that the Board afford his client an extension until August to determine the source of the stray gas and if caused by his client then until October (or perhaps later) to remedy the problem.

He raised questions as to responsibility based on the distance from the longwall mining to the Area of Concern and the Department's earlier denial of subsidence claims for the dead grass

filed by some of the home owners. He also wished to investigate the numerous gas wells in the immediate vicinity, both active and abandoned, as possible sources and causes of the stray gas migration. He believes that some excavation in key locations could uncover the source or a cause. He also pointed out that none of the homes were experiencing stray gas migration. He has been involved in three stray gas migration cases in his career.

Mr. Scott Sabocheck, an oil and gas supervisor employed by the Department, testified as to his knowledge of the stray gas migration problem. He testified that an oil and gas producer, EQT, the owner of a producing well in the area, conducted an investigation from 2014-2016. The investigation concluded that the gas company was not the cause of the stray gas migration. Mr. Sabocheck also testified as to excavation of some of the Area of Concern performed by EQT and the fact that EQT did not locate any abandoned wells or pipes underneath the dead grass.

Mr. Sabocheck has experience dealing with stray gas where the public safety is at risk. He testified as to an emergency contract the Department entered with a contractor in Ross Township to abate a stray gas problem directly affecting a residence. The Department was able to abate the problem at a cost of $11,000 which involved constructing a trenching system around the home's foundation. The contract was bid and the problem rectified quickly in that case.

Mr. Sabocheck indicated that the Department's Mining Program has since taken over the investigation of the stray gas migration problem in Franklin Township, Greene County.

Mr. Kirby Owens, an area home owner, testified that he has worked in the mining industry for over 25 years and has lived in his current home in Franklin Township since 2000. He was not earlier aware of the problem Mr. Haines had with his water well catching on fire but is aware of the dead grass caused by the stray gas migration in the neighborhood since 2009. He said that the problem has gotten worse since 2014 or 2015. He personally witnessed air readings

of 2.5% methane gas in the Area of Concern. He related that when he brought this problem to the attention of an employee or associate of Emerald in 2014 or 2015 that he was advised that it was not the mining company's fault.

Mr. Owens has stopped mowing his grass for fear of explosion. He also can no longer use his woodworking shop which is in a garage over the Area of Concern. Mr. Owens took a video which he played at the Hearing. It was taken in an area 40 feet from his back porch in his yard on March 31, 2017. According to Mr. Owens it showed gas bubbles in rain water on his property. He also was not able to have a graduation party for his son and his family and friends on his property for safety reasons.

Mr. Bryce McKee testified next for the Department. Mr. McKee is a professional geologist who has been employed by the Department since July 2016. Prior to that time, he had extensive experience as a professional geologist for some established companies, including Shell, Halliburton, and Amoco. In these positions, he worked not only throughout the United States but around the world. He has extensive and exceedingly broad experience, including investigating stray gas complaints.

He became interested in this issue in November 2016 and became more formally involved in January 2017. He personally conducted an exhaustive investigation of this problem which consisted of various trips to the area, and an extensive search of not only the Department's records but also the scientific literature. He testified at length as to the steps he took in formulating his opinion that the problem of the stray gas was caused by the coal mining company. He went to great lengths to look at other possible causes and explained why he eliminated them as likely sources of the stray gas.

He also expressed his very real concerns that the problem was getting worse and that it needed to be corrected quickly to make sure that no one was injured or killed. He explained how the readings are influenced by various factors and vary widely at any given time and from day to day or week to week. Mr. McKee provided strong, credible testimony, that leads us to the conclusion that the public health and safety would be threatened if we granted the Supersedeas. Methane is a colorless, odorless gas that can be both flammable and explosive, can cause asphyxiation of people and animals, and can kill vegetation. The lower explosive limit is the minimum concentration of methane gas in air that will cause an explosion or fire. For methane, the lower explosive limit is 5% methane in the air. Methane gas levels at the ground surface, as opposed to the air, have exceeded the lower explosive limit for methane numerous times according to Mr. McKee. In fact, methane concentrations in the Area of Concern at the ground surface have consistently exceeded the lower explosive limit for methane. Methane concentrations as high as 100% at the ground surface have been recorded by Department employees.

We wish to readily acknowledge the substantial steps which the coal mining company has taken in the last 30 days to investigate and monitor this dangerous situation. Nevertheless, we feel that the testimony and the conclusions set forth by Mr. McKee lead us to conclude that Emerald Contura has not carried its burden of proof to convince us that they have a likelihood of success on the merits. We also do not believe they have shown irreparable harm either by showing a monetary loss or that the tight deadlines deprive them of due process. This Supersedeas Hearing and review by the Board affords them due process. In addition, the Board is open to a request for an expedited hearing on the merits.

After hearing the testimony and carefully considering the evidence presented at the Hearing, we share the concerns expressed by Mr. McKee that the residents residing on Garards Fort Road in Franklin Township, Greene County, are confronting a serious public safety issue. No citizen of Pennsylvania should face such a problem. We commend the Commonwealth of Pennsylvania, Department of Environmental Protection, for taking strong and decisive action to protect her citizens.

Our Order of June 26, 2017 is attached to this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 27, 2017

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Nicole Mariann Rodrigues, Esquire
Forrest M. Smith, Esquire
(*via electronic filing system*)

For Appellant:
James V. Corbelli, Esquire
Joseph K. Reinhart, Esquire
Sean M. McGovern, Esquire
Nicole Vasquez Schmitt, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD CONTURA, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-038-R**
	:	**(Consolidated with 2017-046-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 26th day of June, 2017, following a hearing on Appellant's Petition for Supersedeas and in consideration of the arguments presented, it is ordered as follows:

1) Appellant's Petition for Supersedeas is **denied.**

2) An Opinion in support of this Order shall follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 26, 2017

c: **For the Commonwealth of PA, DEP:**
Michael J. Heilman, Esquire
Nicole Mariann Rodrigues, Esquire
Forrest M. Smith, Esquire
(*via electronic filing system*)

For Appellant:
James V. Corbelli, Esquire
Joseph K. Reinhart, Esquire
Sean M. McGovern, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 27, 2017**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss as moot a permittee's appeal from certain conditions in its Title V operating permit for its silicate furnace because the Department's subsequent issuance of a plan approval authorizing construction and short-term operation of a replacement fuel oil supply skid for the furnace did not nullify the conditions at issue in the permit.

O P I N I O N

PQ Corporation has a Title V operating permit that authorizes the operation of its sodium silicate furnace at its facility in Chester, Pennsylvania. The Department of Environmental Protection most recently renewed that permit on April 20, 2016. PQ filed this appeal from that permit renewal. PQ objects to emission limits and continuous monitoring requirements with respect to carbon monoxide, burner tip cooling monitoring and recordkeeping requirements, continuous flame pattern monitoring requirements, and nitrogen oxides emission and production reporting requirements.

On February 14, 2017, the Department issued a plan approval to PQ that authorized the construction and short-term operation of a replacement fuel oil supply skid for the furnace. None of the Title V conditions at issue in this appeal were changed by the plan approval. In fact, the plan approval repeated the conditions virtually verbatim. PQ did not file an appeal from the plan approval.

The Department has filed a motion to dismiss. It argues that PQ's appeal from the Title V permit is moot because the plan approval repeated the conditions in the permit that are at issue in this appeal and PQ did not appeal the plan approval. PQ opposes the motion. We evaluate motions to dismiss in the light most favorable to the nonmoving party and will grant the motion where the moving party is entitled to judgment as a matter of law. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54; *Dobbin v. DEP*, 2010 EHB 852, 857. We find that the Department's motion has no merit.

Mootness is a prudential limitation related to justiciability. A matter becomes moot when events occur during the pendency of the appeal that deprive the Board of the ability to provide effective relief. *South v. DEP*, 2015 EHB 203, 206. Mootness does not deprive the Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed. *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900.

In order for a subsequent Department action to render an appeal from an earlier Department action moot, it must be clear that the first action is "gone and is no longer here for the Appellants to appeal or for the Board to issue any relief with respect thereto." *Cooley v. DEP*, 2005 EHB 761, 774. The focus in evaluating a claim of mootness is not so much on the Department's subsequent action, it is on the earlier Department action. Unless it is very clear

that the earlier, now defunct action is nullified and ceases to have any legal effect, the appeal therefrom is not moot. *West Buffalo Twp. Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Perano v. DEP*, 2010 EHB 449, 451-52; *Stewart & Conti Dev. Co. v. DEP*, 2004 EHB 18, 19-20; *Valley Forge Chap. Trout Unlimited v. DEP*, 1997 EHB 1160, 1163. Thus, in *Kilmer v. DEP*, 1999 EHB 846, the Department took three actions: it issued one order, issued a letter vacating the first order, and issued a second order. We held that the appellant's appeal from the first order was moot, not so much because there was a second order, but because the Department expressly vacated the first order. *Id.*, 1999 EHB at 849.

In this case, PQ's Title V permit is hardly defunct. Nor have the specific permit conditions at issue in the case been nullified. To the contrary, they have now been reaffirmed in the plan approval. They have continuing legal effect. The plan approval on its face says, "The permittee shall comply with all of the existing requirements of its current Title V permit, No. 23-00016, unless specifically revised in this plan approval." (Pg. 10, Section C, condition #001.) The requirements at issue in this appeal have not been revised. If we find that the Department erred in issuing the conditions, the relief that we provide will extend to the conditions as repeated in the plan approval. In the meantime, PQ's failure to comply with the conditions would constitute a violation of the permit *and* the plan approval. The permit remains in full force and effect. With respect to the conditions at issue, nothing has changed.

The Department seems to misapprehend the difference between an operating permit and a plan approval. The plan approval only authorizes construction and short-term operation. It does not in and of itself modify the permit. Indeed, there is no guarantee that a new or revised operating permit will follow the issuance of a plan approval. PQ's plan approval expires in 2018; its permit expires in 2021. The plan approval may come and go but the permit remains in

effect. While it is true that, if there are inconsistent terms in the preexisting permit and the plan approval, the terms of the plan approval might take precedence during the duration of the plan approval, there is no such inconsistency here. This appeal is not moot.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of June, 2017, it is hereby ordered that the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: June 27, 2017

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

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
Jessica Hunt, Esquire
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For Appellant:
Mark K. Dausch, Esquire
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Varun Shekhar, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2015-093-R**
	:	**(Consolidated with 2015-159-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: July 10, 2017**
PROTECTION and FIRSTENERGY	:	
GENERATION, LLC, Permittee	:	

OPINION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Summary judgment is granted to the Appellant on the issue of standing where two of its members have adequately averred that there is a reasonable potential they will be impacted by the action that is under appeal. Summary judgment is granted to the Permittee on the question of whether the Department of Environmental Protection was required to apply the EPA rule on coal combustion residuals. Summary judgment is denied as to all other issues where questions of material fact remain.

O P I N I O N

This matter involves consolidated appeals filed by Sierra Club challenging the reissuance, renewal and minor modification of Solid Waste Permit No. 300370 ("the permit") issued by the Pennsylvania Department of Environmental Protection ("Department") to FirstEnergy Generation, LLC ("FirstEnergy") for the Hatfield's Ferry Landfill, a residual waste landfill in Monongahela Township, Greene County. Before the Environmental Hearing Board ("Board")

are Motions for Partial Summary Judgment filed by both Sierra Club and FirstEnergy. Based on the documents filed by the parties, the background of this matter is as follows:

Background

The previous owner and operator of the Hatfield's Ferry Landfill ("the landfill") is Allegheny Energy Supply Company ("Allegheny Energy"), which FirstEnergy describes as a "sister" company. (FirstEnergy Brief in Support of Motion, p. 3.) In 2009, Allegheny Energy applied for and received a major modification to the permit that authorized Phase 3 of the landfill. In May 2015, the Department renewed and reissued the permit, and at that time designated FirstEnergy as the owner and operator of the landfill. The renewal and reissuance also extended the expiration date of the permit. In September 2015, the Department issued a minor modification of the permit that authorized FirstEnergy to dispose of flue gas desulfurization material generated at FirstEnergy's Bruce Mansfield Power Station, a coal-fired electric generating power station. According to the brief in support of FirstEnergy's motion, the Bruce Mansfield Power Station "utilizes flue gas desulfurization or 'scrubber' technology designed to remove virtually all particulates and most of the sulfur dioxide from the boiler flue gases. . .The scrubber system creates a flue gas desulfurization byproduct, which comes off of the scrubber system in a liquid form." (FirstEnergy Brief in Support of Motion, p. 2.) FirstEnergy states in its brief that much of the liquid flue gas desulfurization material is recycled into solid gypsum which is used by a nearby factory to produce drywall, and "[u]ntil December 31, 2016, the remaining liquid flue gas desulfurization material was combined with other Bruce Mansfield materials. . .and pumped via an approximately 7-mile long underground pipeline to the Little Blue Run Disposal Impoundment." (*Id.* at 3.) Pursuant to a Consent Decree with the Department, FirstEnergy was required to cease sending the liquid flue gas desulfurization

material to the Little Blue Run Disposal Impoundment. Thereafter it constructed a dewatering facility for the liquid flue gas desulfurization material that is not recycled into gypsum and applied for the permit modification at issue in this appeal in order to dispose of the material at the landfill.

Sierra Club appealed the 2015 renewal and reissuance of the permit and the 2015 minor modification, and the appeals were consolidated at EHB Docket No. 2015-093-R. Both Sierra Club and FirstEnergy have moved for partial summary judgment on certain issues raised in the appeal. The Department filed responses opposing Sierra Club's motion and supporting one of the arguments made by FirstEnergy in its motion.

Standard for Grant of Summary Judgment or Partial Summary Judgment

The Board may grant summary judgment where the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 751 (citing *Stedge v. DEP*, 2015 EHB 31, 33). The Board views the record in the light most favorable to the non-moving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *Id.*

FirstEnergy Motion for Partial Summary Judgment

First Energy moves for partial summary judgment on two grounds: First, that certain of Sierra Club's objections are barred by the doctrine of administrative finality and, second, that one of Sierra Club's objections is based on an EPA rule that has not been adopted in Pennsylvania. The Department filed a response in support of the latter argument.

Administrative Finality:

FirstEnergy argues, first, that Sierra Club's objections related to the renewal and reissuance of the permit are barred by the doctrine of administrative finality because Sierra Club did not appeal the issuance of the original permit or the 2009 major modification granted to Allegheny Energy. Sierra Club filed a response in opposition, and the Department takes no position on this argument.

The doctrine of administrative finality precludes a future attack on an action that was not challenged by a timely appeal. *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). The Board held in *Love v. DEP*, 2010 EHB 523, 525, "It is well-settled that a party may not use an appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action."

FirstEnergy relies on the Board's decision in *Yourshaw v. DEP*, 1998 EHB 37, in support of its argument that Sierra Club's objections are barred by administrative finality. *Yourshaw* involved a challenge to a second renewal of a surface mining permit and NPDES permit. In that case, the Board held:

> In the case of an appeal of a permit reissuance or renewal, the appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed. *Borough of Ridgway* v. *DER*, 1994 EHB 1090, 1102. Therefore, if an uncontested permit is reissued, then matters necessarily considered during the original issuance proceeding are unappealable upon reissuance. *Blevins* v. *DER*, 1986 EHB 1003.

1998 EHB at 39-40. FirstEnergy argues, "Applying this principle to these appeals, Sierra Club's objections are limited to issues that have arisen between the time of the issuance of the Major

Modification of the Permit in 2009 (which Sierra Club did not appeal) and the renewal and reissuance of the Permit in 2015." (FirstEnergy Brief in Support of Motion, p. 8)

In response, Sierra Club points to several more recent Board decisions where we have held that the doctrine of administrative finality "has limited effect where the Department is charged with periodic re-evaluation of, e.g., a permit." *Love, supra*, at 528 (citing, *inter alia, Wheatland Tube v. DEP*, 2004 EHB 131, 133, and *Solebury Twp. v. DEP*, 2004 EHB 95, 113-14). In *Angela Cres Trust of June 25, 1998 v. DEP*, 2009 EHB 342, 360, we recognized that although "there needs to be some finality to permitting actions so that a permittee may proceed with its project free of the fear of a challenge at some indefinite time in the future…where some action or condition causes a reexamination of the permit, the concept of administrative finality may not be applicable here." The action that causes reexamination of a permit may be a renewal or modification, as explained in the cases highlighted below.

In *Tinicum Twp v. DEP*, 2002 EHB 822, we rejected the argument that administrative finality barred an appeal of an NPDES permit renewal, and held:

> An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place. It does, however, require the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information. Similarly, our review focuses upon the *continuation*, not the historical initiation, of the activity in question.

Id. at 835 (emphasis in original). As we further held in *Wheatland Tube, supra*, discussing our decision in *Tinicum*,

> [E]ven in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five

> years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.

2004 EHB at 135 (emphasis in original).

In *Solebury School v. DEP*, 2014 EHB 482, the Board considered a challenge to a depth correction to a noncoal surface mining permit that allowed the permittee to mine an additional 50 feet deeper. The Board explained that the issue was not whether the permit should have been issued in the first place, "but rather, in the context of a depth correction, whether it is appropriate to let the permitted activity continue in light of the current information [showing that mining was causing hazardous conditions at the appellant school.]" *Id*. at 527.

FirstEnergy states that it does not disagree with the general proposition that a permit renewal involves a reevaluation of the permit based on up-to-date information, but it argues that "administrative finality still applies in the context of appeals from a permit renewal when the essence of the appellant's challenge is to the past issuance or modification of the permit." It contends that several of Sierra Club's objections focus on past determinations made by the Department, specifically related to water pollution, fugitive dust and whether the Department's action met legal requirements. (FirstEnergy Reply Brief.)

We disagree that Sierra Club's objections, on their face, are barred by administrative finality. Here, as in the cases cited above, the issue is not whether the permit was appropriate in the first place, but whether it should continue in place for an additional period of time. As we stated in *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 727: "A permit renewal is an appropriate time to ensure that an operation is being run in accordance with the law." Here, we have not only a permit renewal but also a modification of the permit to allow the disposal of

waste from a new source. For these reasons, we find that FirstEnergy has not demonstrated that it is entitled to partial summary judgment on the basis of administrative finality.

CCR Rule:

FirstEnergy argues that it is entitled to summary judgment on Sierra Club's objection that "FirstEnergy's application and the Department's action fail to demonstrate that the Modification will comply with EPA's rule on the disposal of coal combustion residuals." This objection relates to the federal Environmental Protection Agency's ("EPA") Coal Combustion Residuals Rule (CCR Rule) published in the Federal Register on April 17, 2015 and effective October 19, 2015. The rule establishes technical requirements for coal combustion residuals for landfills and surface impoundments.

FirstEnergy argues that although states may choose to adopt the federal requirements into their existing program, they are not required to do so. It further argues that, at the time the Department approved the minor modification at issue in this appeal, the CCR rule was not yet effective, and, therefore, there was no requirement for the Department to enforce the requirements or incorporate them into a permit.

Sierra Club responds that Pennsylvania law mandates compliance with federal requirements such as the CCR Rule. It further argues that FirstEnergy's reliance on the effective date of the CCR Rule is misplaced since the rule was finalized and issued five months prior to the Department's issuance of the 2015 modification on September 21, 2015. Sierra Club points out that even though the rule's effective date was not until October 19, 2015, the Department had knowledge of it prior to the issuance of the 2015 modification.

The Department filed a Response supporting FirstEnergy's argument. In its Response, the Department states that Pennsylvania has not incorporated the CCR Rule's requirements into

its regulations. It states that EPA invited, but did not require, states to adopt the CCR Rule requirements, and the Department has not done so.

To the extent Sierra Club is asserting the Department erred by failing to ensure that the challenged permitting actions complied with the CCR Rule, we find that FirstEnergy is entitled to summary judgment on this objection. Sierra Club cites the Board's decision in *Giordano v. DEP*, 2001 EHB 713, 731-32, as support for its position that it may be appropriate to apply a regulation promulgated after the action in question. However, not only was the CCR Rule not adopted by Pennsylvania at the time of the permitting actions, it has never been promulgated in Pennsylvania. Even Sierra Club acknowledges that the EPA "strongly encouraged" states to adopt at least the minimum criteria, but did not require them to do so. (Sierra Club Response, p. 22.) We cannot find that the Department erred or acted contrary to law by failing to enforce a regulation that does not exist. Therefore, summary judgment is granted to FirstEnergy on the issue of whether the Department should have required compliance with the CCR Rule.

Sierra Club Motion for Partial Summary Judgment

Sierra Club moves for partial summary judgment on four issues: First, that it has standing to bring this appeal; second, that the Department's action of modifying the permit should have been classified as a major, not a minor, modification; third, that the bond required by the Department is inadequate; and, fourth, that the Department's issuance of the renewal and modification failed to satisfy fundamental legal requirements. Both FirstEnergy and the Department filed responses opposing the motion.

Standing

Sierra Club argues that it has standing to bring this appeal through the standing of two of its members and as a representative of its members. Sierra Club offers two of its members as

standing witnesses: Veronica Fike and Terri Donaldson. According to documents filed with Sierra Club's motion, Ms. Fike lives approximately seven and a half miles from the landfill and has lived at that location since December 2012. Ms. Donaldson lives approximately three miles from the landfill and has been a lifelong resident of the area. According to affidavits filed with Sierra Club's motion, Ms. Fike and Ms. Donaldson are concerned for their health and the health of their families and the community. Ms. Donaldson is a cancer survivor and is concerned about the risk of cancer from coal ash pollution. Ms. Fike shares those concerns.

According to their affidavits, both Ms. Donaldson's and Ms. Fike's homes are served by the Carmichaels Water Authority, which draws its water from the Monongahela River less than four miles downstream of the landfill. They are concerned about the potential for coal ash contamination of the water authority's water supply and they have purchased bottled water for drinking.

Ms. Fike and Ms. Donaldson also express concern about fugitive dust pollution from the landfill and barges that will transport waste from Bruce Mansfield to the landfill. Ms. Fike states that she regularly canoes on the Monongahela River and walks a trail along the river's edge. Sierra Club argues that Ms. Fike's and Ms. Donaldson's interests in this matter are substantial, direct, and immediate and meet the test for standing in Pennsylvania and before the Board. Sierra Club also asserts that it has standing as a representative of its members based on the standing of Ms. Fike and Ms. Donaldson. FirstEnergy opposes Sierra Club's motion for partial summary judgment on the issue of standing. The Department takes no position on this issue.

FirstEnergy argues that a determination on standing is inappropriate at the summary judgment stage. It correctly points out that most of the Board decisions cited by Sierra Club in its motion are decisions in which the Board denied a *permittee's* motion for summary judgment

seeking a ruling that an appellant did not have standing to pursue its appeal. However, we disagree with FirstEnergy's contention that a ruling in favor of standing may not be made at the summary judgment stage. The Board has clearly entertained motions for summary judgment on the issue of standing filed by permittees or the Department. Where such a motion is filed by an appellant, and the appellant's standing is clear and properly supported by affidavits, deposition testimony or other supporting documentation, we see no reason why the Board may not grant summary judgment on this issue.

In *Citizens for Pennsylvania's Future, supra*, Judge Beckman discussed the standard to be applied when deciding a motion for summary judgment on the issue of standing:

> When applying [the summary judgment] standard to a motion for summary judgment that contests standing, the Board looks to whether there are genuine issues of material fact as to the standing issue and if it is clear that the appellant whose standing is being challenged lacks standing as a matter of law.

Citizens for Pennsylvania's Future, 2015 EHB at 751 (citing *Stedge, supra*; *Tri-County Landfill v. DEP*, 2014 EHB 128, 131; *Giordano v. DEP*, 2000 EHB 1184, 1187). Although the matter before the Board in that case was a motion for summary judgment filed jointly by the permittee and the Department, we held that "[t]he facts in this case demonstrate to the Board's satisfaction that Mr. Szybist meets the 'substantial, direct, and immediate' standard applicable in third-party permit appeals." 2015 EHB at 754. Based on the finding that a member of the appellant organization hiked in the project area, the Board determined that the appellant organization had standing.

Clearly, if a permittee or the Department were able to demonstrate that an appellant did not have standing, summary judgment would be granted. Likewise, where an appellant clearly demonstrates through undisputed facts that it has standing and meets the requirements of the

Board's rule on summary judgment at 25 Pa. Code § 1021.94a, we see no reason why we may not rule on the issue of standing at this stage of the proceedings.

We turn now to the elements of standing. An organization can have standing either in its own right or as a representative of its members. *Citizens for Pennsylvania's Future*, 2015 EHB at 751 (citing *Pennsylvania Trout v. DEP*, 2004 EHB 310, 355, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004)). Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Id.*

In *Friends of Lackawanna v. DEP*, 2016 EHB 641, the Board summarized the Commonwealth Court's opinion on standing in *Funk v. Wolf*, 144 A.3d 228, 243-48 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) as follows:

> [T]he Court's discussion regarding standing may be distilled down to this: Appellants have standing if they credibly aver that they use the affected area and there is a realistic potential that their use of that area could be adversely affected by the challenged activity. *Id*., *slip op*. at 21-29. *See also Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 922 (Pa. 2013) (standing can be premised on a serious risk of alteration of the components of parties' surrounding environment [citations omitted]… *Funk* also reaffirms that an association or group has standing if at least one individual associated with the group has standing. *Funk*, slip op. at 24 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TDC), Inc.*, 528 U.S. 167, 183 (2000)) [citations omitted].

Applying these principles to the case at hand it is hard to imagine how Ms. Fike and Ms. Donaldson could not have standing. They live near the landfill, Ms. Fike canoes and walks in the area around the landfill, and they credibly allege that their use of the area will be adversely impacted by the renewal and modification of the permit.

FirstEnergy's response is twofold: It asserts, first, that Ms. Donaldson's and Ms. Fike's health concerns about the landfill are subjective and not supported by credible evidence and,

second, that there are disputed issues of fact regarding Ms. Fike's and Ms. Donaldson's recreational use and aesthetic enjoyment of the area surrounding the landfill.

As to its first argument, FirstEnergy contends that there is no objective evidence that the Carmichaels Water Authority water has been or will be impacted by the landfill or that there will be any adverse impact to the Monongahela River. They allege that modeling done by their experts shows that even a potential spill of coal combustion by-product directly into the river would not create a human health risk for drinking water or increased risk to aquatic life.

As we have previously held, an appellant need not prove its case on the merits in order to establish standing. *Ziviello v. State Conservation Comm'n.*, 2000 EHB 999, 1005. In *Delaware Riverkeeper v. DEP*, 2004 EHB 599, the permittee challenged the appellants' claim of standing on the basis of technical evidence that the permittee contended showed no adverse impact. The Board rejected the argument as follows:

> [The Borough] also attacks the Appellants' claim of standing because they have done no technical studies to show that the River will be adversely affected by the discharge while the technical evidence presented by the Borough proves that the discharge will have no impact on the water quality of the River. This assertion can only be based on the erroneous belief that the Appellants must prove they can succeed on the merits of their claim to have standing.

Id. at 632. The Board went on to state:

> The Appellants do not have to prove that they will succeed on the merits to have standing. This Board has long held that interference with the enjoyment of environmental resources is a basis for standing…Decisions of other courts concur with that view [citations omitted].

Id.

FirstEnergy also argues there are disputed issues of fact regarding Ms. Fike's and Ms. Donaldson's use and enjoyment of the area. FirstEnergy asserts that Ms. Fike's affidavit and

deposition do not describe the frequency with which she canoes on the Monongahela River or walks along the river's edge or the proximity of her walks and canoeing to the landfill's location. FirstEnergy also argues that the landfill was in operation from approximately 1990 until some time in 2013 and there is no evidence that Ms. Fike's or Ms. Donaldson's recreational use was impacted during that time. In its reply, Sierra Club points to pages in Ms. Fike's deposition and exhibits to her affidavit that discuss when she has canoed the Monongahela River and walked the trail along the river and the location where she has engaged in these activities. (Sierra Club Reply, p. 4-5.)

We find that Ms. Fike and Ms. Donaldson have credibly demonstrated that they live in and use the area around the landfill and there is a realistic potential that their use and enjoyment of the area may be adversely affected if the permit renewal and modification are upheld. As members of the appellant organization, Ms. Fike's and Ms. Donaldson's standing conveys standing to Sierra Club. Even viewing the record in the light most favorable to FirstEnergy and the Department, we find that Sierra Club has met its burden of demonstrating that it is entitled to summary judgment on the issue of standing.

Minor Modification

Sierra Club asserts that pursuant to the Department's waste regulations, at 25 Pa. Code § 287.154(a)(2), the 2015 minor modification should have been considered a major modification. Section 287.154(a) lists various types of modifications that must be considered as an application for a major permit modification. Subsection (a)(2) lists "a change in the average or maximum daily waste volume." Sierra Club asserts that because the 2015 modification "dramatically increases" the amount of flue gas desulfurization waste that FirstEnergy may dispose of in the

landfill it falls under the scope of Section 287.154(a)(2) and should have been considered by the Department as a major permit modification.

The Department and FirstEnergy dispute that there was a change in the amount of waste permitted for disposal and they attribute Sierra Club's argument to a faulty reading of the permit materials. The Department contends that "Sierra Club seeks to confuse the Board by equating a change in the projected rate of waste generation, with the permitted maximum rate of disposal." (Department Response to Sierra Club Motion for Partial Summary Judgment, p. 4-5.) The Department argues that only a change in the disposal rate requires a major modification. In its Reply Brief, Sierra Club spends several pages arguing to the contrary.

This is clearly an issue on which facts are in dispute, and the Board would greatly benefit from hearing testimony on the issue. Summary judgment is denied.

Adequacy of the Bond

Sierra Club argues that the Department issued an inadequate bond for the landfill because it failed to take into account what Sierra Club describes as FirstEnergy's poor compliance history, an increase in waste disposal capacity resulting from the 2015 modification, and the costs of remediation and closure of the barge unloading areas. In its Response, the Department discusses how it considered FirstEnergy's compliance history in evaluating the necessary bonding for the site. Both the Department and FirstEnergy also dispute Sierra Club's allegation that there was an increase in waste disposal capacity necessitating an adjustment to the bond amount. Finally, in its Response, the Department discusses why it dismissed the inclusion of the barge unloading area in its calculation of bonding for the site.

As with the previous issue, we find that there are numerous material facts in dispute, and the Board would greatly benefit from hearing testimony on those issues. As we held in *Groce v. DEP*, 2006 EHB 268:

> [W]here resolution of the parties' conflicting positions involves resolution of matters of fact, the case is not appropriate for summary judgment. Such issues can only be resolved after a full trial and evaluation of expert opinions on those matters.

Id. at 270 (citing *Mountaintop Area Joint Sanitary Authority v. DEP*, 2006 EHB 153).

Legal Requirements

Finally, Sierra Club argues that the Department's review of the application for permit renewal and modification failed to demonstrate compliance with applicable environmental laws, including the Solid Waste Management Act, the Clean Streams Law and Article I, § 27 of the Pennsylvania Constitution.[1] Not surprisingly, the Department and FirstEnergy filed responses that go through a litany of the steps the Department took to ensure compliance with the environmental statutes. Viewing the facts in a light most favorable to the non-moving parties, the Department and FirstEnergy, we find that Sierra Club's arguments raise questions of material fact not suitable for resolution by summary judgment.

[1] The test for determining compliance with Article I, Section 27 of the Pennsylvania Constitution set forth in *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976) was recently overturned by the Pennsylvania Supreme Court in its recent opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 10 MAP 2015 (Pa. June 20, 2017), which was issued after the parties filed their motions for partial summary judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2015-093-R**
	:	**(Consolidated with 2015-159-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and FIRSTENERGY	:	
GENERATION, LLC, Permittee	:	

O R D E R

AND NOW, this 10th day of July, 2017, it is hereby ordered as follows:

1. FirstEnergy and the Department are granted summary judgment on the issue of whether the Department was required to apply the EPA coal combustion residuals rule in the Department's review of the applications for the actions under appeal.
2. Sierra Club is granted summary judgment on the issue of standing.
3. Summary judgment is denied as to all other issues raised in the parties' motions.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
JUDGE

DATED: July 10, 2017

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

GARY A. GREEN	:	
	:	
v.	:	
	:	**EHB Docket No. 2017-014-B**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: July 17, 2017**
PROTECTION and DJ&W MINING INC.,	:	
Permittee	:	

OPINION AND ORDER ON
DISMISSING APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of Appellant, Gary A. Green, where Appellant has demonstrated an intent not to proceed and has otherwise failed to follow Board rules and Orders.

O P I N I O N

Gary A. Green filed a pro se appeal on March 3, 2017, objecting to the Department of Environmental Protection's ("DEP" or "Department") approval of a Stage III bond release to DJ & W Mining, Inc. ("DJ&W") for the Green Mine. The March 3, 2017, appeal, filed on the Board's Notice of Appeal form with an attachment, was hand-written, marked-up, difficult to read and in some places indecipherable. In addition to these shortcomings, Mr. Green failed to attach a copy of the DEP action that he was seeking to challenge in his appeal. On March 8, 2017, the Board issued an Order for Perfection ("Perfection Order") of the Appeal ordering Mr. Green to file a copy of the Department action being appealed on or before March 22, 2017. Mr. Green failed to file any response to the Board's March 8 Perfection Order. On March 31, 2017, the Board issued a Rule to Show Cause ordering Mr. Green to explain why his appeal should not

be dismissed as a sanction for failing to comply with the Board's Perfection Order, or alternatively, requiring him to file a copy of the Department action being appealed on or before April 17, 2017. On April 14, 2017, Mr. Green filed a copy of the Department's January 24, 2017, letter notifying him of the Stage III Bond Release that is the subject of this appeal.

On May 9, 2017, DJ&W entered a notice of appearance and filed a Motion to Dismiss Appeal or, in the Alternative, Strike the Notice of Appeal ("Motion"). The Motion pointed out the many issues with the Notice of Appeal in this case and requested that the Board dismiss the appeal as a sanction for Mr. Green's failure to follow the Board's rules governing the proper filing of a Notice of Appeal. In the alternative, the Motion requested that we strike the Notice of Appeal and allow Mr. Green to seek Board leave to amend his Notice of Appeal. Mr. Green once again failed to follow Board rules and did not submit a response to the Motion as required by 25 Pa. Code § 1021.94(c). On the basis of that failure, the Board could have granted the Motion and dismissed Mr. Green's appeal at that point. See 25 Pa. Code § 1021.94(f). However, in an effort to provide Mr. Green another opportunity to proceed with his claim, on June 20, 2017, the Board issued an Opinion and Order striking the Notice of Appeal and directing Mr. Green to request permission from the Board to amend his Notice of Appeal pursuant to 25 Pa. Code § 1021.53(b) by July 10, 2017. As of the date of this Opinion and Order, Mr. Green has not responded to the Board's June 20 Order.

Mr. Green has been unable to secure counsel to represent him in this appeal but the Board has repeatedly held that although an Appellant 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." *Neitschke v. DEP*, 2013 EHB 861, 862; *see Goetz v. DEP*, 2002 EHB 976. The Board's rules authorize sanctions upon parties for failing to

abide by Board Orders and/or the Board's rules of practice and procedure. *Slater v. DEP*, 2016 EHB 380, 381, citing 25 Pa. Code § 1021.161. Included within these sanctions is the dismissal of an appeal. Further, the Board has consistently held that where a party has shown a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Slater*, 2016 EHB 381, citing *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862.

As is evident by the above recitation of the proceedings in this case to this point, Mr. Green either cannot or will not comply with the rules governing proceedings in front of this Board. We have been down this road before with Mr. Green. In 2014, Mr. Green appealed the Department's actions in releasing the Stage I and Stage II Bond Release for DJ&W's Green Mine. On September 7, 2016, his appeal was dismissed as a sanction because he had repeatedly failed to follow Board rules and comply with Board Orders. *Green v. DEP*, 2016 EHB 656. Once again, we have given Mr. Green numerous opportunities to comply with the Board's rules and prior Orders and to proceed with his claim and he has not done so. We note that the previously filed Notice of Appeal in this case has been struck and Mr. Green has not followed through with the opportunity we provided to request to file an amended Notice of Appeal. This clearly shows an intent not to proceed in this matter. When a party evinces an intent to no longer continue its appeal, we have found it is appropriate to consider the dismissal of the appeal. *Nietschke v. DEP*, 2013 EHB 861, 862. Mr. Green's apparent lack of interest with proceeding with his claim along with his failure to follow the Board's rules and prior Orders makes it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY A. GREEN	:	
	:	
v.	:	
	:	**EHB Docket No. 2017-014-B**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: July 17, 2017**
PROTECTION and DJ&W MINING INC.,	:	
Permittee	:	

O R D E R

AND NOW, this 17th day of July, 2017, it is hereby ordered the appeal in this matter is dismissed. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 17, 2017

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

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 17, 2017**

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to compel responses to written discovery requests regarding operator logs related to the permittee's furnace and the permittee's other similar North American facilities.

O P I N I O N

This appeal involves PQ Corporation's ("PQ's") objections to certain conditions of its Title V Operating Permit for its Chester, Pennsylvania facility, reissued and renewed by the Department of Environmental Protection (the "Department") effective April 19, 2016. In particular, PQ objects to the following conditions related to its No. 4 Sodium Silicate Furnace (No. 4 Furnace) at its facility: (1) emission limits and continuous monitoring requirements for carbon monoxide; (2) monitoring and recordkeeping requirements related to burner tip cooling; (3) continuous monitoring requirements for flame patterns; and (4) reporting requirements for emissions and production data.

The Department served PQ with its second set of interrogatories and document requests on May 3, 2017. PQ responded, but the Department is not satisfied with PQ's responses, and

after an unsuccessful attempt to obtain more acceptable responses, it has filed a motion to compel. PQ opposes the motion.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. 4003.1. However, no discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. 4011; *Haney v. DEP*, 2014 EHB 293, 296-97. "[T]he Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. Discovery before the Board is governed by a proportionality standard, such that discovery obligations must be "consistent with the just, speedy, and inexpensive determination and resolution of litigation disputes." *Tri-Realty Co. v. DEP*, 2015 EHB 552, 555-56 (quoting 2012 Explanatory Comment Prec. Rule 4009.1, Part B).

There is a tendency to get the standard for the discoverability of information wrong. The standard is *not* that the information sought is reasonably calculated to lead to the discovery of relevant evidence; the standard is that the information sought must in fact be relevant. Pa.R.C.P. 4003.1(a); *City of Allentown v. DEP*, EHB Docket No. 2016-144-M (Opinion and Order, May 2, 2017). The information does not necessarily need to be admissible (e.g. hearsay) so long as it appears reasonably calculated to lead to the discovery of admissible evidence, but in any event, it still must be relevant. Pa.R.C.P. 4003.1(a) and (b); *Allentown*, *supra*. Thus, in the context of a

discovery dispute, we usually do not need to pay much attention to whether the material will ultimately be determined to be admissible, but we do need to make an assessment of relevancy. *Id*.; *Cabot Oil & Gas Corp. v. DEP*, 2016 EHB 20, 24.

Because it can be very difficult to tell early on in a case what is relevant and what is not, we apply the relevancy requirement very broadly at the discovery stage. We will generally allow discovery into an area so long as it appears that there is a reasonable potential that it might ultimately prove to be relevant. *Allentown, supra*; *Cabot, supra*; *Borough of St. Clair v. DEP*, 2013 EHB 177, 179. Once the party seeking the discovery makes some showing of potential relevance, the burden quickly shifts to the party objecting to the discovery request to demonstrate its right to refuse to produce the requested information. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 505, 506; *Wallace Twp. v. DEP*, 2002 EHB 841, 844; *Estate of Charles Peters v. DER*, 1991 EHB 653, 656.

The Department's motion to compel is heavy on rhetorical flourishes but light on specific allegations of deficiency in PQ's responses. As best we can tell, the Department is seeking (1) unredacted furnace operation log spreadsheets relating to PQ's No. 4 Furnace, and (2) information regarding PQ's facilities in Gurnee, Illinois, South Gate, California, Joliet, Illinois, and any other PQ facility that has an operating permit with a carbon monoxide limit for a sodium silicate furnace. The Department argues that "the information it seeks will be useful to the Department in defending claims made by PQ about what PQ and its sources are capable of doing and demonstrating that the conditions appealed by PQ are reasonable for the No. 4 Furnace."

PQ responds that it provided multiple spreadsheets containing information on several aspects of the No. 4 Furnace's operations, including, among others, effluent and wastewater treatment plant parametric data, end product testing, ratios of particular product compositions,

boiler operations, and particulate control and temperature data. PQ says it provided versions of its spreadsheets with unredacted column headers identifying all categories of data, including that data which was redacted as wholly irrelevant and unrelated to this appeal. It says that wastewater-related data, as indicated by tank level readings, pH values and other effluent parametric data, in no way relate to any of PQ's challenges to its permit. It adds that information on boiler parameters are equally unrelated because the boiler is a distinct source, and particulate control information, furnace temperature data, and product composition information are also unrelated.

With respect to the out-of-state facilities, PQ argues that the Department impermissibly requests data pertaining not just to carbon monoxide emissions, but all other pollutants, which are not related in any way to this appeal. It asks for information on not just glass furnaces, but all sources within the PQ facilities (including, e.g., boilers, engines, generators, etc.), none of which are related to this appeal. PQ says that the information cannot possibly be relevant because the out-of-state facilities are not regulated by the Department. Finally, it complains that the Department previously objected to what PQ believed was an earlier similar request by PQ for information from the Department, and PQ's current refusal to answer the Department's discovery is simply payback.

Taking PQ's points in reverse order, if PQ was not satisfied with the Department's earlier discovery responses, and was unable to work it out with the Department, it needed to file a motion to compel. One party's failure to comply with its discovery obligations does not excuse the other party's duty to comply. Two wrongs do not make a right.

With respect to out-of-state facilities, air pollution control is all about assessing what is "reasonable," and "available," and "technically feasible." PQ's permit requirements were

apparently developed in the context of a RACT (Reasonably Available Control Technology) determination, and presumably, a BAT (Best Available Technology) determination. What similar situated facilities can do would seem to be quite relevant in making these and other similar determinations. Details regarding the age and characteristics of other sources are necessary to determine whether they are in fact similar. This information is at least potentially relevant from a technical point of view, regardless of where the facilities are located. That said, PQ's point that discovery regarding sources other than furnaces within those facilities is irrelevant is well-taken. PQ's duty to respond is limited to information regarding the furnaces.

With respect to the spreadsheets, we agree with the Department that the fact that the redacted information was contained in the same document as clearly discoverable information strongly suggests that the redacted information is discoverable as well. *See Consol, supra*. PQ has failed to meet its burden of showing us why the redacted information in the operator log spreadsheets is irrelevant, with the exception of information regarding boiler operations. We note that PQ has not claimed that the information is privileged or that divulging it would somehow be prejudicial. It is perhaps also worth mentioning in passing that PQ, having been granted the privilege of a permit, has a general obligation to supply information regarding the operation of its source to the Department upon request. 25 Pa. Code § 127.512(c)(5); PQ Permit Condition #009, Section B.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of July, 2017, it is hereby ordered that the Department's motion to compel is granted in part in accordance with the foregoing Opinion. PQ shall serve on the Department responses to the Department's second discovery requests in accordance with the foregoing Opinion on or before **August 7, 2017**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 17, 2017

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

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-155-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: July 28, 2017**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board denies two Motions to Dismiss where a sufficient case or controversy remains to make it prudent to proceed with the case.

O P I N I O N

Background

The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC ("Consol"), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area ("BMEEA"). BMEEA is located adjacent to and partially underlies Ryerson Station State Park. In general, as proposed by Consol, BMEEA consists of five longwall panels approximately 1,500 feet wide by 12,000 feet long with the longer dimension running largely in

an east-west direction. The five panels start with the 1L panel on the northern boundary of BMEEA through the 5L panel on the southern edge of BMEEA.

On March 29, 2012, the Pennsylvania Department of Environmental Protection (the "Department" or "DEP"), issued Permit Revision No. 158 allowing development mining for BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. These streams are generally located in the western half of BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol's application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run. The Center for Coalfield Justice and the Sierra Club ("CCJ/SC"), appealed the issuance of Permit Revision Nos. 180 and 189 and those appeals are consolidated at EHB Docket No. 2014-072-B ("Consolidated Appeal"). A multi-day hearing was held on the Consolidated Appeal in August 2016 and the filing of post hearing briefs was concluded on December 6, 2016. Supplemental briefs were submitted on July 12, 2017, providing the parties' analyses of the impact of the Pennsylvania Supreme Court's decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, (10 MAP 2015) to the Article 1, Section 27 claim in this case. The Consolidated Appeal is awaiting adjudication by this Board.

On February 22, 2016, Consol submitted an application seeking authorization to conduct longwall mining beneath Polen Run and Kent Run in the 3L panel. On December 13, 2016, the Department issued Permit Revision No. 204 authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. Permit Revision No. 204 requires Consol to implement an

approved stream restoration plan to address any impacts to the streams from Consol's longwall mining. Permit Revision No. 204 also includes Special Condition No. 97[1] that states Consol may not conduct longwall mining beneath or adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources ("DCNR") grants written access to Consol to allow them to perform stream mitigation work authorized by the Department. CCJ/SC appealed the issuance of Permit Revision No. 204 on December 19, 2016 listing numerous objections to the Department's issuance of the permit revision.

On the afternoon of December 21, 2016, CCJ/SC filed a Petition for Supersedeas ("Petition") with this Board, seeking to halt longwall mining under Polen Run and Kent Run. On December 22, 2016, the Board held a conference call with all parties to discuss how to proceed on the Petition and requested a status update from counsel for Consol about mining in the 3L panel. The Board was informed that, as of that morning, the longwall face in the 3L panel had advanced beyond Polen Run. Following the conference call, the Board issued an Order on December 23, 2016, scheduling a hearing on CCJ/SC's Petition to begin on January 10, 2017. The Order required Consol to file notification if it received the grant of written access from DCNR pursuant to Special Condition No. 97 or otherwise resolved the Special Condition and also prohibited longwall mining within 500 feet of any portion of Kent Run that overlies the 3L panel pending a ruling on the Petition.

Consol filed its response to the Petition on January 3, 2017, and included with it a Motion to Dismiss Petition for Supersedeas ("Motion"). On January 9, 2017, an Opinion and Order on the Motion was issued granting in part and denying in part Consol's Motion. The Board found

[1] Consol appealed the inclusion of Special Condition No. 97 in Permit Revision No. 204 and the appeal was docketed at 2017-002-R. On May 12, 2017, Consol filed a Praecipe to Withdraw Appeal, and the docket was marked closed and discontinued on June 8, 2017 by an Order of the Board.

that the Petition was moot as to Polen Run because the action the Petition sought to prevent, the undermining of Polen Run, had already occurred. The Board dismissed any claims under the Petition that addressed Polen Run but ruled that the Petition was ripe as to Kent Run. A hearing on CCJ/SC's Petition was held in Pittsburgh from January 10 – 12, 2017. On January 18, 2017, the parties submitted briefs and memoranda of law addressing the issues raised in the hearing. On January 24, 2017, the Board issued an Order granting the Petition in part, preventing Consol from conducting longwall mining within 100 feet of any portion of Kent Run, and an Opinion in the matter was issued on February 1, 2017. Consol filed a Motion for Expedited Hearing on March 10, 2017, and responses were filed by the Department and CCJ/SC on March 15, 2017. The Board denied the Motion by an Opinion and Order issued on March 22, 2017.

In late April 2017, Consol and DCNR entered into an agreement ("DCNR Agreement") intended to satisfy Special Condition No. 97 that states in part that Consol will not conduct longwall mining beneath Kent Run in the 3L panel. Relying primarily on the DCNR Agreement, Consol filed a Motion to Dismiss Appeal as Moot on June 9, 2017 ("Consol Motion"). The Department followed on June 23, 2017, with a Motion to Dismiss Appellants' Appeal as Moot with Respect to Kent Run ("DEP Motion"). On July 10, 2017, CCJ/SC filed a Response to both the Consol Motion and the DEP Motion ("CCJ/SC Response"). The Department did not file a reply to the CCJ/SC Response. Consol filed a Reply Brief to CCJ/SC's Response on July 26, 2017 ("Consol Reply"). The Consol Motion and DEP Motion are now ready for decision.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to

dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id*., See also *Bernardi v. DEP, 2016* EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Id*.; *Ehmann v. DEP*, 2008 EHB 386, 390.

Contrary to a lack of jurisdiction, where the Board must dismiss an appeal, mootness is a matter of prudence. In *Ehmann* the Board explained that:

> Mootness is a *prudential* limitation related to justiciability; not jurisdiction. If this Board lacks jurisdiction, it *must* dismiss an appeal. In contrast, where an appeal is moot, the Board has the authority based upon its own measure of prudence to proceed. Although prudence will often dictate dismissal, this appeal demonstrates that that is not always the case.

Ehmann, 2008 EHB 386, 388.

The Board will generally dismiss an appeal as moot where an actual case or controversy no longer exists. *Consol Pennsylvania Coal Company v. DEP and Center for Coalfield Justice*, 2015 EHB 48, *aff'd, Consol Penn. Coal v. Dep't of Envtl Prot*., 129 A.3d 28 (Pa. Cmwlth. 2015). "The existence of a case or controversy requires a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication, with sufficiently adverse parties to sharpen the issues for judicial resolution." *Consol Penn. Coal v. Dep't of Envtl Prot*., 129 A.3d 28, 39 (Pa. Cmwlth. 2015) citing *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority (SEPTA),* 937 A.2d 1176, 1179 (Pa. Cmwlth. 2007) (en banc). "A matter before the Board becomes moot when

an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001). By way of example, we have specifically found that a permittee's compliance with, and the subsequent removal of, a permit revision renders an appeal objecting to that revision moot. *Morris Twp. v. DEP*, 2006 EHB 55, 56. To be sure, rescission of a Department action will not always moot an appeal: for example, where concrete, continuing obligations exist. *Ehmann*, 2008 EHB 386 (revocation of the authority to mine did not discharge liability for reclamation or duty to prevent discharges). In such instances, the Board can clearly provide effective relief. *Id*. at 388, 389. Nevertheless, "[i]t is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Goetz v. DEP*, 2001 EHB 1127, 1131. Some examples of exceptional circumstances include, but are not limited to, where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *See, e.g., Robinson Coal Co. v. DEP*, 2011 EHB 895, 899. The existence of any one of these circumstances "may justify" the Board declining to dismiss the matter. *Ehmann*, 2008 EHB at 390

Analysis

In the Consol Motion, Consol states that the sole issue before the Board in this appeal is the Department's issuance of a permit to longwall mine beneath and within 100 feet of Kent Run in the 3L panel and to conduct any necessary streambed mitigation work associated with that mining. Consol argues that the DCNR Agreement which provides that Consol will not longwall mine beneath and within 100 feet of Kent Run in the 3L panel, makes any appeal of Permit

Revision No. 204 moot. Consol asserts that there is no case or controversy for the Board to decide because the remedy sought by CCJ/SC has already occurred independent of the appeal. Consol also argues that none of the exceptions to the mootness doctrine apply to the situation presented by this case. The Department joins Consol in part by arguing that the case should be dismissed as moot as to Kent Run but it does not seek to have the entire matter dismissed. The Department sides with Consol in stating that the DCNR Agreement means that the Board cannot grant the requested relief. The Department, however, goes further and argues that in addition to the DCNR Agreement, Consol has submitted revised maps that show only development mining in the area of Kent Run in the 3L panel and therefore, the Department contends there is nothing to vacate in Permit Revision No. 204. The Department points out that without any longwall mining in the area of Kent Run, CCJ/SC's relief request that the Board impose the necessary terms and conditions under the applicable statutes and regulations to protect Kent Run is not a proper basis for relief. Finally, the Department argues that the limited exceptions to the mootness doctrine do not apply, specifically that any future change in Consol's plan with regard to longwall mining in the area of Kent Run would trigger an appealable action and therefore would not evade review.

In their response to the Consol Motion and DEP Motion, CCJ/SC argue that the DCNR Agreement does not moot their appeal because it does not change the Department permit action or the terms of Permit Revision No. 204. They note that the DCNR Agreement involves only one party to this action, Consol, and that Consol has not requested and the Department has not acted to withdraw or revise Permit Revision No. 204 in light of the DCNR Agreement. While acknowledging that Consol cannot longwall mine under Kent Run in the 3L panel until it receives the permission from DCNR that it currently lacks, CCJ/SC note that there is nothing to

prevent Consol and DCNR from reaching a new or revised agreement that would allow longwall mining to go forward under Kent Run. They also assert that Consol has previously offered inconsistent statements before the Board and the Commonwealth Court regarding whether it could resume longwall mining in the vicinity of Kent Run in the 3L panel. During testimony at the supersedeas hearing, a Consol representative stated that Consol would not be able to return to mine the 3L panel once the longwall machine was removed from the 3L panel, but in a subsequent affidavit filed with this Board, Consol stated there was the potential to restart longwall mining in the 3L panel as early as July 2017 continuing until an unnamed date in September 2017.[2] Regarding the Department's assertion that the revised maps support the position that the Permit Revision No. 204 appeal is moot as to Kent Run, CCJ/SC point out that the revised maps were submitted as part of a permit application to longwall mine beneath Polen Run in the 4L and 5L panel on which the Department has yet to take action. CCJ/SC question how unapproved revised maps submitted as part of a permit application will require a permit revision if they should be changed to reflect longwall mining under Kent Run as asserted in the DEP Motion.

As noted above, the issue of mootness is a prudential question for the Board, not one of jurisdiction. Therefore, we need to determine based on our own measure of prudence whether we should proceed with this case. At first glance, the arguments from Consol and the Department seem compelling and suggest that the proper course of action would be to grant the Consol Motion and DEP Motion and dismiss this case. After all, as things stand at this point, Consol has executed an agreement with DCNR that all parties in this case agree provides that Consol will

[2] In support of a Motion for Expedited Hearing filed by Consol in this matter on March 10, 2017, Consol submitted the Affidavit of Barry Miller which stated Consol could return to mine the coal under Kent Run in the 3L panel between July and September 2017.

not longwall mine beneath or within 100 feet of Kent Run in the 3L panel. Furthermore, Consol has submitted revised maps that eliminate longwall mining in the area of Kent Run in the 3L panel and show the area under and within 100 feet of Kent Run as development area only. However, on closer examination of the facts in this case, we agree with CCJ/SC that these changes do not, at this point, go far enough to moot their appeal. A sufficient case or controversy remains in our opinion to make it prudent to proceed with the case and deny the Consol Motion and DEP Motion.

We will first address the Department's contention that Consol's submission of the revised maps that show only development mining in the vicinity of Kent Run in the 3L panel support a finding that the appeal is moot and should be dismissed. In the affidavit from Joel Koricich accompanying the DEP Motion, he states that the revised maps are included in an application seeking Department authorization to conduct longwall mining under Polen Run in the 4L and 5L panels and that any future changes to these maps that seek approval to conduct longwall mining under Kent Run will constitute a permit revision subject to appeal under 25 Pa. Code § 86.52. Under the relevant sections of 25 Pa. Code § 86.52, a permit revision is required when there is a change to the coal mining activities set forth in the application upon which the permit is issued or when required by the Department. Our understanding is that the revised maps were submitted as part of a pending permit application seeking a permit revision and have not been officially approved or otherwise acted on by the Department to the best of our knowledge.[3] We do not see

[3] In its Motion filed on June 23, 2017, the Department did not state that it had approved or otherwise taken a Department action with regard to the revised maps. CCJ/SC pointed out this issue in their response filed on July 10, 2017. Under our rules, specifically 25 Pa. Code § 1021.94(d), Consol and the Department had 15 days to file a reply to the response. On July 25, 2017, the Department filed a letter with the Board stating that it would not be filing a reply. Consol's Reply, filed on July 26, 2017, does not state that the revised maps had been approved by the Department or that the permit application that they accompanied had been approved or denied. In a conference call with the Board held on July 27, 2017, the Department explained that it had not yet acted on the pending permit application but did not directly

how the revised maps have any legal weight at this point or otherwise supersede the previously submitted maps that were approved as part of the issuance of Permit Revision No. 204. In the Consol Reply, Consol states that its submittal of the revised mining map is binding on it but provides no statutory or regulatory citation in support of this statement, citing only to Mr. Koricich's affidavit. Permit applications and the documents submitted with them are subject to revision and/or withdrawal up until the point where the Department acts to approve or deny the permit application and issues the permit or permit revision. There is nothing to prevent Consol from pulling its submission of the revised maps and/or revising them further until the Department takes action on the pending permit revision application. Once the revised maps are acted on and become part of a permit revision issued by the Department, we agree that any further changes would certainly require a new permit revision under 25 Pa. Code § 86.52 as discussed by Mr. Koricich in his affidavit. However, on the record in front of us, that has not happened yet. As a result of their lack of any status until approved or acted on by the Department, we find that the revised maps do not support the Department and Consol's contention that the case is moot as to Kent Run.

We next turn our attention to the impact of the DCNR Agreement on the appeal. Permit Revision No. 204 contains Special Condition No. 97 that requires Consol to receive written access from DCNR to perform authorized stream mitigation work. Under the permit terms, Consol could not begin longwall mining under Permit Revision No. 204 until this condition was satisfied. The DEP Motion states that Consol has satisfied the condition by executing the DCNR Agreement. Since the permit condition has been satisfied, Consol can now proceed under

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address the status of the revised maps. As such, we lack any information on what, if any, action the Department has taken with regard to the revised maps since it filed its Motion on June 23, 2017. For the purposes of this Opinion, we are left to assume that the revised maps have not been approved or otherwise acted on by the Department.

Permit Revision No. 204 subject only to the restrictions placed on it under the terms of the DCNR Agreement. While Consol agreed not to longwall mine underneath Kent Run in the 3L and 4L panels, there is nothing preventing Consol and DCNR from further amending the current DCNR Agreement to remove that restriction. In the Consol Reply, Consol sets forth various reasons why it contends any further amendment to the DCNR Agreement to allow longwall mining underneath Kent Run is not likely. We agree with Consol that the likelihood of that happening is remote, but we think that prudence dictates that we at least acknowledge that possibility.

The Department discussed that scenario in its Brief in support of the DEP Motion. The Department states that if such a change to the DCNR Agreement occurred, Consol would be required to submit further revised maps that would be considered a permit revision that could be appealed at that time pursuant to 25 Pa. Code § 86.52. As we discussed above, to the best of our knowledge, the revised maps have not been approved or otherwise acted on by the Department. The current approved versions of the maps are those submitted with and approved as part of Permit Revision No. 204. It is unclear to us how changes to unapproved maps would constitute a permit revision and therefore be subject to appeal by CCJ/SC. Ultimately, the potential for further changes to the DCNR Agreement and the uncertainty of what would happen if that occurred suggests to us that it would not be prudent to rely on the terms of the DCNR Agreement as the basis for dismissing the permit appeal. As things stand at this time, we think there are too many moving parts with regard to the DCNR Agreement and the revised maps to rely on those documents as a basis for finding that CCJ/SC's appeal of Permit Revision No. 204 should be dismissed for mootness. Those documents do not revise or otherwise negate the specific terms of Permit Revision No. 204 which remains largely intact at this time. The only change is that the

one impediment to Consol operating under the specific terms of the permit revision, Special Condition No. 97, has been satisfied according to the Department. The Department has taken no action to revise Permit Revision No. 204 to eliminate the possibility of longwall mining under Kent Run, relying instead on the terms of an agreement to which it is not a party. We think given that, and the impermanence of the DCNR Agreement and revised maps, there is enough of an ongoing case or controversy present that it would not be prudent for the Board to dismiss the appeal. Because Permit Revision No. 204 remains largely intact, the Board is still in a position to grant relief to CCJ/SC even as to Kent Run if it were to find after hearing that the Department's issuance of the permit revision was unreasonable, contrary to law or contrary to the Pennsylvania Constitution. If Consol has no intention of longwall mining the coal beneath or within 100 feet of Kent Run in the 3L panel, it should submit a permit revision application to the Department stating that fact and requesting the Department to issue a permit revision to that effect.

While it at most played a minor role in the parties' arguments set forth in their filings, we also note that Permit Revision No. 204 permitted Consol to mine beneath Polen Run in addition to Kent Run. The Department only sought to dismiss the appeal as it applied to Kent Run recognizing that Permit Revision No. 204 addressed more than Kent Run. Consol, however, argued for dismissal of the entire appeal contending that the sole remaining issue before the Board relates to longwall mining in the vicinity of Kent Run. Consol does not clearly explain the basis for this statement. In a footnote in both the Consol Motion and its Brief in support of its Motion, Consol states that the Board has recognized the portion of the appeal as to Polen Run as being moot under our Opinion and Order in this matter dated January 9, 2017. The issue in front of the Board at that time was Consol's Motion to Dismiss CCJ/SC's Petition for

Supersedeas. The Petition was filed by CCJ/SC to prevent Consol from undermining Polen Run before the Board could hear the appeal of Permit Revision No. 204. The Board's January 9, 2017 Opinion and Order clearly granted dismissal of the Petition for Supersedeas that addressed Polen Run but did not entirely dismiss CCJ/SC's appeal of Permit Revision No. 204 as to Polen Run. If Consol is relying, as it appears, on our January 9, 2017 Opinion and Order addressing the Petition for Supersedeas as the basis for its position that the sole remaining issue in front of the Board in this appeal is longwall mining in the vicinity of Kent Run, it is incorrect in doing so. The Board did not dismiss the entire appeal as to Polen Run. Further, even though Polen Run had been undermined, we do not think that the Board is prevented from evaluating the various objections that CCJ/SC raised regarding the Department's issuance of the permit revision. At least some of those objections clearly raised issues with the post-mining mitigation and the manner in which the mitigation was authorized by the permit revision under Chapter 105. See Notice of Appeal Paragraphs 85-90.

Finally, we think the facts of the timing of Polen Run's undermining demonstrate that the situation in this case would support an exception to the mootness doctrine. There is an exception for actions that are capable of repetition yet likely to evade review. Permit Revision No. 204 was issued on December 13, 2016. Polen Run was undermined by the morning of December 22, 2016. Consol appears to be advocating that the appeal involving Polen Run is moot because it has already been undermined. As evident with Polen Run, if we were to adopt Consol's position, it is likely that the Board would in many, if not most cases be unable to complete its review of a Department's permitting decision prior to the stream being undermined. This would allow these decisions to evade review. Furthermore, such as situation is not only capable of repetition, it may very well happen again in the near future. In a conference call with the parties held on July

27, 2017, the Board was informed that Consol is proceeding in the 4L panel and at the current pace of mining, it will reach Polen Run in the 4L panel at some point in September 2017. Consol does not have the necessary permit from the Department to undermine Polen Run in the 4L panel at this point. The permit application discussed by Mr. Koricich in his affidavit, and which the revised maps are part of, is to allow that longwall mining to proceed under Polen Run in 4L and 5L panels. Depending on the timing of the Department's decision to grant or deny the requested permit revision, it is easy to see a similar scenario where the undermining of Polen Run could rapidly follow permit issuance. A permit decision by the Department should not be allowed to evade review under the mootness doctrine because the stream has been undermined prior to the Board rendering a decision on a permit appeal and, therefore, we think the exception to the mootness doctrine for conduct that is capable of repetition but likely to evade review applies to the appeal of Permit Revision No. 204 as to Polen Run. This is a further reason to deny Consol's Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-155-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 28th day of July, 2017, it is hereby ordered:

1. The Department's Motion to Dismiss Appellants' Appeal as Moot with Respect to Kent Run is **denied**;

2. Consol's Motion to Dismiss Appeal as Moot is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 28, 2017

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

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

For Appellants:
Sarah E. Winner, Esquire
John M. Becher, Esquire
(via electronic filing system)

Permittee:
Robert L. Burns, Esquire
Megan S. Haines, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. RITTER	:	
	:	
v.	:	**EHB Docket No. 2015-166-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SULLIVAN TOWNSHIP, Permittee	:	**Issued: August 3, 2017**

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the Appellant's appeal of the Department's Plan Revision approval under the Sewage Facilities Act, 35 P.S. § 750.1, *et seq.*, and the Administration of Sewage Facilities Planning Program Regulations, 25 Pa. Code § 71.1 *et seq*. The Department acted reasonably and in accordance with the law when it approved the Plan Revision. Further, the Appellant failed to file a Post-Hearing Brief as ordered by the Board. All issues from Appellant's case-in-chief are deemed waived. The Appellant had the burden of proof under the Board's Rules and his failure to file a Post-Hearing Brief as ordered provides an alternative basis to dismiss the appeal and grant the Department's Motion for Directed Adjudication.

FINDINGS OF FACT

Parties

1. The Department is the executive agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce the Sewage Facilities Act ("SFA"), 35 P.S § 750.1 *et seq.*, and the Administration of Sewage Facilities Planning Program Regulations ("Sewage Planning Regulations"), 25 Pa. Code § 71.1 *et seq.*

2. John E. Ritter ("Appellant") resides at 173 Sugar Branch Road, Troy, PA 16947, which adjoins an undeveloped lot owned by Anthony and Patricia Fiamingo.

Sewage Plan

3. On August 12, 2015, pursuant to Section 5 of the SFA and the Sewage Planning Regulations, 25 Pa. Code §§ 71.51(a)9(4), 71.52, 71.61, and 71.64, Sullivan Township ("Township" or "Permittee"), Tioga County, submitted to the Department a proposed revision to the Township's Official Sewage Plan ("Plan Revision"). (DEP Ex. 2; Note of Transcript ("N.T.") at 88, 108).

4. The Plan Revision will allow for a Small Flow Treatment Facility ("SFTF") on an undeveloped lot of Sugar Branch Road, Troy, PA 16947 ("Sugar Branch Lake Estates"). (DEP Ex. 2; N.T. at 86, 108-09).

5. The Plan Revision was properly submitted under the SFA, 35 P.S. § 750.5, and was ultimately approved by the Department. (DEP Ex. 11; N.T. at 85).

6. The undeveloped lot on Sugar Branch Road, Troy, PA 16497 in Sugar Branch Lake Estates is owned by Anthony and Patricia Fiamingo ("Fiamingo Lot"). (DEP Ex. 2; DEP Ex. 2B).

7. The Appellant owns a lot adjoining the Fiamingo Lot on which Mr. Ritter's residence is situated. (DEP Ex. 2; DEP Ex. 2A).

8. The Plan Revision was originally submitted on May 14, 2015, and it was denied by the Department on May 27, 2015 due to its being administratively incomplete. (DEP Ex. 1; N.T. at 84).

9. On December 4, 1997, the Township enacted an ordinance known as the "Small Flow Sewage Facilities Ordinance," which established the requirements for the installation,

operation, and maintenance of SFTFs within the Township. The Department took this Ordinance into consideration in reviewing the Plan Revision. (DEP Ex. 3).

10. The Department denied the May 14, 2015 Plan Revision because it was incomplete. The Department listed items that were not included in the application, and one of those items referenced failing to properly notify the neighboring property owners with water wells within 200 feet (200') of the proposed discharge path for the SFTF. (DEP Ex. 1).

11. The Department's requirement that the Township require proper notification of the neighboring property owners with water wells within 200 feet of the proposed discharge path of the SFTF was an additional requirement that is not mandated by statute or regulation. (N.T. at 86-87).

12. The Sugar Branch Lake Estates has a Code of Regulations that does not allow for the surface discharge of sewage drainage within 125 feet of Sugar Branch Lake. (DEP Ex. 5).

13. The Sugar Branch Lake Estates Code of Regulations are not enforceable by the Department. (N.T. at 140).

14. The proposed discharge point for the SFTF is more than 125 feet from Sugar Branch Lake. (DEP Ex. 2B; N.T. at 142).

15. The proposed discharge point for the SFTF is on a small stormwater waterway ("Small Stormwater Waterway") located on the Fiamingo Lot. (DEP Ex. 2B).

16. The Small Stormwater Waterway does not cross the Fiamingo Lot property line onto the Ritter Lot. (DEP Ex. 2B).

17. The SFTF will treat domestic wastewater generated from a residential dwelling. (N.T. at 130).

18. The Township and the Fiamingos entered into an installation and maintenance

agreement on May 12, 2015. (DEP Ex. 4).

19. On July 24, 2015, the Department received a copy of a comment letter submitted by Mr. Ritter that was addressed to the Sullivan Township Supervisors ("Ritter Comment Letter"). (DEP Ex. 7).

20. The Ritter Comment Letter included some comments, which pertained to the Plan Revisions. (DEP Ex. 7).

21. On August 11, 2015, the Township adopted the Plan Revision to the Township's Official Sewage Plan by Resolution at a public meeting. (DEP Ex. 6).

22. On August 12, 2015, the Department received from Sullivan Township a resubmission of the Plan Revision. (DEP Ex. 2; N.T. at 88, 108).

23. The Department addressed minor completeness issues of the Plan Revision through emails with the consultant. (DEP Ex. 12; DEP Ex. 13; N.T. at 108).

24. The Department considered the aspects of the Ritter Comment Letter that pertained to the Plan Revision. (N.T. at 142-146).

25. On October 1, 2015, the Department determined that the Plan Revision approved and submitted by the Township was administratively and technically complete and was therefore approved. (DEP Ex. 11).

26. The Fiamingo Lot was subdivided as part of the original March 1967 subdivision for Sugar Branch Lake Estates and is therefore considered under the Sewage Planning Regulations as a "lot of record" in existence prior to May 15, 1972. (N.T. at 80-81).

27. Prior to the approval of the Plan Revision, on-lot sewage disposal was the only sewage disposal method allowed by the Sullivan Township Sewage Treatment Plan in the area where the Fiamingo Lot is situated. (N.T. at 80-84).

28. Soils present on the Fiamingo Lot are not suitable for any on-lot sewage disposal technology currently approved in Pennsylvania. (DEP Ex. 2C at 2; N.T. at 130-32).

29. Section 71.52 of the Sewage Planning Regulations, 25 Pa. Code § 71.52, "Content requirements – new land development revisions" is applicable to the Department's review of the Planning Revision. (N.T. at 110).

30. Sullivan Township satisfied the Sewage Planning Regulations at 25 Pa. Code § 71.52(a)(1)(i), "Type of facilities to be served, density of proposed development and whether the development is residential, commercial or industrial" via the Project Narrative it submitted in the Plan Revision. (DEP Ex. 2; N.T. at 111).

31. Thomas Mark Randis is employed by the Department as an Environmental Program Manager. (N.T. at 78-79).

32. Mr. Randis made the Department's final decision to approve the Plan Revision. (N.T. at 92-93).

33. Daniel Thetford is employed by the Department as a Soil Scientist 2. (N.T. at 105).

34. Mr. Thetford was the lead reviewer on the Plan Revision. (N.T. at 92, 108).

35. Mr. Thetford recommended to Mr. Randis that he sign the letter approving the Plan Revision. (N.T. at 155).

36. Mr. Thetford described how he reviewed the Plan Revision and determined that it satisfied the requirements of the Sewage Planning Regulations at 25 Pa. Code §§ 71.52, 71.64, which are applicable to new land development. (DEP Ex. 2; DEP Ex. 3; DEP Ex. 4; DEP Ex. 5; DEP Ex. 6; N.T. at 111-135).

37. Sullivan Township satisfied the Sewage Planning Regulations at 25 Pa. Code §

71.64(c)(5), which requires a preliminary hydrogeologic evaluation when the small flow treatment facility will use land disposal or a dry stream channel discharge for final disposal, including an evaluation that establishes specific responsibilities for operation and maintenance of the proposed system which shall include documentation of one or a combination of the following operation and maintenance requirements have been established or approved in writing by the municipality by requiring the Installation and Maintenance Agreement and by the Township's ordinance. (DEP Ex. 3; DEP Ex. 4; N.T. at 135-36).

38. The Sewage Planning Regulations at 25 Pa. Code § 71.64(c)(6) were not applicable to the Sullivan Township Plan Revision. (N.T. at 136-37).

39. Sullivan Township satisfied the Sewage Planning Regulations at 25 Pa. Code § 71.64(c)(7), which requires a preliminary hydrogeologic evaluation when the SFTF will use land disposal or a dry stream channel discharge for final disposal, including an evaluation of the alternatives available to provide sewage facilities, which documents that the use of small flow treatment facilities is a technically, environmentally, and administratively acceptable alternative. (DEP Ex. 9; DEP Ex. D-2B; N.T. at 137-38, 142).

40. The Department evaluated the proposed discharge point for the SFTF under Subsection 71.64(c)(2) of the Sewage Planning Regulations at 25 Pa. Code § 71.64(c)(2), relating to dry stream channel discharge. (N.T. at 132).

41. The Fiamingos provided to the Department an analysis by Philip Getty, a Professional Geologist, which concluded that the SFTF and its discharge were not likely to impact any groundwater uses due to the location of the SFTF discharge relative to Sugar Branch Lake, and considering soil and geologic conditions in the discharge pathway. (DEP Ex. 2D; N.T. at 135).

Appeal to the Environmental Hearing Board

42. On August 30, 2016, the Department filed a motion for sanctions against Mr. Ritter for failing to file his pre-hearing memorandum by August 25, 2016. (Bd. Ex. 18).

43. The Board issued a Rule to Show Cause against Appellant, regarding his failure to file his Pre-Hearing Memorandum, returnable in writing by September 9, 2016. (Bd. Ex. 20).

44. Mr. Ritter filed his pre-hearing memorandum on September 9, 2016. (Bd. Ex. 24, 25).

45. On November 28, 2016, the Board ordered Appellant's post-hearing brief be filed on or before December 30, 2016. (Bd. Ex. 35).

46. To date, Mr. Ritter has not filed a post-hearing brief.

DISCUSSION

Background

On October 30, 2015, Mr. John E. Ritter ("Mr. Ritter" or "Appellant") filed an appeal of the Department's approval of a revision to the Sullivan Township Official Sewage Plan ("Plan Revision"), which proposed the development of a neighboring property ("Fiamingo Lot"). Mr. Ritter owns the property adjacent to the property subject to the revised plan. The Plan Revision allows for the development of a small flow treatment facility ("SFTF") which will discharge treated effluent to the Small Stormwater Waterway before being directed to Sugar Branch Lake.

Appellant voiced a series of objections regarding the Plan Revision in his Notice of Appeal ("NOA"). These objections included (1) fear of system failure resulting in pollution of Appellant's well; (2) insufficient soils, geology, groundwater, and soil infiltration assessments and lack of complete and thorough test results; (3) the discharge point was so close to Sugar Branch Lake as to violate the Sugar Branch Lake Estates Association's Code of Regulations; and

(4) the SFTF's surface discharge system is projected to flow through areas of wetlands adjacent to the Appellant's property and no expert opinion had been rendered as to the impact, if any, to those wetlands areas.

On August, 30, 2016, the Department filed a Motion for Sanctions for Failure to File a Pre-Hearing Memorandum. The Board issued an Order and a Rule to Show Cause on August 31, 2016, directing Appellant to file his Pre-Hearing Memorandum by no later than September 9, 2016. Mr. Ritter did so. The Department filed its Pre-Hearing Memorandum on September 26, 2016 and Sullivan Township ("Township" or "Permittee") followed suit, filing its Pre-Hearing Memorandum on the same date.

The Appellant had concerns with the plans to construct the SFTF on property next to his.[1] (N.T. at 16). The SFTF will serve the adjoining property and includes a discharge to the Small Stormwater Waterway, a swale or channel that is near Appellant's property. (N.T. at 17). The Appellant has a well on his property and his primary concern is that discharge will adversely affect the well. *Id*. The Appellant asserts that the plans violate 25 Pa. Code § 73.13 and the requirement for minimum horizontal isolation distance. *Id*. The Appellant is also concerned that during heavy rain events the discharge in the channel will overflow onto his property, and if there is a system failure of the SFTF, untreated effluent will flow onto his property and contaminate his water well. (N.T. at 18-19).

[1] The Board discerns Mr. Ritter's concerns from his testimony at the hearing. Mr. Ritter's Pre-Hearing Memorandum did not contain the required statements of facts or legal issues. 25 Pa. Code § 1021.104(a)(1)-(2). Mr. Ritter, as previously noted, did not file a Post-Hearing Brief. As a pro se appellant, the Board recognizes the difficulties that many pro se appellants have complying with the Board's Rules of Practice and Procedure, but these Rules contain binding requirements that appellants are required to follow.

The Board held a hearing on the merits of the appeal on October 19, 2016.[2] While Mr. Ritter failed to file a Post-Hearing Brief, the Department and the Intervenor both did so, and the matter is ripe for adjudication.[3] Though Mr. Ritter raised several concerns in his NOA, there is only one issue before the Board, and that is whether the Department appropriately considered the discharge point and the possibility that the discharge from the SFTF, planned to be installed on the Fiamingo Lot, will contaminate Mr. Ritter's water well. Specifically, did the Department act in a reasonable manner, lawfully, and in accordance with the facts when it approved the Township's Plan Revision? The Board finds that it did, and dismisses this appeal accordingly, as set forth below.

Burden of Proof and Standard of Review

In hearings before the Board, the party with the burden of proof is required to present a *prima facie* case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). Here, that is the Appellant. An appellant in a third-party appeal bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *See e.g., Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 410; *Gadinski v. DEP*, 2013 EHB 246, 269. The Practice and Procedure Rules of the Environmental Hearing Board provide that "a party appealing an action of the Department shall have the burden of proof . . . when a party who is not the recipient of an action by the Department protests the action." 25 Pa. Code § 1021.122(c)(2). The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the

[2] For the convenience of the Parties, the Board held the hearing at the Department's North Central Regional office in Williamsport, Pennsylvania.

[3] As an alternative basis for dismissing Mr. Ritter's appeal, the Department asks the Board to grant its Motion for a Directed Adjudication because Mr. Ritter failed to submit a Post-Hearing Brief. Mr. Ritter has the burden of proof in this Appeal and this failure constitutes a waiver of all issues not included in his non-existing Brief. Without a brief, Mr. Ritter has not made a *prima facie* case and the Department asserts that it is entitled to a Directed Adjudication. The Department's argument has merit and will be addressed later in this Adjudication.

facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Borough of St. Clair v. DEP*, 2016 EHB 299, 317-18; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269. Because Mr. Ritter has not raised any constitutional issues, he must show by a preponderance of the evidence that the Department acted unlawfully or unreasonably in approving the Township's Plan Revision.

The Board reviews Department actions *de novo. Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michael L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearings *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley v. DEP, 2001 EHB 131, 156. The Board is able to consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Commw. 2004). In this case, the Board finds that the Department acted reasonably, lawfully, and in accordance with the facts when it approved the Township's Plan Revision.

Whether the Department Approval was Lawful and a Reasonable Exercise of the Department's Discretion as Supported by the Facts

The Pennsylvania Sewage Facilities Act gives every Pennsylvania municipality the responsibility for developing and implementing a current and comprehensive sewage facilities plan in conformance with the requirements that are enumerated at Section 5(d). 35 P.S. § 750.5(d); *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425, 429. "It is well-settled that primary decision-making responsibility regarding sewage facilities plans lies at the municipal level." *Id*. Under the Sewage Facilities Act, the Department has the responsibility of (1) insuring that municipalities submit plans and revisions for review; (2) approving or disapproving those plans or revisions; and (3) making sure that those plans are implemented. *See Morton Kise, et al. v. DER, et. al.*, 1992 EHB 1580, 1605.

The Department does not second guess properly made planning or zoning decisions that have been made by local agencies, or other similar decisions of local concern, even though such decisions may be related to approved plans. *Community College of Delaware County v. Fox*, 342 A.2d 468, 478 (Pa. Cmwlth. 1975). Put another way, the Department's role is to ensure that any proposed sewer system conforms with local planning and is consistent with the statewide supervision of water quality management. *Id*. at 478; *see Northampton Township v. DEP*, 2008 EHB 563, 567 ("Neither the Department nor this Board function as überplanners, and we must be wary of any scheme that would have us making planning choices in lieu of the municipality."); *see Oley Township v. DEP*, 710 A.2d 1228, 1230 (Pa. Cmwlth. 1998) (discussing that although sewage facilities planning touches on a divergent set of issues in the law, the Department is not in a position to insert itself into all areas of dispute).

The Sewage Facilities Act states that

> [e]ach municipality shall submit to the Department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable

> period as the Department may prescribe, and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the Department: Provided, however, that a municipality may at any time initiate and submit to the Department revisions of the plan.

35 P.S. § 750.5(a). Municipal sewage plan revisions must also comport with the requirements of Section 5(d) of the Sewage Facilities Act, 35 P.S. § 750.5(d), and the Sewage Planning Regulations, 25 Pa. Code §§ 71.1 *et seq.* Section 71.32(d)(1)—(7) provides that the Department shall consider the following:

> (1) Whether the plan or the revision meets the requirements of the act, The Clean Streams Law and this part.
> (2) Whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public.
> (3) Whether the plan or revision furthers the policies established under section 3 of the act (35 P.S. § 750.3) and sections 4 and 5 of The Clean Streams Law (35 P.S. §§ 691.4 and 691.5).
> (4) Whether the official plan or official plan revision is able to be implemented.
> (5) Whether the official plan or official plan revision adequately provides for continued operation and maintenance of the proposed sewage facilities.
> (6) Whether the official plan or official plan revision contains documentation that inconsistences identified in § 71.21(a)(5)(i)—(iii) (relating to content of official plans) have been resolved under § 71.31(e).
> (7) If the official plan or official plan revision includes proposed sewage facilities connected to or otherwise affecting sewage facilities of other municipalities, whether the other municipalities have submitted necessary revisions to their plans for approval by the Department.

25 Pa. Code § 71.32(d)(1)—(7). These considerations guide the Department's review.

Because this is a third-party appeal and the Appellant has the burden of proof, we first turn our attention to the Appellant's arguments regarding the Department approval of the Plan Revision. At the hearing, the Appellant focused his argument on issues that are more appropriate for consideration during the permit review,[4] which was not the subject of the pending appeal,

[4] At the planning stage, potential issues need to be identified and carefully evaluated, but there is no requirement that the methods selected for sewage treatment need to be absolutely certain of implementation. *Borough of Kutztown v. DEP*, 2016 EHB 88, 95-96. Mr. Ritter's concerns went beyond the planning stage and were more focused on the absolute certainty of implementation that is a concern during the subsequent permitting stage.

and on the likelihood of system failure and whether the Department had adequately considered this risk. Appellant's concern regarding the possible failure of the planned SFTF is a legitimate concern on its face, but the Appellant provided no supporting facts for this argument, only hypothetical scenarios. An appellant must do more than simply raise concerns to make his case. *Borough of St. Clair v. DEP*, 2014 EHB 76, 115 (stating "appellants may not simply raise an issue and then speculate that all types of unforeseen calamities may occur."), *citing Shuey v. DEP*, 2005 EHB 657, 711.

During testimony, the Department divulged that the planned system in question had both visible and audible alarms to indicate malfunctions. (N.T. at 33). These signals would be observable by Mr. Ritter. *Id*. Further, regular inspections of the system are required to ensure that it is functioning appropriately. (N.T. at 36-37). Appellant stated that he was glad to learn that regular inspections were mandated, but insisted that he was nonetheless concerned about failure occurring during the gaps in time between inspections. (N.T. at 37). While the Board is sensitive to Mr. Ritter's concern as a neighbor of the Fiamingo Lot, the Department has taken reasonable steps to prevent malfunction and to make any potential malfunction abundantly apparent both on visual and auditory levels.

In making its case, the Department presented witnesses who described the Fiamingo Lot and explained the Plan Revision approval process in detail. The lot is a pre-1972 lot of record that was carved out from a larger parcel. (N.T. at 80). This is significant because as a pre-1972 lot, the assumption is that sewage disposal of some kind is available on the lot. *Id*. at 81. However, the lot did not fit into the Township's current Act 537 Plan for onlot disposal. The particularities of the soils present on the Fiamingo Lot, in addition to other limitations on the property, would not allow for an onlot system. (N.T. at 83-84). This prompted the Township to

make revisions following a petition to the Township from the Fiamingos, the lot owners of record. *Id*. The Township made the Plan Revision available for public comment prior to its being submitted to the Department for approval. (N.T. at 82).

Once the Plan Revision was submitted to the Department, the Department reviewed the module to determine whether it met all the relevant standards applied by the regulations, the Township, and any other additional standards arising from site-specific conditions of the lot. (N.T. at 84). Initially the Plan Revision was denied. *Id*. The Department sent a denial letter on May 27, 2015 requesting that the Sullivan Township Supervisors correct deficiencies and respond to other requests prior to the Department reexamining the Plan Revision. (N.T. at 84-85). Among the identified deficiencies were: the lack of a fully signed copy of an installation and maintenance agreement, no map showing 200 feet on either side of the sewage route and all groundwater uses in that zone, lack of proof of notification by certified mail to the owners of wells within 200 feet of the sewage route, and a missing fee for review of the Plan Revision. (N.T. at 85). When the Township resubmitted the Plan Revision, the Department approved it because the Township successfully addressed all of the identified issues. (N.T. at 85-86). This of course included providing proof of notification to all owners of wells within 200 feet of the sewage route, which included Mr. Ritter. (N.T. at 86-87).

Because Mr. Ritter conflated the Plan Revision approval process, which is the subject of this appeal, with the later permitting process, the Department's witnesses also clarified the distinctions between the two. In granting approval for a Plan Revision, the Department determines whether the Plan Revision has met requirements under Act 537 and whether proper notification has been given. The approval ends with the conceptual plan. (N.T. at 94-95). When examining a permit application, the Department examines the conceptual plan and determines

the necessary specifics of the system: water quality standards, antidegradation requirements, discharge points, and other relevant specifics. (N.T. at 95). This appeal centered only on whether the Department's approval of the Plan Revision was reasonable and in accordance with the law.

The Department also demonstrated that it considered, in depth, the administrative completeness of the Township's Revised Plan. Department soil scientist, Dale Thetford, testified at length regarding his involvement with the Plan Revision resubmission. (N.T. at 105). The analysis of the Revised Plan was actually more detailed than other submissions due to the nature of the property. (N.T. at 92; 96). Because the Fiamingo Lot had not been previously developed, it was considered "new land development," which meant that Section 71.52 applied. (N.T. at 109). Mr. Thetford addressed each subsection in turn during the hearing. (N.T. at 101-126). Mr. Thetford also described the Revised Plan's adherence to Section 71.61, which calls for official plan requirements for alternative evaluations. (N.T. at 126-140). The Revised Plan application contained the necessary information under this regulation. In addition to completing an administrative review of the Revised Plan, the Department also undertook a review of the conceptual physical nature of the Revised Plan, which included a site visit. (N.T. at 141). After its extensive administrative, regulatory, and physical review, the Department determined that the Plan Revision was appropriate for the Fiamingo Lot.

The Board agrees with the Department that its approval of the Plan Revision was reasonable and in accordance with the law. Mr. Ritter failed to demonstrate that the Plan Revision did not meet the requirements of the Sewage Planning Regulations. He instead focused on alleged deficiencies related to the Administration of Sewage Facilities Permitting Regulations, 25 Pa. Code § 72.1, *et seq.* and the Standards for Onlot Sewage Treatment Facilities Regulations, 25 Pa. Code § 73.1, *et seq.* The Department and the Township assert that neither set

of regulations applies here. The Board agrees that these regulations governing permitting and onlot sewage treatment facilities are not applicable to this Plan Revision.

Mr. Ritter focused primarily on the potential for failure of the SFTF, which is a matter the Department would address during its review of permit applications under the Administration of Sewage Facilities Permitting Regulations in 25 Pa. Code Chapter 72. Here, the applicable regulations in Chapter 71 do not require the consideration of a hypothetical system failure for the approval of a plan revision. At the hearing, Mr. Ritter's case-in-chief amounted to objections that could be raised regarding the Department's consideration of permit applications pursuant to the implementation of the Plan Revision, but not in this appeal of the Plan Revision. Alternatively, Mr. Ritter's arguments might have been relevant with respect to a Plan Revision authorizing an onlot, soils-based system, but the Plan Revision here did not involve an onlot, soils-based system. The SFTF is not an onlot, soils-based system. Therefore, Mr. Ritter did not provide the Board with any basis to meet his burden of proof in this appeal.

Department's Motion for a Directed Adjudication

In its Post-Hearing Brief, the Department asked the Board to grant its Motion for a Directed Adjudication based upon Mr. Ritter's failure to submit his Post-Hearing Brief as ordered.[5] Without a Post-Hearing Brief, the Department asserts that the Appellant waived any and all issues in his appeal. The Board agrees.

Even assuming, *arguendo*, that Mr. Ritter had introduced sufficient evidence at the hearing to carry his burden, Mr. Ritter failed to file a Post-Hearing Brief as ordered by the Board on November 28, 2016. Under the Board's Rules, the party with the burden of proof in an appeal must make a *prima facie* case by the close of his case-in-chief. 25 Pa. Code 1021.117(b). The

[5] At the hearing, the Department also asked the Board for a Directed Adjudication at the end of the Appellant's case-in-chief, asserting that Mr. Ritter failed to submit sufficient evidence to establish a prima facie case. (N.T. at 77-78).

Pennsylvania Commonwealth Court has ruled that a party appearing before the Board is deemed to waive any issues not raised in its Post-Hearing Brief. *Lucky Strike Coal Co., et al. v. Commonwealth, DER*, 119 A.2d 447 (Pa. Cmwlth. 1988); *see also Plumstead Township v. Commonwealth, DER*, 1995 EHB 741. Mr. Ritter has the burden of proof in this appeal and by failing to file a Post-Hearing Brief, he has waived any and all issues that he raised in his case-in-chief at the hearing. Therefore, Mr. Ritter has not presented a *prima facie* case that the Department's approval of the Plan Revision was unreasonable or contrary to law.

Because Mr. Ritter has the burden of proof in this appeal and because he has not filed a Post-Hearing Brief, the Board finds that Mr. Ritter has waived the issues presented in his case-in-chief and has failed to prove that the Department acted unreasonably or contrary to law when it approved the Plan Revision. For these reasons alone, the Board could grant the Department's Motion for a Directed Adjudication and order that this Appeal is dismissed.[6] The Board has nevertheless also evaluated the merits of Mr. Ritter's appeal and has decided that Mr. Ritter failed to carry his burden of proof. Therefore, the Board orders that his appeal is dismissed.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.24; 35 P.S. § 691.7; 35 P.S. § 7514

2. The Department is the executive agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce the SFA, 35 P.S. § 750.1 *et seq.*, and the

[6] In its Post-Hearing Brief, the Department also included a demurrer to Mr. Ritter's case-in-chief based upon the Department's assertion that Mr. Ritter's objections are not related to the approval of the Plan Revision but are rather related to concerns about the failure of a particular sewage disposal system. The Department believes these concerns could be raised in the context of an appeal from the issuance of a permit, but not in the context of the approval of the Plan Revision. While the Board recognizes that the Department's argument has merit, the Board does not need to address this argument, having already determined there are two bases to dismiss Mr. Ritter's appeal.

Administration of Sewage Facilities Planning Program Regulations ("Sewage Planning Regulations"), 25 Pa. Code § 71.1 *et seq*.

3. Appellant, as a third-party appellant, bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

4. Appellant must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

5. The Board reviews Department actions de novo, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

6. The Plan Revision was properly submitted under the SFA, 35 P.S. § 750.5, and was administratively complete.

7. The Plan Revision was properly approved under the SFA, 35 P.S. § 750.5 because it is an administratively, technically, and environmentally acceptable sewage disposal option.

8. The Plan Revision meets the requirements of the Sewage Planning Regulations, 25 Pa. Code § 71.51, for approval by the Department as a revision to the Township's Official Sewage Plan because it is an administratively, technically, and environmentally acceptable disposal option.

9. The proposed installation and maintenance of an SFTF is authorized by the municipality pursuant to the Sewage Planning Regulations, 25 Pa. Code § 71.64(c)(5).

10. In its approval of Sullivan Township's Sewage Plan Revision, the Department acted reasonably and in conformance with the SFA and the Sewage Planning Regulations.

11. Mr. Ritter did not establish a *prima facie* case showing that the Department erred or acted unreasonably in its approval of Sullivan Township's Sewage Plan Revision.

12. The Department has properly determined that the use of the SFTF for the treatment of domestic sewage from the Fiamingo Lot is an administratively, technically, and environmentally acceptable disposal option.

13. The Plan Revision meets the requirements of the Township's Ordinance Regarding SFTF Installation and Maintenance.

14. The Plan Revision meets all of the relevant Township ordinances.

15. The Plan Revision meets the requirements of the Sewage Facilities Act, for approval by the Department as a revision to the Township's Official Sewage Plan.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN E. RITTER	:	
	:	
v.	:	**EHB Docket No. 2015-166-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SULLIVAN TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 3rd of August, 2017, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 3, 2017

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

For the Commonwealth of PA, DEP:
David M. Chuprinski, Esquire
Jeana A. Longo, Esquire
(via electronic filing system)

For Appellant, *Pro Se:*
John E. Ritter
(*via electronic filing system*)

For Permittee:
Jeffrey Scott Loomis, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
v.	:	**EHB Docket No. 2015-095-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 9, 2017**

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

By Steven C. Beckman, Judge

Synopsis

The Board finds that the Administrative Order issued to B&R Resources, LLC and Richard F. Campola by the Department requiring the plugging of abandoned wells under the Oil and Gas Act is lawful and reasonable. Richard F. Campola is individually liable for the violations identified in the Administrative Order and for complying with the requirements of the Administrative Order under the participation theory. Mr. Campola had actual knowledge of the violations, and intentionally neglected to remedy the violations despite having both the duty to act and the authority to act to address the violations.

Background

This matter involves the appeal of B&R Resources, LLC ("B&R Resources") and Mr. Richard F. Campola of a June 22, 2015 Administrative Order ("June 2015 Order") by the Department of Environmental Protection ("DEP" or "Department") alleging violations of the 2012 Oil and Gas Act. The June 2015 Order requires B&R Resources and Mr. Campola to, among other things, plug and mark wells that have been deemed abandoned. B&R Resources and Mr. Campola filed a timely appeal of the June 2015 Order on July 10, 2015. On May 6,

2016, B&R Resources and Mr. Campola filed a Motion for Partial Summary Judgment asserting that they should be awarded summary judgment on the issues of whether Mr. Campola was an "operator" as that term is defined in the 2012 Oil and Gas Act, and whether the Department properly imposed personal liability on Mr. Campola. On July 15, 2016, the Board issued an Opinion and Order on Appellants' Motion for Partial Summary Judgment granting summary judgment on the issue of whether Mr. Campola was an "operator," and denying summary judgment on the issue of personal liability. *B&R Resources v. DEP*, 2015 EHB 475.

A one day hearing was held in this matter on November 9, 2016, at the Board's Northwest Office and Court Facility in Erie, Pennsylvania. Following the hearing, the Department filed a post hearing brief on January 27, 2017. B&R Resources and Mr. Campola filed their post hearing brief on February 24, 2017, and the Department followed with a reply brief on March 10, 2017. On March 15, 2017, B&R Resources and Mr. Campola filed a Request for Oral Argument or in the alternative, Motion for Leave to File Reply Brief ("Request/Motion") to respond to the Department's reply brief. The Department filed a response to the Request/Motion on March 24, 2017, and on March 27, 2017, the Board issued an Order denying the Request/Motion. The matter is now ready for the Board to render its decision.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 878, No. 13, 58 Pa. Cons. Stat. §§ 3201-3274 ("2012 Oil and Gas Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations"). (Parties' Joint Stipulation of Facts ("Stip.") 1).

2. B&R Resources, LLC ("B&R Resources") is an Ohio Limited Liability Company engaged in various oil and gas exploration activities in Pennsylvania and maintains a business mailing address of 33275 Coachman Lane, Solon, Ohio 44139. (Stip. 2).

3. Mr. Richard F. Campola is an adult individual maintaining a mailing address of 33275 Coachman Lane, Solon, Ohio 44139. (Stip. 3).

4. Mr. Campola purchased an existing entity, B&R Resources, in July/August 2011. (Transcript page ("T") 14, 18).

5. Mr. Campola is the managing member and the sole member of B&R Resources. (Stip. 4).

6. Mr. Campola alone holds all of the interests in B&R Resources. (T. 67).

7. Beginning in June or July 2011, Mr. Campola, as managing member of B&R Resources, made the day-to-day operating decisions on behalf of B&R Resources including which wells to produce and whether or not to plug or abandon wells. (Stips. 12, 13).

8. Mr. Campola was the sole employee of B&R Resources as of September 2011. (T. 23).

9. In 2011, the Department transferred well permits from Dylan Resources to B&R Resources, including the 47 oil and/or gas wells that are the subject of the June 2015 Order. A list of the subject wells by permit number, well name and number, and Township and County location, is attached to the Department's June 2015 Order and incorporated therein as Exhibit A (collectively the "Abandoned Wells"). (Stip. 5).

10. B&R Resources holds the permits for the Abandoned Wells. (Stip. 7).

11. B&R Resources is the "operator" of the Abandoned Wells as that term is defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa. C.S.A. § 3203. (T. 122).

12. Mr. Campola, individually, is not the permittee for any of the Abandoned Wells. (Stip. 10).

13. Mr. Campola, individually, is not the "operator" of the Abandoned Wells as that term is defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa. C.S.A. § 3203. (Stip. 11).

14. Each of the Abandoned Wells is an "abandoned well" as that term is defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa. C.S.A. § 3203. (Stip. 6).

15. Pursuant to Section 3220(a) of the 2012 Oil and Gas Act, 58 Pa. C.S.A. § 3220(a), "upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the Department." (Stip. 8).

16. B&R Resources has not plugged any of the Abandoned Wells. (Stip. 9).

17. When Mr. Campola purchased B&R Resources it had an inventory of about 157 wells, consisting of 67 producing wells and 90 wells that were not producing. (T. 15).

18. Mr. Campola's plan when he purchased B&R Resources was to put the non-producing wells back into production. (T. 15).

19. As early as December 8, 2011, Mr. Campola had knowledge that some of the Abandoned Wells "appeared abandoned" to the Department inspector. (Stip. 26).

20. B&R Resources put seven of the non-producing wells into production by September 2012. (T. 41).

21. Between September 2012 and March 2014, no additional non-producing wells were put into production. (T. 41-42).

22. After March 2014, an additional non-producing well was put back into limited production and was eventually sold and transferred from B&R Resources to the landowner. (T. 44-46).

23. The 74 wells in production were split between two separate fields: the Albion field with 68 producing wells and the Elk Creek field with six producing wells. (T. 50-51).

24. The 68 wells that were producing in the Albion Field were considered by Mr. Campola as the core wells. (T. 51).

25. At Mr. Campola's direction, B&R Resources expended financial resources on maintenance and operation of the core wells, as production from the core wells was the sole stream of revenue into B&R Resources. (Tr. 52-53, 105-106).

26. B&R Resources encountered issues with certain landowners and one tenant in the same production field that contains the Abandoned Wells during the times in which the alleged violations set forth in the June 2015 Order took place. Those issues were:

a. A lawsuit was initiated by the Shulteis family regarding the Koby 4 well, a/k/a the W Koby 1 well, a well permitted to B&R Resources. The Shulteis family sued B&R Resources to invalidate a lease and plug the Koby 4 well.

b. The Mikovch family refused to allow B&R Resources to access the Mikovch property, upon which there were multiple wells permitted to B&R Resources. A lawsuit was threatened by Mr. Mikovch against B&R Resources.

c. The Mahalak family refused to allow B&R Resources to access the Mahalak property, upon which there were wells permitted to B&R Resources.

d. The "Brad Rodgers Suit" was filed in magisterial district court regarding the destruction of a B&R Resources gathering line.

e. The Smith family refused to allow B&R Resources to access the Wattrell Well, a well permitted to B&R Resources.

f. The initial refusal by the Longo family to access the Coblentz well, a well permitted to B&R Resources at the time of refusal.

g. The Sherman family refused to allow B&R Resources to access the D. Sherman Well, a well permitted to B&R Resources at the time of refusal.

h. The refusal by Corrine Shaffer to allow B&R Resources to operate a well on Mrs. Shaffer's property permitted to B&R Resources.

i. There was interference with and conversion of gas from B&R Resources' sales line by Mr. Parabeck, which was resolved amicably.

j. The refusal by Milton Payne to allow B&R Resources to operate the Kid well, a well permitted to B&R Resources at the time of refusal.

k. Milton Payne refused to allow B&R Resources to operate the L Miller well, a well permitted to B&R Resources.

l. Critical equipment was lost on the Morrison property which led to a brief police investigation and amicable resolution between B&R Resources and the landowner. (Stip. 14).

27. The B&R Resources wells providing house gas were not included in the Abandoned Wells that the Department named in its June 2015 Order. (T. 58, 120).

28. The Department was aware that B&R Resources was involved in the Shulteis suit. (Stip. 15).

29. The Department was aware of the threat of litigation by the Mikovch family. (Stip. 16).

30. A DEP Oil and Gas inspector, Jon Scott, emailed Mr. Campola on December 8, 2011, notifying Mr. Campola that a number of B&R Resources' wells seemed to be abandoned

and asking if Mr. Campola had developed a plan for those wells. (T. 27, DEP Exhibit ("Ex.") C).

31. Mr. Campola did not develop a plan in response to the December 8, 2011 email. (T. 27).

32. Mr. Campola was involved in a serious car accident in January of 2012 while responding to an issue occurring at the Coblentz well on the Longo property. (Stip. 17).

33. The Department was aware of Mr. Campola's accident. (Stip. 18).

34. Mr. Campola received correspondence from the Department dated August 21, 2012, with an attached inspection report and Notice of Violation ("NOV") for the Walter and Mary Koby 4 well. (T. 33-34, DEP Ex. B).

35. The August 21, 2012, NOV and attached inspection report informed Mr. Campola that the Department determined the Walter and Mary Koby 4 Well was abandoned and needed to be plugged. (T. 34, DEP Ex. B).

36. On November 6, 2012, the Department sent Mr. Campola correspondence and attached inspection reports and NOVs identifying additional wells that were abandoned and required plugging. (T. 34-35, DEP Ex. E).

37. Mr. Campola sent a written response to the Department's November 6, 2012, correspondence dated November 14, 2012 stating that the wells were shut-in for the moment. (Tr. 107-109, DEP Ex. F).

38. On December 6, 2012, the Department sent Mr. Campola a third letter with attached inspection reports and NOVs concerning the abandonment of additional wells. (T. 38, DEP Ex. G).

39. The Department sent Mr. Campola a fourth letter with an NOV and attached inspection report on March 28, 2014, that again notified Mr. Campola of the abandonment of the Walter and Mary Koby 4 Well. (T. 39, DEP Ex. H).

40. Mr. Campola responded to the March 28, 2014, DEP correspondence and NOV with a letter dated May 4, 2014 and expressed a desire to produce the well and discussed potential ownership issues with the well. (T. 42-44, DEP Ex. I).

41. The Department sent a fifth letter with attached inspection reports and an NOV to Mr. Campola on September 12, 2014, regarding the abandonment and failure to plug numerous wells. (T. 47, DEP Ex. J).

42. Mr. Campola responded to the September 12, 2014, correspondence and NOV by letter dated September 30, 2014. Mr. Campola does not recall writing and sending the September 30, 2014 letter. In this letter Mr. Campola stated, among other things, that B&R Resources was not in a position to plug wells and that it wished to address the matter without DEP interference and to resolve some issues each year. (T. 48, DEP Ex. K).

43. On June 4, 2015, the Department sent Mr. Campola a sixth letter dated June 4, 2015, along with attached inspection reports and an NOV regarding the abandonment and failure to plug wells. (T. 56, DEP Ex. L).

44. Mr. Campola responded to the June 4, 2015, NOV by letter dated June 11, 2015 explaining B&R Resources' issues at each of the wells. (DEP Ex. M).

45. During the time period relevant to the June 2015 Order, Anthony Oprendek was an environmental group manager in the Oil and Gas Program and was in the chain of supervision of Jon Scott, the Department's oil and gas inspector who conducted the inspections of the B&R Resources wells. (T. 113-114).

46. Mr. Oprendek participated in a meeting with Mr. Campola in May 2014 and personally explained to Mr. Campola the definition of an "abandoned well" under the 2012 Oil and Gas Act. (T. 116-117).

47. Mr. Oprendek stated that he believed that Mr. Campola understood the discussion regarding the definition of an abandoned well. (T. 117).

48. Mr. Oprendek met with Mr. Campola in June 2015 and again discussed the issue of abandoned wells and the need to plug them. (T. 117).

49. Mr. Oprendek met with Mr. Campola in July 2015 following the issuance of the June 2015 Order. (T. 125-126).

50. During at least one of the meetings with Mr. Campola, Mr. Oprendek requested a schedule from Mr. Campola to bring the non-producing wells back into compliance but Mr. Campola did not provide the requested schedule. (T. 55).

51. Mr. Oprendek did not inquire about B&R Resources' financial condition at any of the meetings with Mr. Campola. (T. 126-127).

52. Mr. Oprendek stated that neither he nor DEP made any inquiry about whether B&R Resources could financially afford to plug the Abandoned Wells despite being told by Mr. Campola that the company did not have the ability to plug all of the Abandoned Wells. (T. 128).

53. Mr. Oprendek also spoke with Mr. Campola on the phone a number of times about the issue of the abandoned wells. (T. 118).

54. B&R Resources produced gas into National Fuel Gas Distribution Corporation's Q-3 gathering line through Meter No. PDP0101085. (Stip. 19).

55. B&R Resources expended resources to maintain its compressor station and pay for dehydration so B&R Resources could sell its production to National Fuel. (T. 49-50).

56. By letter dated December 18, 2014, Mr. Campola, as managing member of B&R Resources, received notice that National Fuel would be "indefinitely isolate[ing]" a section of the Q-3 gathering line, eliminating B&R Resources' existing interconnection with that line. (Stip. 20).

57. B&R Resources did not have sufficient capital to buy the Q-3 gathering line when National Fuel offered it for sale. (T. 78-79).

58. The isolation of the Q-3 gathering line severely limited B&R Resources' ability to sell natural gas. (Stip. 21).

59. The Department was aware of the Q-3 gathering line isolation. (Stip. 22).

60. Mr. Campola suffered a stroke in or about August 2014. (Stip. 23).

61. As a result of the stroke suffered by Mr. Campola, he was admitted to and remained in a hospital for approximately one month following the event. (Stip. 24).

62. The Department was aware of Mr. Campola's stroke. (Stip. 25).

63. B&R Resources' Profit and Loss Statements for the years 2011 through 2014 listed gross profits of $552,953 and total expenses minus depreciation expenses of $398,375. (B&R Resources Ex. 1).

64. B&R Resources spent approximately $80,000 between 2011 and 2014 on line repair costs. (Tr. 103; B&R Resources Ex. 1).

65. Mr. Campola made a business decision to invest funds in fixing the lines for compliant producing wells instead of investing funds in non-compliant wells to remedy violations. (T. 103-104).

66. B&R Resources spent approximately $46,000 between 2011 and 2014 on legal fees. (B&R Resources Ex. 1)

67. B&R Resources corrected certain environmental violations that it determined could have an environmental impact. (Stip. 29).

DISCUSSION

Standard of Review

This appeal concerns the Department's June 2015 Order requiring B&R Resources and Mr. Campola to take action regarding a number of abandoned wells. The Department bears the burden of proof to demonstrate that its issuance of an administrative order is supported by a preponderance of evidence, is authorized by statute, and is a reasonable and proper exercise of its authority. *Keck v. DEP,* EHB Docket No. 2015-186-B (Opinion issued April 28, 2017), *citing* 25 Pa. Code § 1021.122; *Natiello,* 2008 EHB 640, 647; *see also Whitemarsh Disposal Corp. et al. v. DEP,* 2000 EHB 300. A preponderance of the evidence means that the evidence in favor of the proposition must be greater than the evidence opposed to it. *Perano v. DEP,* 2011 EHB 623, 633. The Board's scope of review is *de novo*: we are not limited to considering the facts that were available to the Department at the time that it issued its order. *Natiello,* 2008 EHB at 67; *see also Warren Sand and Gravel v. DEP*, 341 A.2d 556 (Pa. Cmwlth. 1975).

Analysis

In the initial appeal filed by B&R Resources and Mr. Campola the following issues were raised: that the wells listed in the June 2015 Order were not abandoned, that Mr. Campola cannot be held personally responsible under the June 2015 Order, and a generalized objection that the June 2015 Order itself was otherwise premature, arbitrary, capricious, contrary to law, unreasonable and unwarranted. B&R Resources and Mr. Campola appear to have dropped their claims regarding the first issue, whether the Abandoned Wells listed in the June 2015 Order are in fact abandoned under the law. In fact, just prior to the hearing, they filed a joint stipulation with the Department stating that wells listed in the June 2015 Order were abandoned wells as

that term is defined in the 2012 Oil and Gas Act. B&R Resources also appears to have dropped its assertion that the June 2015 Order was otherwise premature, arbitrary, caprious, contrary to law, unreasonable and unwarranted as applied to its actions. These issues were not raised on behalf of B&R Resources in either the Pre-Hearing Memorandum or the Post-Hearing Brief filed by B&R Resources and Mr. Campola. If a party decides not to pursue an issue or objection in the party's pre-hearing memorandum or post-hearing brief the issue is waived. *Wilson v. DEP*, 2015 EHB 644, 682, *citing* 25 Pa. Code §§ 1021.104 and 1021.131(c); *DEP v. Seligman*, 2014 EHB 755-779; *Rural Area Concerned Citizens (RACC) v. DEP*, 2014 EHB 391, 411. Therefore, at least as to B&R Resources, the appeal of the June 2015 Order is dismissed. As a result of the waiver of these issues, the only issue left to resolve following the hearing is whether the Department's issuance of the June 2015 Order against Mr. Campola is supported by the evidence, authorized by statute and is a proper exercise of its authority.

The Department asserts that it was proper for the Department to issue the June 2015 Order to Mr. Campola because he is personally liable for the violations and resulting obligations set forth in the June 2015 Order under the participation theory.[1] The participation theory recognizes that "an individual with authority to direct the affairs of a corporation can be liable for a violation if he was personally involved in it." *Whiting v. DEP*, 2015 EHB 799, 818 citing *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 358. In *Whitemarsh*, the Board said:

> A key to the application of the theory seems to be whether the individual knew about the violations but intentionally neglected to

[1] This case presents some conceptual difficulty for the Board in addressing the participation theory. At the time of the June 2015 Order and for the vast majority of the time during the events leading up to the June 2015 Order, Mr. Campola was not only the managing and sole member of B&R Resources, LLC, he was also the sole employee. While we maintain the legal fiction that corporations can take actions, the fact is that all actions, even those we attribute to a corporation, are undertaken by people. In this case, except for very short periods of time not relevant to the issues, as both the sole member of the LLC and its sole employee, all B&R Resources' activities were conducted exclusively by Mr. Campola. It is difficult therefore to speak of actions by B&R Resources as independent of Mr. Campola and vice versa.

> do anything about them. *internal citations omitted*. … Thus, knowledge seems to be the linchpin. An allegation that an officer 'should have known' will not suffice, but an allegation that the officer 'actually knew' of the conduct can be adequate to support individual liability.

Id. at 359-360. Citing *Wicks v. Milzoco Builders, Inc*., 470 A.2d 86 (Pa. 1983), the Board in *Whitemarsh* also held that the "individual at issue must have had authority to direct corporate action" and "that there is no reason an individual must be an officer so long as he has managerial authority regarding the conduct in question." *Id*. at 360. Finally the Board noted that "Not only must the individual have authority; he must also have a duty that he has violated. If he has no duty, there has been no 'neglect.'" *Whitemarsh* at 361. The factors gleaned from *Whitemarsh* for determining personal liability under the "participation theory" are whether the individual had actual knowledge of the violation and intentionally neglected to remedy the violation, along with whether the individual had both the authority and duty to act to address the violation. *Id*. at 361.

The Department contends that it has demonstrated by a preponderance of the evidence that Mr. Campola should be personally liable for the violations in the June 2015 Order because he knew about the violations and chose not to do anything to address the violations despite having both the authority and duty to do so. B&R Resources and Mr. Campola assert that the June 2015 Order against Mr. Campola, in his individual capacity, is contrary to law because (1) Mr. Campola did not have knowledge of the violations; (2) the evidence presented by the Department does not show that Mr. Campola acted with intentional neglect or callous disregard to B&R Resource's obligation to plug the well; and (3) that Mr. Campola is not a member of the class of persons responsible for plugging the wells under the regulations that were in place at the time of the violations.

Actual Knowledge

The first factor to consider in determining whether Mr. Campola is individually liable under the participation theory is whether he had actual knowledge of the violations set forth in the June 2015 Order. As discussed more fully below, the Department through correspondence including six Notices of Violation, along with in person meetings and telephone calls with Mr. Campola, repeatedly raised the issue of B&R Resources' abandoned wells and the need to plug those wells with Mr. Campola. Despite that, Mr. Campola states that the testimony demonstrates that he "did not have actual knowledge of B&R Resources' duty to address the violations or consider the wells to be abandoned until June 5, 2015." (Appellants' Post-Hearing Brief, p. 24). Even if we were to agree that this was correct, which we do not, the June 5, 2015 date on which Mr. Campola admits that he has actual knowledge is prior to the Department's issuance of the June 2015 Order under appeal in this case and demonstrates that he had actual knowledge of the violations that are set forth in the June 2015 Order at the time it was issued. This admission would be sufficient on its own, but the Department has also demonstrated by a preponderance of evidence that Mr. Campola had actual knowledge of the violations well before June 2015. Mr. Campola's claims to the contrary are simply not credible.

B&R Resources became the permit holder for the Abandoned Wells in 2011 when Mr. Campola purchased B&R Resources. Mr. Campola purchased B&R Resources knowing that approximately 90 wells were not producing. (T. 15). A few months after Mr. Campola purchased B&R Resources he had an in person meeting with DEP where he told Mr. Oprendek that "I was taking over the wells and if he had problems, to get a hold of me." (T. 23). On December 8, 2011, DEP Oil & Gas inspector Jon Scott sent an email to Mr. Campola detailing that he had reviewed a number of B&R Resources' wells and that they appeared to be

abandoned. Mr. Scott asked Mr. Campola if a plan had been developed to address the abandoned wells. Mr. Campola did not provide a plan to the Department but did continue to communicate with the Department via phone, email, and in person meetings. Mr. Campola received the first of six NOVs on August 21, 2012, and testified that he understood that it was the Department's position that there was a violation and that DEP wanted the identified well plugged. Mr. Campola responded in writing to the second NOV which was issued on November 6, 2012, via letter dated November 14, 2012. In his response letter, Mr. Campola acknowledged that the "inspection reports are notifying me of failure to plug wells," and requested that the Department work with him to give him time to bring wells back online. (DEP Ex. F). The Department sent a third NOV regarding abandoned wells in December 2012.

The Department resumed its efforts to bring B&R Resources and Mr. Campola into compliance with the Oil and Gas Act with a fourth NOV on March 28, 2014. Mr. Campola responded by letter dated May 4, 2014, stating that he was unable to do anything with the specific well that was the subject of the NOV because of ongoing litigation with the landowner but that he would like to produce the well. (DEP Ex. I). Mr. Campola acknowledged during the hearing that the well had not produced in over a year, that the matter had not been redressed since the first NOV over eighteen months before, and that he had not made an effort to plug the well. The Department sent a fifth NOV on September 12, 2014, and Mr. Campola responded by letter on September 30, 2014. In his response letter, Mr. Campola expressed a belief that B&R Resources had been singled out as an operator, and asked for "the support of your office to allow us to fix problems without DEP interference." (DEP Ex. K). The response letter went further and stated that B&R Resources' "intent was never to plug the wells, but to produce them" while blaming landowners, the laws of Pennsylvania and "sketchy records" at the Department for being

unable to turn on more wells. (DEP Ex. K). Finally, the September 30, 2014 letter states that "Now, as to the violations, B&R is not in any position to plug wells at this time." (DEP Ex. K). Mr. Campola's letter makes clear that he understood that failing to plug the wells was a violation, that he had no plans to plug any wells, and that he wanted to resolve the matters without the involvement of the Department. A final NOV was sent to Mr. Campola on June 4, 2015, to which Mr. Campola responded via letter dated June 11, 2015. The Department correspondence and NOVs included copies of inspection reports on which the Department clearly spelled out both the definition of an "abandoned well" and the plugging requirement found in the 2012 Oil and Gas Act and the fact that the identified B&R Resources' wells were in violation of those provisions. The DEP correspondence and NOVs that Mr. Campola acknowledged receiving, along with his responses to some of those NOVs, clearly undercuts his position that he lacked actual knowledge of the violations and the requirement to plug the Abandoned Wells.

We also find that the series of meetings that Mr. Campola attended with Mr. Oprendek of the DEP supports our determination that Mr. Campola had actual knowledge of the violations cited in the June 2015 Order. Mr. Oprendek twice met with Mr. Campola to discuss the Department's issues with B&R Resources' wells before the Department issued the June 2015 Order. In those meetings, Mr. Campola apparently debated the issue of whether the wells were abandoned and needed to be plugged. (T. 122).

Mr. Oprendek testified that he read the definition of an abandoned well in the 2012 Oil and Gas Act to Mr. Campola and told him that the law requires abandoned wells to be plugged. The definition of an abandoned well found in the 2012 Oil and Gas Act is not difficult to understand. In the relevant section, it states that a well is considered abandoned when it has not

been used to produce, extract or inject any gas, petroleum or other liquid within the prior 12 months or where the necessary equipment for production, extraction or injection has been removed. *See* 58 C.S.A. § 3203. In light of the straightforward nature of these concepts, we credit Mr. Oprendek's testimony that Mr. Campola understood the information about abandoned wells and the need to plug them that was discussed at the meetings.

Mr. Campola experienced some unfortunate health issues between 2012 and 2014 including a car accident requiring hospitalization and rehabilitation as well as a stroke in August 2014. While these are unfortunate events, and the stroke caused some memory issues for Mr. Campola, the evidence presented does not show that these incidents prevented Mr. Campola from understanding that the wells were abandoned and that the failure to plug the Abandoned Wells was a violation. Mr. Campola testified that he did not have any memory of events from August 27, 2014, through approximately the end of the year in 2014. While Mr. Campola may not remember receiving and responding to the NOV in September 2014, he acknowledged the authenticity of the correspondence and his responses clearly indicate knowledge of the issues raised in that correspondence. Mr. Campola's health issues appear to involve a limited portion of the time period that led up to the June 2015 Order and do not overcome the significant evidence that the Department offered that Mr. Campola had actual knowledge of the violations set out in the June 2015 Order.

Intentional Neglect

The next issue is whether Mr. Campola intentionally neglected addressing the violations. In finding intentional neglect in *Whitemarsh*, the Board focused on whether the operator "actively avoided dealing with the problem." *Whitemarsh,* 200 EHB 300, 359. As support for its finding of personal liability, the Board provided an example of the operator in *Whitemarsh*

"quibbling about payment arrangements as the Plant's effluent continued to deteriorate." *Id.* The Department set forth three ways it argues that Mr. Campola intentionally neglected the situation by actively avoiding addressing the violations: 1) by deliberately choosing not to cooperate with the Department's efforts to address the Abandoned Wells; 2) by personally choosing to focus B&R Resources' money and efforts on enhancing the existing producing wells instead of addressing the Abandoned Wells and 3) erroneously blaming landowner problems for the failure to address the Abandoned Wells even though the landowner problems did not actually involve the Abandoned Wells. (DEP's Post-Hearing Brief, p. 18). Mr. Campola argues that he did not intentionally neglect to address the violations in the June 2015 Order because B&R Resources simply did not have enough money to plug the Abandoned Wells. (Appellants' Post-Hearing Brief, p. 18). In support of his position, which appears to be that but for the financial issues B&R Resources would have addressed the violations, Mr. Campola offers various reasons for the financial problems, including "the historic drop in natural gas prices, the isolation of the Q-3 Gathering Line, the Shulteis Lawsuit and the numerous ancillary issues with landowners" along with the serious physical ailments he suffered during his day to day management of B&R Resources. (Appellants' Post-Hearing Brief, p. 24).

The Department has presented ample evidence that Mr. Campola sought to actively avoid addressing the violations cited in the June 2015 Order. In 2011, the Department requested that it be provided with a plan to address abandoned wells found by the Department inspector. No plan was provided by Mr. Campola or B&R Resources. Despite repeated correspondence, phone calls and in person meetings with Mr. Campola taking place over several years, there was no evidence presented at the hearing that any of the Abandoned Wells that were brought to Mr. Campola's attention by the Department have been plugged or otherwise addressed. Instead the evidence

shows that Mr. Campola resisted the Department's efforts to bring the Abandoned Wells into compliance. In his September 30, 2014, response to correspondence from the Department that identified 46 abandoned wells, 40 of which were later listed as Abandoned Wells in the June 2015 Order, Mr. Campola asserted that B&R Resources had been singled out by the Department and requested that the DEP office "allow us to fix problems without DEP interference." (DEP Ex. K). Mr. Campola made a similar request during a phone call with Mr. Oprendek of DEP. (T. 118). Despite that request, in the more than eight months that passed between the time of his correspondence and the issuance of the June 2015 Order, there was no evidence presented that Mr. Campola fixed any of the problems or plugged a single Abandoned Well. It is clear from the record that rather than work with the Department, he sought to hold off the Department's efforts by asserting various justifications for his failure to address the violations. We do not fault Mr. Campola for wanting to put wells back into production but at some point, given that more than three years had passed since the issue of abandoned wells was raised with Mr. Campola, the Department could no longer ignore the numerous non-compliant wells. The lack of any meaningful progress in resolving the violations during that time period and, indeed up to the time of the hearing, supports a finding that Mr. Campola intentionally neglected to deal with the violations identified in the June 2015 Order.

We do not find the various justifications offered by Mr. Campola to be compelling arguments on his behalf. In his correspondence and meetings with DEP, as well as at the hearing, Mr. Campola repeatedly blamed landowner lawsuits for the inability to address the Abandoned Wells. However, Mr. Campola testified that all but one landowner issue involved wells providing house gas, and not the Abandoned Wells. (Tr. 57-58). The exception was the Walter and Mary Koby #4 Well located on the Shulteis family property. The Shulteis family

sued Mr. Campola seeking to have the lease terminated and the well plugged. Despite the wishes of the landowner, and NOVs related to this specific well for failure to plug, Mr. Campola did not make any attempt to plug the Walter and Mary Koby #4 Well, and instead spent B&R Resources funds to defend the lawsuit. While issues with landowners may have indirectly impacted the ability of B&R Resources and Mr. Campola to move forward with returning some wells to production, the evidence does not support an argument that landowner issues directly prevented the plugging of any of the Abandoned Wells.

Mr. Campola also argues that B&R Resources lacked the financial wherewithal to address the violations and this means that his failure to do so was not intentional. In support of this position, Mr. Campola offered profit and loss statements for B&R Resources for the years 2011, 2012, 2013 and 2014. Under well-established case law, the Board has routinely held that an appellant's financial inability to comply with an order is not a defense to the validity of a Department order in a proceeding in front of the Board. *Starr v. DEP*, 2003 EHB 360, citing *Ramey Borough v. DEP*, 351 A.2d 613 (Pa. 1976). Given that clear approach, we are not sure that Mr. Campola can properly rely on his claim that B&R Resources' alleged lack of financial resources makes his failure to follow the requirements of June 2015 Order unintentional. It would be counterintuitive to allow him to assert such an argument in defense of a claim that he personally participated in the violations when the company could not do so in response to a Department order. We think that is particularly true in a fact situation like this where the only actor on behalf of the company is Mr. Campola because in essence his actions are B&R Resources' actions. Finally, allowing such an argument to prevail would drastically undercut the participation theory since in our experience these types of cases frequently involve companies in financial difficulty. While B&R Resources had some financial difficulties, it also had some

financial resources that Mr. Campola decided to spend for other purposes rather than correct the violations identified in the June 2015 Order.

Authority and Duty to Act

The final issue in addressing the participation theory involves the related questions of duty and authority to act. There is no question that Mr. Campola had the authority to act to address the violations identified in the June 2015 Order. He was the managing and sole member of B&R Resources and for the vast majority of the time, the only employee. Mr. Campola made all of the day to day operational decisions for B&R Resources, including how to respond to the Department NOVs and how to spend B&R Resources' revenue. The facts here are even more compelling than the facts the Board relied on to find personal liability in *Whitemarsh.* In *Whitemarsh* although the operator was not the sole employee but a general manager, "there was no one higher in the chain of command than [him]." *Whitemarsh*, 2000 EHB 300, 359.

Mr. Campola does not directly challenge the issue of whether he had the authority to act, instead focusing on the question of whether he had a duty to act to address the violations. He asserts that he is not a member of the class of individuals that can be held liable to plug a well and that the Department's use of the participation theory to include him in the class is unreasonable. (Appellant's Post-Hearing Brief, p. 25). The 2012 Oil and Gas Act provides that the owner or operator is responsible for plugging an abandoned well. See 58 Pa. C.S.A. § 3220(a). The parties stipulated that Mr. Campola is not the operator of the Abandoned Wells. In the June 2015 Order, the Department states that B&R Resources is the owner of the Abandoned Wells and does not make a similar assertion about Mr. Campola. Given that it is not discussed in the June 2015 Order, Mr. Campola did not raise the issue of whether he is an owner in his Notice of Appeal. The question of whether Mr. Campola is the "owner" of the Abandoned Wells as that

term is used in the 2012 Oil and Gas Act only arose as a defense offered by Mr. Campola in his Post-Hearing Brief to the Department's claims under the participation theory. As such, we think it is improper to evaluate it as an independent basis for liability as the Department requests in its Reply to Appellants' Post-Hearing Brief. However, we do think it has relevance to the issue of whether Mr. Campola had a duty to act to address the violations in the June 2015 Order.

The 2012 Oil and Gas Act defines "owner" as a "person who owns, manages, leases, controls or possesses a well or coal property." 58 Pa. C.S.A. § 3203. This statutory definition clearly expands the meaning of owner beyond the common understanding of an owner and ownership to include a person who manages or controls a well. There is no question that the testimony and evidence supports that Mr. Campola managed and controlled the Abandoned Wells. As we have noted repeatedly, he was the managing member and sole member of B&R Resources and made all day to day decisions for B&R Resources including which wells to produce and whether to plug or not plug wells. The fact that he alone managed and controlled the Abandoned Wells is sufficient for us to conclude that he had a duty to address the violations and supports finding him individually liable under the participation theory. Ultimately, only Mr. Campola could have authorized B&R Resources to address the violations and plug the Abandoned Wells.

In addition to challenging the specific issues regarding the participation theory, Mr. Campola raised two other challenges to the June 2015 Order. First, in an attempt to distinguish the facts of this case from those in *Whitemars*h, Mr. Campola asserts that because there was no immediate threat of harm to the environment from the Abandoned Wells, the Department's Order against Mr. Campola was unreasonable. (Appellants' Post-Hearing Brief, p. 20). All parties have conceded that violations in the June 2015 Order occurred and the 2012 Oil and Gas

Act is clear in stating that "the [D]epartment may issue orders necessary to aid in enforcement of this chapter." 58 Pa. C.S.A. §3253(a). The Department does not have to wait until an abandoned well is leaking into the environment to issue an order to have it plugged. Just because the Abandoned Wells in the June 2015 Order did not arguably pose an immediate threat to the environment does not make it unreasonable for the Department to require that Mr. Campola address the violations by issuing a lawful administrative order. In fact, we think the Department's approach in dealing with the Abandoned Wells in this case, and giving B&R Resources and Mr. Campola multiple chances over several years to address these wells, was more than reasonable. The Department would have been well within the law to have brought this situation to a head well before June 2015.

Mr. Campola's final argument is one of policy stating that "[i]mposing personal liability under these facts disrupts the trajectory of established Pennsylvania participation theory precedent." (Appellants' Post-Hearing Brief, p. 25). Mr. Campola states that the application of the participation theory in this instance for what he asserts is a strict liability offense creates a standard where an officer may face personal liability "by virtue of their position as an officer in the business entity." (Appellants' Post-Hearing Brief, p. 25-26). We reject the claim that this is what we have done in this case. The purpose of the test outlined in *Whitemarsh*, and our analysis of Mr. Campola's actions under that test, is to ensure that an officer is not held liable solely by virtue of his or her position. The Board in *Whitemarsh* evaluated the precedential case of *Kaites v. Department of Environmental Resources*, 529 A.2d 1148 (Pa. Cmwlth. 1987). The Board stated that:

> The "participation theory" simply recognizes the fundamental point that an individual with authority to direct the affairs of a corporation can be held liable for a violation if he was personally involved in it. This principle was enumerated in

> *Kaites*… "As a general rule, corporate officers are individually liable for their own tortious actions. *Citations omitted*. In Pennsylvania, the participation theory imposes liability 'on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity.' *Wicks*, 503 Pa. at 621, 470 A.2d at 90. Thus for liability to attach the officer must actually participate in the wrongful acts. *Amabile v. Auto Kleen Car Wash*, 249 Pa. Superior Ct. 240, 376 A.2d 247 (1977)."

Whitemarsh, 2000 EHB 300, 358-359. The precedent before the Board and in Pennsylvania on the participation theory is clear: if an owner or officer knew about a violation, intentionally neglected to do anything to remedy the violation, and had the duty and authority to act, the officer or owner may be held personally responsible for violations. The Board's decision in this case is consistent with the current case law dealing with the participation theory. The facts of this case show that Mr. Campola knew that failing to plug the abandoned wells was a violation, that he intentionally neglected to remedy the violations, and that he was the only person with the duty and authority to act on behalf of B&R Resources.

We find that the Department's issuance of the June 2015 Order to B&R Resources and Mr. Campola individually is supported by a preponderance of the evidence, is authorized by statute, and is a reasonable and proper exercise of its authority. Therefore, we dismiss the appeal filed by B&R Resources and Mr. Campola.

CONCLUSIONS OF LAW

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

2. The Department is the agency with the duty and authority to administer and enforce the Oil and Gas Act, Act of February 14, 2012, P.L. 878, No. 13, 58 Pa. Cons. Stat. §§ 3201-3274 ("2012 Oil and Gas Act"); Section 1917-A of the Administrative Code of 1929, Act

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

3. The Department bears the burden of proof when it issues an administrative order. 25 Pa. Code § 1021.122(b).

4. The Department's burden is to demonstrate that its issuance of the June 2015 Order is supported by a preponderance of the evidence presented and admitted before the Board, is authorized by statute, and is a reasonable and proper exercise of its authority.

5. B&R Resources waived its claims in the Notice of Appeal by failing to pursue them in its pre-hearing memorandum and post-hearing brief and, therefore, the appeal by B&R Resources is dismissed.

6. The Oil and Gas Act authorizes the Department to issue an order as is necessary to enforce the provisions of the statute. 58 Pa. C.S. §3253.

7. The Abandoned Wells listed in the June 2015 Order are "abandoned wells" as that term is defined in the 2012 Oil and Gas Act. 58 Pa. C.S.A. §3203.

8. The 2012 Oil and Gas Act requires that abandoned wells be plugged. 58 C.S.A. § 3220(a).

9. B&R Resources and Mr. Campola failed to plug the Abandoned Wells in violation of the requirements of the 2012 Oil and Gas Act.

10. Mr. Campola is personally liable for the violations set forth in the June 2015 Order under the participation theory.

11. Mr. Campola knew of the violations identified in the June 2015 Order, intentionally neglected to remedy the violations, and had both the authority and duty to remedy the violations.

The Department met its burden and demonstrated by a preponderance of the evidence of record that its June 2015 Order as to Mr. Campola was authorized by statute and was a reasonable and proper exercise of its authority.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 9th day of August, 2017, it is hereby ordered the appeal in this matter is dismissed.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 9, 2017

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

For the Commonwealth of PA, DEP:
Michael Braymer, Esquire
Katherine Knickelbein, Esquire
(*via electronic filing system)*

For Appellants:
Jon C. Beckman, Esquire
Brian J. Pulito, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2016-106-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Intervenor	:	**Issued: August 9, 2017**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board retains jurisdiction in an appeal from a Department letter approving revisions to a sewer authority's plans to address a projected overload because the letter appears to be a final, appealable action. The scope of this appeal may be broader than it otherwise might have been because the Board dismissed earlier appeals involving the same matters without prejudice. The propriety of the Department's determinations as set forth in the letters cannot be entirely resolved as a matter of law based upon undisputed facts.

O P I N I O N

Northampton Bucks County Municipal Authority ("Northampton") is appealing a June 14, 2016 letter the Department of Environmental Protection (the "Department") sent to the Bucks County Water and Sewer Authority ("Bucks"). The letter relates to the conveyance and treatment of sewage in the Neshaminy Interceptor sewer line, which is part of Bucks's sewer system. Bucks and Northampton have a long history regarding the conveyance of sewage in the

Neshaminy Interceptor. Bucks and Northampton entered into an agreement in 1965 for the conveyance of Northampton's wastewater to Philadelphia through Bucks's system via the Neshaminy Interceptor. Northampton is one of 13 municipal entities that connect to the interceptor line. At the outset, we should note that the Department has maintained throughout this appeal that the letter does not constitute a final, appealable action subject to this Board's jurisdiction because the letter constitutes nothing more than an acknowledged "acceptance" of Bucks's revisions to its connection management plan, not an "approval" of those revisions.

In 2012, based on Bucks's Chapter 94 annual report, the Department determined that a hydraulic overload was projected in portions of the Neshaminy Interceptor and at the Totem Road Pump Station, which receives flows from the Neshaminy Interceptor. The Department memorialized that determination in a letter to Bucks dated July 25, 2012. Northampton appealed that letter determination to this Board. *NBCMA v. DEP*, EHB Docket No. 2012-155-L. As a result of the Department's determination, Bucks was required to submit to the Department a corrective action plan (CAP) and a connection management plan (CMP), which it did on February 24, 2014. The Department's letter expressly required Bucks to submit a CAP "for the review and written approval of the Department."

In a settlement agreement between Bucks and the Department entered into on March 10, 2014, the Department agreed that it would accept Bucks's CAP and CMP. The settlement agreement also provided as follows:

> The parties agree that [Bucks] has a right to submit revised CMPs to the Department that alter the NICMP [Neshaminy Interceptor Connection Management Plan], and that the Department has a right to accept or not accept any such revisions…Acceptance of changes to the NICMP shall be based on an evaluation of the impacts of such changes on projected flows to the Neshaminy Interceptor system and/or documented I/I removal based on metered flows that confirm additional capacity is available. Year 2018 and beyond allocations will be based on municipal compliance with the flow limits established in their

> supplementary agreement with [Bucks] and the remaining available capacity in the Neshaminy Interceptor Sewer System.

Thus, the parties agreed that Bucks could submit revisions to the CMP to the Department and the Department had the right to accept or not accept revisions to the CMP. The fact that the Department could refuse to accept Bucks's proposed revisions strongly suggests that an approval process was contemplated. Because the Department had the right not to accept proposed revisions, presumably those revisions could not go into effect without the Department's approval. This is not consistent with the construct that is being advocated by the Department in this appeal that Bucks was merely providing the Department with what amounts to a courtesy copy of the CMP revisions and the Department was merely offering a gratuitous, nonbinding opinion regarding the validity of the revisions.

In any event, the Department issued a letter on March 10, 2014 "accepting" Bucks's CAP and CMP. With respect to the CAP, the letter said,

1. [Bucks] will initiate negotiations with tributary municipalities by March 31, 2014, aimed at the execution of supplemental agreements to existing service agreements. These agreements will establish average annual, maximum daily and instantaneous peak flow limits and a schedule for achieving these limits through proposed infiltration and inflow (I/I) activities as well as the completion of Act 537 planning.
2. [Bucks] will participate, as necessary, in municipal Act 537 Plan updates for the Neshaminy Interceptor Service Area. This participation will include the provision of measured flow data, within 45 days if requested, for each metered municipal connection and an analysis of [Bucks] conveyance and contracted conveyance facilities for the projected Service Area needs.
3. [Bucks] will complete design, permitting and construction, as needed, for the upgrade to portions of the Neshaminy Interceptor for projected peak flow needs identified in municipal 537 planning.

With respect to the CMP, the letter said,

> In addition, DEP hereby accepts the submitted NICMP, last revised on February 24, 2014, with the tables last updated on February 17, 2014. The 2014 connections that include a proposed flow of 334,750 gallons of sewage per day (gpd) will be released with the acceptance of the NICAP. The remaining

> connections for 2015 and beyond will be released in accordance with the schedule included in the NICMP. This NICMP requires completion and compliance with listed milestones prior to the release of connections for specific municipalities.
> ….
> Please be advised that, in accordance with 25 Pa. Code, Section 71.51(b), no exemptions from sewage facilities planning can be issued for projects in municipalities tributary to the Neshaminy Interceptor until all milestones in the [CAP] and [CMP] implementation schedule have been completed. DEP may approve complete Sewage Facilities Planning Modules submitted by municipalities that are shown to be consistent with the [CAP] and [CMP] while [Bucks] is under a CAP and CMP. All planning modules submitted to DEP must include construction schedules that are consistent with the most currently **approved** version of the [CMP].

(Emphasis added.) This letter seems to contemplate a continuing and controlling hands-on role for the Department, which again is inconsistent with the Department's construct that it is merely an interested bystander. Among other things, the letter dictates that future planning modules will need to comply with the "most currently **approved** version of the [CMP]" (emphasis added).

With Northampton's appeal from the Department's letter still pending, Northampton filed an additional appeal when the Department sent another letter to Bucks on March 10, 2014 "accepting" its CAP and CMP. *NBCMA v. DEP*, EHB Docket No. 2014-040-L. Northampton included the following objections in its notice of appeal:

> 11. [Northampton] appeals the Approval to the extent that it directly, concretely and adversely impacts [Northampton] and is unreasonable, arbitrary, capricious, vague, ambiguous, an abuse of discretion, beyond the scope of the Department's enforcement authority, inconsistent with the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 *et seq*., the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 *et. seq*., 25 Pa. Code Chapters 71 and 94, and the Pennsylvania Constitution, not supported by substantial or accurate evidence, constitutes an error of law, and is otherwise contrary to fact and law, as relates to the foregoing.
>
> 12. [Northampton] additionally challenges and/or reserves the right to challenge, *inter alia*: (a) the Department's findings, characterization and portrayal of the facts; (b) the Department's factual and legal conclusions concerning and characterization of actions or inactions by [Bucks], [Northampton], and/or any other tributary municipalities or municipal authorities; (c) the Department's recitation, interpretation, characterization and application of the requirements and scope of Chapters 71 and 94 and related statutes; and/or (d) positions that the Department, or any other party may take in this or related proceedings.

Thereafter, Northampton and the Department settled the appeals, and at their request we included the following language in our Order closing out the appeals:

> The appeals of Northampton Bucks County Municipal Authority docketed at Nos. 2012-155-L and 2014-040-L are hereby DISMISSED without prejudice to the right of [Northampton] and the Department to raise any and all factual and legal issues raised in these appeals in any future Board proceedings between [Northampton] and the Department.

As expected, changing circumstances among Bucks's tributary municipalities compelled Bucks to submit "proposed" revisions to the CMP. Again, someone does not submit "proposed" revisions if some sort of approval is not required. The Department "reviewed" the "proposed" revisions and, by letter dated June 14, 2016, "accepted" the proposed revisions. The letter went on to state:

> According to your NICMP, the 2016 connections may be released to those municipalities that have complied with the execution of the supplementary agreement with [Bucks] and have submitted completed and adopted plans to DEP no later than October 1, 2015. A completed Act 537 plan contains executed supplemental agreements as identified in the NICAP and NICMP, as well as incorporates [Bucks's] Neshaminy Interceptor Alternative Analysis. Most Act 537 plans previously submitted to DEP do not contain the supporting supplemental agreement, nor the Neshaminy Interceptor Alternative Analysis. Therefore, these submissions are incomplete and do not qualify for the release of 2016 connections. Each municipality is advised by copy of this letter to contact Ms. Kelly Boettlin at 484.250.5184 to discuss the status of their Act 537 plan update as necessary.

The instant appeal is from the June 14, 2016 letter. Northampton says that the Department's actions have had the effect of forcing it to sign a take-it-or-leave-it contract that has been presented to it by Bucks that will impose nonnegotiable penalties if Northampton exceeds specified flow limits. It says that it should have been allowed to attempt to negotiate a better deal, but the Department had effectively destroyed its bargaining position. It adds that the terms of the draft contract that Bucks has given to Northampton are objectionable. The practical

impact of all this is that Northampton has been told that Northampton Township will not receive all of the planning approvals for new developments that will tie into the Neshaminy Interceptor unless and until Northampton enters into a supplemental contract with Bucks. Northampton complains that Bucks basically has it over a barrel and the Department is unfairly enabling that behavior.[1]

The Department's Motion for Summary Judgment Based on Lack of Jurisdiction

The Department previously moved to dismiss this appeal for lack of jurisdiction. It argued that the June letter merely acknowledged receipt of Bucks's revisions. It insisted that a letter merely acknowledging receipt of something and offering nonbinding hints and suggestions is not an appealable action, which is probably true if that is all that a letter does. We denied the motion, however, because we rejected the Department's characterization of the letter. We held that, despite the Department's wordsmithing, the letter had all the indicia of a final, appealable action that adversely affected Northampton's rights. We had this to say:

> The Department asserts that it has no approval authority regarding CAPs or CMPs under the Chapter 94 regulations for projected overloads. The Department contrasts Section 94.21 (relating to existing overloads) with Section 94.22 (relating to projected overloads). The Department points to language in Section 94.21 that requires a sewerage facilities permittee, in response to a determination of an existing overload, to submit a CAP to the regional office "for review and approval of the Department." 25 Pa. Code § 94.21(a)(3). The CAP must also include a program for controlling new connections to the system, which we presume to be a CMP. *Id.* The Department notes that the "review and approval" language is absent from the requirements in Section 94.22 for projected overloads.[3]
>
> However, simply because the projected overload regulation does not specify that the Department must approve a CAP and its associated CMP does not necessarily mean that the Department lacks all authority or discretion to approve CAPs and CMPs in the context of a projected overload. Section 94.22 requires a permittee's CAP to address the steps to be taken to prevent sewerage facilities from actually

[1] The Department sent another letter to Bucks approving new revisions to its plans on June 27, 2017. The letter is nearly identical to the letter under appeal in this case. Northampton has filed an appeal from the June 27 letter. EHB Docket No. 2017-058-L.

becoming overloaded, and it mandates that, if the steps include "planning, design, financing, construction and operation of sewerage facilities, the facilities shall be consistent" with an approved official plan and with the requirements of the Department and the federal government. 25 Pa. Code § 94.22(1). The Department does not tell us what happens if a permittee submits a CAP that does not satisfy these requirements. Pursuant to the Department's position, it seems that the Department would likewise have no authority to *disapprove* a CAP or CMP.

Indeed, the Department asserts in its motion that it is "bound by" Bucks County Authority's decisions on how to rectify the state of projected overload at the Neshaminy Interceptor, which is a somewhat curious position to take given the broad authority the Department has to regulate sewage facilities under the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20. *See* 35 P.S. § 750.10 (powers and duties of the Department). Under the Department's conception, it would appear that the Department has no power to take any action other than offering mere hints and suggestions on a CAP until there is an existing overload. Presumably, even if the measures outlined by a permittee in a CAP and CMP in response to a projected overload are obviously insufficient to correct the problem, the Department is without recourse until things get worse and a facility becomes actively overloaded. To take this approach to its ultimate conclusion, one could theoretically submit almost anything in response to a projected overload and the Department would "accept" it.

We are not convinced that the Department is without authority to approve or disapprove projected overload CAPs and CMPs, and we are not completely convinced that what the Department calls an "acceptance" of Bucks County Authority's CMP revisions is not in reality an "approval." Notably, despite the Department's arguments in its motion to the contrary, the Department's own letter from 2012 advising of the projected overloads in the Neshaminy Interceptor and Totem Road Pump Station and requesting a CAP and CMP stated that the CAP must undergo the "review and written approval of the Department."[]

If the Department does review and approve CAPs and CMPs for projected overloads, then it would seem to follow that subsequent revisions to those plans would also undergo a certain level of review and approval. Although the Department insists in its motion that it did not undertake any substantive review of the CMP revisions at issue here, it appears from the June letter that the revisions did undergo at least some level of review since there are six detailed recommendations for what should be included in a future revision. All of this goes to show that it is far from clear that the Department did not take a final, appealable action adversely affecting Northampton Bucks in the June letter. If the Department did in fact approve the revisions to the CMP, then the basic question we are presented with in this appeal is whether it should have approved the revisions. If the Department did not approve the revisions, then we expect that to become clearer as we move forward and the record is further developed.

[3] We note, however, that at one point in the Chapter 94 regulations there is reference to an "approved CAP" that does not distinguish between Sections 94.21 and 94.22:

> A sewer extension may not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations or other portions of the sewer system to become overloaded or if the flows will add to an existing overload **unless the extension is in accordance with an approved CAP submitted under § 94.21 or § 94.22** (relating to existing overload; and projected overload) or unless the extension is approved under § 94.54 (relating to sewer line extension).
>
> 25 Pa. Code § 94.11(a) (relating to sewer extensions) (emphasis added).

(Opinion and Order, February 15, 2017) (footnote 4 omitted).

The Department has not given up. It has now filed a motion for summary judgment, once again challenging the Board's jurisdiction. It contends that the Board lacks jurisdiction to review the determinations in the June 14 letter because the letter imposes no new requirements on Northampton and because there is no effective relief that the Board can offer. It says that Northampton's obligation to enter into a supplemental agreement derives exclusively from the CAP and CMP themselves, and the Department previously "accepted" those plans. Therefore, even if we were to hold that the June letter was issued in error, the requirement for a supplemental agreement would remain. Bucks has submitted a brief supporting the Department's position on jurisdiction.[2]

Northampton refutes these points, and adds that the letter is the first time the Department, instead of simply requiring Northampton and Bucks to enter into *negotiations* leading up to a supplemental agreement, created a new requirement that Northampton must enter into a take-it-or-leave-it agreement written by Bucks and the Department acting in concert. It also says that the letter in effect rejects a draft supplemental agreement that had been prepared by Northampton and submitted to Bucks as the basis for further negotiations.

[2] Bucks's arguments are largely the same as the Department's arguments. Unless otherwise noted, when we refer to the Department's positions we are describing the positions of both the Department and Bucks.

"A grant of summary judgment by the [Board] is proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Services, Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). The Board views the record in a light most favorable to the nonmoving party and resolves all doubts as to the existence of a genuine issue of material fact against the moving party. *Berks Cnty. v. DEP*, 2012 EHB 23, 24. Summary judgment is only granted in the "clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy v. DEP*, 2007 EHB 511, 511-12. With respect to Departmental communications, there is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Merck v.*

DEP, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59; *Kutztown*, 2001 EHB at 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Although we think Northampton may be reading too much into the letter, we do agree with it that the Department and Bucks have failed to show as a matter of law and undisputed fact that the Board lacks jurisdiction. We are more convinced than we were when we ruled on the Department's motion to dismiss that the letter constitutes more than a mere acknowledgment of receipt. The letter embodies an approval of Bucks's revisions to its plans and that approval affects Northampton's rights. From the very beginning of this process, the Department has made it clear that Bucks's plans and the revisions thereto must be *approved* by the Department. It said in 2012 that the CAP must be submitted for review and *written approval*. It provided in its settlement agreement that Bucks could submit revisions but the Department could refuse to accept them based on an evaluation of their merits. In its CAP and CMP acceptance letter, it said that future planning modules needed to be consistent with the most currently *approved* version of the CMP. In what is perhaps a Freudian slip, an internal email referred to the June letter as the *approval* letter, which is entirely consistent with how the Department has handled this matter from the start.

The Department once again argues that it does not have the authority to insist on approving Bucks's plans. This argument seems out of place in the jurisdictional dispute. If it is true that the Department lacks the authority to do what it did here, the Department would seem to have bolstered Northampton's arguments on the merits. Northampton has argued that the Department has exceeded its authority, and the Department apparently seems to agree. However, it does not follow from the fact that the Department's actions may have exceeded its authority

that the Department has not taken an appealable action. They are two separate issues. In assessing jurisdiction, we must evaluate whether the Department has acted in a way that adversely affects someone's rights. Whether the Department exceeded its authority in taking that action goes to the merits, not the issue of jurisdiction.

To some extent, it may be that the Department's posited distinction between acceptance and approval is based on the Department's view of how detailed its review should be. For example, the Department apparently did not tell Bucks exactly how it must address its projected overload or how it must allocate its remaining available capacity among its many users. However, the existing record suggests that the Department was actively involved in working with Bucks in coming up with basic methodologies, such as the concept of enforceable contracts with users that contain flow limits. Our jurisdiction does not necessarily turn on the level of detail of the Department's review. The Department clearly engaged in some level of substantive, content-based review of Bucks's plans and revisions.

The Department concedes that a letter it sent to Bucks on June 26, 2012 presented Northampton with a "viable appeal point" because that letter triggered Bucks's obligation to develop a CAP and CMP. That was the original letter where the Department determined that the Neshaminy Interceptor was in projected overload status. It also found that the Totem Road Pump Station was actually overloaded. That letter was revised on July 25, 2012 when the Department changed its mind about the actual versus projected overflow status of the Totem Road Pump Station. The projected overload status of the Interceptor stayed the same in both letters. Northampton only appealed the July letter. The Department says Northampton's failure to appeal the June 26, 2012 letter means Northampton cannot challenge anything regarding the Interceptor, even though the Department repeated the finding regarding the Interceptor in the

July letter. We see this as too fine of a distinction. Northampton adequately preserved its rights by appealing the July letter.

The Department goes on to argue that, even if the Board has jurisdiction to review the June letter, the scope of the appeal is quite limited; namely, it is limited to assessing the propriety of the revisions themselves, which are rather minor and not particularly controversial in and of themselves. The Department and Bucks cite our holding in *Winegardner v. DEP*, where we said:

> Our role is necessarily circumscribed by the Departmental action that has been appealed…Our responsibility is limited to revising the propriety of *that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions…It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry.

2002 EHB 790, 793 (citations omitted) (emphasis in original). Thus, they continue, Northampton's objections to the corrective measures spelled out in the CAP and CMP (such as the supplemental-contract requirement) do not belong in this case because those measures were imposed in the CAP and CMP back in 2014.

The Department might have had a good point but for the fact that, at the parties' joint request, our Order dismissing Northampton's earlier appeals stated that the dismissal was without prejudice to the right of Northampton (as well as the Department) to raise any and all factual and legal issues raised in those appeals in any further appeal. Unfortunately, none of the parties have explained how they think this dismissal Order in the old appeals should impact this appeal, but we cannot ignore our own Order. Such an Order cannot create jurisdiction where none otherwise exists, but it can broaden the scope of our review in a case in which we have jurisdiction. Northampton broadly challenged the Department's entire approach in those earlier appeals, which it has repeated in this appeal. Thus, it is certainly possible that, by virtue of our

Order in the earlier cases, Northampton is not constrained to challenging the narrow findings specifically addressed in the June letter. If that is the case, the relief we could afford would be correspondingly broad.

For all of these reasons, the Department's motion for summary judgment based on the Board's alleged lack of jurisdiction is denied.

Northampton's Motion on the Merits

Northampton has moved for summary judgment on the merits. Northampton's argument is that the June 14, 2016 letter in effect requires it to execute a specific supplemental agreement that was drafted by Bucks with terms supplied by the Department as a condition to Northampton Township having future planning modules approved, and that by imposing this requirement, the Department has exceeded its regulatory authority and acted unreasonably. Northampton does not object to the supplemental-agreement requirement *per se*. Rather, Northampton's complaint distilled down to its essence is that it should be allowed to negotiate a better deal with Bucks. Indeed, this appeal appears to some extent to be little more than a strained attempt on the part of Northampton to improve its bargaining position *vis-à-vis* Bucks.

The Department initially disputes that the letter requires *Northampton* to do anything; it simply approves what *Bucks* is doing to try and eliminate the projected overload. The Department's point may be technically correct but it is, perhaps, somewhat disingenuous. It is true that the letter was sent to Bucks and on its face it only approves revisions to Bucks's plans, but the letter, together with the letters that were the subject of the earlier appeals that were dismissed without prejudice, clearly and unavoidably affect Northampton as one of the "tributary municipalities" mentioned therein. For current purposes, we take Northampton at its word that it has no real choice but to use the Bucks system, at least in the short term.

We do not know the actual state of negotiations between Bucks and Northampton, but we will assume for purposes of discussion that Bucks has presented Northampton with a take-it-or-leave-it deal if Northampton wants to continue to use Bucks's facilities. Northampton argues that the Department erred by approving such behavior. However, we do not see anything that as a matter of law is necessarily or inherently improper with the owner of a sewer system imposing nonnegotiable terms and conditions on any party who wishes to use its system. Nor do we see anything that as a matter of law is necessarily or inherently improper with the Department in its role as planning overseer approving a sewage planning mechanism that incorporates such an arrangement. Indeed, we suspect that it is more the exception than the rule for sewer systems to negotiate unique terms with particular users. The owner of a sewage system undoubtedly has the right to regulate the use of its system. It strikes us that Northampton's suggestion that it, as a user, gets to dictate how Bucks may manage its system is odd if not rather presumptuous. It is true that Northampton has many users of its own and presumably must be heavily involved in its Township's planning efforts, but that does not change the fundamental fact that it is a user of someone else's facilities.

Whether the Department's approvals of Bucks's system management choices in this case were reasonable remains a question of mixed fact and law, which we are not in a position to decide in the context of Northampton's summary judgment motion. Going forward, the fact that the system in question is about to be overloaded will certainly be a key factor in making our determination. It is important to remember that Bucks *must* get its system out of projected overload status. Flow limits are a key element of Bucks's plan to fix the problem.

The main purpose of 25 Pa. Code Chapter 94 is "to prevent unpermitted and insufficiently treated wastewater from entering waters of this Commonwealth by requiring the

owners and operators of sewerage facilities to project, plan and manage future hydraulic, organic and industrial waste loadings to their sewerage facilities," with one of the primary aims to "[p]revent the occurrence of overloaded sewerage facilities." 25 Pa. Code § 94.2. CAPs must "set[] forth steps to be taken by the permittee to prevent the sewerage facilities from becoming hydraulically or organically overloaded," and "[l]imit new connections to and extensions of the sewerage facilities based upon remaining available capacity under a plan submitted in accordance with this section." 25 Pa. Code § 94.22(1)-(2). Thus, to address the problems associated with a hydraulic overload, systems in potential trouble such as Bucks must have a means of assessing and managing available capacity, which in turn requires them to assess and control the flows they receive into their systems. With 13 tributary municipalities, Bucks can only achieve this goal by assessing and having a means of restricting the flows it receives from each municipality. To allow one municipality unlimited flows upsets the entire system and inhibits Bucks's ability to avoid an overload in the Neshaminy Interceptor. As the Department's Environmental Program Manager for the Clean Water Program, Jenifer Fields, testified at her deposition,

> To make a Corrective Action Plan like this one work within the 537 framework, there should be some established flow limitations for each municipality. Because without it, one municipality could be taking up the capacity that is allocated to another municipality. So those agreements would establish flow limits for each municipality.

(Fields Dep. at 60-61.) *Accord*, 25 Pa. Code § 71.32(d)(4) (sewage facilities plans must be able to be implemented); *Wilson v. DEP*, 2010 EHB 827, 832 (same). Without supplemental agreements that define flow limits, we question how Bucks would have the legal authority to control the flows from the 13 municipalities that send sewage through the Neshaminy Interceptor.

Northampton next argues that the contract terms that are being forced upon it are unreasonable. Indeed, it is safe to assume that we would not be writing this Opinion if Northampton were satisfied with the terms being offered. The Department's error, Northampton says, is that the Department is actually the source of those unreasonable terms; at the very least, the Department is enabling Bucks's draconian behavior. Northampton adds that it has prepared a better agreement, and it is unhappy that neither Bucks nor the Department even considered it.

We are not entirely sure at this juncture that it is necessary or appropriate for the Board to involve itself in the parties' contract discussions. Generally speaking, we do not get involved in contract disputes. *Pond Reclamation v. DEP*, 1997 EHB 468. But even if we were to delve into the reasonableness of the contract in an appeal from the Department's approvals of system management choices, Bucks would have a considerable amount of latitude. It is neither our role nor the Department's role in the context of sewage facilities planning in general or system overload management in particular to search for the "best" solution. Our role is to ensure that the Department has correctly found that the choices made will get the job done and are lawful and reasonable. As we just said the other day in *Ritter v. DEP*, EHB Docket No. 2015-166-M (Adjudication, August 3, 2017),

> The Department does not second guess properly made planning or zoning decisions that have been made by local agencies, or other similar decisions of local concern, even though such decisions may be related to approved plans. *Community College of Delaware County v. Fox*, 342 A.2d 468, 478 (Pa. Cmwlth. 1975). Put another way, the Department's role is to ensure that any proposed sewer system conforms with local planning and is consistent with the statewide supervision of water quality management. *Id*. at 478; *see Northampton Township v. DEP*, 2008 EHB 563, 567 ("Neither the Department nor this Board function as überplanners, and we must be wary of any scheme that would have us making planning choices in lieu of the municipality."); *see Oley Township v. DEP*, 710 A.2d 1228, 1230 (Pa. Cmwlth. 1998) (discussing that although sewage facilities planning touches on a divergent set of issues in the law, the Department is not in a position to insert itself into all areas of dispute).

(Slip op. at 11.) Although we were discussing sewage facilities planning generally in *Ritter*, our discussion relates just as well to system management under 25 Pa. Code Chapter 94. Ultimately, whether the terms being dictated by Bucks (purportedly acting as the Department's front man) are unreasonable given the exigencies presented here is at best a mixed question of fact and law that we are not in a position to answer in the context of Northampton's motion for summary judgment.

Having said that, a few observations are in order. Northampton says that Bucks is acting unreasonably (and the Department by approving Bucks's actions is acting unlawfully and unreasonably) because the contract terms presented by Bucks are based in part on Bucks's contract with the City of Philadelphia, which is where Bucks sends its sewage. We are having difficulty imagining why Bucks would *not* want to take appropriate measures to ensure that it is able to comply with its own contractual obligations. The downstream limitations imposed by the City are part of the reality that upstream tributary sources must face.

Northampton similarly complains that the proposed contract terms go beyond the minimum requirements of Bucks's CAP and CMP. Again, Northampton cites no authority for the proposition that Bucks as the owner of the system must limit itself to the minimum requirements in a pending CAP and CMP when establishing terms and conditions for the use of its system. Northampton says the contract terms must be consistent with "regulatory guidance" without referring us to any such legal requirement. Northampton says that Bucks's supplemental agreement must be "consistent" with the 1965 agreement between Northampton and Bucks. We are not sure why, and we are not sure what "consistent" means in this context. Bucks is in a state of projected overload, which presents a serious risk to public health, safety, and welfare that must be addressed regardless of what a contract drafted 52 years ago says. The Department's

duty is to see that this new threat is alleviated, and nothing that it has done here appears to us as a matter of law to be inconsistent with that duty. Northampton says the requirements embodied in the supplemental agreement should have been included in the CAP itself. It does not explain why this would have made a difference, or why including the terms in a contract as opposed to the CAP itself was somehow improper. Northampton's argument that the supplemental agreement is unnecessary because its 1965 agreement with Bucks already provides for fees and penalties begs the question why Northampton would so vigorously resist executing the supplemental agreement if it were superfluous. Obviously, it would not. The 1965 agreement does not limit flow. The fact that Bucks's system is now projected to be overloaded changes everything and compels corresponding changes in the parties' relationship.

Northampton says that the Department has improperly delegated its authority to oversee sewage planning to Bucks. We are having some difficulty following this argument, in part because at other points Northampton seems to assert that the Department has inserted itself too much into the process. In any event, Northampton cites no authority in support of its position. Delegation occurs when one party entrusts another party to perform a task that was originally intended for the first party to do. We do not see what the Department was supposed to do that it has instead delegated to Bucks. It is Bucks's responsibility as the system owner to deal with its projected overload in the first instance. As noted above, the Department's role is to review Bucks's efforts, painful as that may be, advise and assist where appropriate, and at least arguably approve those efforts or, as the Department would say, "accept" those efforts. We see no record at this point that would support a finding that the Department has "delegated" any of its responsibilities to Bucks. If anything, the record shows that, rather than shunting off parts of its

proper oversight role, the Department has been actively involved throughout the process. Given the number of moving parts, this level of involvement appears to have been entirely appropriate.

Northampton adds that the Department also exceeded its authority and acted unreasonably by deciding in the letters that it will not approve future planning approvals in Northampton Township until a supplemental agreement is executed with Bucks. However, the Department's statements about what it intends to do in the future are generally not appealable. *Sayreville Seaport Assoc. v. Dep't of Envtl. Prot.*, 60 A.3d 867 (Pa. Cmwlth. 2012). As we said in our Opinion and Order on the Department's motion to dismiss in this case, challenges regarding the Department's decisions regarding Act 537 Plan revisions must be presented in an appeal from the Department's final action on those revisions. (Opinion and Order, slip op. at 11-13.) *See also HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Bucks Cnty. Water and Sewer Auth. v. DEP*, 2013 EHB 659, 662-63. For all of these reasons, Northampton's motion for summary judgment is denied.

The Department's Motion on the Merits

In addition to challenging the Board's jurisdiction, the Department also moves for summary judgment on the merits. It argues that its acceptance of Bucks's decisions in the June 14 letter was proper as a matter of undisputed fact and law. It says that its fundamental premise that Northampton cannot send unlimited amounts of sewage into a system constrained by projected hydraulic overload issues and by flow limits imposed by the City of Philadelphia is entirely reasonable in the context of the regulations that the Department implements. The Department, it says, must determine whether municipal Act 537 planning is consistent with Chapter 94 and capable of implementation, and that is exactly what it has done.

The Department's motion is basically the converse of Northampton's motion. Just as we discussed above in the context of Northampton's motion, the propriety of the Department's action cannot be decided entirely as a matter of law based on undisputed facts. Therefore, its motion must be denied as well.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTHAMPTON BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2016-106-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUCKS COUNTY WATER AND SEWER AUTHORITY, Intervenor	:	

O R D E R

AND NOW, this 9th day of August, 2017, it is hereby ordered that the motions for summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 9, 2017

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

For the Commonwealth of PA, DEP:
William H. Gelles, Esquire
Aviva H. Reinfeld, Esquire
(*via electronic filing system*)

For Appellant:
Nicole R. Moshang, Esquire
Jonathan E. Rinde, Esquire
(*via electronic filing system*)

For Intervenor:
Steven A. Hann, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2014-072-B**
	:	**(Consolidated with 2014-083-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**and 2015-051-B)**
	:	**Issued: August 15, 2017**

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

By Steven C. Beckman, Judge

Synopsis

The Board denies in part and grants in part the consolidated appeals of the Center for Coalfield Justice and the Sierra Club challenging the Department's issuance of Permit Revisions No. 180 and No. 189 to Consol Pennsylvania Coal Company, LLC for longwall mining in the Bailey Mine Eastern Expansion Area. The Center for Coalfield Justice and the Sierra Club failed to demonstrate by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 180 was unreasonable or in violation of the relevant statutes and regulations or Article I, Section 27 of the Pennsylvania Constitution. The anticipated and actual impacts to the streams from the longwall mining authorized by Permit Revision No. 180 did not rise to the level of impairing the streams in the permit revision area. The Center for Coalfield Justice and the Sierra Club did demonstrate by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 189 was unreasonable and in violation of the relevant statutes and regulations and Article I, Section 27 of the Pennsylvania Constitution. The anticipated and actual impacts to Polen Run from the longwall mining authorized by Permit

Revision No. 189 impaired Polen Run and caused the pollution of Polen Run under 25 Pa. Code § 86.37(a)(3).

Background

The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC ("Consol") has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area ("BMEEA"). The BMEEA is located adjacent to and partially underlies Ryerson Station State Park. In general, as proposed by Consol, the BMEEA consists of five longwall panels approximately 1,500 feet wide by 12,000 feet long with the longer dimension running largely in an east-west direction. The five panels start with the 1L panel on the northern boundary of the BMEEA through the 5L panel on the southern edge of the BMEEA.

On March 29, 2012, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP"), issued Permit Revision No. 158 allowing development mining for the BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of the BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. These streams are generally located in the western half of the BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol's application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run. The Center for Coalfield Justice and the Sierra Club ("CCJ/SC") timely appealed the issuance of Permit Revision Nos. 180 and 189 and those appeals are consolidated at EHB Docket No. 2014-072-B. A site visit by the hearing judge and an eight

day hearing were held in August 2016. The filing of post-hearing briefs was concluded on December 6, 2016. All five Board judges conducted a second site visit on April 24, 2017. The Board ordered the parties to file supplemental briefs on or before July 5, 2017 to address the impact of the June 20, 2017 Pennsylvania Supreme Court decision *in Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 2017 Pa. LEXIS 1393 (Pa. 2017) ("*PEDF*"). On July 27, 2017, the Board issued a further order permitting the parties to submit supplemental briefs discussing the impact of Act 32 of 2017 (enacted July 21, 2017) on or before August 8, 2017. The Board received briefs from all parties on the impact to this case of the *PEDF* decision and the enactment of Act 32 of 2017. The matter is now ready for decision by the Board.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce, *inter alia*, the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, Sp. Sess. No. 1, P.L. 31, *as amended*, 52 P.S. §§1406.1-1406.21 ("Mine Subsidence Act"); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.19a ("Surface Mining Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S.§§ 691.1-691-1001 ("Clean Streams Law"); the Dam Safety & Encroachments Act, Act of Nov. 26, 1978, P.L. 1375, No. 325, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-17 ("Administrative Code"); and regulations promulgated thereunder. (Stipulations of the Parties Number ("Stip.") 1.)

2. The Center for Coalfield Justice is a non-profit organization formed under the laws of the Commonwealth of Pennsylvania with a business and mailing address of 184 South Main Street, Washington, Pennsylvania, 15301. (Stip. 2.)

3. The Sierra Club is a non-profit organization with national headquarters in Oakland, California, with a business and mailing address of 2101 Webster St., Suite 1300, Oakland, California, 94612. (Stip. 3.)

4. Consol Pennsylvania Coal Company, LLC is a Delaware Limited Liability Company authorized to do business in Pennsylvania with a business address of 1000 CONSOL Energy Drive, Canonsburg, Pennsylvania, 15317. (Stip. 4.)

5. Following the presentation by CCJ/SC of standing witnesses, the Board discussed the issue of standing with the counsel for the parties during which the Department continued to raise no objection to standing and Consol stated that it no longer objected to the standing of any party. (Transcript page ("T") 95.)

Bailey Mine

6. Consol operates the Bailey Mine, an underground coal mine located in several townships in Greene and Washington Counties, Pennsylvania pursuant to Coal Mining Activity Permit No. 30841316 ("CMAP"). (Stips. 5 and 6.)

7. Since 1985, Consol has conducted underground mining operations at the Bailey Mine using both development mining and longwall mining. (Stips. 7 and 8.)

8. "Longwall mining" is the method used to remove coal from the coal seam in sections typically referred to as panels. Longwall mining is also known as full extraction mining. (Stip. 9; T. 858.)

9. As longwall mining proceeds in a panel, the roof collapses behind the longwall and the surface above that longwall panel subsides. (T. 858.)

10. "Development mining" is performed by continuous mining machines in order to establish gate roads, ventilation shafts, openings, entries and access to the working sections of

the underground mine in preparation for longwall mining. Unlike longwall mining, development mining leaves pillars of coal to support the surface. (Stip. 10.)

Bailey Mine Eastern Expansion Area

11. In April 2007, Consol submitted an application for a permit revision to CMAP No. 30841316 for development and longwall mining in the Bailey Mine Eastern Expansion Area. (Stip. 11; Exhibit "Ex." CP-8.)[1]

12. The BMEEA generally consists of multiple longwall panels amounting to approximately 3000 acres in Richhill Township, Washington County, Pennsylvania. (Stip. 15.)

13. After several years of review of the application, the Department had not issued a permit revision for the BMEEA because Consol had not demonstrated to the Department's satisfaction that longwall mining could be conducted safely under the streams in the BMEEA. (T. 556.)

14. In March 2012, in order to continue mining, Consol revised its pending permit revision application to provide for development mining only in the BMEEA. (Stip. 12; T. 555-556, 938.)

15. The Department issued Permit Revision No. 158 on March 29, 2012, authorizing only development mining in the BMEEA. (Stip. 13.)

16. At the time it issued Permit Revision No. 158, the Department told Consol that there was no guarantee that it would issue a permit revision for longwall mining in the BMEEA and advised Consol that it was accepting that risk if it choose to proceed with development mining. (T. 971-972; 1528.)

[1] Consol's exhibits are designated "CP-". The Department's exhibits are designated "C-". CCJ/SC's exhibits are designated "A-". The parties also used joint stipulated exhibits that are designated "Stip Ex.".

Permit Revision No. 180

17. On the same day as the Department issued Permit Revision No. 158, March 29, 2012, Consol re-submitted an application (identified as the Permit Revision No. 180 application) to longwall mine in the BMEEA. (Ex. CP-8, T. 939.)

18. In the Permit Revision No. 180 application for longwall mining in the BMEEA, Consol proposed to conduct longwall mining within five panels identified as the 1L, 2L, 3L, 4L, and 5L panels. (Stip. 16; Ex. CP-8.)

19. Each of the five proposed longwall panels was approximately 1,500 feet wide by 12,000 feet long with the longer dimension running largely in an east-west direction and starting with the 1L panel on the northern boundary of the BMEEA through the 5L panel on the southern edge of the BMEEA. (Ex. CP-2C; T. 838; 935; 1610.)

20. The western most sections of proposed panels 4L and 5L and smaller portions of the 2L and 3L panels are beneath a portion of Ryerson Station State Park. (Stip. 17.)

21. Consol's Permit Revision No. 180 application contained the standard permit application modules required to be submitted to the Department including Module 8 and Module 15. (Stips. 18 and 27; T. 1457-1458.)

22. Module 8 is a standard component of underground mining permit applications and includes information related to surface and underground hydrology and hydrogeology of the proposed permit area. (Stip. 18, Stip. Ex. B.)

23. The Module 8 contained in the Permit Revision No. 180 application included an inventory of all streams that exist over the underground permit area for the proposed Permit Revision No. 180 area and within 200 feet of the underground permit boundary. (Stip. 19.)

24. The fourteen streams identified and evaluated in Module 8 are:

Unnamed Tributary ("UNT") 32599 to North Fork Dunkard Fork

UNT 32601 to Kent Run

UNT 32602 to Kent Run

UNT 32604 to North Fork Dunkard Fork

UNT 32605 to North Fork Dunkard Fork

UNT 32618 to North Fork Dunkard Fork

UNT 32619 to North Fork Dunkard Fork

UNT 32620 to UNT 32619

UNT 32621 to North Fork Dunkard Fork

Jacobs Run

Kent Run

North Fork Dunkard Fork

Polen Run

Whitethorn Run (Stip. 24.)

25. The designated use for the streams within the permit boundary under 25 Pa. Code Chapter 93 is Trout Stocked Fishery. (Stip. 32; Stip. Ex. B, Bates No. 1004.)

26. Trout Stocking's designated use is described as "Maintenance of stocked trout from February 15 to July 31 and maintenance and propagation of fish species and additional flora and fauna which are indigenous to a warm water habitat." 25 Pa. Code § 93.3.

27. Each of the streams was attaining its designated use at the time of Consol's Permit Revision No. 180 application. (Stip. Ex. B, Bates No. 1005.)

28. Information contained in the Module 8 stream inventory included whether the streams are intermittent or perennial; the average annual flow; stream existing uses; and general

stream quality characteristics. The stream inventory is set forth in Form 8.3B of Module 8. (Stip. 20.)

29. Each of the streams listed in the stream inventory in Form 8.3B of Module 8 is listed as perennial based on its biological characteristics. (Stip. Ex. B, Bates Nos. 1023-1035; T. 1267.)

30. Pre-mining stream flow data from 2006 and 2007 is set forth in Table 8.4.A.1. (Stip. Ex. B, Bates Nos. 1274-1302.)

31. The pre-mining stream flow data in Table 8.4.A.1 shows that the flow in the streams in the BMEEA varies widely during the year and that many of the streams in the BMEEA naturally experience periods of low or no flow. (Stip. Ex. B, Bates Nos. 1274-1302; T. 1271-1272; Ex. CP-23; Ex. CP-24)

32. Sections of Kent Run, Polen Run, Whitethorn Run, UNT 32618 and UNT 32620 have all been observed to have intermittent flow characteristics based on stream monitoring records. (T. 1073.)

33. The purpose of the pre-mining stream flow data in Module 8 is to establish background/baseline data to allow for evaluation of any post-mining impacts. (T. 1262.)

34. Module 8 includes a Hydrologic Monitoring Plan that provides for monitoring stream flow and quality at specific monitoring stations. The Hydrologic Plan is set forth in Form 8.6A and includes daily monitoring in the streams as the longwall mining approaches and undermines a stream, and weekly monitoring before and after the period when the undermining is taking place. (Stips. 25 and 26, Stip. Ex. B, Bates Nos. 1314-1315)

35. Longwall mining and the resulting subsidence do not always cause the loss of flow or result in impacts that require mitigation or restoration in overlying streams. (T. 1161, 1547.)

36. Module 8 also includes an evaluation of the potential for longwall mining to affect streams above the proposed underground permit area, based on several hydrogeologic variables. (Stip. 22.)

37. The hydrogeologic variables addressed in Module 8 include: drainage/watershed area; streambed lithology; depth of cover; overburden geology; percentage of the watershed to be mined; stream orientation; presence of natural fracture zones; stream gradient; and mining height (a rough measure of the thickness of the coal seam). (Stip. 23.)

38. In Module 8, Consol predicted the potential impacts to the streams in BMEEA based on the hydrogeologic variables, analogous streams and previously collected data and categorized the potential for mining-induced flow loss for each stream. The streams were categorized by Consol as: an impact is not predicted, there is a potential for a temporary impact and an impact is predicted. (Stip. Ex. B, Bates No. 1004.)

39. Consol stated in Module 8 that no mining-induced flow loss was predicted for five streams (North Fork Dunkard Fork, Jacobs Run, UNT 32599, UNT 32602, UNT 32621), there was a potential for a temporary impact in six streams (Kent Run, UNT 32601, UNT 32604, UNT 32618, UNT 32619, UNT 32620) and mining-induced flow loss was predicted for three streams (Polen Run, Whitethorn Run, UNT 32605). (Stip. Ex. B, Bates Nos. 1004-1010, 1304.)

40. Module 15 is a standard component of underground mining permit applications and includes information related to the potential impacts of mining activities within and adjacent to streams and wetlands. (Stip. 27, Stip. Ex. D.)

41. Module 15 contained in the application for Permit Revision No. 180 included the results of subsidence modeling that predicts whether and to what extent mining-related pooling may occur in the streams. (Stip. 28.)

42. Mining-related pooling occurs when water collects behind the higher portion of the streambed over a mine gate road and forms a pooled area. (Stip. 29.)

43. Module 15 identified the stream restoration plans and methods Consol proposed to employ to restore streams, that may be adversely affected by mine subsidence, to their pre-mining conditions. (Stip. 30.)

44. The restoration plans included erosion and sedimentation controls; methods for repairing fractures and heaves in streambeds; methods for remediating stream pooling; and methods and criteria for determining whether streams have been restored to their pre-mining conditions. (Stip. 31.)

45. Among the methods identified for stream mitigation/restoration in Module 15 are removal of heaved bedrock, surface fracture sealing and/or consolidation grouting and flow augmentation. (Stip. Ex. D, Bates No. 1360.)

46. Module 15 also included information regarding the resident aquatic community and biological monitoring results for the streams in the BMEEA. (Stip. 33; Stip. Ex. D.)

47. As the District Mining Manager, Joel Koricich directed the staff of hydrogeologists, aquatic biologists and engineers responsible for the Department's review of the Permit Revision No. 180 application. (T. 433-434.)

48. Michael Bodnar, a Senior Civil Engineer General for the Department, reviewed the information in Module 15 of the Permit Revision No. 180 application related to the proposed post-mining stream mitigation/restoration work. (T. 96-97.)

49. Mr. Bodnar was admitted as an expert in civil engineering (T. 1633.)

50. Mr. Bodnar also reviewed the subsidence modeling submitted by Consol as part of the Permit Revision No. 180 application. (T. 1636.)

51. Various Department hydrogeologists and at least one Department aquatic biologist participated in the review of the Permit Revision No. 180 application over the years of its review. None of these individuals testified during the hearing. (T. 434.)

52. The Department published a Technical Guidance Document entitled Surface Water Protection – Underground Bituminous Coal Mining Operations ("TGD") to provide direction to staff in the Bureau of District Mining Operations during review of underground mining applications. (Stip. Ex. M.)

53. The Department used the TGD for guidance during its review of the Permit Revision No. 180 application. (T. 1501.)

54. The Department conducted an independent review of the data submitted by Consol in the Permit Revision No. 180 application and Permit Revision No. 189 application and reached its conclusions based on that data. (T. 478.)

55. During its application review, the Department classified the BMEEA streams into two categories: those where it predicts there will be impacts from longwall mining and those that it predicts will not be impacted by longwall mining. (T.467-468, 494.)

56. Where the Department predicts that the longwall mining will impact a stream, it requires mitigation/restoration plans. (T. 495.)

57. During its application review, when determining whether a stream will maintain its uses, the Department generally considers flow monitoring data and a biological component. (T. 489.)

58. When evaluating whether an impacted stream will maintain existing and designated uses, the Department considers the condition of the stream after implementation of the post-mining mitigation/restoration plan for that stream. (T. 489, 506.)

59. In order to authorize longwall mining, the Department needs to determine during its permit application review that any impacts to the streams will be temporary and not permanent. (T. 503.)

60. The stream mitigation/restoration plans reviewed by the Department in the Permit Revision No. 180 application include what the Department considers minor forms of stream restoration (heave removal, fracture sealing, streambed grouting) to address potential flow loss and gate cuts to address predicted pooling. (T. 98-99.)

61. The stream mitigation/restoration plans describe heave removal as the removal of heaved bedrock to restore the original stream profile by light equipment located on the banks of the stream or instream if necessary. (Stip. Ex. D; Bates No. 1360.)

62. Heave removal generally involves a day or two of work at most. (T. 1143.)

63. Fracture sealing is the hand placement of bentonite into a surface fracture to prevent the fracture from causing flow loss. (Stip. Ex. D, Bates No. 1361; T. 1143.)

64. The mitigation/restoration plans describe streambed grouting as injecting grout into the shallow subsurface via boreholes that terminate at depths between 3 ft. and 15 ft. below ground surface. (Stip. Ex. D, Bates No. 1361.)

65. The purpose of the streambed grouting is to seal subsurface fractures resulting from mine subsidence that may cause flow loss. (T. 1144.)

66. Stream flow is diverted around the section of the stream where the grouting work is taking place to allow the work to be completed in the dry. (T. 1146; 1156.)

67. Typically the bypassed stream section is approximately 100 feet in length but in at least one instance in the BMEEA, the flow bypass for grouting was 325 feet. (T. 1156; 1201.)

68. The boreholes for grouting are drilled in a pattern in the streambed. (T. 1144; Ex. CP-14.)

69. The length of time for streambed grouting depends on the length of the stream section required to be grouted. Consol typically grouts 35 feet per day or 150 to 200 feet per week. (T. 1156.)

70. The Permit Revision No. 180 application proposed seven total gate cuts to address anticipated pooling: four in North Fork Dunkard Fork, two in Kent Run; and one in Whitethorn Run. (T. 99, 163-164, 1007).

71. The four gate cuts/channel excavations proposed for North Fork Dunkard Fork range from 50 feet to 700 feet in approximate length. The proposed gate cut/channel excavation for Whitethorn Run is approximately 125 feet long. (Stip. Ex. D, Stip. Ex. G.)

72. Gate cuts are necessary to eliminate high points left in a stream as a result of differential subsidence and involves the excavation of a portion of the streambed to achieve the desired grade in the stream to eliminate the pool. (T. 100-101.)

73. A gate cut takes approximately two weeks, possibly up to a month depending on conditions. (T. 113.)

74. There are over 200 naturally occurring pools in the streams in BMEEA ranging in size from 50 to several hundred feet long and a foot or so deep to five feet deep. (T. 1005.)

75. A number of erosion and sedimentation control measures are required during gate cutting including bypassing stream flow around the stream section where the gate cutting is taking place. (T. 107.)

76. The stream mitigation/restoration plans in Module 15 reviewed by the Department also include flow augmentation. (Stip. Ex. D, Bates No. 1361-1362.)

77. The purpose of flow augmentation is to maintain the use of the stream until Consol can implement its stream restoration plans. (T. 1136.)

78. Stream augmentation involves the delivery of freshwater, usually from a groundwater well or spring in the area, upstream of a stream section experiencing flow loss in order to maintain flow across that stream section. (Stip. Ex. D, Bates Nos. 1361-1362; T. 1136.)

79. Where flow loss is anticipated, augmentation is required to begin within 24 hours. Where flow loss is not predicted, augmentation is required to begin within 15 days. (T. 1136-1137.)

80. The Department issued Permit Revision No. 180 on May 1, 2014. (Stip. 34; Stip. Ex. F.)

81. Permit Revision No. 180 authorized longwall mining in panels 1L through 5L, but did not authorize longwall mining beneath two streams located in the western portion of the BMEEA, Polen Run and Kent Run. (Stips. 35, 36 and 37.)

82. Permit Revision No. 180 also included special condition No. 83A that provides:

> If longwall mining beneath Polen Run is not approved after permit revision no. 180, CPCC shall employ the mining cessation plan in Module 22 such that no effects from full-extraction mining occur to Polen Run. (Stip. 42.)

83. Permit Revision No. 180 was approved and signed by Joel Koricich, the Department's District Mining Manager. (Stip. Ex. F; T. 432.)

84. With the exception of gate cutting, the Department gave global approval to Consol to perform the stream mitigation/restoration plans outlined in Module 15 in streams in the BMEEA when it issued Permit Revision No. 180. (T. 99.)

85. Gate cutting was authorized by Permit Revision No. 180 in North Fork Dunkard Fork and Whitethorn Run but not in Kent Run because the Department did not authorize longwall mining under Kent Run. (T.1643.)

86. The Department did not permit longwall mining under Kent Run in Permit Revision No. 180 because it concluded that Kent Run was at risk for permanent adverse effects if it was undermined. (T. 1607-1608.)

87. The Department did not permit longwall mining under Polen Run in Permit Revision No. 187 because it concluded that the proposed mitigation/restoration technique, streambed grouting, would not be successful in restoring Polen Run. (T. 1639-1640.)

Permit Revision No. 189

88. Consol submitted an application for Permit Revision No. 189 in May 2014 seeking authorization for longwall mining under Polen Run in the 1L and 2L panels. (Stip. 54, Stip. Ex. A.)

89. The Permit Revision No. 189 application did not seek authorization to conduct longwall mining under Kent Run within the BMEEA. (T. 1612.)

90. 51. The Department used the TGD for guidance during its review of the Permit Revision No. 189 application. (T. 1501.)

91. The main component of the Permit Revision No. 189 application was a revised stream restoration plan for Polen Run set forth in Module 15. (Stip. 56; Stip. Ex. C.)

92. The revised stream restoration plan for Polen Run above the 1L and 2L panels in Module 15 proposed installation of a geo-composite liner system ("Channel Liner System") (Stip. 55; T. 120.)

93. The purpose of the Channel Liner System proposed by Consol in the Permit Revision No. 189 application was to convey flow from unmined areas upstream of the 1L and 2L panels to downstream areas. (T. 120.)

94. The proposed Channel Liner System began approximately 600 feet upstream of the 1L panel and extended down to the south end of the 2L panel. (Stip. Ex. C.)

95. The stream restoration plan for Polen Run over the 1L and 2L panels provided that as a result of the installation of the Channel Liner System there would be a nine percent reduction in stream length due to the removal of unstable sections of the existing stream. (T. 549.)

96. The proposed Channel Liner System as described in Module 15 involves a number of construction and installation steps. (Stip. Ex. C.)

97. As described in Module 15, the general construction and installation steps for the Channel Liner System are as follows: 1. Clearing all vegetation along the project corridor to a width on average of 30 feet to allow installation of the liner; 2. Removal and stockpiling of the existing stream bottom material; 3. Excavation of the proposed new stream channel and the filling of any of the existing channel areas that are outside the relocated new channel; 4. Installation of one foot of clean material in the excavated channel; 5. Installation of the geosynthetic clay liner ("GCL"); 6. Installation of another foot of clean material on top of the GCL; 7. Placement of stream substrate into the channel; 8; Construction of instream habitat structures; 9. Replanting of the stream banks with appropriate vegetation. (Stip. Ex. C; T. 164-165, 1638-1639.)

98. The GCL is virtually impermeable. (T. 122, 1175.)

99. Because the GCL is impermeable, the stream restoration plan in Module 15 provides a collector drain system consisting of five collector drains and outlet pipes to allow groundwater present beneath the Channel Liner System to be collected and brought back into the stream. (T. 122-124.)

100. Module 15 provides that no water will be allowed in the stream channel until the reconstructed stream channel is completely stabilized with all structures installed. (Stip. Ex. C., Bates No. 4208.)

101. Consol estimated in Module 15 that stream flow restoration in Polen Run would take 90 days to complete per longwall panel. (Stip. Ex. C., Bates No. 4207.)

102. The Department issued Permit Revision No. 189 on February 26, 2015. (Stip. 58.)

103. Permit Revision No. 189 was approved and signed by Mr. Koricich, the Department's District Mining Manager. (Stip. Ex. F.)

104. Mr. Bodnar was the lead permit reviewer for Permit Revision No. 189. As the lead permit reviewer, he reviewed most of the information submitted in the modules for Permit Revision No. 189 including the Channel Liner System addressed in Module 15. (T. 120-121.)

105. Mr. Bodnar was aware of three other streams where stream liners have successfully conveyed flow across the liner. (T. 1642.)

106. Mr. Bodnar testified that it was his opinion that based on the design information in Module 15 and the extensive review of that information by the Department, water flow would be successfully conveyed by the Channel Liner System across the 1L and 2L sections of Polen Run. (T. 1643.)

107. Successful water flow across the Channel Liner System was defined as conveying all of the flow from the start of the section over the 1L panel minus 14 gallons per minute at the end of the 1L panel section and conveying all of the flow at the start of the section over the 2L panel minus 10 gallons per minute at the end of the 2L panel section. (T. 128-132.)

108. Mr. Bodnar did not perform any calculations to determine the ability of the drain collector system to collect groundwater below Polen Run. He relied on his experience and knowledge of drain construction and the proposed designs submitted by Consol to determine that the drain collector system would function adequately. (T. 124.)

Longwall Mining Impacts and Mitigation/Restoration Efforts

109. Longwall mining in the BMEEA pursuant to Permit Revision No. 180 began on August 4, 2014. (T. 179.)

110. At the time of the hearing in August 2016, Consol had completed longwall mining in the 1L and 2L panels and had just commenced longwall mining in the 3L panel. (T. 179; Stip. Ex. R.)

111. Portions of four streams identified in Module 8 (UNT 32620, UNT 32618, Whitethorn Run and Polen Run) had been undermined by longwall mining at the time of the hearing. (T. 179; Ex. A-2 thru A-27; A-28.)

112. Joe Laslo is a Surface Mine Conservation Inspector for the Department. (T. 175.)

113. As a Surface Mine Conservation Inspector, Mr. Laslo is responsible for monitoring the streams in the BMEEA for impacts from the longwall mining under Permit Revisions No. 180 and 189. (T. 176.)

114. Mr. Laslo observed Polen Run, Whitethorn Run, UNT 32618 and UNT 32620 prior to, during and after Consol's longwall mining undermined these streams. Mr. Laslo's

ongoing observations of the streams are recorded in the Bureau of Mining Information System, known by its acronym BUMIS. (T. 181; Ex. A-2 thru A-27.)

115. During his observations of the streams in the BMEEA prior to mining, Mr. Laslo observed that sections of some streams were dry at times. Mr. Laslo specifically testified that he observed sections of stream with no flow in Polen Run, Kent Run and in the headwaters of both UNT 32618 and UNT 32620 prior to mining. (T. 386.)

116. Mr. Laslo observed impacts to the streams from Consol's longwall mining including heaves, fractures, pooling and flow loss. (T. 402.)

117. Mr. Laslo observed heaving and fractures in the streambed of Polen Run after it was undermined. (Exs. A-4 and A-5; T. 203-212.)

118. Mr. Laslo observed heaving and fractures in the streambed of Whitethorn Run after it was undermined. (Ex. A-14; T. 264-266.)

119. Mr. Laslo observed heaving in the streambed of UNT 32618 after it was undermined. (Exs. A16 and A-20; T. 281-282; 300-307.)

120. Mr. Laslo observed heaving and fracturing in the streambed of UNT 32620 after it was undermined. (Ex. A-22 thru A-24; T. 317-335.)

121. At times, Mr. Laslo observed flow over heaves and fractures in streams but also observed flow loss resulting from heaves and fractures in the streambed. (Ex. A-15; T. 274, 346 387.)

122. Brian Benson is the Supervisor of Stream Mitigation and Monitoring for Consol and is responsible for overseeing Consol's stream mitigation/restoration plans as well as reporting active mining and post-mining observations to the Department. (T. 1121.)

123. Mr. Benson was admitted as an expert on streambed mitigation and restoration techniques. (T. 1131.)

124. When required to augment stream flow, Mr. Benson testified that Consol controls the flow rate in an attempt to mimic natural pre-mining conditions. (T. 1136.)

125. Mr. Benson testified that at the time of the hearing Consol had removed just one instance of heaved bedrock and it was located in a Polen Run tributary. The heave removal was completed using hand tools. (T. 1159.)

126. Mr. Benson testified that at the time of the hearing Consol had completed four sections of grouting in the streams and was working on grouting six additional sites. (T. 1160.)

127. Mr. Benson observed that following the completion of grouting a section of stream, the flow conveyance was improved and it was difficult to tell that the work had been completed because the streambed was left in its natural condition. (T. 1160.)

128. The Channel Liner System in Polen Run over the 1L panel was installed in three segments starting in April 2015. The majority of the Channel Liner System over the 1L panel was completed by July 2015 with the final section completed on or around December 1, 2015. (T. 1180, 1207, 1226; Stip. 60.)

129. Installation of the Channel Liner System in Polen Run over the 2L panel was completed in August 2016. (T. 1180.)

130. The Channel Liner System is approximately 2,400 feet in length over the 1L panel and approximately 2,220 feet in length over the 2L panel. (T. 129-130.)

131. During construction of the Channel Liner System above the 1L panel, water flow was bypassed around a section of Polen Run for approximately 1,000 to 1,200 feet, or as much as 1,500 feet, while constructing the first upstream section of the Channel Liner System. When that

section was completed, flow was returned to that section and flow was then bypassed around a 700 to 1,000 foot section of Polen Run while the Channel Liner System work was completed in the downstream section. (T. 235, 1179.)

132. Construction of the Channel Liner System in Polen Run involved extensive construction activity and the use of large construction equipment. (Ex. CP-18; Ex. A-6 thru A-12; T. 1172-1173.)

133. Vegetation and trees were removed from the streambank along Polen Run above the 1L and 2L panels to allow for the installation of the Channel Liner System. (Ex. CP-18; Ex. A-6 thru A-9; A-12; T. 1177-1178.)

134. Large weirs were installed in Polen Run as part of the Channel Liner System. (Ex. A-6.)

135. The stream channel of Polen Run was excavated to allow the installation of the Channel Liner System. (Ex. A-6 thru A-12; T. 215, 221.)

136. At certain points in Polen Run, Consol was required to use a hydraulic hammer to fracture solid rock below the pre-mining streambed in order to excavate the streambed to the depth necessary for the installation of the Channel Liner System. (Ex. A-11; T. 237-238.)

137. The streambank of Polen Run was rebuilt using coconut matting and vegetation including live willow stakes. (Exs. A-8 and A-9; T. 224-225, 228-229.)

138. Mr. Laslo observed sections of Polen Run, Whitethorn Run, UNT 32618 and UNT 32620 with no flow post-mining. (Exs. A-13, A-15, A-16, A-21, A-22 and A-23.)

139. Consol augmented stream flow when flow loss was noted by Consol or brought to its attention by the Department. (T. 276-277, 406-407.)

140. The Department allowed Consol to halt augmentation when the Department concluded that the conditions warranted a halt to augmentation. (T. 257.)

141. The Department grants two types of augmentation reprieves. First, there can be a global reprieve when precipitation conditions indicate drought conditions or the Department observes significant streams outside the mining area that are dry. The Department may also grant a site-specific reprieve. (T. 256-258, 396-398.)

142. A global augmentation reprieve would apply to an entire stream or streams. A site-specific augmentation reprieve usually would involve a section of stream across a specific longwall panel. (T. 414.)

143. A global augmentation reprieve was in place in the BMEEA in the end of September 2015 through early to mid-October 2015. (T. 1138.)

144. Mr. Laslo observed contractors for Consol removing live fish from dry sections of streams on more than one occasion and transporting the fish to flowing sections of the stream. (T. 268-270.)

145. Mr. Laslo did not observe Consol's contractors removing any other types of organisms from the streams. (T. 270-271.)

146. Mr. Laslo did not observe any dead fish or other dead organisms. (T. 270-271.)

147. Dr. Stout was admitted as an expert in biology and stream ecology. (T. 660.)

148. Dr. Stout did not review any other permit applications for longwall coal mining activities other than the permit revision applications in this case. (T. 655.)

149. Dr. Stout did not personally conduct and did not review any studies on the effectiveness of augmentation or of mitigation/restoration techniques after longwall mining in restoring biology. (T. 802-803.)

150. The regulatory-use designation of trout-stocked fisheries (TSF) is different than the issue of whether there is actual habitat that will support trout. (T. 781-782.)

151. Dr. Stout testified that Polen Run, Whitethorn Run, UNT 32618 and UNT 32620 lack sufficient water flow to support trout. (T. 781.)

152. Dr. Stout testified that the only stream in the BMEEA in which trout can survive based on habitat is North Fork Dunkard Fork. (T. 782.)

153. Dr. Stout testified that the streams in BMEEA would not be able to maintain populations of trout, warmwater fish, amphibians and macroinvertebrates in the event of mining-induced flow loss. (T. 676-684.)

154. Dr. Stout testified that some macroinvertebrates have adapted to handle low-flow conditions. (T. 697-698.)

155. Dr. Stout's testimony addressing the impacts to the aquatic populations was based on a "total loss of flow" which he described as the total loss of flow from the surface, the subsurface and the hyporheic zone of the stream so that if you dug down through the stones, you would not come to water in any reasonable distance. (T. 773.)

156. Dr. Nuttle was admitted as an expert on ecology. (T. 1323.)

157. Dr. Nuttle oversees the data analysis and synthesis for the biological monitoring data collected on the Bailey Mine on behalf of Consol. (T. 1323.)

158. Dr. Nuttle was very familiar with the streams in the BMEEA because he had visited them frequently through the years as part of his work. (T. 1324.)

159. Dr. Nuttle testified that he agreed with Dr. Stout that there were long-lived organisms present in the streams in the BMEEA but disagreed that their presence was an indication of continuous flow all year round. (T. 1325.)

160. Dr. Nuttle testified that the long-lived organisms in the streams have developed mechanisms for surviving in streams that do not flow continuously such as moving into wetter sections of the stream and stream substrate and dormancy. (T. 1325-1327.)

161. Dr. Nuttle testified that it is not necessary to have flowing water in the streams at all times to support the aquatic life found in streams in the BMEEA. (T. 1327.)

162. Dr. Nuttle testified that based on a study of streams in a different section of the Bailey Mine, the streams impacted by longwall mining in that section have biological scores post-mining that meet the Department's criteria for recovery of the biology in those streams. (Ex. CP-27 and CP-28; T. 1342-1349.)

163. Dr. Nuttle testified that based on the study of streams in a different section of the Bailey Mine, he concluded that augmentation was successful as a temporary mitigation technique in maintaining the use of aquatic life in those streams as a temporary measure so permanent mitigation/restoration can be implemented. (T. 1351.)

164. Dr. Nuttle testified that organisms in the stream will likely die when you excavate the stream substrate during stream restoration activities. (T. 1379-1380.)

DISCUSSION

This matter involves a third party appeal by CCJ/SC of two permit revisions issued to Consol by the Department. In a third party permit appeal, in order to be successful, the party challenging the Department's permit decision must show, by a preponderance of the evidence, that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution in issuing the permit. *United Refining Company v. DEP*, 2016 EHB 442,448; *aff'd., United Refining Company v. Dep't of Envtl. Prot.,* No. 1321 C.D. 2016 (Pa. Cmwlth. June 12, 2017). See also *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d

578, 587 (Pa. Cmwlth. Ct. 2016) (In order to prevail, appellants must show that the Department acted unreasonably or contrary to the laws of the Commonwealth or the Pennsylvania Constitution). The preponderance of evidence standard requires that CCJ/SC meet their burden of proof by showing that the evidence in favor of their proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. CCJ/SC's evidence must be greater than the evidence that the issuance of the permit was appropriate or in accordance with the applicable law. *United Refining*, 2016 EHB at 449; *Perano v. DEP*, 2011 EHB 623, 633. The Board is not tasked with the duty to review the Department's decision-making process. The Board's review is de novo and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining, supra.*; *see also Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

CCJ/SC set out two main arguments in their post-hearing brief.[2] First, CCJ/SC assert that the Department's decisions to issue Permit Revisions No. 180 and No. 189 are contrary to the

[2] CCJ/SC raise two other issues in their post-hearing brief that are easily disposed of. First, they ask that the Board dismiss the Motion for Nonsuit presented by Consol at the close of CCJ/SC's case in chief. The Board did not grant the Motion for Nonsuit during the hearing and stated that if Consol wished to file a further motion or renew that argument in its post-hearing brief, it should do so. (T. 817). Consol did not file a further motion or discuss its Motion for Nonsuit in its post-hearing brief. Therefore we consider the Motion to Nonsuit issue to have been decided and any further argument on it to be waived by Consol and will not address it further. The second issue is less clear and appears to be an argument by CCJ/SC that the Department in some fashion circumvented the requirements of Chapter 105 in issuing the permit revisions in this case (CCJ/SC's post-hearing brief, p.87-88). The Department argues that this argument is waived because it was not set out in CCJ/SC's pre-hearing memorandum. (Department's post-hearing brief, p. 96). We agree with the Department that this argument has been waived. It was not raised in the pre-hearing memorandum and should not be raised for the first time in the post-hearing memorandum. Furthermore, the argument that CCJ/SC are trying to make is not clearly set out and appears to be largely intertwined with their overall argument that the permit revisions violate the Clean Streams Law and the Mine Subsidence Act and regulations. As such, even if it was not waived, we would not treat it as a separate issue but would determine it as part of our overall decision in this case.

Clean Streams Law and the Mine Subsidence Act and the regulations implementing those statutes. (CCJ/SC's Post-hearing Brief, p. 104-106). Second, CCJ/SC argue that the Department violated Article 1, Section 27 of the Pennsylvania Constitution when it issued Permit Revisions No. 180 and No. 189. (CCJ/SC's Post- hearing Brief, p. 106-108). We find that based on the evidence presented at the hearing, CCJ/SC have failed to show by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 180 was unreasonable, contrary to the law or violated the Pennsylvania Constitution. However, we find that the evidence presented does demonstrate that issuance of Permit Revision No. 189 was unreasonable and contrary to law and the Department's decision to issue Permit Revision No. 189 also violated the Pennsylvania Constitution. Therefore, CCJ/SC's consolidated appeals are dismissed in part and granted in part.

Act 32 of 2017

A fundamental issue before we address the details of the parties' positions is to determine what laws apply to the case. This issue became more complicated as a result of legislation enacted while the Board was working on the adjudication in this matter. On July 21, 2017, Act 32 of 2017, P.L. 345 ("Act 32") amending Sections 5 and 9.1 of the Mine Subsidence Act became law. Section 1 of Act 32 added new subsections 5(i) and 5(j) to Section 5 stating:

> (i) In a permit application to conduct bituminous coal mining operations subject to this act, planned subsidence in a predictable and controlled manner which is not predicted to result in the permanent disruption of premining existing or designated uses of surface waters of the Commonwealth shall not be considered presumptive evidence that the proposed bituminous coal mining operations have the potential to cause pollution as defined in section 1 of the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law."
>
> (j) The provisions of subsection (i) shall only apply if:

(1) a person submits an application to conduct bituminous mining operations subject to this act to the department that provides for the restoration of the premining range of flows and restoration of premining biological communities in any waters of this Commonwealth predicted to be adversely affected by subsidence. The restoration shall be consistent with the premining existing and designated uses of the waters of this Commonwealth; and

(2) the application is approved by the department.

Section 1 of Act 32.

Section 2 of Act 32 in essence amends Section 9.1 by adding an exception for Section 5(i) to Section 9.1(d) that states:

(d) Nothing in this act shall be construed to amend, modify or otherwise supersede:

(3) except as provided under section 5 (i), any standard contained in the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Steams Law," or any regulation promulgated thereunder by the Environmental Quality Board.

Section 2 of Act 32.

Finally, Sections 3 and 4 of Act 32 deal with the application and effective date of the Act. Section 3 provides that the additions to Section 5 and the amendment of Section 9.1(d) shall apply to all permits issued under the Mine Subsidence Act after October 8, 2005.[3] Section 4 provides that the Act shall take effect immediately.

The Board, after a conference call with the parties, issued an order allowing the parties to file simultaneous briefs addressing two questions: 1) In light of the recent passage of Act 32 of 2017, what law is applicable to the Department's permitting decisions under appeal in this case; and 2) If Act 32 of 2017 is the applicable law, what is the impact of that legislation on the issues

[3] The October 8, 2005 date appears to have been selected because it is the effective date of the Department's Technical Guidance Document entitled "Surface Water Protection – Underground Bituminous Coal Mining Operations ("TGD").

in this case? Each of the parties filed a brief addressing these two issues. On the first issue, the Department and CCJ/SC asserted in their briefs that the law that applies to the Department's permitting decisions in this case and the Board's review of those decisions is the law in existence prior to the enactment of Act 32. Both the Department and CCJ/SC argue that because Pennsylvania is a Primacy state[4] as to its approved mining program, the federal Office of Surface Mining Reclamation and Enforcement ("OSM") has to at a minimum review and potentially approve Act 32's revisions to the Mine Subsidence Act before Act 32 becomes effective and enforceable in Pennsylvania.[5] OSM regulations state that:

> [w]henever changes to laws or regulation that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

30 CFR. 732.17(g).[6]

[4] As a Primacy state, Pennsylvania has received approval from the federal OSM to administer and enforce federal law using state coal mining laws and regulations including the provisions of the Mine Subsidence Act and the Clean Streams Law and the regulations issued pursuant to those statutes.

[5] None of the parties in their briefs informed the Board of the status of OSM's review of Act 32. We presume that having addressed the OSM review issue, if OSM had acted to review and approve/disapprove Act 32, one or more of the parties would have so informed the Board. For the purposes of this adjudication, we assume that the OSM review process has not been completed. The Department pointed out in its brief that OSM must allow for public comment and has up to seven months to reach a decision. (Department's Brief Concerning the Impact of Act of July 21, 2017, P.L. 345, NO. 32, p. 6, fn. 2).

[6] In 1980, after Congress enacted the federal Surface Mining Control and Reclamation Act in 1977, 30 U.S.C. Sections 1201-1328, the Commonwealth decided to seek primary jurisdiction to regulate coal mining in Pennsylvania. To achieve this goal, the General Assembly amended various state statutes governing coal mining. See Act of October 10, 1980 (P.L.835, No. 155); Act of October 10, 1980 (P.L. 874, No. 156); Act of October 10, 1980 (P.L. 895, No. 157). The Commonwealth submitted these state statutes along with the regulations promulgated under them to the federal OSM for review and approval. In 1982, OSM approved the Commonwealth's program. 30 CFR Section 938.10 (State regulatory program approval). Since 1982, the Commonwealth has continued to maintain primary jurisdiction under OSM's oversight that includes OSM's review and approval of all amendments to the Commonwealth's approved program. 30 CFR Section 938.15 (Approval of Pennsylvania regulatory program amendments).

The Department notes that OSM must first decide whether Act 32 constitutes a change in the approved program and then, if OSM determines that Act 32 does constitute a change, OSM must decide whether to approve or disapprove that change to the approved program. CCJ/SC clearly state that Act 32 is a change to Pennsylvania's underground coal mining program requiring OSM approval. The Department does not directly state that Act 32 is a change but does state that it amends the Mine Subsidence Act and the Clean Streams Law, two of the laws that compromise Pennsylvania's approved Primacy program. From that statement and the fact that the Department takes the position that the law that applies in this case is the law in existence prior to the enactment of Act 32, we infer that the Department has concluded that Act 32 is a change that requires OSM approval. Consol addresses the Primacy issue in a lengthy footnote found on page 4 of its Supplemental Post-hearing Brief Regarding Act 32 of 2017 and focuses its argument largely on its contention that Act 32 does not constitute an alteration or change to the approved Pennsylvania program. Therefore, Consol argues that OSM has no role to play in reviewing or approving Act 32. In support of its position, Consol asserts that Act 32 simply codifies the Department's longstanding interpretation of the interplay of the Clean Streams Law and the Mine Subsidence Act under the TGD into the Mine Subsidence Act. Consol further notes that OSM has been aware of the TGD since around 2006.

We agree with the Department and CCJ/SC that Act 32 does constitute a change to the approved Pennsylvania mining program. Consol's argument that it is not a change is really based on its belief that Act 32 does not alter the review process used by the DEP since its adoption of the TGD. We reject that position for two reasons. First it ignores the plain language of OSM regulation Section 732.17 (g) which talks about review by OSM when there are "changes to laws or regulations that make up the approved State program…". Act 32 is without

question a change to a Pennsylvania law, the Mine Subsidence Act that is part of the approved Pennsylvania program. The impact of that change on the approved program is for OSM to determine, but we think there can be no question that Act 32 is a change to the law in Pennsylvania.

Second, we find that Consol and the Department's argument that Act 32 does not change the review process under the TGD is not correct. It may not change the outcome of the Department's permit review process where the Department ultimately decides to issue the permit revision but we do think that Act 32 has an impact on the review process. Act 32 is clearly aimed at the specific language found in the Department's mining regulations at 25 Pa. Code § 86.37. 25 Pa. Code § 86.37(a)(3) states as follows:

> A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply: The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

Act 32 in essence says that so long as the mining applicant sets forth a plan to satisfy certain restoration criteria defined within the Act that the Department approves, the demonstration of no presumptive evidence of potential pollution required under 25 Pa. Code § 86.37(a)(3) has been met. The permit review process set out in Act 32 clearly limits the Department's ability to interpret 25 Pa. Code § 86.37(a)(3) and apply the regulation to the unique facts of each permit application. The fact that the restoration criteria in Act 32 are consistent with the way that the Department claims to have approached the permit revisions in this case under the TGD does not lessen the fact that these criteria are now enshrined in a statute that must be followed in the permit review process. As the Department itself points out on the first page of the TGD, "the policies and procedures herein are not an adjudication or a regulation. There is no intent on the

part of the DEP to give the rules that weight or deference. … DEP reserves the discretion to deviate from this policy statement if circumstances warrant." (Stip. Ex. M, p.1). Act 32 eliminates the discretion that the DEP previously reserved regarding its permit decisions under the TGD. We therefore reject Consol's argument that Act 32 does not change the approved Pennsylvania mining program.

We find that the Department and CCJ/SC are correct that Act 32 is not effective until OSM has reviewed it and taken appropriate action to approve or disapprove the changes it makes to the Pennsylvania's mining program. Therefore, our review of the Department's permit decisions challenged by CCJ/SC in this case will be based on the law as it existed prior to the recent enactment of Act 32.[7, 8]

[7] As a result of this decision, we will not review the additional reasons to disregard Act 32 that CCJ/SC set forth in Appellants' Supplemental Brief Regarding Act 32 of 2017.

[8] Even if we determined that Act 32 did apply to our decision in this case, we would have reached the same result regarding our ruling on the Department's decisions to issue Permit Revisions No. 180 and 189. Our interpretation of Act 32 leads us to conclude that its impact is quite limited. This view, although not the result when applied in this case, is apparently shared by the Department who argued that applying Act 32 would have no impact on the issues before the Board and Consol who stated that the enactment of Act 32 does not change the law. Act 32 states that planned subsidence which is not predicted to result in the permanent disruption of premining existing or designated uses of surface waters **shall not be considered presumptive evidence that the proposed mining operations have the potential to cause pollution**. (emphasis added) In essence, Act 32 eliminates the legal presumption spelled out in 25 Pa. Code § 86.37(a)(3) that CCJ/SC relied on in its case that subsidence that is predicted to cause something other than permanent disruption could potentially cause prohibited pollution under the Clean Streams Law, the Mine Subsidence Act and corresponding regulations. Elimination of a legal presumption does not change the underlying law, it only addresses the burden of proof. Under Act 32, the party with the burden of proof, CCJ/SC in this case, must prove without relying on the presumption, that the position it is advocating is the proper one under the appropriate legal standard. In this case, we found that even with the presumption, CCJ/SC did not prove that the Department should not have issued Permit Revision No. 180. That result would not change if the presumption were eliminated because, ultimately, we concluded that Permit Revision No. 180 did not violate the Mine Subsidence Act, the Clean Streams Law or the regulations. We did find that the Department's decision to issue Permit Revision No. 189 was contrary to the law and regulations, not only because we determined it constituted pollution under 25 Pa. Code § 86.37(a)(3) but because CCJ/SC demonstrated that the longwall mining beneath Polen Run in the 1L and 2L panels along with the required restoration was so disruptive that it impaired Polen Run. That decision did not rely on a presumption regarding whether certain operations have the potential to cause pollution but instead relied on the Board's ability under its de novo review to consider facts beyond those known to

The Department's Permit Decisions under the Clean Streams Law and the Mine Subsidence Act and their Regulations

Permit Revisions No. 180 and No. 189 allow Consol to conduct longwall mining operations in specific areas of the BMEEA. Permit Revision No. 180 permits longwall mining in panels 1L through 5L but excludes the panel sections under Polen Run and Kent Run. Permit Revision No. 189 is more limited and only authorizes longwall mining in the panel section under Polen Run in the 1L and 2L panels. These permit revisions were issued pursuant to the Department's authority under several environmental statutes including the Clean Streams Law and the Mine Subsidence Act. (Joint Stipulated Ex. F.) CCJ/SC raise related arguments that the permit decisions in this case violate both the Clean Streams Law and the Mine Subsidence Act and their regulations. CCJ/SC assert that under the facts presented at the hearing, the Department's issuance of Permit Revisions No. 180 and 189 violates the Clean Streams Law[9] and its regulations because the permit revisions issued by the Department fail to maintain and protect the designated uses in the streams that have been or will be undermined by Consol's longwall mining in the BMEEA. CCJ/SC acknowledge that the Clean Streams Law is not intended to prevent all possible impacts to a stream but argue that it does require the Department to "proactively prevent impairment of stream uses" citing 25 Pa. Code §§ 93.3, 93.4(a), 93.4a(b).

DEP at the time it made the permit decision. Those facts demonstrated that Consol's proposed and actual activities impaired Polen Run in violation of the Clean Streams Law.

[9] In their post-hearing brief, CCJ/SC discuss specific sections of the Mine Subsidence Act (Sections 5(e) and 9.1(d)) and argue that these sections are relied on by the Department and Consol as part of the legal basis for granting the permits in question by avoiding the requirements of the Clean Streams Law. The problem with CCJ/SC's position is that neither the Department nor Consol make the argument that CCJ/SC set out in their post-hearing brief. Neither the Department nor Consol argue that the Mine Subsidence Act should be read to trump the Clean Streams Law. Such a position would be contrary to the Board's holding in *UMCO Energy, Inc. v. DEP*, 2006 EHB 489 and the plain language of Section 9.1(d) of the Mine Subsidence Act. At most, Consol argues that the Board should read the two statutes together and attempt to carry out the requirements of both. We reject CCJ/SC's attempt to create a controversy on this issue. We agree with Consol that to the extent it is necessary to do so in analyzing this matter, our goal is to reconcile the two statutes.

(CCJ/SC's Post-hearing Brief, p. 83.) CCJ/SC state that, "Protection and maintenance of stream uses is the essential component of the Department's analysis concerning subsidence-induced stream impacts." (CCJ/SC's Post-hearing Brief, p. 83-84.) Therefore, according to CCJ/SC, the Department violated the Clean Streams Law and its regulations when it issued these permit revisions despite Department predictions that the streams in BMEEA would suffer flow loss, heaving, fracturing and pooling that would require mitigation and restoration work, because the instream impacts and required mitigation/restoration activities would impair stream uses.

In a similar vein, CCJ/SC argue that the Department's permitting decisions in this case violate the Mine Subsidence Act and, more specifically, its implementing regulations that provide specific requirements governing the issuance of mining permits. The focus of CCJ/SC's claim is on the criteria for permit approval or denial found at 25 Pa. Code § 86.37. CCJ/SC challenge the Department's decision that Consol's applications for the permit revisions satisfied the requirement that there be no presumptive evidence of potential pollution found at 25 Pa. Code § 86.37(a)(3). 25 Pa. Code § 86.37(a)(3) states as follows:

> A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply: The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

The Department, using a pre-printed form (5600-FM-MR0462 Rev. 11/2007) entitled "Written Findings Document for Coal Mining Permits" found that: "3. The applicant has demonstrated there is no presumptive evidence of potential pollution of the waters of the Commonwealth [§86.37(a)(3)]." (Joint Stipulated Ex. N.) CCJ/SC argue that the same anticipated and actual impacts to the streams discussed previously, namely flow loss and

pooling, along with the required mitigation /restoration activities, constitute pollution and, therefore, the Department's determination that Consol affirmatively demonstrated that there is no presumptive evidence of potential pollution of the waters of the Commonwealth is wrong and Consol's applications for Permit Revisions No. 180 and 189 should have been denied.

The Department and Consol take the position that the Department's permitting decisions in this case were both reasonable and in compliance with the Clean Streams Law, the Mine Subsidence Act and their regulations. Not surprisingly, the Department's and Consol's arguments overlap in many places. First, they argue that despite the statements to the contrary, CCJ/SC are seeking a no impact standard for the streams subject to undermining by Consol's longwall mining and contend that the laws and regulations in Pennsylvania do not support CCJ/SC's position that no impact is permitted. (Department's Post-hearing Brief, p. 99; Consol's Post-hearing Brief, p. 38). They further suggest that requiring a no-impact standard would be inconsistent with the need to balance societal interests in both clean water and longwall mining expressed by the legislature in the Clean Streams Law and in the Mine Subsidence Act. (Department's Post-hearing Brief, p. 104-105; Consol's Post-hearing Brief, p. 44-45). Consol claims, and the Department apparently agrees, that a no impact standard would prevent all longwall mining because it would be infeasible to longwall mine without mining under streams in this part of Pennsylvania. (Consol's Post-hearing Brief, p. 45-46; Department's Post-hearing Brief, p. 104).

Moving beyond the no impact standard discussion, the Department and Consol next assert that the anticipated and actual longwall mining impacts to the streams in the BMEEA do not impair the uses of those streams and do not constitute pollution. The Department and Consol reject the idea that the mitigation/restoration activities required to be performed on the streams as

a result of the subsidence impacts impair the streams during the time the mitigation activities take place. They argue that CCJ/SC failed to present sufficient evidence regarding impairment of the streams in the BMEEA. The Department and Consol further argue that where there are anticipated or actual impacts to the streams, any such impacts are temporary as a result of the mitigation and restoration requirements incorporated into the permit revisions issued by the Department. They argue that CCJ/SC has not demonstrated that any such impacts are permanent and that any temporary impacts to the stream do not impair the designated uses of the streams and therefore, do not constitute a violation of the Clean Streams Law and its regulations nor do they constitute pollution in violation of the Mine Subsidence Act and its regulations.

No Impact Standard

We first turn our attention to the issue of a no impact standard and whether any part of the Clean Streams Law, the Mine Subsidence Act or their regulations require that the Department ensure that the activities authorized by the permit revisions will have no impact on the streams in the BMEEA. The parties dispute whether that issue is even before the Board in this case with the Department and Consol aggressively asserting that CCJ/SC are seeking to enforce a no impact standard and CCJ/SC just as aggressively denying that they are arguing for such a standard. The Board addressed this issue in an earlier one judge Opinion and Order[10] in this case in response to a motion for summary judgment, but given that this ongoing dispute is highlighted in the parties' post-hearing briefs, we think it is worth addressing the issue again in this Adjudication.

There is no question that subsidence associated with longwall mining authorized by the permit revisions issued by the Department in this case impacted the streams that had been

[10]*Center for Coalfield Justice v. DEP*, 2016 EHB 341.

undermined in the BMEEA at the time of the hearing. Further, the Department and Consol both acknowledged during the permit revision review process that there would be some impacts to the BMEEA streams if the permit revisions were issued. The parties do not seriously contest these points, but to the extent any of them do, we find that the evidence that impacts to the streams were both anticipated during the permit review process and have in fact occurred is beyond dispute. Given that determination, if in fact the Clean Streams Law, the Mine Subsidence Act and its regulations require that longwall mining have no impact on the waters of the Commonwealth, the Department's issuance of the Permit Revisions No. 180 and 189 would clearly be contrary to law. However, we find that a no impact standard is not required by, or consistent with, our understanding of the Clean Streams Law, the Mine Subsidence Act or their regulations.

The Board in recent opinions and adjudications has addressed the overall permitting scheme established by Pennsylvania's environmental statutes and regulations. In evaluating the arguments surrounding the no impact standard set forth by the parties in this case, we think it is important to keep that overall scheme in mind and to recognize as the Board has said that "it is a fact of life that normal development cannot be accomplished without *some* environmental impact." *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 243, *aff'd*., 131 A.3d 578 (Pa. Cmwlth. 2016). In the earlier summary judgment opinion in this case, we stated, "A permit, at its most basic, is permission from the state to undertake activities that may impact the environment and cause pollution." *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 348. Similarly, the Board in *Brockway Borough* expressed that, "The point of the environmental laws is not to prohibit the discharge of all pollutants, but to intelligently regulate such activity ….Permits exist to provide a limited allowance of what might otherwise constitute an unlawful

activity. The majority of environmental permitting regimes contemplate some amount of environmental impact." *Brockway Borough, supra* at 243 (internal citation omitted). In *Pine Creek Valley Watershed Association, Inc. v. DEP*, 2016 EHB 748, 755, the Board rejected Pine Creek's argument that the Department has an overarching duty to prevent pollution of streams under various statutes, including the Clean Streams Law, stating that Pine Creek's position was an oversimplification of Pennsylvania's environmental statutes. Each of the cited cases involves the Clean Streams Law and its regulations. We think these cases, along with a plain reading of the statute and its implementing regulations, make clear that there is not a requirement that there be no impact on the waters of the Commonwealth from activities permitted by the Department pursuant to the Clean Streams Law and its regulations.

Just as we think that a no impact standard is not required under the Clean Streams Law and its regulations, we think that the same is true for the Mine Subsidence Act and its regulations as applied to longwall mining. The Board previously recognized that "longwall mining is an acceptable mining method in Pennsylvania and cannot be prohibited simply because it causes subsidence resulting in material damage." *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 585 ("*UMCO Energy*"). At the same time, the Board made clear that while longwall mining is a permitted mining method, permission to longwall mine is not absolute but remains subject to proper conditions. *Id*. at 560. In addressing the interplay between the Mine Subsidence Act and the Clean Streams Law, we found that "it is much more likely that the Legislature intended a reasonable accommodation between the rights of mining companies and the protection of the waters of the Commonwealth." *Id*. at 565.

The specific mining regulation that is the focus of CCJ/SC's argument is 25 Pa. Code § 86.37(a)(3) that requires that the applicant in this case, Consol, demonstrate to the Department

that there is "no presumptive evidence of potential pollution of the waters of the Commonwealth." Pollution is not defined in the Mine Subsidence Act or in Chapter 86 of the mining regulations. A strict reading of 25 Pa. Code § 86.37(a)(3) and what constitutes "pollution" in that regulation that relies on the definition of "pollution" in the Clean Streams Law and the Board's prior case law interpreting the Clean Streams Law definition, would clearly result in a no impact standard. The Board has previously held that subsidence impacts, including pooling and changes to a stream's current (flow rate), fit within the Clean Streams Law's definition of "pollution." *Consol v. DEP*, 2002 EHB 1038, 1045 ("*Consol I*"). It is difficult, if not impossible, to envision that longwall mining as it is currently practiced in Pennsylvania could continue if the Board held that any potential for the loss of flow in any amount and for any length of time constituted pollution as that term is used in 25 Pa. Code § 86.37(a)(3). Such a result seems inconsistent with the general guidance discussed above regarding the interplay of the Clean Streams Law and the Mine Subsidence Act and our current understanding of the Board's prior case law dealing with Pa. Code § 86.37(a)(3).

The Board and the Commonwealth Court have addressed the meaning and application of the phrase "no presumptive evidence of potential pollution of the waters of the Commonwealth" in several prior cases but not in a context directly analogous to the situation that is posed by CCJ/SC's challenge to Permit Revisions No. 180 and 189. The earliest rulings involved cases where the Department denied permits to mining companies because of concerns with acid mine drainage. In *Harman Coal Company v. DER*, 1977 EHB 1, the Board did not directly discuss the phrase but stated in its conclusions of law that the discharge of acid mine drainage to clean waters of the Commonwealth was a violation of the regulation (25 Pa. Code § 99.35) that contained the phrase "presumptive evidence of potential pollution." The Commonwealth Court

in the appeal of the Board's *Harman Coal Company* decision, stated that "The pertinent DER regulation provides that permits may not be issued if there is any evidence that mine drainage into a clean stream will be acidic and if there is 'presumptive evidence of *potential* pollution of the waters of the Commonwealth.' 25 Pa. Code § 99.35(a). . . Applicants for permits therefore must carry the burden to prove that the drainage is not acidic and that adequate measures can and will be taken to insure that the drainage will not result in any pollution of the clean streams of the Commonwealth." *Harman Coal Company v. DER*, 384 A.2d 289, 290-91 (Pa. Cmwlth. 1977) (emphasis in original).

In three other early cases involving acid mine drainage, *Magnum Mineral v. DER*, 1988 EHB 867, *Hepburnia Coal Company v. DER*, 1992 EHB 1315 and *Al Hamilton Contracting Company v. DER*, 1992 EHB 1458, the Board addressed the meaning of the phrase in a similar fashion to *Harman Coal*. In *Magnum Mineral*, the Board accepted the Department's position that the "phrase means that the applicant must demonstrate that pollution of the surface and groundwater from its mining activities will not occur." *Id.* at 892. The Board held that Magnum's burden under 25 Pa Code §86.37(a)(3) was to demonstrate by a preponderance of evidence that pollution of the surface and groundwater will not result from its proposed mining. Magnum did not meet its burden because the Board found that Magnum had not shown that acid mine drainage would not be created or that it would be effectively treated by the addition of alkaline. *Id.* at 912. In *Hepburnia Coal Company*, the Board found that Hepburnia did not meet its burden to show that there is no presumptive evidence of potential pollution to the waters of the Commonwealth and, therefore, DEP did not abuse its discretion in denying the permit application because of the potential for AMD from the surface mining activities. *Id.* at 1330. In *Al Hamilton Contracting Company*, the Board stated that it construed the presumptive evidence

of potential pollution language to mean that the applicant must demonstrate that pollution of the surface and groundwater from its mining activities will not occur and that acid mine drainage was a form of "pollution," citing to *Magnum Minerals*. *Id*. at 1488. Hamilton conceded that its activities had the potential to generate acid mine drainage. The Board held, therefore, that in order to make the necessary demonstration under 25 Pa Code §86.37(a)(3) and receive a permit, "Hamilton must show either that it can treat any acid mine drainage produced or that the acid mine drainage will not escape into 'waters of the Commonwealth.'" *Id.* at 1488. The Board found that Hamilton failed to do either and the Department acted properly in denying the permit.

In *Rand AM, Inc. v. DEP*, 1997 EHB 351, the Board addressed the requirements of 25 Pa Code §86.37(a)(3) in the context of a permit application for a deep mine permit. The applicant proposed to conduct its mining operations using the room and pillar method. Citing 25 Pa. Code §86.37(a)(3), the Board said that an "applicant for a coal mining permit must demonstrate that the proposed mine will not cause any pollutional discharge." *Id.* at 360. The Board upheld the Department's permit denial because it found that the proposed mine had the potential to create acid mine drainage and that the design of the mine's coal barrier was inadequate to prevent the discharge of the acidic pool water. The Board ruled that the evidence strongly supported the Department's position that the mine would "result in the pollution of various waters of the Commonwealth, including Champion Creek, Little Champion Creek and Indian Creek." *Id.* at 362.

Unlike the earlier Board decisions discussed above, in *PUSH v. DEP*, 1999 EHB 514, *aff'd.*, 789 A.2d 319 (Pa. Cmwlth. Ct. 2001), the Board addressed 25 Pa. Code §86.37(a)(3) in the context of permitting of a longwall mine operation. The Board, among various claims raised by the parties challenging the Department's permit decision, reviewed two issues similar to the

claims in this case: 1) whether the perennial streams in the permit area are adequately protected and 2) whether the mining company adequately demonstrated there is no presumptive evidence of potential pollution to waters of the Commonwealth. The Board identified the Department's determination of whether there is any presumptive evidence of potential pollution under 25 Pa. Code §86.37 as "one of the most important steps" in the Department's review of a mining permit application. *Id*. at 559. Citing several of the earlier cases discussed above, the Board stated, "An applicant for a coal mining permit (or in this case a permit revision) must demonstrate that the proposed mining will not cause any pollutional discharges." *Id*. The Board upheld the Department's determination of no potential pollution based on the Board's conclusion that the potential for water from the post-mining discharges to adversely affect surface water was non-existent. The Board found that the Department correctly determined the mining operations would not "cause pollution of the shallow groundwater or otherwise cause any pollution which would create a nuisance, be harmful to the public welfare or wildlife, or otherwise adversely affect the uses of groundwater" and that such a determination was consistent with the definition of "pollution" found in the Clean Streams Law. *Id*. at 561. Further, the Board rejected PUSH's arguments regarding the Board's decision in *Oley Township v. DEP*, 1996 EHB 1098, stating that it did not hold in *Oley Township* that pollution exists absent an adverse impact upon uses of the waters of the Commonwealth. *Id*. at 562. In a footnote to its discussion regarding its *Oley Township* decision, the Board stated "[t]he use of 'would' in [*Oley Township*] in stating that 'any physical or biological alteration of water resources *would* constitute pollution' was inadvertently broader than the definition of 'pollution' in the Clean Streams Law permits. The sentence should have read 'may' constitute pollution." *Id*. at 562, fn 13.

PUSH appealed the Board's decision to the Commonwealth Court which affirmed the Board. PUSH's position at the Commonwealth Court was that the Board was wrong to conclude that the longwall mining would not cause pollution to the waters of the Commonwealth because the Board improperly concluded that "pollution does not occur absent an adverse impact upon uses of the waters of the Commonwealth." *Id*. at 328. The Commonwealth Court noted that PUSH's argument amounted to a no degradation standard and rejected this position stating "what PUSH is arguing is that no matter how minimal, coal mines can cause no degradation of the water supply. For their part, Respondents contend that interpretation would mean that there can be no mining or, for that matter, industrial or residential uses because all of those activities place substances in the waters of the Commonwealth. They argue that only substances that cause harm to uses of the waters of the Commonwealth are prohibited by this provision. We agree." *Id*. The Commonwealth Court held that PUSH's argument was without merit because the Board clearly applied the correct standard because "the Clean Streams Law requires that pollution affect the 'uses' of the water." *Id*. at 329.

In *Birdsboro & Birdsboro Municipal Authority v. DEP*, 2001 EHB 377, the Board addressed identical regulatory language applicable to non-coal mining activities that requires the permit applicant to demonstrate that there is no presumptive evidence of potential pollution found at 25 Pa. Code §77.126(a)(3). The Board, relying on its decision in *Al Hamilton Contracting Co.* under 25 Pa. Code §86.37(a)(3), rejected Birdsboro's position that the regulatory language required the Department to deny the permit "unless the applicant proves positively and without doubt that there was no potential for pollution whatsoever." *Id*. at 401. The Board stated that if it accepted Birdsboro's reading "it would be doubtful whether any permits for noncoal mining would ever be issued." *Id*. at 402. The Board upheld the

Department's decision to grant the permit because Birdsboro did not demonstrate via credible evidence that the permitted mining activities would result in pollution to the waters of the Commonwealth, particularly given the special condition the Department put in the permit. Birdsboro appealed the Board's decision and the Commonwealth Court affirmed the Board. *Birdsboro v. DEP*, 795 A.2d 444 (Pa. Cmwlth. 2002). The Commonwealth Court rejected Birdsboro's position that the applicant had to demonstrate that there was no potential for pollution to occur. Instead, it accepted DEP's reading of the regulation that the permit applicant is merely required "to demonstrate that there is no evidence that presumptively indicates pollution will occur." *Id*. at 448.

Two other cases are worth discussing on this point because they are discussed by the parties in their post-hearing briefs although the outcome in each of the cases does not turn on the meaning of 25 Pa. Code §86.37(a)(3). In an earlier case also involving the Bailey Mine and Consol, the Board issued three separate opinions addressing summary judgment requests from the parties. (*Consol I*; *Consol v DEP*, 2003 EHB 239 ("*Consol II*"); *Consol v. DEP*, 2003 EHB 792 ("*Consol III*")). The case arose from Consol's challenge to certain conditions that the Department set in the permit revision that required Consol to get further approvals to longwall mine in the Bailey Mine. The Board's decision in *Consol I* makes clear that Chapter 86 of the mining regulations, including 25 Pa. Code §86.37(a)(3), apply to the subsidence impacts of underground mining on all waters of the Commonwealth. *Consol I*, *supra* at 1050. While the issue of the meaning and application of the requirement found at 25 Pa. Code §86.37(a)(3) is discussed in the series of opinions issued, the Board does not reach a decision on that issue and there is no basis for concluding that the language in *Consol I*, *Consol II*, or *Consol III* requires a no impact standard.

The same conclusion is true for the other case cited by the parties, *UMCO Energy*, which we will discuss in greater detail in the next section. In *UMCO Energy*, one of the parties, PennFuture, advocated to the Board "that *any* pollution or *any* interference *must* be prohibited." *Id*. at 558. The Board did not directly discuss 25 Pa. Code §86.37(a)(3) but did address the term "pollution" and clearly was thinking of this regulation when it did so. The Board noted that pollution is an extremely broad term and not all pollution in its literal sense can or should be regulated. *Id*. at 557. Ultimately, the Board was not required to decide whether any pollution is permissible to resolve the case but noted that "it is unlikely that (the Department) has a mandatory duty to disallow mining as PennFuture asserts. The Department may have legal authority to preclude longwall mining that results in only minor and/or temporary disruption, but whether doing so would be a reasonable exercise of discretion will turn on the facts of each individual case." *Id*. at 558, fn. 7. *UMCO Energy* clearly does not support a finding that a no impact standard is the proper way to understand the requirements of 25 Pa. Code §86.37(a)(3).

A finding that the statutes and regulations raised by CCJ/SC in this case require a no impact standard would be inconsistent with those prior decisions by the Board. We clearly rejected similar arguments in those prior cases and do so again here today. Therefore, to the extent CCJ/SC's legal position is that the Department's permitting decisions in this case are improper because they did not prevent any and all impact to the streams in the BMEEA from Consol's longwall mining, we reject that argument as not consistent with prior Board precedent and the requirements of the Clean Streams Law, the Mine Subsidence Act, and their regulations.

Permanent Elimination of the Streams

Having established that no impact is not the proper standard, we also find that Board precedent supports the conclusion that the Department may not grant permits for longwall

mining that will result in the permanent elimination of a stream. In *UMCO Energy*, the mining company challenged a Department order restricting it to room and pillar mining under a particular stream. The Board ruled in the Department's favor relying on the Clean Streams Law, the Mine Subsidence Act and their regulations finding that neither the Clean Streams Law nor the Mine Subsidence Act superseded the other and that it was necessary to reconcile those two statutes. *UMCO Energy*, *supra* at 585. In analyzing the particular facts, the Board noted that the proposed longwall mining would have completely and permanently eliminated all natural flow in the stream and that doing so constituted pollution, eliminated the value of the stream, eliminated the actual and designated uses of the stream, disrupted the hydrologic balance, constituted an adverse hydrologic consequence and did not protect fish, wildlife and related environmental values citing to 25 Pa. Code Chap. 86 among other regulations. *Id.* at 557-558. The Board also stated the Department had the authority to deny permission for longwall mining even if the mining company committed to perform mitigation measures. In making that statement, it is clear that the Board judged the mitigation measures proposed by UMCO to be inadequate because the proposed measures would not allow the stream to recover in the foreseeable future and it was likely that perpetual mitigation would be required. *Id*. at 554-545, n. 4.

Stream Impairment and Pollution

As set forth above, Board precedent establishes end points bracketing the level of impact to streams by longwall mining that may be permitted under the Clean Streams Law, the Mine Subsidence Act and their regulations. Longwall mining may have some impact on a stream but it cannot completely and permanently eliminate a stream. Between those two end points, there is a wide range of potential and actual impacts that may occur, both in terms of scope and duration, as is clearly evident by the facts of this case. In order to decide this matter, we are required to

examine the scope and duration of those impacts and determine whether the impacts that were anticipated to occur or which actually have occurred, make it unreasonable or contrary to law for the Department to have issued Consol the permit revisions challenged by CCJ/SC. As previously discussed, CCJ/SC believe that the level of impact that should be permitted is limited to impacts that will not impair the designated uses of the streams. They argue that allowing subsidence-induced impairment violates the statutory and regulatory requirement to maintain and protect those uses and constitutes pollution. They also contend that it is unlawful for the Department to rely on post-mining mitigation plans as a basis for approving permits that it knows will cause subsidence-induced impairment. The Department and Consol argue that CCJ/SC have failed to show that the streams are or will be impaired as a result of the permit revisions authorizing longwall mining. They assert that any impact is temporary, it is required to be mitigated and/or remediated and, as a result, the stream uses are not impaired, and the impacts do not constitute pollution.

We have studied the parties' arguments as well as the prior case law. As a result, we conclude that the fundamental question in this case is whether the impacts from subsidence anticipated from and caused by Consol's longwall mining in the BMEEA will impair or have impaired the streams in the area. Impairment clearly violates the Clean Streams Law and its regulations and if the Department determines that the longwall mining will impair streams in the BMEEA, it should deny the permit revisions. It also violates the Mine Subsidence Act and its regulations. Pollution, as that term is used in 25 Pa. Code §86.37(a)(3), is properly thought of as a question of impairment. If during the permit review, the Department concludes that Consol's actions will impair streams in the BMEEA, then the Department should deny the requested

permit revision because Consol will have failed to demonstrate that there is "no presumptive evidence of potential pollution" as required by the regulation.

Impairment is a concept rather than a strict definition in the statutes and regulations. Water quality standards for the surface waters in Pennsylvania are set forth in Chapter 93 of the Department's regulations. Each surface water has a designated water use which shall be protected. 25 Pa. Code § 93.3. The antidegradation requirements found at 25 Pa. Code § 93.4a(b) require that existing instream water uses, along with the level of water quality necessary to protect those uses, must be maintained and protected. A surface water is said to be impaired if it does not meet its designated water use. It is clear that the intent of these water quality regulations is to protect the water quality in the streams to ensure that the water uses are also protected. The parties are generally in agreement on this point and that the permit revisions issued by the Department must maintain and protect the existing instream water uses. However, as we noted in our summary judgment opinion, the language of the regulation does not provide any specific indication regarding whether the existing uses must be maintained at all times, or whether the uses may be disrupted on a temporary basis. *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 350. The regulation also does not provide any guidance about whether impairment must be evaluated without taking into account any required mitigation or restoration. The Department and Consol argue that the statutes and regulations allow for disruption of the stream uses that are limited in scope and duration. We think this is correct. Limited and temporary disruptions of a stream's uses clearly are part of the Department's overall permitting scheme and occur frequently when work is required within or adjacent to a stream. However, we note that terms like limited and temporary are also imprecise and subject to various interpretations. Ultimately we need to examine the facts of this case to see whether in our

judgment the anticipated or actual impacts to the streams caused by Consol's longwall mining result in impermissible impairment of the streams because the impacts, either as a result of the scope of the impacts, the duration of the impacts or some combination of those two, rise to a level that the streams cannot meet their designated use.

The permit revision applications submitted by Consol identified fourteen surface streams overlying the permit area or within 200 feet of the permit area boundary. The streams in the BMEEA permit area are classified trout stocking (TSF) in Chapter 93. The main impact anticipated by the Department and Consol involved changes to the flow regime in the stream, principally flow loss and pooling. In Module 8 of the permit applications, Consol provided a prediction of the potential for mining-induced flow loss for each of the fourteen streams based on an analysis of the hydrogeologic variables for each stream, comparison to analogous streams and previously collected data for the streams. Each stream was assigned by Consol to one of three categories based on the potential for a predicted impact on the stream's flow from the longwall mining: an impact is not predicted (North Fork Dunkard Fork, Jacobs Run, UNT 32599, UNT 32602, UNT 32621); there is potential for a temporary impact (Kent Run, UNT 32601, UNT 32604, UNT 32618, UNT 32619, UNT 32620) and an impact is predicted (Polen Run, Whitethorn Run, UNT 32605). (Joint Stipulated Ex B, p. 8-14, Table 8.5). In reviewing the permit application, DEP testified that it generally views the streams as either predicted to have flow loss or not predicted to have flow loss and requires mitigation/restoration plans accordingly. (T. 468, 494). In addition to predictions regarding flow loss, according to the testimony, Consol has the ability to reliably predict the locations in streams where pooling is likely to occur based on factors such as stream slope. Consol predicted that within the BMEEA, there would be

pooling in sections of the North Fork Dunkard Fork, Kent Run and Whitethorn Run. (Joint Stipulated Ex. D, p. 15-19; T. 99).

The Department required Consol to include mitigation/restoration plans to address anticipated, as well as unanticipated, impacts to the BMEEA streams. The required mitigation/restoration plans submitted by Consol and approved by the Department in this case fall into two broad categories. The first category is general in nature and not linked to a specific location in a specific stream in the BMEEA. This category of approved stream mitigation activities includes augmentation, heave removal, fracture sealing and streambed grouting and are termed minor forms of stream restoration by the Department. In the permit revisions it issued, the Department approved these activities on a global basis for use in any stream within the BMEEA where the impact from the longwall mining makes them necessary to address impacts in those streams. (T. 98-99.) While the Department's approval is global, the Department does require in the permit revisions that these so-called minor forms of stream restoration activities follow certain requirements intended to minimize the impact on the streams from both the subsidence and the resulting mitigation/restoration. For instance, the Department has specific requirements regarding when augmentation must commence. Where flow loss is anticipated, the Department's approval requires that Consol begin augmentation within 24 hours of the observation that flow loss has occurred in a stretch of a stream. In cases where the flow loss is not anticipated in advance, augmentation must commence within 15 days of observed flow loss. In addition, augmentation must continue until natural flow is restored.

In addition to the mitigation/restoration activities approved on a global basis by the Department in this case, specific mitigation/restoration plans were included in the permit applications for certain streams where the Department concluded certain specific measures

would be required. Consol included specific mitigation/restoration plans involving gate cutting to address the anticipated pooling in North Fork Dunkard Fork and Whitethorn Run in Permit Revision No. 180. In the application for Permit Revision No. 189, Consol included a specific mitigation/restoration plan providing for the installation of a stream channel liner in Polen Run in the 1L and 2L panels. (T. 120.)

CCJ/SC argue that we should not consider the post-mitigation conditions of the streams in determining whether the streams are impaired as a result of Consol's activities. At the same time, they ask us to consider the impact that the mitigation activities have on the streams and the fact that those mitigation activities themselves may be impairing the streams. We think that it is proper to consider the entire picture of what takes place in the streams as a result of Consol's longwall mining including any impacts prior to mitigation, as well as the mitigation activities and their impacts and results.

At the time of the hearing in August 2016, Consol had completed longwall mining in the 1L and 2L panels and had begun mining in the 3L panel. (Ex. CP-10.) As a result, at least some portion of each of the following streams had been undermined: UNT 32618, UNT 32620, Polen Run, and Whitethorn Run.[11] Consol predicted in its Permit Revision No. 180 application that two of the streams (UNT 32618 and 32620) had the potential for a temporary flow loss impact and two of the streams (Polen Run and Whitethorn Run) were predicted to suffer mining-induced flow loss. Joe Laslo, DEP's Surface Mine Conservation Inspector or shadow inspector[12] for the BMEEA testified that UNT 32618, UNT 32620, Polen Run and Whitethorn Run each suffered

[11] A small portion of UNT 32619 appears to have potentially been undermined at the start of the longwall mining of 3L panel just prior to the hearing but there was no testimony about any impacts it may have experienced as a result of the longwall mining.

[12] A shadow inspector is a term used to describe the DEP inspector who monitors the effect of subsidence in the area covered by the permit by following or shadowing the longwall panels as the mining takes place.

heaves, fracturing, and flow loss after being undermined by Consol. (Ex. A-2 to A-27, T. 402.) In addition, Mr. Laslo testified that he had observed pooling resulting from Consol's longwall mining although he did not identify a specific stream or streams. (T. 402.) The record is clear that the Department anticipated that Consol's longwall mining would impact the streams in the BMEEA when it issued the permits and that the anticipated impacts in fact occurred in the streams that had been undermined at the time of the hearing.

However, CCJ/SC failed to demonstrate that the stream impacts permitted by Permit Revision No. 180 impaired the streams in the BMEEA. The major anticipated and observed impact was flow loss and pooling. There is little question that the streams in the BMEEA experienced some flow loss after they were undermined by Consol. It is also clear that Consol augmented the streams to mitigate the impact from the flow loss. The issue with determining the impact of the subsidence induced flow loss is complicated by the fact that these streams naturally experience wide variability in their flow conditions including the complete loss of flow in some sections of the streams. Given the variable flow conditions, Consol's expert, Dr. Nuttle testified that the stream inhabitants have adapted to those conditions and that a temporary loss of flow until augmentation is implemented would not affect them. CCJ/SC's expert, Dr. Stout, did not provide an effective rebuttal on this issue. We found Dr. Nuttle's testimony on this point more credible than Dr. Stout. He was much more familiar with the streams in question and had studied these streams in greater detail. Further, Joe Laslo, the Department's field inspector, testified that he did not observe any dead fish or other dead organisms in the streams that had suffered mining-induced flow loss at the time of the hearing. As to pooling, the streams in the BMEEA contained numerous pools pre-mining so it is difficult to conclude that the pooling that occurred post-mining would result in impairment of the streams.

The mitigation activities themselves also impact the streams, in a large part, because they require instream repair work as well as work along the streambanks. The impacts are really of two types. First, the streambeds themselves are disturbed by the work. Depending on the nature of the impact, the instream work ranged from the removal of heaves in the streambed either by hand or mechanical means, through drilling into the streambed and injecting grout material to digging out sections of the streambed in order to eliminate pooling. The second impact is a loss of flow within the section of the stream that is being worked on because the stream flow is bypassed around the work area in order to allow the work to proceed in the dry and minimize the impacts to the downstream water quality from sedimentation. Despite the impacts on the streams from the mitigation/restoration activities required under Permit Revision No. 180, we are not convinced that the streams are impaired by these activities because of the limited scope and duration of these activities. The heave removal and surface fracture sealing restoration activities are accomplished with limited impact to the streams and according to the testimony are generally completed in a day. Consolidation grouting is more involved and involves de-watering a section of the stream and drilling into the streambed. In general these grouting activities take place in limited sections of the streams and take a limited amount of time to complete according to the testimony. In the end, with consolidation grouting, the pre-mining streambed and channel are largely intact following restoration.

Gate cutting does raise some concern because the streambed is excavated in places to lower the stream gradient and re-establish stream flow. Extensive excavation of the streambed can certainly impact a stream and impair its uses because of the impact it will have on the organisms in that stream. There was limited testimony in this case about the potential for impairment from gate cutting under Permit Revision No. 180. The Department approved gate

cutting in five locations, four of which were in North Fork Dunkard Fork and one in Whitethorn Run. The section in Whitethorn Run was relatively short, 125 feet. There was very little testimony concerning the potential or actual impact of gate cutting in Whitethorn Run to allow us to determine that it was causing impairment of the stream. North Fork Dunkard Fork is the main stream in the BMEEA to which all of the streams are tributary and it has flow all year round. The sections of North Fork Dunkard Fork where gate cutting was proposed ranged from 50 feet to 700 feet in length. The testimony was that gate cutting generally takes two weeks but this clearly is dependent on the length of the section and complexity. Again, the factual and expert testimony was limited on the impact of gate cutting in North Fork Dunkard Fork and we find that CCJ/SC have not proven by a preponderance of evidence that it will be impaired as a result of the gate cutting activities. We certainly can envision that gate cutting could be found to cause impairment if the facts were present to support that decision. Overall, we do not conclude that the Department should have denied the permit revision because of the potential and actual impacts from mitigation/restoration activities approved in Permit Revision No. 180.

The Department determined during its analysis of the application for Permit Revision No. 180 that Consol had failed to demonstrate to the Department's satisfaction that the proposed longwall mining would not harm Polen Run and Kent Run. The Department determined that Polen Run would suffer significant flow loss and that the mitigation/restoration proposed by Consol would not adequately address that impact. Consol submitted additional information that only sought permission to longwall mine under Polen Run in the 1L and 2L panels and contained a revised mitigation/restoration plan. The revised mitigation/restoration plan approved by the Department when it issued Permit Revision No. 189 called for the installation of a Channel Liner System and the complete rebuilding of Polen Run from approximately 600 feet upstream of

where Polen Run crossed onto the 1L panel to the point downstream where it crossed off the 2L panel. We find that the scope and duration of the impacts to Polen Run that were anticipated during the permit application review and that actually occurred as a result of Permit Revision No. 189 result in the impairment of Polen Run and constitute pollution as that term is used in 25 Pa. Code §86.37(a)(3). When the Department anticipates that the impacts from longwall mining are going to be so extensive that the only way to "fix" the anticipated damage to the stream is to essentially destroy the existing stream channel and streambanks and rebuild it from scratch, the Department's decision to issue Permit Revision No. 189 is unreasonable and contrary to the law.

When we view the impacts from the subsidence and the resulting restoration authorized under Permit Revision No. 189 along the spectrum between a no impact standard and the permanent elimination of the stream discussed previously, we conclude that the impacts authorized in Polen Run under Permit Revision No. 189 are similar to the permanent elimination that the Board previously found unacceptable in *UMCO Energy*. Polen Run as it existed prior to Consol's longwall mining no longer exists. The pre-mining Polen Run has been replaced by an entirely new stream over the 1L and 2L panels that flows in the same general location as the former stream but it is not the same stream. The reconstructed stream is shorter in length and at points wider in cross-section. Groundwater is no longer able to enter the stream in the normal fashion because of the impermeable nature of the liner but instead is collected and introduced back into the stream at discrete points. As a result of the construction activities, the pre-mining stream channel, the pre-mining vegetation on the stream banks, and all pre-mining stream habitat in this section of Polen Run were eliminated. The extreme disruption to Polen Run caused by this construction activity is readily apparent in several of the pictures presented in the hearing. (See Ex. A-6 thru A-12). In the case of Polen Run over the 1L panel, it took approximately eight

months before the construction activities were fully completed. It is unclear from the testimony exactly how long the construction activity took over the 2L panel but it apparently was a matter of multiple months. During the construction, all flow was bypassed around the construction activities via tubes ranging in length from 1,000 to 1,500 feet. While some fish and organisms may have been able to migrate downstream or upstream of the construction activity, the complete elimination of the existing channel would largely eliminate all organisms previously found in Polen Run. It is clear that during the construction period, large sections of Polen Run ceased to function as a stream for an extended period of time. The scope and duration of these heavy construction activities, as well as the elimination of the pre-mining Polen Run and its replacement with a reconstructed stream lead us to conclude that Polen Run was impaired and suffered pollution within the meaning of 25 Pa Code §86.37(a)(3).

Consol and the Department argue that we should only evaluate these issues following mitigation and that the Channel Liner System installed in Polen Run is working well and meeting the performance criteria set by the Department. That argument misses the point in our opinion. Repairing a stream by the installation of a channel lining system as a last resort where impacts from longwall mining have exceeded what was anticipated and/or where mitigation and restoration activities have failed to adequately restore a stream may be acceptable and the performance criteria should play a role in determining the success of such efforts. However, we conclude that it is not reasonable or lawful to allow longwall mining to take place when the Department determines prior to issuing the permit that the impacts to a stream will rise to a level that the necessary restoration will require this level of disruption to the existing stream. The fact that the Department concluded that Consol would be able to construct a functioning new stream to take the place of the stream that Consol was going to completely eliminate because of the

longwall mining does not make it reasonable and lawful to grant a permit to eliminate the stream in the first place.

The anticipated and actual impacts to Polen Run are in contrast to the anticipated and actual impacts in the streams authorized to be mined under by Permit Revision No. 180 discussed previously. CCJ/SC did not present evidence that demonstrated that these impacts were likely to or did impair these streams. Unlike Polen Run, the overall character of these streams was not anticipated to significantly change as a result of the anticipated subsidence and proposed mitigation/restoration. Our review of the facts shows that the actual impacts were generally consistent with what the Department anticipated when it issued the permit revision. We certainly believe that even this level of impact, which necessitates the implementation of the minor forms of stream mitigation, could result in stream impairment if the time or amount of work involved extended beyond what was demonstrated in this case.

Article I, Section 27

CCJ/SC argue that the Department's decision to issue Permit Revisions No. 180 and 189 violated Article I, Section 27 of the Pennsylvania Constitution. In evaluating an Article I, Section 27 claim, the Board previously applied the three part test set forth in *Payne v. Kassab*, 312 A.2d. 86 (Pa. Cmwlth 1973), *aff'd* 361 A.2d 263 (Pa. 1976) ("*Payne*"). In an opinion issued as the Board was finalizing this adjudication, the Pennsylvania Supreme Court, in *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 2017 Pa. LEXIS 1393 (Pa. 2017)("*PEDF*") overruled the *Payne* test stating "we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges." 2017 Pa. LEXIS at *36. The Supreme Court held that the *Payne* test was unrelated to the text of Section 27 and the trust principles animating it and, therefore, stripped the constitutional provision of its meaning. *Id.* In

place of the *Payne* test, the Supreme Court ruled that the proper standard of judicial review when reviewing a challenge to the constitutionality of Commonwealth actions under Section 27 "lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment." *Id.*

In discussing the meaning of Section 27 and the new standard, the Supreme Court looked favorably to the plurality decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) ("*Robinson Twshp*.") The Supreme Court, citing *Robinson Twshp*., held that Section 27 grants two separate rights to the people of Pennsylvania. 2017 Pa. LEXIS at *38. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state's power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. *Id.* The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id.* The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries. *Id*. at *39.

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

> Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the

> trust and the trustee's fiduciary duties, and does not equate 'to mere subjective judgment.' The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interest of the beneficiaries.'

Id. at *42; citing *Robinson Twshp*. at 978; (internal citations omitted.)

In setting forth the trustee responsibilities of the Commonwealth, the Supreme Court in *PEDF* rejected the public trust doctrine in favor of private trust duties as noted in the concurring and dissenting opinion by Justice Baer. *Id*. at *57-59.

Unfortunately, neither the decision in *PEDF* nor the plurality decision in *Robinson Twshp.*, discuss the application of Article I, Section 27 principles in the context of a Department permitting decision. In *PEDF*, the issue involved was legislative action and the distribution and use of certain funds by the Legislature, The private trust duties relied on by the majority in *PEDF* are well suited to the factual issues in that case involving money. Unfortunately, they do not translate quite as directly to the more typical permitting cases that come before the Board and which is the type of Department action challenged by CCJ/SC in this case. Similarly, in the *Robinson Twshp*. case, the facts involved legislative action and whether certain provisions of newly passed oil and gas legislation were constitutional. Neither of these recent Supreme Court cases examine a permitting decision by the Department and therefore, we are left with little guidance on how to apply the new standard established by the Supreme Court to the Department's decision to issue Permit Revisions No. 180 and 189.

We will first address the easier of the two permitting decisions challenged by CCJ/SC as violating the Pennsylvania Constitution. We have determined that the Department's issuance of Permit Revision No. 189 was in violation of the Clean Streams Law, the Mine Subsidence Act and associated regulations. Even without fully evaluating the Department's action granting

Permit Revision No. 189 under the new standard set out in *PEDF*, we have little difficulty concluding that this Department action also violates Article I, Section 27. At a minimum, a Department permitting action that is not lawful under the statutes and regulations in place to protect the waters of the Commonwealth, cannot be said to meet the Department's trustee responsibility under Article I, Section 27 and is clearly a state action taken contrary to the rights of citizens to pure water. We therefore hold that in addition to being unlawful, the Department's decision to issue Permit Revision No. 189 violates Article I, Section 27.

Whether the issuance of Permit Revision No. 180 does or does not violate Article I, Section 27 is a more complicated question. We will first turn our attention to the first right set forth in Article I, Section 27, the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. In *PEDF*, the Supreme Court spends little time discussing or applying this provision. Citing *Robinson Twshp*, the Supreme Court states "This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional. 2017 Pa. LEXIS at *38. The plurality in *Robinson Twshp* discusses this first section more extensively. They first note that this section requires "each branch of the government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features." *Robinson Twshp.* at 952. The Supreme Court plurality recognizes that as a practical matter, air and water quality have relative rather than absolute attributes and that state and federal laws and regulation govern "clean air" and "pure water" and they acknowledge that courts generally defer to agency expertise in making a factual determination whether the benchmark are met. *Id*. at 953. Despite the deferential standard, the *Robinson Twshp.* plurality states that courts still have a role in

deciding constitutional compliance by other branches of government and that the benchmark for these decision by courts is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation of our air and water quality. *Id.* The plurality also notes that the Constitution protects the people from government action that "unreasonably causes actual or likely deterioration" of the natural, scenic, historic and esthetic values of the environment. *Id.*

At the same time as they discussed the citizens' rights under Article I, Section 27, the plurality in *Robinson Twshp.* made clear that they did not view the Environmental Rights Amendment as preventing all impacts to the environment. They state that "The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we explain below, for the derailment of economic or social development; nor for a sacrifice of other fundamental values." *Robinson Twshp.* at 953. Further on they note that this section is not meant to "deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people." *Id*. at 954. Instead, they find that to achieve recognition of the environmental rights found in the first clause of Article I, Section 27, "necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment." *Id*. at 954. The Supreme Court in both *PEDF* and the plurality opinion in *Robinson Twshp.* speak in terms of this provision preventing the government from taking actions that cause unreasonable degradation or deterioration of the air and water and other environmental interests enumerated in this section. CCJ/SC's claim that the Department acted unconstitutionally in this case is based on the impact of longwall mining on the streams in the permit area. Therefore, in evaluating the Department's decision to grant Permit Revision No. 180 under the first part of Article I, Section 27, the proper approach is for

the Board to determine whether the Department considered the environmental effects of its permitting action and whether that action is likely to cause, or in fact did cause, the unreasonable degradation or deterioration of the waters of the Commonwealth in BMEEA.

There is no doubt that the Department gave consideration to the environmental effects of its permit decision in this case prior to taking the permit action. The Department's permit application required Consol to provide detailed information on the environmental effects of Consol's proposed longwall mining operations. The review of Consol's permit application took place over seven years and involved meetings between Department personnel and Consol, several revisions to the permit application, extensive review of the permit application by the Department's technical staff and public participation through comments and at least one hearing. As part of its permit decision, the Department excluded areas beneath Kent Run and Polen Run from longwall mining because of concerns regarding the potential environmental effects of longwall mining on those streams and required Consol to mitigate and restore any streams that were impacted by the longwall mining that was permitted. Overall, it is clear that consideration was given by the Department to the environmental effects of its permitting decision on the citizens' rights to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. Therefore, this constitutional requirement was satisfied by the Department's action.

We also find that the issuance of Permit Revision No. 180 did not cause the unreasonable degradation or deterioration of the waters of the Commonwealth in the permit area. As was discussed previously, there is no doubt that Consol's longwall mining was anticipated to and did cause impacts to the streams in the BMEEA. If those impacts impaired the uses of those streams, we would easily conclude that such impacts constituted the unreasonable degradation

and deterioration of the waters of the Commonwealth. As we have discussed previously, however, we did not find that the impacts that were anticipated and actually occurred as a result of the Department issuing Permit Revision No. 180 resulted in stream impairment. The issue then becomes whether impacts that do not impair a stream can still be considered as causing the unreasonable degradation or deterioration of the waters of the Commonwealth and therefore, violate Article 1, Section 27. In the abstract, we find that certain impacts that don't impair a stream but do impact it, can, based on their scope or duration, rise to the level of causing unreasonable degradation or deterioration. Finding otherwise would mean that you are treating the Article 1, Sec 27 Constitutional standard as coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *PEDF* clearly rejected such an approach when it rejected the *Payne* test. There is no question that the longwall mining authorized by the Department degrades and causes deterioration of the streams in BMEEA on at least a limited and temporary basis. Ultimately then it becomes an issue of whether the degradation and deterioration is unreasonable. We hold that they are not in this case. In order to be unreasonable, we conclude that the destruction and degradation of the streams would need be more significant than the limited and temporary impacts that result from Consol's longwall mining under Permit Revision No. 180 issued by the Department. Longwall mining has social utility and is a type of development leading to an increase in the general welfare, convenience, and prosperity of the people. If it lacked that characteristic, it would be more likely to be judged unreasonable. The impacts to the streams are generally limited in time and scope in a large part because of the requirements for mitigation and restoration that the Department placed in Permit Revision No. 180. We think that the Department permit action in this case is not contrary to the

right of the citizens of Pennsylvania to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment set out in Article 1, Section 27.

We now turn our attention to the second right granted to the people by Article I, Section 27 as articulated by the Supreme Court in *PEDF*. That right is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. 2017 Pa. LEXIS at *38. While it is not directly discussed in *PEDF*, we think that it is clear that the Supreme Court would find that the streams in BMEEA are public natural resources. The Supreme Court discussed that this section of the Environmental Rights Amendment was revised to eliminate an enumerated list that include "waters" as one of the natural resources to discourage courts from limiting the scope of natural resources covered. *Id*. at *39. Given that stated intention, it seems without question that the streams in consideration in this case are the type of public natural resources intended to be covered by the Amendment.

The next sentence in Article I, Section 27 defines the nature of the Commonwealth's relationship to these public natural resources including the streams in BMEEA. The Supreme Court found that the third clause establishes a public trust, whereby the natural resources such as the streams in BMEEA are the corpus of the trust, the Commonwealth is the trustee and the people are the beneficiaries. 2017 Pa. LEXIS at *39. The plain language of this sentence requires the Commonwealth to conserve and maintain Pennsylvania's public natural resources for the benefit of all the people. As previously discussed, the Supreme Court in *PEDF* states that the trust provision in Article I, Section 27 creates two basic duties for the Commonwealth, only one of which applies to the facts of this case. The Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties. *Id*. at *40-41 (citing *Robinson Twshp.* at

957). In performing its trust duties, the Commonwealth is a fiduciary and must act towards the natural resources with prudence, loyalty and impartiality. *Id.* According to the Supreme Court in *PEDF,* the duty of prudence requires the Commonwealth "to 'exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property'" Id. at *41 (citing *In re Mendenhall,* 398 A.2d 951, 953 (Pa. 1979)). The duty of loyalty imposes an obligation to manage the corpus of the trust, i.e. the natural resources, so as to accomplish the trust's purpose for the benefit of the trust's beneficiaries. *Id*. (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 69 A. 1037, 1038 (Pa. 1908)). Finally, the duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. *Id*. (citing 20 Pa. C.S. § 7773 and *Estate of Sewell,* 409 A.2d 401, 402 (Pa. 1979)). Putting all of this together, the issue for the Board to decide is whether the Department properly carried out its trustee duties of prudence, loyalty and impartiality to conserve and maintain the streams in the BMEEA by prohibiting their degradation, diminution and depletion when it issued Permit Revision No. 180.

We find that the Department has satisfied its trustee responsibilities in issuing Permit Revision No. 180. First, the Department acted to conserve and maintain both Kent Run and Polen Run by denying Consol permission to undermine those streams. This decision clearly managed these natural resources for the benefit of the citizens of Pennsylvania by prohibiting any degradation, diminution and depletion of these two streams. As we have discussed, the remaining streams in the BMEEA will incur some impacts as a result of Consol's longwall mining. We think that the Department has acted to conserve and maintain those streams in a prudent, loyal and impartial manner. The Department exercised its responsibility to review the permit application with ordinary care and skill that one would exercise when dealing with your

own property. In fact, the Department can well be said to have exercised a higher level of skill given the technical expertise and years of experience it brought to its review. It managed the process and put requirements in the permit revision to ensure that the impacts to the streams would be mitigated and the streams will be restored if necessary. The review and permitting was done in an impartial manner that gave due regard to the interests of both the current citizens and future citizens of Pennsylvania. Overall, we conclude that as to the issuance of Permit Revision No. 180, the Department's actions do not violate Article 1, Section 27 of the Pennsylvania Constitution.

CONCLUSIONS OF LAW

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

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

3. CCJ/SC must show by a preponderance of the evidence that the Department acted unreasonably or in violation of the Commonwealth's laws or the Pennsylvania Constitution. *United Refining Company v. DEP*, 2016 EHB 442, 448; *aff'd*, *United Refining Company* v. *Dep't of Envtl. Prot.*, No. 1321 C.D. 2016, (Pa. Cmwlth. June 12, 2017); *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot*., 131 A.3d 578, 587 (Pa. Cmwlth. Ct. 2016)

4. The preponderance of the evidence standard requires that CCJ/SC meet their burden by showing that the evidence in favor of their proposition is greater than that opposed to it. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. CCJ/SC's evidence must be greater than the evidence that the issuance of the permit was appropriate or in accordance with the applicable law. *United Refining*

Company v. DEP, 2016 EHB 442, 449, *aff'd*., *United Refining Company* v. *Dep't of Envtl. Prot.*, No. 1321 C.D. 2016, (Pa. Cmwlth. June 12, 2017).

5. The Board is not tasked with the duty to review the Department's decision-making process. The Board's review is de novo and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *United Refining Company* v. *Dep't of Envtl. Prot.,* No. 1321 C.D. 2016, (Pa. Cmwlth. June 12, 2017); *Smedley v. DEP*, 2001 EHB 131; *Warren Sand & Gravel v. Dep't of Envtl. Res.*, 342 A.2d 556 (Pa. Cmwlth. Ct. 1975)

6. Act 32 constitutes a change to the Mine Subsidence Act and Pennsylvania's approved mining program and OSM review and approval is required before it become effective in Pennsylvania. 30 C.F.R. 732.17(g).

7. The Clean Streams Law and the Mine Subsidence Act and their regulations do not require that longwall mining have no impact on the waters of the Commonwealth. *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 243, aff'd, 131 A.3d 578 (Pa. Cmwlth. 2016) citing *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), aff'd, 361 A.2d 263 (Pa. 1976); *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 348; *PUSH v. DEP*, 1999 EHB 514, aff'd 789 A.2d 319 (Pa. Cmwlth. Ct. 2001)

8. The Clean Streams Law and the Mine Subsidence Act and their regulations require that the Department not grant permits for longwall mining that will result in the permanent elimination of a stream. *UMCO Energy, Inc. v. DEP*, 2006 EHB 489.

9. Impairment of a stream by the impacts of longwall mining violates the Clean Streams Law and the Mine Subsidence Act and their regulations.

10. When considering the impacts of longwall mining on streams, "pollution" as that term is used in the regulatory phrase "no presumptive evidence of potential pollution" in 25 Pa. Code § 86.37(a)(3) is a question of the impairment of waters of the Commonwealth.

11. Anticipated and actual impacts to the streams from Consol's longwall mining in the permit revision area include the loss of flow, heaving, fracturing and pooling.

12. Proposed and actual mitigation and restoration activities to address the impact to the streams from Consol's longwall mining include flow augmentation, gate cutting, heave removal, grouting and installation of a Channel Liner System.

13. The impacts to the streams in the permit revisions area result from both the subsidence caused by the longwall mining as well as the mitigation and restoration activities.

14. The scope and duration of the anticipated and actual impacts to the streams in the permit revisions area are important to determining whether the impacts constitute impairment of the streams and pollution under 25 Pa. Code § 86.37(a)(3).

15. The anticipated and actual impacts to the streams in the BMEEA as a result of the Department's decision to issue Permit Revision No. 180 do not constitute impairment of the streams or pollution under 25 Pa. Code § 86.37(a)(3).

16. CCJ/SC failed to demonstrate by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 180 was unreasonable or in violation of the law.

17. The anticipated and actual impacts to Polen Run as a result of the Department's decision to issue Permit Revision No. 189 constitute impairment of Polen Run as well as the pollution of Polen Run under 25 Pa. Code § 86.37(a)(3).

18. CCJ/SC demonstrated by a preponderance of the evidence that the Department's decision to issue Permit Revision No. 189 is unreasonable and in violation of the law.

19. The Clean Streams Law and the Mine Subsidence Act and their regulations are statutes and regulations relevant to the protection of the Commonwealth's public natural resources. Article I, Section 27 of the Pennsylvania Constitution.

20. The Department's decision to issue Permit Revision No. 189 violates Article I, Section 27 of the Pennsylvania Constitution because it is contrary to law and therefore does not comply with the Department's trustee responsibilities and is contrary to the rights of citizens to pure water. Article I, Section 27 of the Pennsylvania Constitution; *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 2017 Pa. LEXIS 1393 (Pa. 2017); *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

21. The Department's decision to issue Permit Revision No. 180 does not violate the first right, the right of citizens to clean air and pure water , and to the preservation of natural, scenic, historic and esthetic values of the environment set forth Article 1, Section 27 of the Pennsylvania Constitution, because the Department gave proper consideration of the environmental effects of its permitting decision and the permit decision did not cause the unreasonable degradation or deterioration of the waters of the Commonwealth in the permit area. Article I, Section 27 of the Pennsylvania Constitution; *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 2017 Pa. LEXIS 1393 (Pa. 2017); *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

22. The Department's decision to issue Permit Revision No. 180 does not violate the second right, the common ownership by the people, including future generations, of Pennsylvania's public natural resources set forth Article 1, Section 27 of the Pennsylvania

Constitution, because the Department satisfied its trustee responsibilities. Article I, Section 27 of the Pennsylvania Constitution; *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 2017 Pa. LEXIS 1393 (Pa. 2017); *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 15th day of August, 2017, it is hereby ordered the Center for Coalfield Justice's and the Sierra Club's appeal of Permit Revision No. 180 is **denied.** The Center for Coalfield Justice's and the Sierra Club's appeal of Permit Revision No. 189 is **granted.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 15, 2017

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(via electronic mail)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 21, 2017**
	:	

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

In ruling on motions for summary judgment, the Board holds that a permittee is not precluded by operation of the doctrine of administrative finality from challenging certain conditions in its renewed Title V operating permit. The Board also holds that the renewed permit is not clear with respect to which office of the Department the permittee must send its emissions data, but that is an issue that should be easily resolved by the parties.

O P I N I O N

PQ Corporation ("PQ") owns and operates a silicate manufacturing operation at 1201 West Front Street, Chester City, Delaware County. Its operation includes the No. 4 Sodium Silicate Furnace (Source ID 102), which PQ operates pursuant to the following: a Reasonably Available Control Technology ("RACT") determination, issued by the Department of Environmental Protection (the "Department") on June 16, 1998; Title V Operating Permit 23-00016, issued by the Department on July 6, 2000, renewed on June 11, 2010, amended on January 11, 2011, September 25, 2012, and January 12, 2015, and renewed again on April 19, 2016 (the subject of the current appeal); and Plan Approvals 23-0016A, issued on February 18,

2009, 23-0016C, issued on July 16, 2013, and 23-0016D, issued on February 10, 2017. Since September 25, 2012, PQ's permit has required it to monitor and record daily the burner tip cooling air pressure settings for each side of the furnace, including whenever there are changes in the pressure settings. Since 1998, PQ has been required to continuously monitor the flame pattern on the furnace. PQ has had carbon monoxide (CO) emissions limits and monitoring requirements for the furnace in its plan approvals and permits since 2009. In 2009, the Department issued Plan Approval 23-0016A to PQ, which imposed CO emissions limits of 1.16 pounds per hour based on a four-hour average, rolling by one hour, and 5.08 tons per year determined on a twelve-month rolling basis. The CO limits were incorporated into PQ's permit on June 11, 2010. PQ did not appeal its CO emissions limits in Plan Approval 23-0016A or in its January 11, 2011, September 25, 2012, or January 12, 2015 permit amendments.

In December 2012, PQ submitted a plan approval application to the Department requesting an increase in its CO emissions limits to 19.5 pounds per hour on a four-hour rolling average, and 85.41 tons per year determined on a twelve-month rolling basis. On July 16, 2013, the Department issued Plan Approval 23-0016C to PQ, increasing PQ's CO emissions limits to 20 pounds per hour based on a four-hour average, rolling by one hour, and 87.6 tons per year determined on a twelve-month rolling basis. PQ did not appeal the issuance of Plan Approval 23-0016C or its incorporation into PQ's permit on January 12, 2015. Since July 16, 2013, PQ's CO emissions limits for the furnace have remained 20 pounds per hour and 87.6 tons per year. PQ also has a permit limit of 6 pounds of nitrogen oxides (NOx) per ton of sodium silicate produced. Since 2012, the only pertinent plan approval application PQ has submitted to the Department has been for the replacement of its fuel oil skid on the furnace. PQ did not appeal its

requirements to monitor and record the burner tip cooling pressure on the furnace in its 2012 and 2015 permit amendments or Plan Approval 23-0016C.

PQ operates a continuous emissions monitoring system (CEMS) to continuously measure and record emissions of NOx and CO from the No. 4 furnace. PQ's permit and its plan approvals have had minimum data availability requirements for PQ's CO CEMS. The Department's Continuing Source Monitoring Manual and PQ's permit and plan approvals provide that PQ's CEMS reports should be submitted to the Department's Central Office. Since 2010, PQ's permit has required it to submit all reports, test data, monitoring data, and notifications, other than CEMS reports, to the Department's Regional Air Program Manager for the Southeast Region.

PQ filed this appeal from the Department's latest renewal of PQ's Title V operating permit, issued April 19, 2016. With respect to its No. 4 furnace, PQ objects to (1) the emissions limits and monitoring requirements for carbon monoxide, (2) the requirement to monitor and record the burner tip cooling air pressure settings, (3) the requirement to continuously monitor the flame pattern, and (4) the requirement regarding the submission of its monitoring and production data to the Department. Before us now are competing summary judgment motions from PQ and the Department.[1]

The Department has moved for summary judgment based on the theory that all four of PQ's objections are barred by the doctrine of administrative finality. It says that PQ's permit

[1] The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Citizens for Pa.'s Future v. DEP*, 2015 EHB 750, 751. The Board views the record in the light most favorable to the nonmoving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106.

obligations have been in place for some time and that PQ has forfeited the ability to challenge them by failing to appeal when they were originally imposed. To this end, the Department asserts that the requirement to continuously monitor the flame pattern in the furnace has been in place and remained unchanged since the Department's RACT determination in 1998; the burner tip requirement has been in place since PQ's permit was amended in 2012; PQ has had CO limits and continuous monitoring requirements in its plan approval since 2009, although the limits were relaxed in 2013; and the requirement for PQ to submit its data has been in place in some form since 2010. The Department also contends that PQ has made only minor changes to its No. 4 furnace since these requirements were imposed, and therefore, PQ cannot challenge any of the requirements now on the basis of changed circumstances.

In response, PQ argues that the renewal of a fixed-term permit such as PQ's Title V operating permit provides an opportunity to ensure that the continuation of the permitted activity pursuant to the existing permit terms is still appropriate based upon up-to-date information. PQ adds that, in any event, the Department has in fact changed some language in the permit conditions related to flame pattern monitoring and data submission in the permit renewal. PQ says that the Department included new language in Section D, Source ID 102, Condition 12 regarding maintenance and repair of the flame pattern monitoring equipment that was included for the first time in the permit renewal under appeal. PQ says that new language also appears for the first time in Condition 36 regarding data reporting.

In addition, PQ asserts that it now has considerable new information and data that has never before been available to assess whether, e.g., its CO limits are appropriate. Some of the information, PQ contends, was not available even during the permit renewal process. PQ asserts that its CEMS data for CO, which continues to accrue, was not certified by the Department at the

time of the most recently reissued operating permit and only now at the point of the renewal does PQ possess an adequate body of CO emissions data to challenge its CO limits. All of this goes to PQ's argument that administrative finality does not bar its challenges, and that the renewal of the permit creates a viable appeal point for anything in the permit as well as the permit itself in the context of present circumstances.

We agree with PQ. Permits that have a fixed term have such a term for a reason. *Friends of Lackawanna v. DEP*, 2015 EHB 785, 788. When the term expires, the Department needs to decide whether the permitted activity should be allowed to continue, and if so, pursuant to what terms and conditions. As with any other Department determination, we review the Department's action based upon up-to-date information to decide whether it was lawful and reasonable. *Solebury School v. DEP*, 2014 EHB 482, 526-27; *East Penn Mfg. Co. v. DEP*, 2005 EHB 9; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Tinicum Twp. v. DEP*, 2002 EHB 822. The Department disputes that PQ has any new information. The Department argues that PQ already possessed data from its CEMS during the renewal and PQ did not need to wait for the Department to certify the CEMS and generate a summary report for PQ to understand its own data. While it is unclear to what extent the Department reviewed PQ's CEMS data during the permit renewal process, we nevertheless fail to see why either the Department or the Board would want to ignore that information when reviewing a permit renewal.

Regarding the change in language in the permit conditions, while the Department in its initial brief asserts that there were no changes at all from prior approvals, in its reply brief it tempers its argument to instead say there were no "material" changes, and that the Department "merely clarified existing conditions." As this appeal and the current motions illustrate, what constitutes a "material" change is often subjective. We do not think that we should preclude

review of a permit simply because the Department tells us that, in its opinion, there have not been material changes.

Perhaps more fundamentally, we fail to see why a permittee or any other adversely affected party should be precluded from challenging the Department's action, even if that action was an approval of the renewal without any changes. Whether there should have been changes is well within the appropriate scope of our review at the renewal stage. The Department's decision not to make any changes is no less a decision of the Department subject to the Board's review than a decision to make changes.[2] Thus, whether PQ should be permitted to continue to operate its furnace for another five years, and if so, pursuant to what terms and conditions, is a perfectly legitimate and appropriate inquiry for the Department to make and for us to review.[3]

It has been said that the purpose of the administrative finality doctrine is to preclude a collateral attack where a party could have appealed an administrative action but failed to do so. *Dep't of Envtl. Res. v. Wheeling-Pgh. Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977); *Moosic Lakes Club v. DEP*, 2002 EHB 396. The administrative action in question here is the permit renewal. PQ obviously could not have appealed the permit renewal until the Department acted upon it. PQ cannot appeal the Department's decision to issue PQ's

[2] PQ tells us that it specifically asked the Department to make changes during the review process. However, we have held that a party's appeal rights are not limited to those issues that were the subject of prior comments. *See Snyder v. DEP*, 2015 EHB 857, 875 (party advancing this argument had not cited any ruling of the Board or any statutory or regulatory provision supporting the notion that an appellant's arguments and objections in its appeal are constrained in any way by the comments submitted or not submitted to the Department during the public comment period); *Groce v. DEP*, 2006 EHB 856, 941 (citing *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998)) (matters not addressed in plan approval process may still be considered by the Board); *Concerned Citizens Against Sludge v. DER*, 1983 EHB 282, 284 ("This right to appeal to the Board is unqualified; there is no indication whatsoever that an appellant must have availed himself of prior opportunities in the administrative process, such as commenting on a permit application."). *See also Hanslovan v. DER*, 1990 EHB 1351, 1352-53 (expressing grave doubts that submission of prior written objections to the Department limits appeal rights).

[3] Our review, of course, is limited to the objections raised in the notice of appeal.

original permit or include any particular terms or conditions in the original permit, *Winegardner v. DEP*, 2002 EHB 790, 793, but it can appeal the Department's decision to renew the permit and the terms of the renewed permit, even if the Department decided to leave the terms unchanged or without "material" changes. Therefore, the Department's motion based on administrative finality must be denied.[4]

PQ has moved for summary judgment only with respect to the objection in its notice of appeal involving the submission of monitoring and production data to the Department. This objection arises out of the disputed meaning of Condition 36 for Source ID 102 in Section D of the renewed permit. The Department has also moved for summary judgment on the merits of this issue in addition to its administrative finality argument.[5] Condition 36 is largely based on Section 129.309 of the Department's air quality regulations, which went into effect in June 2010, and requires the owner or operator of a glass melting furnace such as PQ's to

> calculate and report to the Department or appropriate approved local air pollution control agency on a quarterly basis, no later than 30 days after the end of the quarter, the CEMS data and glass production data used to show compliance with the allowable NOx emission limitation specified in [25 Pa. Code] § 129.304 (relating to emission requirements). The glass production data must consist of the quantity of glass, in tons, pulled per day for each furnace.

25 Pa. Code § 129.309(a). The Department says that "glass production data" means data regarding NOx emissions and the amount of glass PQ produced. The NOx data apparently

[4] In its reply, the Department accuses PQ of not precisely following our rules in responding to the Department's motion, even though it appears the Department has truncated the margins of its own response to PQ's statement of facts to skirt our rules on page limits. *See* 25 Pa. Code § 1021.94a(g). On August 17, 2017, we denied a motion from PQ seeking leave to file an amended response to the Department's motion. In any event, as we have said in the past, "the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected." *Neville Chem. Co. v. DEP*, 2003 EHB 530, 532 (quoting *Kleissler v. DEP*, 2002 EHB 737, 739); 25 Pa. Code § 1021.4 (regarding construction and application of the Board's rules). We do not detect any prejudice to the Department resulting from PQ's aberration from our rules.

[5] While the Department contends that there are material facts in dispute that prevent the entering of summary judgment with respect to PQ's motion, it maintains that there are no material facts in dispute concerning its own motion regarding Condition 36.

comes from PQ's CEMS. In what appears to have been a failed effort to clarify where PQ must send exactly what information, the Department included the following language in Condition 36 of the latest permit renewal:

> (a) The owner or operator of a glass melting furnace shall calculate and report to the Department or appropriate approved local air pollution control agency on a quarterly basis, no later than 30 days after the end of the quarter, the CEMS data and glass production data used to show compliance with the allowable NOx emission limitation specified in § 129.304 (relating to emission requirements). The glass production data must consist of the quantity of glass, in tons, pulled per day for each furnace.
>
> (b) This report shall be sent to the Southeast Regional office of the Pennsylvania Department of Environmental Protection.

Subsection (b) was included for the first time in the current permit renewal. The parties seem to disagree on what the permit as written requires with respect to which data should be sent to the Department's Central Office versus the Southeast Regional Office, and the reasonableness of the requirement.

PQ points out that, although Condition 36 appears to require CEMS data and glass production data for NOx to be submitted to the Southeast Regional Office, Condition 32 requires all CEMS data to be reported to the Central Office. We are told that CEMS data is submitted to the Central Office electronically through a portal maintained by that office called CEMDPS*Online. The Department tells us that the Regional Offices do not have the ability to process the raw data that PQ and other operators input into the electronic CEMS reporting system. At the same time, the Department maintains that the Central Office cannot process production data. PQ tells us that the Department issued a notice of violation (NOV) to PQ in December 2015 because PQ submitted to the Central Office both CEMS data and production data, instead of sending the production data to the Regional Office. We can understand why PQ would want clarification on what it believes to be inconsistent or overlapping conditions so as

not to risk again being in violation of its permit. PQ wants Condition 36 to be revised to provide that PQ submit all of its CEMS data exclusively to the Central Office and only its glass production data to the Southeast Regional Office.

The Department maintains that the permit conditions are clear and reasonable. The Department takes the position that the unspecific language in Section 129.309(a) regarding the submission of "CEMS data and glass production data" "to the Department" allows the Department to require PQ to submit different sets of data to different Department offices, or to submit certain portions of data to multiple offices. It says that PQ is to submit all CEMS electronic data reports to the Central Office. PQ is also required to submit its CEMS data with respect to NOx to the Southeast Regional Office, but not in the format of the CEMS electronic data reports because, as just mentioned, the Regional Office cannot process those reports. Instead, from what we can gather, PQ must print off its NOx CEMS data, which it has or will submit to the Central Office in electronic form (along with the rest of its CEMS data), and send the paper copies of the NOx data to the Southeast Regional Office. At the same time PQ must also submit its glass production data to the Regional Office.

It is disappointing that the relationship between PQ and the Department is at a point where the parties cannot work out a resolution of this rather trivial issue without resorting to filing competing motions for summary judgment. Having said that, PQ's confusion regarding the meaning of Condition 36 in the context of the rest of the permit is justified. The permit language is not clear, particularly given PQ's awareness of the limitations of the Department's various offices, and the Department's summary judgment filings, if anything, make the matter less clear. Even the Department's organizational designee was confused at his deposition about what PQ's permit requires, and we are told by the Department that he is the one who in fact

drafted the permit. (The Department notes that he had a very bad head cold that day.) Whether Condition 36 is reasonable or unreasonable as a matter of law cannot be decided on the basis of the current record. In the unfortunate event that the parties cannot figure this out on their own, perhaps the hearing will clarify the matter.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2016-086-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 21st day of August, 2017, it is hereby ordered that the motions for summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 21, 2017

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

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-155-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: August 22, 2017**

OPINION AND ORDER ON PERMITTEE'S PETITION FOR RECONSIDERATION OF THE BOARD'S DECISION ON ITS MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board denies the Permittee's Petition for Reconsideration of the Board's Decision on its Motion to Dismiss because Consol has not demonstrated extraordinary circumstances exist in this case that justify reconsideration of the Board's interlocutory order dismissing Consol's Motion to Dismiss.

O P I N I O N

Introduction

On July 28, 2017, the Board issued an Opinion and Order on the Motions to Dismiss ("July Opinion/Order") filed by Consol Pennsylvania Coal Company, LLC ("Consol") and the Department of Environmental Protection (the "Department" or "DEP). Consol's Motion to Dismiss Appeal as Moot ("Consol's Motion") relied primarily on the April 2017 agreement ("DCNR Agreement") reached between Consol and the Department of Conservation and Natural

Resources ("DCNR") that states in part that Consol will not conduct longwall mining beneath Kent Run in the 3L panel. In the July Opinion/Order, the Board found that the DCNR Agreement did not provide a sufficient basis for dismissing the appeal as moot because we concluded that there was nothing preventing Consol and DCNR from further amending the DCNR Agreement to remove that restriction. We also found that the portions of the appeal related to Polen Run and the post-mining mitigation authorized by Permit Revision No. 204 still raised viable claims for the Board's consideration. Finally, we determined that the issues in this case were subject to repetition yet likely to evade review and, therefore, one of the recognized exceptions to the mootness doctrine applied. Consol filed a Petition for Reconsideration of the Board's Decision on its Motion to Dismiss ("Petition") on August 7, 2017.[1] On August 16, 2017, the Department filed a letter stating that it did not join Consol's Petition and is not seeking reconsideration of the portion of the Board's July Opinion/Order dismissing the Department's Motion to Dismiss. On August 18, 2017, the Center for Coalfield Justice and the Sierra Club ("CCJ/SC") filed a Response to Permittee's Petition for Reconsideration.[2] The Board is now in a position to rule on the Petition.

Standard of Review

The Board's July Opinion/Order is an interlocutory order. Reconsideration of an interlocutory order is governed by 25 Pa. Code § 1021.151(a) that states that the "petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board."

[1] The Board's e-filing system rejected the filing at first because of an issue in accepting an exhibit to the Petition. The issue was resolved the next day and Consol re-filed the Petition. As a result, the Petition is shown on the Board's docket with a filing date of August 8, 2017 but in fact was timely filed on August 7, 2017. See 25 Pa. Code § 1021.151(a).

[2] Because of the initial filing issue with the Petition, electronic service of the Petition on CCJ/SC did not occur until August 8, 2017. Under Board Rules, CCJ/SC had 10 days from the date of service to file an answer to the Petition and, therefore, the filing of the Response on August 18, 2017 is timely. See 25 Pa. Code § 1021.151(b).

The comment to this rule states that reconsideration "is an extraordinary remedy and is inappropriate for the vast majority of rulings issued by the Board." The Board has also held that the standard for reconsideration for interlocutory orders is even higher than that for final orders since the petitioner must demonstrate extraordinary circumstances in addition to meeting the criteria established under 25 Pa. Code § 1021.152 for final orders. *New Hope Stone & Lime Co. v. DEP*, 2016 EHB 741, 743 (citing *Associated Wholesaler, Inc. v. DEP*, 1998 EHB 23, 26-27). See also *Kiskadden v. DEP*, 2014 EHB 737. The rule governing reconsideration of final orders, 25 Pa. Code §1021.152, provides that reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons that may include the following:

> (1) The final order rests on a legal ground or a factual finding that was not proposed by any party.
>
> (2) The crucial facts set forth in the petition:
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (ii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a).

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

Analysis

We find that Consol has not demonstrated extraordinary circumstances exist in this case that justify reconsideration of the Board's interlocutory order dismissing Consol's Motion to

Dismiss. In addition, Consol has not met the criteria for reconsideration of a final order by showing compelling and persuasive reasons for the Board to exercise its discretion to grant reconsideration. Consol sets forth three main arguments in support of its Petition based on its understanding of the Board's rulings in the July Opinion/Order. First, Consol argues that there has been a change in the controlling law as a result of a Memorandum Opinion issued by the Commonwealth Court on August 2, 2017 ("Memorandum Opinion"). The Memorandum Opinion dismissed as moot Consol's appeal seeking reversal of the Board's prior order in this case that granted in part a supersedeas precluding longwall mining beneath and within 100 feet of Kent Run in the 3L panel. Second, Consol argues that the enactment of Act 32 of 2017 while the Board was considering Consol's Motion to Dismiss but prior to the issuance of the July Opinion/Order constitutes a change of legal circumstances and facts and dictates that the Polen Run portion of CCJ/SC's appeal is moot. Finally, Consol challenges the Board's decision in the July Opinion/Order that the exception to the mootness doctrine for actions that are capable of repetition yet likely to evade review applied because Consol contends the Board misapprehended the applicability of the doctrine and the implications of the Board's pending decision in the Permit Revisions Nos. 180 and 189 appeal.[3]

Consol argues that the Commonwealth Court's Memorandum Opinion is an intervening appellate decision that is binding on the Board and, therefore, constitutes an extraordinary circumstance warranting reconsideration. (Petition, No. 41, p. 10). We disagree with Consol on this point. The issue in front of the Commonwealth Court was limited to Consol's appeal of the Board's earlier decision granting a requested supersedeas. We think that the issues in front of the Board in this case are sufficiently different from the single issue in front of the

[3] The Board's decision in the Permit Revisions No. 180 and 189 appeals docketed at 2014-072-B was issued on August 15, 2017 while the Petition in this case was under consideration.

Commonwealth Court that the Memorandum Opinion does not definitively decide the mootness question for CCJ/SC's challenge to the Department's permitting decision. In the Memorandum Opinion, the Commonwealth Court held that "[B]ecause Consol has now agreed to forego all longwall mining beneath Kent Run in the 3L panel as authorized under Permit Revision No. 204, we cannot grant Consol the requested relief with respect to the EHB's supersedeas order." (Memorandum Opinion, p. 4). It is clear that the Commonwealth Court was looking at the mootness question solely in the context of the supersedeas issue and the relief it could provide to Consol. That is distinct from the context of the current proceeding in front of the Board. For instance the supersedeas appeal did not involve any of the issues surrounding Polen Run discussed by the Board in its July Opinion/Order. We thoroughly considered and evaluated the impact of the DCNR Agreement on CCJ/SC's permit appeal before determining that the appeal was not moot and see no reason to revisit that decision based on the Memorandum Opinion. We conclude that the decision set forth in the Memorandum Opinion does not constitute an extraordinary circumstance requiring us to grant Consol's Petition.

Consol's second argument relies on the enactment of Act 32 and argues that it constitutes a change of legal circumstances and facts. Consol correctly points out that the parties did not include an analysis of Act 32 in the initial briefs regarding Consol's Motion because of the timing of its enactment after those briefs had been submitted to the Board. However, Consol's Reply Brief in Support of Motion to Dismiss Appeal as Moot ("Reply Brief") was filed on July 26, 2017, five days after the enactment of Act 32 on July 21, 2017. The Reply Brief makes no mention of Act 32 nor did Consol request an opportunity to present a supplemental brief on the impact of Act 32 on its mootness claim. Therefore, we find that Act 32 is not a fact that "could not have been presented earlier to the Board with the exercise of due diligence" by Consol.

Consol had the opportunity to raise Act 32 and its impact with the Board at that time but Consol failed to do so and it is not appropriate to raise it at this point.

In addition, we disagree with Consol that Act 32 constitutes a change in legal circumstances at this time. While none of the parties addressed Act 32 in this case, Consol and the other parties in this case did discuss Act 32 in supplemental briefs filed in the permit appeals docketed at 2014-072. In the recently issued adjudication in that case, the Board held that Act 32 is not yet effective in Pennsylvania because it needs to be reviewed and approved by the federal Office of Surface Mining Reclamation and Enforcement. *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Docket No. 2014-072-B, *slip. op*. at 31 (Adjudication issued August 15, 2017). In light of that decision, we reject Consol's argument that Act 32 constitutes a change in legal circumstances at this point in time. Further, we are not convinced that Consol is correct in its contention that Act 32 answers any challenge that CCJ/SC may have set forth in their Notice of Appeal regarding the post-mining mitigation requirements in Polen Run. We have not extensively analyzed that question and would want to provide the parties the opportunity to brief the impact of Act 32 on those issues before rendering any final decision. However, as a preliminary matter, we do not read Act 32 as fully resolving all issues regarding post-mining mitigation and restoration of Polen Run and therefore, it does not support reconsideration at this point since it does not clearly justify a reversal of the Board's decision in the July Opinion/Order.

Consol's third argument challenges the Board's decision in the July Opinion/Order that the exception to the mootness doctrine for actions that are capable of repetition yet likely to evade review applies in this case. Consol contends that the Board misapprehended the applicability of the doctrine and the implications of the Board's pending decision in the Permit

Revisions Nos. 180 and 189 appeal. The pending decision raised by Consol has been issued at this point. See *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Docket No. 2014-072-B (Adjudication issued August 15, 2017). We first note that the analysis of the applicability of the exception to mootness was offered as an alternative basis for denying Consol's Motion to Dismiss. Therefore, even if we agreed with Consol's third argument, given our prior decisions on the Petition, it would not require us to grant reconsideration. Since we continue to conclude that the issues in this case are not moot, we do not have to rely on an exception to the mootness doctrine to proceed in this case. Further, however, we do not agree that the adjudication in the 2014-072 case fully resolves the issues in this case and prevents those issues from evading review as suggested by Consol. The Board's intent in its decision in *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Docket No. 2014-072-B (Adjudication issued August 15, 2017) was to address the legal questions raised by the Department's permit decisions under appeal in that case. That adjudication did not address the timing concern regarding the Department's permit decisions that we raised in discussing the exception to mootness in our July Opinion/Order. Those concerns remain and we are not convinced otherwise by Consol's third argument.

In conclusion, reconsideration of an interlocutory decision of the Board requires the party seeking reconsideration to demonstrate extraordinary circumstances. While Consol properly raised several actions that took place after the Board issued its July Opinion/Order, we disagree that those actions warrant reconsideration. As the comment to the Board Rule governing this issue states reconsideration "is an extraordinary remedy and is inappropriate for the vast majority of rulings issued by the Board." 25 Pa Code § 1021.151. We conclude that Consol's request for

reconsideration does not fall into the small number of cases where reconsideration would be appropriate. Therefore, we deny Consol's Petition.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2016-155-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 22nd day of August, 2017, it is hereby ordered that Consol's Petition for Reconsideration of the Board's Decision on its Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 22, 2017

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

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 29, 2017**
	:	

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

By Steven C. Beckman, Judge

Synopsis

The Board upholds a civil penalty assessment of $9,000 for violations of the Storage Tank and Spill Prevention Act. The penalty amount was lawful and a reasonable and appropriate exercise of the Department's discretion.

Background

On December 30, 2015, the Pennsylvania Department of Environmental Protection ("Department" or "DEP") assessed a civil penalty of $9,000 against Paul Lynch Investments, Inc. ("Lynch Investments") under Section 1307 of the Storage Tank and Spill Prevention Act ("Storage Tank Act"). 35 P.S. § 6021.1307. The storage tank owned and operated by Lynch Investments was located on property also owned by Lynch Investments at 401 South Jefferson St., New Castle, Pennsylvania ("Tank"). The Assessment of Civil Penalty ("Assessment") alleged that Lynch Investments had committed five (5) violations of the Storage Tank Act. Lynch Investments filed a Notice of Appeal challenging the Assessment on January 27, 2016. Lynch Investments also asserted that it lacked the ability to prepay the civil penalty or post the required bond. The Board held a hearing on the inability to prepay claim and, on June 16, 2016,

issued an Opinion and Order holding that Lynch Investments failed to demonstrate its claim of inability to prepay the penalty or post an appeal bond. Therefore, the Board ordered it to prepay the penalty or post an appeal bond in the required amount.

On October 11, 2016, the Department filed a Motion for Partial Summary Judgment ("Motion") seeking summary judgment on Lynch Investments' liability on the violations identified in the Assessment and on Lynch Investments' claim that the civil penalty was barred by the statute of limitations. Lynch Investments failed to file a response to the Department's Motion. On November 21, 2016, the Board granted the Department's Motion and found as a matter of law that Lynch Investments is liable for the violations identified in the Assessment and that the civil penalty is not barred by the statute of limitations. On March 7, 2017, the Board held a hearing on the only remaining issue, whether the Department's civil penalty assessment of $9,000 is reasonable, appropriate and in compliance with the relevant law. The Department filed its post-hearing brief on April 28, 2017. Following the Board's granting of a requested extension, Lynch Investments filed its post-hearing brief on June 12, 2017. The Department filed a reply brief on June 27, 2017 and the case is now ready for decision by the Board.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 – 6021.2104 ("Storage Tank Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510 – 17 and the rules and regulations promulgated thereunder.

2. Lynch Investments is a corporation organized and existing under Pennsylvania law with a business mailing address of P.O. Box 5411, New Castle, PA 16105. (Transcript ("T.") 79, 83; DEP Exhibit ("Ex.") F).

3. Paul Lynch was the President of Lynch Investments at the time of the alleged violations and made the bulk of the day-to-day decisions for Lynch Investments. (T. 79-80).

4. Lynch Investments owns property located at 401 South Jefferson Street in the City of New Castle, Lawrence County, Pennsylvania ("Property"). (DEP Ex. F).

5. At the Property, Lynch Investments owned and operated an underground storage tank that stored gasoline, had a capacity of 15,000 gallons, and is registered with the Department as Facility ID Number 37-11301. (DEP Ex. F).

6. Lynch Investments was the owner and operator of the Tank. (T. 80-81; DEP Ex. F).

7. Lynch Investments' ownership of the Tank began sometime around late 2003 to 2004. (T. 29, 80).

8. Storage Tank Act regulations require that tanks be inspected every three (3) years. 25 Pa. Code § 245.411(c).

9. Lynch Investments had the Tank inspected in 2005 and 2008. (T. 82).

10. The Department sent a written reminder to Lynch Investments on March 11, 2011 that the due date for the inspection of the Tank was March 7, 2011. (T. 30)

11. Lynch Investments did not have the Tank inspected in March 2011 as required. (T. 30; DEP Ex. A)

12. Paul Lynch knew an inspection of the Tank was due every three years. (T. 82.)

13. On September 23, 2011, the Department sent a Notice of Violation to Lynch Investments for failure to complete the required inspection of the Tank. (T. 30, 33; DEP Ex. A).

14. Lynch Investments had the Tank inspected on January 27, 2012. (T. 27; DEP Ex. C).

15. When the Tank was inspected on January 27, 2012, the Tank contained 14.5 inches, or approximately 1,500 gallons, of petroleum product. (T. 28, 46; DEP Ex. C).

16. The January 2012 inspection report noted that the Tank's interstitial monitoring system used to conduct release detection on the Tank was not functioning. (DEP Ex. C).

17. Department regulations require that that owners and operators provide a method of release detection and perform interstitial monitoring at least once every 30 days for a tank storing more than an inch of petroleum product. (T. 20). 25 Pa. Code §§ 245.441 and 245.442.

18. Mr. Lynch was aware at the time of the January 2012 inspection that the release detection equipment was not working. (T. 90-91).

19. The release detection equipment was not working because of a lack of electrical service at the Property due to vandalism. (T. 76-77, 83-87).

20. There are several methods of release detection that could have been used on the Tank that did not require electricity, however, Lynch Investments was not aware of these detection methods. (Tr. 66, 103.)

21. The Department sent a Notice of Violation to Lynch Investments on March 7, 2012 for failure to meet tank and piping release detection requirements and failure to meet operator training requirements. (T. 36; DEP Ex. D).

22. Lynch Investments never repaired the release detection system. (T. 45).

23. On September 26, 2012, the Department issued an administrative order ("2012 Order") that required Lynch Investments to empty the Tank within 10 days so that no more than one inch of product remained, and within an additional 10 days, to register the Tank as temporarily out of service. (T. 46; DEP Ex. F).

24. On November 14, 2012, Mr. Lynch left a voice mail for Department employee David Hall acknowledging the Department's 2012 Order. (Tr. 55, 58-59).

25. On April 5, 2013, the Department filed a Petition to enforce the 2012 Order with the Lawrence County Court of Common Pleas. (T. 53-54; DEP Ex. K).

26. Lynch Investments complied with a portion of the 2012 Order when the Tank was emptied in July 2013 but Lynch Investments never registered the Tank as temporarily out of service. (Tr. 45).

27. On July 23, 2013, the Tank was permanently closed and registered as removed. (Tr. 45, 61).

28. On December 30, 2015, the Department assessed a civil penalty against Lynch Investments for multiple violations of the Storage Tank Act including: 1) failing to inspect the tank by March 7, 2011, as required by 25 Pa. Code § 245.411; 2) the interstitial monitoring system was not operational and no release detection was being conducted for the Tank in violation of 25 Pa. Code § 245.411(a); 3) and failure to empty the Tank within 10 days as required under the Department's 2012 Order. (T. 21-22; DEP Ex. G).

29. The Assessment identified two other violations: 1) failure to provide and post procedures for Class C trained operators at the site and 2) failure to register the Tank temporarily out of service as required by the 2012 Order. The Department chose not to assess civil penalties for these violations. (T. 59-61).

30. The Storage Tank Act states that a civil penalty assessed under the Storage Tank Act shall not exceed $10,000 per day for each violation. (T. 23; 35 P.S. § 6021.1307(a)).

31. The Storage Tank Act states that in determining the amount of a civil penalty the Department shall consider the willfulness of the violation, damage to air, water, land or other

natural resources, cost of restoration or abatement, savings to the violator and other relevant factors. (T. 23-24; 35 P.S. § 6021.1307(a)).

32. The civil penalty calculated by the Department for the three violations listed in the Assessment totaled $9,000. (T. 22; DEP Ex. G).

33. The civil penalty assessed for the failure to timely inspect the Tank was $1,500. (Tr. 27).

34. The civil penalty assessed for failure to conduct release detection was $3,000. (Tr. 33).

35. The civil penalty assessed for failure to timely comply with the Department's 2012 Order requiring that Lynch Investments empty the Tank was $4,500. (Tr. 45-46).

36. The Department has a civil penalty assessment matrix ("Penalty Matrix") that provides the policy and framework used by the Department to calculate a civil penalty under the Storage Tank Act. (T. 24; DEP Ex. H).

37. The Penalty Matrix, includes the following factors to be used in calculating a civil penalty: violation seriousness, duration of the violation, willfulness of the violation, environmental damage, savings to the violator, and costs of restoration. The factors in the penalty assessment matrix are similar to those outlined in the Storage Tank Act. (T. 23-25; DEP Ex. H; 35 P.S. § 6021.1307(a)).

38. The Department used the Penalty Matrix in determining the amount of the civil penalties against Lynch Investments set forth in the Assessment. (T. 24).

39. The Department determined that the violation for failing to timely inspect the Tank was a negligent, low-risk violation and selected a duration of one day even though the inspection was completed more than ten (10) months late. (T. 25-29).

40. The Department determined that the violation for failure to conduct release detection was a negligent, medium-risk violation and selected a duration of one day even though the failure to conduct release detection continued for a period of more than a year. (T. 33-35, 41).

41. The Department determined that the violation for failure to timely comply with the requirement to empty the Tank under the Department's 2012 Order was a deliberate, medium-risk violation and selected a duration of one day even though Lynch Investments did not comply with this requirement under the 2012 Order until the product was removed in July 2013. (T. 47-48).

DISCUSSION

The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that: (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under the applicable law; and (3) the penalty is a reasonable and appropriate exercise of the Department's discretion. *Whiting v. DEP*, 2015 EHB 799, 805, citing *Thomas Gordon v. DEP*, 2007 EHB 268; *Clearview Land Development v. DEP*, 2003 EHB 398; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796; *Farmer v. DEP*, 2001 EHB 271. In reviewing the reasonableness of civil penalty assessments, the Board "must determine whether there is a reasonable fit between each violation and the amount assessed." *Thebes v. DEP*, 2010 EHB 370, 398. When reviewing civil penalty assessments, "we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather we review the Department's predetermined amount for reasonableness." *Id.* at 398. There must be a reasonable fit between the violations and the amounts of the civil penalties. *Eureka Stone Quality, Inc. v. DEP*, 2007 EHB 419, 449. If we determine that the Department's calculations are not a reasonable fit, then

the Board may substitute its discretion and direct the Department as to the proper assessment. *Whiting v. DEP*, 2015 EHB 799, 806, citing *The Pines at West Penn, LLC v. DEP*, 2010 EHB 412, 420; *B & W Disposal Inc. v. DEP*, 2003 EHB 456, 468.

In this case, the Board has already found that the violations occurred as a matter of law in its ruling on the Department's Motion for Partial Summary Judgment. Therefore, the only issue left for us to decide is whether the $9,000 civil penalty assessed by the Department is lawful under the Storage Tank Act and a reasonable and appropriate exercise of the Department's discretion. In its post-hearing brief, the Department argues that the Assessment is lawful because it is well below the statutory limit of $10,000 per violation per day and that it is a reasonable fit for the violations based on the testimony demonstrating that the Department used the relevant statutory factors and appropriately considered the risk, willfulness, and duration of the violations. (Department's Post-Hearing Brief, p. 2). Lynch Investments argues in its post-hearing brief that the Board should reconsider the liability determination[1] and that the assessment of civil penalty was both unlawful and unreasonable because of perceived shortcomings in the Department's actions. (Lynch Investments Post-Hearing Brief, p 2).

[1] Despite asking us to reconsider the liability decision, Lynch Investments does not address the reasoning behind the Board's prior ruling or offer a reasoned argument for reconsideration. Further, even though the hearing was limited to issues surrounding the reasonableness of the civil penalty, it is evident from the Findings of Fact that the Department presented evidence during the hearing that sufficiently demonstrated Lynch Investments' liability for the violations. There is no doubt based on the record in this case that Lynch Investments failed to inspect and monitor the storage tank at the Property or to comply with the Department Order. As we understand the limited argument set forth by Lynch Investments in its post-hearing brief, it contends that the violations were in fact the result of inappropriate actions of Department employees and not the acts of Lynch Investments. (Lynch Investments Post-Hearing Brief, p. 5). The inappropriate action claimed by Lynch Investments is that Department personnel failed to inform Lynch Investments of available alternatives for conducting release detection of the storage tank. This argument is unpersuasive. We first note that this claim does not addresses either the failure to inspect or the failure to follow the Department's Order. As the owner of the Tank, Lynch Investments is responsible for being aware of the law and what it requires. What the Department staff may have told or not told Lynch Investments about release detection methods does not excuse it from its responsibility to follow the law. We see no reason to reconsider our liability decision at this point.

The Department argues that its civil penalty assessment is lawful. The statutory section of the Storage Tank Act addressing civil penalties for storage tank violations is found at 35 P.S. § 6021.1307. This section provides that the Department may assess a civil penalty that shall not exceed $10,000 per day for each violation and that it can assess a penalty whether or not the violation was willful. The statute further provides that in determining the amount, the Department shall consider the willfulness of the violation, environmental damage, costs of restoration and abatement, savings to the violator, deterrence and other relevant factors. Finally, the section provides that each violation and each day of violation shall constitute a separate violation. On its face, the civil penalty amount in this case, $9,000, is well within the statutory requirements of the civil penalty section of the Storage Tank Act. In fact, it is less than the "not to exceed" penalty amount that the statute provides for one violation on a single day. It is also apparent from the testimony and evidence in this case that the Department followed the other provisions in the statutory section governing civil penalties in arriving at the $9,000 civil penalty assessed in this case. The Department's decision to assess a civil penalty in this matter is clearly consistent with statutory provisions and therefore, we find that the assessment is lawful.

The third step of the Board's review of a civil penalty assessment is to determine whether the amount assessed by the Department is reasonable and appropriate. We find that a $9,000 civil penalty is a reasonable fit for the violations identified by the Department and an appropriate amount under the facts of this case. The Department presented David Hall, a Water Quality Specialist Supervisor, as its primary witness regarding the Department's determination of the amount of the assessed penalty. Mr. Hall testified that he considered the statutory factors listed in the civil penalty section of the Storage Tank Act and applied those factors as outlined in the Department's Penalty Matrix.

Mr. Hall testified in depth about how he arrived at each penalty amount for the three violations where the Department assessed a civil penalty. The first violation resulting in an assessment was the failure to conduct the inspection of the Tank in a timely manner. The penalty assessed for this violation was $1,500 and Mr. Hall arrived at that amount by evaluating the violation under the multiple factors listed in the Storage Tank Act and discussed in the Penalty Matrix: violation seriousness, duration of violation, willfulness, damage to the air, water, land or other natural resources, savings to the violator, and restoration or abatement costs. Mr. Hall explained that the failure to inspect in a situation such as this is routinely considered a low-risk violation and he determined a base penalty of $750 that he described as the standard penalty used by the Department for this specific violation. Once Mr. Hall had the base penalty, he next considered duration of the violation, which was approximately ten months. Mr. Hall stated that he could have applied the penalty in a daily or monthly fashion, but that approach did not seem to yield a reasonable penalty so he decided to treat the violation as a one day event. The next factor considered was willfulness. Mr. Hall determined that Lynch Investments' actions were negligent and based on that fact, he doubled the base penalty amount. The Department views a violator as negligent when the facts show that the violator should have had knowledge of the requirements but acted in a manner that violated those requirements. Relying on Lynch Investments' satisfactory completion of prior inspections, and the Department's May 11th inspection notification letter, Mr. Hall believed it was reasonable to expect that Lynch Investments knew an inspection was required and due. Mr. Hall did not believe it was reasonable to include any other factors in this penalty as they were either negligible or irrelevant and the final penalty for this violation was set at $1,500. We find that this amount is reasonable and appropriate and note that the amount could easily have been higher given the length of time

between the due date for the inspection and the time when Lynch Investments completed the inspection.

The second violation resulting in a penalty assessment was for the failure to conduct release detection. The failure to conduct release detection over an extended period of time on a Tank that contains 15,000 gallons of petroleum product is a serious concern given the risks to the environment posed by leaks. Mr. Hall treated this violation as presenting a medium risk and assigned a penalty amount of $1,500 based on that risk. Similar to the assessment for the first violation, Mr. Hall could have assessed a penalty for each month that Lynch Investments failed to conduct release detection, but felt that approach did not yield a reasonable penalty. Instead, he counted it as a single violation. In evaluating the willfulness factor for this violation Mr. Hall again determined that Lynch Investments' actions were negligent based on the fact that it was aware of the requirement to conduct leak detection and had previously conducted the required leak detection for several years prior to the time period covered by the violations. Because he determined that Lynch Investments' actions were negligent, he doubled the penalty and arrived at the civil penalty assessment of $3,000. Mr. Hall did not adjust the civil penalty based on any of the other factors. We find the $3,000 civil penalty for this violation to be reasonable and appropriate. Once again, we note that the Department could have sought a substantially higher civil penalty given the length of time the Tank was not monitored for leaks.

The third violation resulting in a penalty assessment was the failure to empty the Tank within 10 days as required under the 2012 Order. Lynch Investments did not appeal the 2012 Order and failed to follow its requirements. As we see in this case, the Department typically does not issue an administrative order in these types of cases until it has tried to resolve a matter by other means. The Department issued a Notice of Violation to Lynch Investments and

communicated with Mr. Lynch about the continuing violations of the Storage Tank Act prior to issuing the 2012 Order. When that failed to get the violations resolved the Department issued the 2012 Order. Several months passed after the 2012 Order was issued before the Tank was emptied as required. Mr. Hall concluded that the failure to comply with the 2012 Order and empty the Tank was a medium risk violation that warranted a $1,500 base penalty. He concluded that failure to follow the 2012 Order was deliberate in light of the prior efforts to address the issue with Lynch Investments and, as a result, he tripled the base penalty. As in the prior violations, he treated this violation as lasting for only a single day even though the Tank was not emptied as required until several months after the 2012 Order was issued. Mr. Hall did not adjust the penalty up or down based on any of the other statutory factors. Lynch Investments' failure to comply with the 2012 Order to empty the Tank, while also failing to conduct proper release detection, was a serious violation and posed a legitimate risk to the environment. We agree with Mr. Hall's determination that Lynch Investments' failure to take the action required by the 2012 Order was deliberate in light of the previous discussions and actions by the Department. Therefore, we find that the assessed civil penalty of $4,500 is appropriate and a reasonable fit for the violation.

We also note that the Department reasonably exercised its discretion not to seek civil penalties for two other violations identified in the Assessment. Mr. Hall testified that he did not believe it was reasonable to assess a penalty for either the failure to have written instructions and procedures posted or available, or for the failure to comply with the requirement in the 2012 Order to register the Tank as temporarily out of service. Mr. Hall stated that an owner's or operator's failure to have written instructions and procedures available was a common violation that the Department had observed at multiple facilities, and the Department elected to treat it as

an opportunity for compliance assistance rather than assessing penalties. Mr. Hall did not think that it would be fair to assess a penalty against Lynch Investments when the Department was not assessing penalties for the same violation against other owners and operators. Mr. Hall further explained that he declined to assess a penalty for failing to register the Tank as temporarily out of service because shortly after the Tank was emptied it was removed and permanently closed. Mr. Hall testified that it seemed reasonable that the completed removal and closure would stand in place for what the 2012 Order required. The Department could have sought civil penalties for these violations, but we think that it was a reasonable and appropriate exercise of the Department's discretion to forego penalty assessments for these violations and supports the overall reasonableness of the manner in which the Department acted with regard to Lynch Investments in arriving at the $9,000 civil penalty in the Assessment.

Lynch Investments' arguments as to why the civil penalties in this case are unlawful, unreasonable and inappropriate are unpersuasive to the Board. The main argument set forth by Lynch Investments is that as a result of vandalism to the Property that destroyed the electrical system and rendered the interstitial monitoring system non-operational, it was not responsible for the violations of the Storage Tank Act. Lynch Investments further assigns blame to the Department because despite knowing of the issues with the electrical systems at the Property, Lynch Investments claims the Department did not inform it about alternatives that existed to address the violations of the Storage Tank Act. Based on the testimony at the hearing, we agree that the Department could have done more to offer Lynch Investments compliance assistance with some of the issues that arose with the Tank following the Department becoming aware of the vandalism at the Property. At the same time, the Department did offer some assistance to Lynch Investments and sent several letters explaining steps that Lynch Investments could take to

address the issues. Many of the violations could have been resolved by simply removing the petroleum product from the Tank and placing it into temporary out of service status. This possibility was mentioned by both Lynch Investments and the Department in correspondence that they exchanged in May 2012. (See T. 39-40; DEP Ex. E). Despite that earlier exchange, the petroleum product was not removed from the Tank until after face-to-face discussions in April 2013 between Mr. Hall and Mr. Lynch. These discussions occurred during a break in the hearing to enforce the 2012 Order when Mr. Hall provided Mr. Lynch with the name of an individual who would be able to remove the petroleum product. Ultimately, despite the less than stellar efforts by the Department to provide compliance assistance, Lynch Investments is responsible for both its actions and inactions in this case. Based on the testimony at the hearing, we conclude that Lynch Investments wanted to retain the Tank because it viewed it as a valuable asset that might be attractive to future tenants at the Property. We do not fault Lynch Investments for wanting to keep the Tank in place but it was obligated to do so in compliance with the Storage Tank Act. It failed to do so in this case despite the Department giving it multiple opportunities to come into compliance. Overall, the arguments set forth do not absolve Lynch Investments of its liability or provide a basis to reduce the civil penalty assessed by the Department.

CONCLUSIONS OF LAW

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

2. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 – 6021.2104 ("Storage Tank Act"); Section 1917-A of the Administrative

Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510 – 17 and the rules and regulations promulgated thereunder.

3. The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1).

4. The Department may assess a penalty of up to $10,000 per day per violation of the Storage Tank Act, the Regulations or a Department order. 35 P.S. § 6021.1307.

5. The Department's burden is to demonstrate that its issuance of the Assessment of Civil Penalty is supported by a preponderance of the evidence presented and admitted before the Board that (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under the applicable law; and (3) the penalty is a reasonable and appropriate exercise of the Department's discretion.

6. Lynch Investments is liable as a matter of law for the violations identified in the Assessment.

7. The Department's assessed civil penalty amount of $9,000 is a lawful, reasonable and appropriate exercise of the Department's authority and a reasonable fit for the violations identified in the Assessment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of August, 2017, it is hereby ordered that this appeal is dismissed. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 29, 2017

c: **DEP, General Law Division:**
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For Appellant:
Paul Lynch, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF ALLENTOWN	:	
v.	:	**EHB Docket No. 2016-144-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 1, 2017**

OPINION AND ORDER ON
MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion to Dismiss. The Board grants the Motion for several reasons. First, the written statement that Appellant challenges is found in a letter from the United States Environmental Protection Agency, and not in a letter from the Department. Second, even if the written statement were found in a Department letter to the Appellant, the written statement is not appealable because the statement is merely the Department's interpretation of its own regulations. Third, the Appellant's challenge to the oral statement from the Department's Program Manager at the September 12, 2016 meeting is not timely, and even if it were timely, the oral statement is not an order or directive. The oral statement is merely the Department's interpretation of a Department regulation that is not appealable at this time. Finally, the Appellant's challenge to the Department's interpretation of its regulation arises in the context of an application for a permit modification that the Appellant has not yet submitted to the Department for review and approval. The Board lacks jurisdiction to evaluate the challenge to

the Department's interpretation of a regulation that the Appellant wants to litigate before the Department makes a decision on the permit modification application that has not yet been filed.

O P I N I O N

Background

The above captioned appeal was filed by the City of Allentown ("Appellant") on October 21, 2016 in response to a letter from the United States Environmental Protection Agency Region III ("EPA") that referenced an oral statement made during an earlier meeting with the Appellant, Department employees, and EPA representatives.

The facts of this appeal have their beginning a decade ago. On or around September 28, 2007, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("First EPA AO") to the Appellant. The First EPA AO ordered Appellant to submit plans to eliminate discharges from the Outfall #003 bypass and to eliminate sanitary sewer overflows ("SSOs"). On or around September 28, 2009, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Second EPA AO") to the Appellant and thirteen other municipal Respondents. The thirteen Respondents all own or operate sewage collection systems that either directly convey wastewater to the Allentown wastewater treatment plant or convey the wastewater to the treatment plant after passing through the sewage collection system operated by another municipality. This Second EPA AO ordered Respondents to eliminate discharge from the SSOs by December 31, 2016, and asserted that Appellant's Outfall #003 is an SSO, not a bypass. On or around February 10, 2016, EPA issued a Findings of Violation, Order for Compliance and Request for Information ("Third EPA AO") which provided an extension of the December 31, 2016 deadline in the Second EPA AO to December 31, 2017.

Throughout this period, the Appellant has had NPDES Permit No. PA002600, which the Department issued on March 20, 2003. It was set to expire on September 30, 2007, but has been

administratively extended for 10 years, through October 1, 2017. The Department has not yet reissued the permit. The Appellant believes that this is due to wet weather issues associated with peak flows at its Kline Island Wastewater Treatment Plant and the issue of blending. On or around April 17, 2013, the Appellant, EPA, and the Department had a meeting to discuss wet weather issues and planned actions to comply with EPA's three AOs. At this meeting, the Appellant also raised the issue of whether blending was allowed in Pennsylvania under state or federal law, as the Eighth Circuit decided *Iowa League of Cities v. Environmental Protection Agency*, 711 F.3d 844 (8th Cir. 2013) on March 25, 2013 and vacated EPA's blending rule that prohibited blending.[1] Following the meeting, the Appellant, EPA, and the Department corresponded twice before meeting again on June 14, 2016. At this second meeting, the Appellant again raised the issue of blending because three years had passed since the Eighth Circuit's decision and neither EPA nor the Department had given the Appellant an answer.

On September 12, 2016, representatives from the Appellant, the Lehigh County Authority, EPA, and the Department met to discuss the Appellant's proposed plan to eliminate overflows. The Appellant also asserts that at the meeting, a Department employee stated that his understanding was that the Department regulations prohibited blending. This statement was later

[1] In *Iowa League of Cities v. Environmental Protection Agency*, the Court of Appeals for the Eighth Circuit addressed the EPA's rule on blending. The Court determined that the EPA failed to go through notice and comment as mandated by the Administrative Procedure Act and vacated the rule, which had been set forth in a letter, because it was "without observance of procedure required by law." *Iowa League of Cities*, 711 F.3d at 876. Additionally, the Court found that the EPA's blending rule "clearly exceed[ed] the EPA's statutory authority and little would be gained by postponing a decision on the merits." *Id*. at 877. The Court found that, while the EPA is authorized to administer more stringent "water quality related effluent limitations," the object of such limitations is the "discharges of pollutants from a point source." *Id*. The Eighth Circuit Court of Appeals also decided that EPA is not authorized to regulate the pollutant levels in a facility's internal waste stream and "insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority." *Id*. at 877-78.

repeated in a summary letter that EPA drafted and sent after the September 12, 2016 meeting. The September 30, 2016 letter from EPA includes the following sentence:

> "Regarding blending, PADEP explained that according to state regulation, all flows from a sanitary system need to receive biological treatment, and therefore blending would be inappropriate."

The Appellant appealed this explanatory statement, which the EPA letter attributed to the Department.

On January 31, 2017, the Department filed a Motion to Dismiss and a Motion to Stay Discovery Pending Disposition of the Department's Motion to Dismiss. In its Motion to Stay Discovery, the Department argued that Appellant's discovery was premised on the disputed contention that the Department made a final decision that is subject to review. It was the Department's position that it did not make a final decision subject to review and that it would be in the interest of judicial economy to address this dispute through the pending motion to dismiss rather than through discovery motions. The Department further contended that Appellant's discovery requests were burdensome because they went well beyond the alleged action at issue. The Department therefore requested that the Board stay discovery until the Board issued a ruling on the Department's pending Motion to Dismiss.

On February 8, 2017, the Appellant filed its Response in Opposition to the Department's Motion to Stay Discovery and argued that "it is well-settled that discovery should not be stayed pending a motion to dismiss for lack of jurisdiction when the discovery sought bears directly on fact-specific jurisdictional arguments raised in the motion to dismiss." Appellant's Response at 1. The Appellant contended that its discovery requests were aimed at addressing the fact-specific issues relevant to whether the Department had rendered an appealable action. The Appellant's position was that because the determination of whether a Department action is

appealable is highly fact-specific, the Appellant needed to be able to conduct discovery into the factual issues related to the jurisdictional issue raised by the Department.

In an Order dated March 9, 2017, the Board granted in part and denied in part the Department's Motion to Stay. All discovery that was not related to the jurisdictional issue raised by the Department in its Motion to Dismiss was stayed. However, the Board also ordered that all discovery that was related to the jurisdictional issue raised by the Department should be answered by March 22, 2017. Additionally, the Order directed that the Appellant file its Response to the Department's Motion to Dismiss no later than April 24, 2017 and that the Department file its Reply no later than May 9, 2017.

On April 4, 2017, Appellant filed a Motion to Compel Appellee Department of Environmental Protection's Response to Discovery Requests. In its Motion, Appellant argued that the Department failed to give a clear answer to Appellant's requests to ascertain the Department's position on blending. The Appellant also asserted that the Department's failure to produce documents due to alleged attorney-client privilege was improper, as attorney-client privilege did not apply to the documents the Appellant sought. The Board disagreed with the Appellant and denied the Motion to Compel.

The Appellant filed its Memorandum in Opposition to Department's Motion to Dismiss on May 24, 2017 in which it made four arguments: (1) that while its appeal is not limited to oral statements, oral statements are appealable, (2) the Department has issued an unequivocal blending prohibition, which is appealable, (3) the Board should determine that the Department has made a decision on blending in order to avoid an unnecessary waste of resources, and (4) the context of the sentence at issue in EPA's letter weighs heavily in favor of its appealability.

On June 7, 2017, the Department filed its Reply to Allentown's Response to Motion to Dismiss. In it, the Department made five arguments: (1) Appellant's appeal is an improper application for declaratory relief, (2) the wording of the challenged communication establishes that the communication is not a Department action, (3) the context of the challenged communication demonstrates that neither the Department's purpose nor intent was to establish a blending prohibition, (4) the Board cannot grant any relief in this appeal, and finally, (5) the Clean Streams Law defers to the Board's definition of "action."[2]

In our review of this appeal and the Department's Motion to Dismiss, we agree with the Department that this appeal should be dismissed. The letter containing the challenged sentence is not a Department letter. It is from EPA, and it confirms an oral statement made by a Department Program Manager at a prior meeting. The oral statement is not itself appealable under these facts. Even if it were a letter from the Department, the sentence in the letter under appeal is an interpretation of a certain Department regulation that is not appealable at this time. The challenged Department interpretation is applicable in the context of a Department permitting program and may be challenged after the Department makes a permit decision.

Standard of Review

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *West Buffalo Twp. v. DEP*, 2015 EHB 780, 781; *Brockley v. DEP*, 2015 EHB 198, 198-99; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see*

[2] In response to the Department's Reply, the Appellant requested and received permission to file a Surreply Brief to respond to the Department's argument that an action subject to appeal under 35 P.S. § 691.7(b) is the same as an action subject to appeal under 35 P.S. § 7514 and the Board's Rules.

also Hanover Twp. v. DEP, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 122-23, *aff'd*, *Consol Pa. Coal Co. LLC v. Dep't of Envtl Prot*., 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390. Here, even when viewed in the light most favorable to the Appellant, the appeal does not withstand the motion to dismiss.

Discussion

The facts of this case present an unusual set of circumstances to evaluate the issues raised by the Department's Motion to Dismiss and warrant some additional background discussion. Prior to addressing the merits of the parties' arguments, there are a few preliminary items that the Board should identify. First, there is an issue regarding the nature of the Department's action under appeal and the Board's jurisdiction to hear a challenge to a statement in a letter written by EPA. Normally, an appellant does not file an appeal with the Board from a letter written by EPA because the Board has jurisdiction to review Department actions. 35 P.S. § 7514. The Board has no jurisdiction over EPA's actions.

EPA sent the September 30, 2016 letter to the Appellant following a meeting between EPA, the Department, the Appellant, and the Lehigh County Authority on September 12, 2016. According to EPA, the meeting was held in response to the Appellant's August 3, 2016 letter "requesting feedback on the proposed Sewer Capacity Assurance Rehabilitation Program (SCARP)." In EPA's letter there is a single sentence which is the focus of Appellant's appeal:

> Regarding blending, PADEP explained that according to state regulation, all flows from a sanitary system need to receive biological treatment, and therefore blending would be

inappropriate.

According to EPA's letter, "PADEP" provided this explanation to the Appellant at the September 12, 2016 meeting in the context of discussions regarding the SCARP. The Appellant and the Department have different views on how to properly characterize the sentence in the letter that was drafted and sent after the September 12, 2016 meeting to discuss the SCARP.

The Appellant asserts that this sentence is written confirmation of a long-awaited answer to the blending question the Appellant raised more than three years before: Specifically whether blending is allowed to eliminate overflows and to comply with the three Administrative Orders that EPA earlier issued to the Appellant. This question was prompted by the Eighth Circuit Court of Appeals' decision in *Iowa League of Cities v. Environmental Protection Agency,* 711 F.3d 844 (8th Cir. 2013) in which the Court of Appeals vacated EPA's regulation that prohibited blending.

In describing the September 12, 2016 meeting the Appellant stated,

> For the majority of that meeting, most of the discussion from the Federal and State government was led by EPA. Suddenly when the discussion turned to the blending issue, DEP took the lead on that discussion. Mr. Bharat Patel, a DEP manager from the Northeast Regional Office, stated that construction of EQ tanks would be an acceptable approach. Ex. 1, Messenger Aff., at ¶ 23; Ex. 2, Chamberlain Aff., at ¶ 7; Ex. 3, Koplish Aff., at ¶ 9. Mr. Patel then unequivocally declared that, based upon a State regulation (*i.e.*, 25 Pa. Code § 92a.47), blending would not be allowed due to the fact that there would not be secondary treatment for all flows. *Id*. Each of the three attendees at that meeting representing the City walked out of that meeting firmly believing that the Department had told the City that it was prohibited from blending and that the City would need to find an alternative means of meeting the AO obligations – with DEP making it clear that the use of an EQ basin was its preferred approach.

Appellant's Memorandum at 3-4. The Appellant further asserts that the September 30, 2016 EPA letter is a "consensus letter" that the Department reviewed and approved before EPA sent it

to the Appellant. According to the Appellant, the Department agrees that the statements in the letter accurately reflects the Department's statements at the September 12, 2016 meeting. The letter confirmed the Appellant's understanding after the September 12, 2016 meeting that the Department "was prohibiting the City from blending." The Appellant believes the Department's "unequivocal" blending prohibition is appealable to the Board at this time.

The Department disagrees that it made any decision prohibiting "blending" by the City of Allentown. Paragraph 9 of Motion to Dismiss. The Department asserts that a Department employee made an oral statement during the September 12, 2016 meeting with the Appellant at EPA's offices concerning his interpretation of a particular Department regulation. Paragraph 8 of Motion to Dismiss. The Department's position is that the challenged sentence in EPA's September 30, 2016 letter is merely "EPA's subjective interpretation of the oral statements of a Department employee is not an action of the Department subject to Board jurisdiction." Department Memorandum at 5. In its Notice of Appeal, the Appellant references EPA's letter as written notice of the Department's action under appeal. Notice of Appeal, Paragraphs 12-16 of Attachment A.

When viewed in the light most favorable to the Appellant, *Brockley*, supra, the Appellant has challenged an oral statement of a Department Program Manager that implicates a particular Department regulation of concern to the Appellant as it prepared its SCARP. EPA subsequently provided written confirmation of the oral statement in its September 30, 2016 letter. EPA has also apparently undertaken a direct enforcement role under its independent enforcement authorities in an attempt to compel the Appellant to eliminate the SSO's that EPA identified in its Administrative Orders.

EPA's direct enforcement role against the Appellant complicates the situation because it is apparent that the Department also has an important permitting role to review and approve any proposed modifications to the Appellant's sewage treatment plant's design to correct the violation identified in EPA's Administrative Orders. To correct the violations, the Appellant must acquire a permit modification issued by the Department pursuant to Section 207 of the Clean Streams Law, 35 P.S. § 691.207, also known as a "Water Quality Management Permit" or a "Part II Permit" and may need a permit modification for its NPDES permit. To secure either a modified Part II Permit or a modified NPDES permit, the Appellant must comply with state Water Resources regulations at 25 Pa. Code Chapters 91-96.[3] The Appellant has particular interest in the Department's future application of 25 Pa. Code § 92a.47 to its not-yet-filed proposal to comply with the EPA-issued Administrative Orders.[4] The Appellant has both an EPA initiated enforcement action against it that it needs to resolve and a need to secure one or more modified permits from the Department for any changes to its sewage treatment plant's design necessary to eliminate the identified violations. To correct the violations that EPA identified, the Appellant has to satisfy both state and federal requirements of the Department and EPA. This regulatory framework explains why a letter from EPA plays such a prominent role in this appeal and why the Appellant is required to meet with and obtain approvals from both EPA and the Department. With this background information addressed, we turn now to the merits.

[3] The Department's water quality permitting program consists of several parts under the Department's regulations. *See* 25 Pa. Code Chapters 91-96. A person needs both an NPDES permit containing discharge limits for a particular permitted discharge and a Part II Permit authorizing the construction of a plant or facility designed to meet the applicable NPDES discharge limits. Both parts of the permitting program are implicated in this appeal. *See* 25 Pa. Code §§ 92a.1(b), 92a.47, 91.21; 35 P.S. § 691.707. The Appellant has an NPDES permit for its existing treatment plant discharges that expired in 2007 but it has been administratively extended. The Appellant also has an existing Part II Permit that will need to be modified to correct the violations identified by EPA in its Administrative Orders.

[4] Section 92a.47 is a particular regulation in Chapter 92a (National Pollutant Discharge Elimination System Permitting, Monitoring, and Compliance). 25 Pa. Code § 92a.47.

The Appellant asserts that its appeal is not just "an appeal of a stand-alone oral statement by a Department Program Manager. This is an appeal of the blending prohibition stated by Mr. Patel [the Department Program Manager] at the September 12, 2016 meeting and the follow-up confirmation of such prohibition in the September 30, 2016 letter." Appellant Memorandum at 8. The issue before the Board is whether this combination of communications, an oral statement of a Department Program Manager, and subsequent written confirmation of the oral statement in a letter from EPA, constitute a final action of the Department that the Appellant may appeal to the Board at this time.

An appellant may only appeal a final Department action. *Eric Ashley v. DEP*, EHB Docket No. 2017-020-L, Slip op. at 2; (Opinion and Order, June 9, 2017); 35 P.S. § 7514(c). An "action" is defined as "an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Additionally, a letter or other written communication, although not labeled an order, but which requires specific action on the part of a recipient, may possess the characteristics of an order. *Borough of Kutztown v. DEP*, 2001 EHB 1115; *202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10; *Medusa Aggregates v. DER*, 1995 EHB 414; *Martin v. DER*, 1987 EHB 612. *See also Borough of Edinboro v. DEP*, 2000 EHB 835; *Goetz v. DEP*, 2000 EHB 840 (inspection report); *Harriman Coal Corp. v. DEP*, 2000 EHB 1295.

As a general rule, the Board will consider the following seven factors in determining whether a Department letter is an action for the purposes of an appeal: (1) the wording of the letter, (2) the substance, meaning, and purpose of the letter, (3) practical impact, (4) regulatory and statutory context, (5) apparent finality of the letter, (6) the relief the Board may offer, and (7)

any other indication of the letter's impact on the recipient's personal or property rights. *Borough of Kutztown v. DEP*, 2001 EHB 1115. *See also Chesapeake Appalachia v. DEP*, 2013 EHB 447, *aff'd*, 89 A.3d 724 (Pa. Cmwlth. 2014); *Eljen Corp. v. DEP*, 2005 EHB 918; *Beaver v. DEP*, 2002 EHB 666. Here, we are asked to examine a prior oral statement made by a Department Program Manager as well as written confirmation of the oral statement in a letter from EPA.

In its Motion to Dismiss, the Department makes two primary arguments. First, the Department argues that a third party's written characterization of a Department employee's oral statement is not a Department action subject to the Board's jurisdiction. Second, the Department argues that an advisory statement of a Department employee is not a final decision of the Department subject to the Board's jurisdiction. The Board finds merit in both arguments.

To address the Department's first argument, the Board needs to evaluate the nature and effect of both the September 12, 2016 oral statement by the Department Program Manager[5] and the sentence confirming that statement in the September 30, 2016 letter from EPA. The Parties describe the nature of the oral statements from the Department at the September 12, 2016 meeting in different ways. The Appellant argues that Mr. Bharat Patel, a DEP manager from the Northeast Regional Office, "then unequivocally declared that based upon a State regulation, (i.e. 25 Pa. Code § 92a.47), blending would not be allowed due to the fact that there would not be secondary treatment for all flows." The Appellant's attendees at the meeting believed that the Department had told the Appellant that it was prohibited from blending. The Department disagrees that its Program Manager announced a prohibition at the September 12, 2016 meeting. According to the Department, the oral statements were merely the Department's identification of relevant regulatory requirements that may be implicated when the Appellant eventually submits

[5] When viewed in the light most favorable to the Appellant, the Board accepts the Appellant's view that the Department employee who made the statement at the September 12, 2016 meeting was Mr. Patel, a Department Program Manager.

an application for a permit modification to the Department for review. The Department asserts that these statements at the meeting merely presented the Department's interpretation of law.

The Department points out that the statements that the Appellant appeals are those made orally by a Department Program Manager during the September 12, 2016 meeting that EPA held to discuss an EPA enforcement action against Appellant. The Department correctly recognizes that oral statements of Department employees are generally not appealable actions subject to the Board's jurisdiction. *JEK Construction Company, Inc. v. DER*, 1990 EHB 535. There is an exception to this, which is that oral directives that meet the definition of an "action" are appealable. *Medusa Aggregates Company v. DER*, 1995 EHB 414, 421-22. For the reasons set forth below, the Board does not find that the Department's oral statement here meets the definition of "action" as defined by the Board's Rules.

The Appellant relies upon *Medusa* for support that the statement made by the Department's employee during the September 12, 2016 meeting constitutes an appealable action. We do not find this to be a compelling argument. In *Medusa*, the appellant argued that a statement made by a Department inspector should constitute an appealable action. *Medusa*, 1995 EHB at 418, 421. The appellant asserted that the Department inspector made statements advising the appellant not to conduct any mining activities within 300 feet of the Fisher House. *Id*. at 423. However, no evidence existed showing the exact content of the inspector's statements, which precluded the Board from engaging in any meaningful analysis. *Id*. While the Board acknowledged that oral statements might be appealable, they would have to conform to the established definition of "action" in order to be appealed. *Id*. at 422. In *Medusa*, the Board determined that the appellant failed to provide sufficient evidence regarding the nature of the Department inspector's statements. *Id*. at 423. Therefore, the Board could not rule on whether the

content of the statement amounted to an appealable action. *Id*. Here, we have EPA written confirmation of the Department Program Manager's statement and we think that it is much more like those statements addressed in *JEK Construction Co., Inc. v. DER*, 1990 EHB 535.

The oral statement at issue in *JEK* allegedly advised the appellant that the Department would not approve a landfill permit where certain conditions existed on the proposed site. *Id*. at 538. Similar to this appeal, at the time that the statement was made, *JEK* had not applied for a permit. *Id*. at 535, 542. The Board found that this fact made the appellant's position – that oral representations are appealable – much more difficult. *Id*. at 544. It is the Board's position that an "expression of an opinion on [the Department's] behalf while a permit application is still under review is not appealable because that opinion could change and the [Department] final decision will be reflected in the permit as issued or denied." *Id*.; *see Snyder Township Residents For Adequate Water Supplies v. DER*, 1984 EHB 842.

In *JEK*, the Department alerted the appellant to problems that existed on the appellant's site and confirmed these problems in a letter. The letter, which confirmed the problems, stated "[the Department] will make a final determination only after a technical review of a complete application." *Id*. at 538. The situation here is very similar. As in *JEK*, a Department employee made an oral statement to the Appellant which was then followed up by a letter (though here, the letter is one step further removed as it came from EPA, not the Department). The Board stated in *JEK*, "[W]e are not charged with the duty of reviewing all opinions expressed by [Department] staff members in the course of administration of all of the environmental statutes." *Id*. at 545. We find that the oral statement challenged in this appeal is an interpretation of a regulation and it is

not an order or directive to the Appellant. Therefore, the oral statement is not a final appealable action.[6]

The Department also asserts that the appealed written confirmation of its prior oral statement appears in a September 30, 2016 letter from the EPA. More specifically, the Department posits that EPA's letter made no representation that it had been sent out on behalf of the Department. Therefore, the Department argues, the Appellant is not challenging a written decision of the Department. Rather, Appellant seeks to challenge the EPA's characterization of a Department employee's prior oral statements. The Department concludes that a letter from EPA is not an action of the Department subject to the Board's jurisdiction.

The Appellant argues that EPA's September 30, 2016 letter is, in practical effect, a Department letter, and it is allowed to challenge the statement in the letter attributed to the Department Program Manager which was made at the September 12, 2016 meeting at EPA's office. The Board disagrees. The letter is clearly from EPA, and the Department's review of the draft of EPA's letter before it was sent to the Appellant does not change its fundamental nature. It is a letter from EPA following a meeting with the Department, EPA, and the Appellant. The letter is not a Department letter in which the Department directed the Appellant to take any action. The Board has no jurisdiction over a challenge to a statement in an EPA letter confirming something a Department Program Manager said at a prior meeting.

[6] Although the Department did not raise a timeliness of appeal argument, the Board notes that the appeal was filed on October 27, 2016 which is more than thirty days from the date of the September 12, 2016 meeting with the Department at EPA's offices. 25 Pa. Code § 1021.52. The Department made the oral statement under appeal at the September 12, 2016 meeting. The thirty day appeal period is jurisdictional *Rostosky v. Dep't of Envtl. Res*., 364 A.2d 761 (Pa. Cmwlth. 1976); *Ametek, Inc. v. DEP*, 2014 EHB 65. The Board has authority to raise sura sponte questions concerning its jurisdiction to hear a matter, such as timeliness of an appeal. *Raykovich v. DEP*, 2014 EHB 287. Appellant's appeal of the oral statement at the September 12, 2016 meeting is not timely, and the Board lacks jurisdiction over this Department's communication as a stand-alone basis of appeal. The Appellant, however, asks the Board to hear its challenge to the Department's oral statement in connection with its challenge to EPA's letter dated September 30, 2016.

The Appellant asserts that the context of EPA's letter and the Department's involvement in reviewing drafts of it before it was sent supports its claim that the EPA's letter constitutes confirmation of a final Department action that is subject to the Board's jurisdiction. The Appellant has for years sought an answer from EPA and the Department regarding the availability of blending to help solve its compliance problems at the center of EPA's ongoing enforcement actions against the Appellant. The Department's oral statement at the September 12, 2016 meeting and EPA's confirming September 30, 2016 letter provide a clear answer to Appellant's question concerning the availability of blending under Section 92a.47. The Board does not agree that the letter's context and the Department's involvement support the assertion that it is a final Department action. However, the Board rejects the Department's assertion that the sentence in EPA's letter is merely a subjective characterization of an oral statement of one of its employees. The Department's review of the draft letter, before it was finalized and sent, eliminates any concerns about the accuracy of the Department's oral statement described in EPA's letter. When viewed in the light most favorable to the Appellant, the description of the Department's statement in EPA's letter is more than just EPA's subjective characterization of something EPA heard at an earlier meeting. The sentence in EPA's letter is an accurate description of a Department Program Manager's statement regarding the Department's interpretation of a Department regulation at 25 Pa. Code § 92a.47.

The Board agrees that the context of the Appellant's longstanding request for an answer regarding blending and the Department's role in reviewing the draft of EPA's letter before it was sent are facts the Board should consider. These facts do not, however, change the nature of the communications under appeal. The statement of the Department Program Manager and the confirming sentence in EPA's follow-up letter merely set forth the Department's interpretation of

a permitting regulation that is not subject to appeal at this preliminary stage of the permitting process.

The Appellant mistakenly asserts that the purpose of the Department's oral statement and EPA's written communication was not to make helpful suggestions or provide an interpretation of law. Rather, according to the Appellant, the purpose was to require the City to put in an EQ basin rather than pursue a blending solution. Appellant Memorandum at 11. The communications did not require or authorize such modifications of Appellant's treatment plant. The letter did not authorize or direct the Appellant to make any changes to its treatment plant until it secured a permit modification which could not be approved until after the Appellant filed an application for a permit modification with the Department, and the Department approved the proposed modification. The Department's communication did not order or direct the Appellant to take an action, but it merely informed the Appellants of applicable regulatory requirements that the Appellant needed to consider when preparing its proposal to correct violations identified in EPA's orders and related permit modification application.[7]

Even if the appealed statement in EPA's letter were present in a Department letter, we would nonetheless find that we lack jurisdiction because the statement at issue is one that reflects the Department's interpretation of its own regulations. Appellant argues that the Department Program Manager's statements were directives that had an effect on Appellant's rights and are therefore subject to appeal and to the Board's jurisdiction. Appellant's Memorandum in Opposition at 7. Appellant further argues that the Department Program Manager's statement was not a standalone oral statement. It was a blending prohibition stated by the Department's

[7] The Department's communication lacked the force of a Department order or mandatory direction. The Appellant's description belies is mistaken assertion: "with DEP making it clear that the use of an EQ basin was its *preferred* approach. Appellant Memorandum at 4 (emphasis added). A preferred approach is not a mandated approach that is required.

Program Manager at the September 12, 2016 meeting and further confirmed in EPA's September 30, 2016 letter. *Id*. at 8. The Appellant then argues that the Department's "unequivocal" blending prohibitions are appealable and that in this matter, an unequivocal blending prohibition appeared in the September 30, 2016 letter.

The Appellant draws the Board's attention to a line of cases that recognize Department letters as appealable actions. The Board agrees that some Department letters can be subject to appeal. However, again the letter in this matter is not a Department letter. It is a letter from EPA. Appellant never directly acknowledges this critical distinction. Instead, the Appellant asserts that given the series of Department communications leading up to the September 30, 2016 EPA letter, and the contents of the letter itself, the Department Program Manager's statement at the September 12, 2016 meeting had the "practical effect of ordering the City to forego blending and put in an EQ basin." *Id*. at 9. Specifically, the Appellant avers as follows: (1) Appellant asked the Department over a period of three years whether blending is allowed; (2) the Department delayed giving a response before it finally determined that blending was illegal; (3) an Administrative Order compliance date of December 31, 2017 was approaching; and (4) the Department told Appellant that it wanted Appellant to install EQ basins while sending the "appropriate message" regarding blending. *Id*. at 10-11. Thus, it is the Appellant's position that the purpose of the oral and written communication from the Department and EPA "was not to make helpful suggestions or provide an interpretation of the laws" but instead was to require the installation of an EQ basin rather than pursue blending. *Id*. at 11.

The Appellant cites *Beaver Valley Slag, Inc. v. DEP*, 2015 EHB 458, in support of its position that letters from the Department may constitute appealable actions. Appellant's Memorandum in Opposition at 8. The Board agrees that *Beaver Slag* supports the proposition

that letters *from the Department* may be appealable. The letter appealed in *Beaver Slag* was not from a third party such as EPA. Nor did it describe the statements of a Department employee. The letter in *Beaver Slag* took two clear actions. First, it rejected four proposals submitted by the environmental consulting service retained by the appellant. *Beaver Slag*, 2015 EHB at 465. Second, the letter directed the appellant to submit a plan within 60 days that detailed how the appellant intended to comply with its permit obligations. *Id*. The Board found that the letter "not only directed the [a]ppellants to *take an action* but also *imposed an obligation* upon the [a]ppellants to do so, thus creating a final action." *Id*. That is not analogous to this appeal. EPA's September 30, 2016 letter neither directed action nor imposed an obligation. It simply described an oral statement that the Department made at an earlier meeting.

As previously stated, this is an appeal of an EPA letter containing a description of a Department Program Manager's oral statement, not of a chain of interactions occurring between Appellant and the Department. Appellant argues that "given the coercive regulatory context" of the EPA letter, it had more significant impacts than requiring new treatment options be submitted. Appellant's Memorandum in Opposition at 9. Appellant insists that the letter "had the practical effect of ordering the City to forego blending and put in an EQ basin."[8] *Id*. We disagree. As previously mentioned, the EPA letter included the following explanatory sentence: "Regarding blending, PADEP explained that according to state regulation, all flows from a sanitary system need to receive biological treatment, and therefore blending would be inappropriate." Bd. Ex. 1 at 9. Nowhere in the letter is there either a direction to take action or an imposed obligation as each appeared in *Beaver Slag*. The Appellant assumes a direction from

[8] Here, the Appellant cited *Borough of Edinboro v. DEP*, 2000 EHB 835, and *Beaver v. DEP*, 2002 EHB 666, to support its position that the Department's written expectation that a municipality will prohibit a certain action (in *Borough of Edinboro* that action was making new connections) is tantamount to the Department effectively requiring the municipality to prohibit that action. However, neither case dealt with a communication that merely provided the Department's interpretation of a permitting regulation.

the Department's interpretation of its regulation, but such direction is not explicit or even implied in EPA's letter. Rather, the EPA letter confirming the Department's prior oral statement merely communicates a Department explanation of a relevant Pennsylvania regulation of interest to the Appellant.

The Appellant also relies on *Borough of Kutztown v. DEP*, 2001 EHB 1115, for its point that EPA's letter directed it to take action. However, the language of the *Kutztown* letter stands in stark contrast to that of EPA's letter. In relevant part, the *Kutztown* letter reads:

> It will be necessary for the permittee to comply with Section 94.22 of Chapter 94 as follows: Submit a corrective action plan (CAP) to the regional office within 90 days setting forth steps to be taken by the permittee to prevent the projected overload. . . . Limit new connections to and the extensions of the sewerage facilities based upon remaining available capacity under a plan submitted in accordance with this section."

Borough of Kutztown, 2001 EHB at 1115-16. The Appellant accurately characterizes the Board's position in *Kutztown* – that, in its letter, the Department did not intend to make helpful suggestions or provide an interpretation of the law, but rather intended to require Kutztown to "begin planning immediately, and do so in a specific manner." *Id*. at 1122. The letter in *Kutztown* also limited new connections. Again, the directives are explicit in the *Kutztown* letter and no such directive or imposed obligation exists here.

The Appellant tries to address this issue by citing *Medusa Aggregates v. DER*, 1995 EHB 414, a case in which the Board looked at the implication of a Department letter and found that it constituted an appealable action. In *Medusa*, the Department argued that the letter in question was not appealable because it did not affect the appellant's rights or obligations but rather,

> [M]erely provided Medusa . . . with various options as follows: discontinue mining within the 300 foot zone around the Fisher House, obtain a new waiver from [the property owner] either voluntarily or through the court, continue mining within the barrier and face a possible enforcement action by DER, or seek injunctive declaratory relief through the Commonwealth Court.

Medusa, 1995 EHB at 418. The letter itself concluded as follows,

> You may choose to provide a written release from the current owner consenting to mining within the 300 foot barrier or try to revise your maps and plans to limit any further activity within the barrier to reclamation only. Please inform us of your plans at your earliest possible convenience. No further mining activities are presently authorized within the barrier.

Id. at 416. The Board in *Medusa* disagreed with the Department's characterization of its letter because the implication of its final sentence was that Medusa must refrain from mining within the 300 foot barrier around the Fisher House. *Id*. at 419. The Board determined that "the language of DER's letter [was] not conditional; it clearly state[d] that Medusa . . . [was] no longer authorized to mine[. . .]." *Id*. at 421. The Board further determined that the letter was not intended to simply be notice to Medusa of its options. *Id*. at 419. "The purpose of the letter was to prohibit further mining." *Id*. Again, the example presented by *Medusa* is not analogous to the current appeal.

Unlike the Department's letter in *Medusa*, there is no language in EPA's letter, which merely confirms the Department's prior oral explanation, barring the Appellant from taking a certain action. All that exists is a written account of the Department's interpretation of a Pennsylvania regulation. Further, the letter was written as a summary of the events that transpired in an earlier meeting. Its purpose was not to impose a blending prohibition. In *Medusa*, the appellants were told not to mine and that if they did, they would face consequences as outlined by the Department. The final sentence of the letter implicitly directed the appellants to cease mining activity by stating that mining activity was now prohibited. Here, the Appellant has been given an interpretation of a regulation that was discussed during the earlier meeting and nothing more.

The Department makes one additional argument in support of the Motion to Dismiss that the Board should address. The Department asserts that the Appellant discussed "potentially modifying the sewage treatment plant's design to allow a portion of the sewage to bypass part of the treatment train under certain circumstances ("blending")." Department Brief at 7. To modify its treatment plant's design, the Appellant would need to submit a complete permit application for a Part II Permit to the Department for review and approval. According to the Department, Appellant has not yet submitted a permit application. Until the Appellant submits a complete permit modification application and the Department completes its review, the Department asserts that there is no final action to appeal to the Board. *JEK Construction Company, Inc. v. DEP*, 1990 EHB at 544. According to the Department, the proper time to challenge a permit action is after the Department acts on the yet-to-be submitted permit modification application.

The Appellant makes several arguments in response to the Department position. First, the Appellant goes to great lengths to describe the Department's oral statements as an unequivocal prohibition against blending. Appellant Memorandum at 8-11. The Appellant also asserts that allowing the appeal avoids unnecessarily wasting resources. Appellant Memorandum at 12-13. Without an immediate appeal of the Department's position, the communities subject to EPA's Administrative Order remain in ongoing non-compliance that may jeopardize the Appellant's ability to meet the deadline in the orders. Finally, the Appellant indicates that it could save $37 million compared to the option suggested by the Department at the September 12, 2016 meeting. There are also additional operational considerations that favor the use of blending that the Appellant wants to use. Overall, the Appellant views these considerations as very significant impacts that support its desire to appeal the Department's communications about blending now.

The Appellant argues it may challenge the Department's position on the availability of blending under 25 Pa. Code § 92a.47 now without applying for a permit modification because the communications amount to a prohibition or direction and there are significant impacts on or benefits for the Appellant if the Board allows the challenge to the Department's position now.

The Appellant wants to challenge the Department's legal interpretation of Section 92a.47 as expressed by the Department's Program Manager during the September 12, 2016 meeting and later confirmed in EPA's September 30, 2016 letter. More to the point, the Appellant wishes to challenge the Department's position now before it submits an application for a permit modification to avoid the time and expense of preparing an application and the delay while it waits for a Department decision. The problem for the Appellant is that communications, such as those in this appeal, that merely state the Department's views on the requirements of the law are not subject to appeal. *Sayreville Seaport Associates Acquisition Co. v. Dep't of Envtl. Prot.* 60 A.3d 867 (Pa. Cmwlth. 2012). In *Sayreville*, the Pennsylvania Commonwealth Court stated:

> Here, the Department's July and December letters do not grant or deny a pending application or permit, and they do not direct Sayreville to take any action nor impose any obligations on the company. Rather, the letters are best characterized as advisory opinions, expressing the Department's understanding of Pennsylvania law. Indeed, as the December letter demonstrates, the Department was not even in possession of all relevant facts when its initial letter issued. (*See* letter of December 23, 2010, stating, "We have recently learned that Sayreville's contaminated soil is licensed in New Jersey…").
>
> While the Department's position may not actually change from that expressed above, as of yet, neither Sayreville nor HCP have followed the formal regulatory process required to seek approval to beneficially use the soil and, therefore, the Department has not yet adversely affected Sayreville's personal or property rights, privileges, duties or obligations. Accordingly, those letters do not constitute appealable actions, triggering the Board's jurisdiction; the appeals should have been quashed.

Id. At 872. The Appellant in this appeal, like the Appellant in *Sayreville* is not authorized to challenge the Department's position regarding Section 92a.47 until the Department makes a decision on the Appellant's permit application that has not yet been filed.[9]

Separate Basis for Board's Jurisdiction under Clean Streams Law

The Appellant raises one additional argument regarding the Board's jurisdiction to consider the challenge to the Department's oral declaration regarding 25 Pa. Code § 92a.47. The Appellant argues that it has two independent jurisdictional bases to challenge the Department's position under the Environmental Hearing Board Act ("EHBA"), 35 P.S. § 7511-7516 and separately under the Clean Streams Law, 35 P.S. § 691.7(a). If the Board agrees with the Department that the Board lacks authority under Section 7514 of the EHBA and the Board's Rules of Practice and Procedure at 25 Pa. Code 1021.2, the Appellant asserts that Clean Streams Law provides a broader basis for jurisdiction than the EHBA because the Clean Streams Law use of the term "action" is not limited by the regulatory definition of the term "action" at 25 Pa. Code § 1021.2. The Appellant asserts that this provides the Board with broader jurisdiction than that provided under the EHBA, and this broader jurisdiction extends to its challenge to the Department's interpretation of Section 92a.47.

The Department disagrees with the Appellant's position that the Clean Streams Law provides a broader independent basis for Board jurisdiction than the EHBA. The Department asserts that "the Clean Streams Law defers to the Board's regulations," 35 P.S. § 691.7(b), *citing Randy J. Spencer v. DEP*, 2008 EHB 573, 574. Under the Department's view, the type of "action" appealable to the Board under Section 7(b) of the Clean Streams Law is the same type

[9] The Appellant is in effect seeking declaratory relief from the Board regarding the Department's interpretation of Section 92a.47. It is well settled that the Board is not empowered to provide appellants with declaratory relief. *Constanza v. Dep't. of Envtl. Res*., 606 A.2a 645 (Pa. Cmwlth. 1992) cited in *Sayreville* 60 A.3d at 872.

of "action" under the EHBA and both statutes adhere to the regulatory definition of the term "action" at 25 Pa. Code § 1021.2.

The Appellant sought and received permission from the Board to file a Surreply Brief to the Department's Reply Brief. In its Surreply Brief, the Appellant asserted that the Board's prior decision in *Spencer* is distinguishable. According to the Appellant, the Board's Rules limiting the time for the taking appeals are applicable to appeals of "actions" under Section 7(b) of the Clean Streams Laws, but the regulatory definition of the term "action" is not applicable. Appellant Surreply Brief at 1-2. The Appellant believes the Board is not bound to follow its regulatory definition of the term "action" at 25 Pa. Code § 1021.2 in an appeal of an "action" under the Clean Streams Law. The Clean Streams Law provides a broader basis for jurisdiction in this appeal to consider the Department's oral statement later confirmed by EPA in a letter.

The Board disagrees with the Appellant's view that the Clean Streams Law provides the Board with the jurisdiction to consider the appeal even if the EHBA and the Board's Rules do not for several reasons. First, the Appellant's argument is premised upon an interpretation that the term "action" in Section 7(b) of the Clean Streams Law is different than the use of the term in the EHBA and the Board's Rules at 25 Pa. Code § 1021.2. There is no authority for such dueling interpretations of the term "action." There is nothing in the Clean Streams Law or the Board's case law to support such a conclusion. Absent support in the Clean Streams Law for such an inconsistent practice or procedure, Section 1021.19(a)-(b) provide that Chapter 1021 governs practice and procedure before the Board. 25 Pa. Code § 1021.19(a)-(b). In *Spencer*, the Board concluded:

> Neither statute at issue here provides a different time period: the Clean Streams Law defers to the Board's regulations, 35 P.S. § 691.7(b) and the Dam Safety and Encroachments Act provides for a similar 30 day appeal period. 32 P.S. § 693.24(a).

While the Appellant is correct that the Board in *Spencer* addressed a timeliness issue, the rule in *Spencer* is equally applicable to address the Appellant's claim that the Clean Steams Law defines the term "action" more broadly than the EHBA and the Board's Rules. The Clean Streams Law does not contain a different or inconsistent definition of the term "action," and therefore the Board will defer to the Board's regulations in Chapter 1021 as it did in *Spencer*.

Even if the Clean Streams Law contained a definition of the term "action" that is different than or inconsistent with the definition in the EHBA and the Board's Rules, the Board would not apply this inconsistent definition in this appeal because of the General Repeals in Section 8 of the Act of January 1, 1988 (P.L. 530 No. 94) which is codified at 35 P.S. §§ 7511-7516 and known and cited as the EHBA. Section 8(b) of Act 94, which is not codified, contains the following general repealer:

b) General – all acts and parts of acts are repealed insofar as they are inconsistent with this act.

Section 8(b) of the Act of January 1, 1988 (P.L. 530 No. 94). If the Clean Streams Law had an inconsistent definition of the term "action," Section 8(b) repealed this inconsistent part of the Clean Streams Law.[10]

Additionally, the Appellant proposes an unworkable and confusing jurisdictional framework in which the Board's jurisdiction over Department actions varies from statute to statute. Most Department regulatory programs rely upon the substantive authority of several enabling statutes thereby further complicating the jurisdictional framework of the Board. The Board needs a consistent jurisdictional framework that the EHBA and the Board's Rules provides.

[10] The Board does not believe the Clean Streams Law contains an inconsistent definition of the term "action" triggering application of the general repealer language in Section 8(b).

Finally, the Board rejects the Appellant's position that the Board has jurisdiction over oral statements of a Department Program Manager that are later confirmed in a letter from EPA that merely provide the Appellant with the Department's interpretation of a Department regulation that it will apply in the future after the Appellant files an application to modify an existing permit. For multiple reasons set forth in this opinion, the Board declines to rely upon the Clean Streams Law as an independent basis for jurisdiction over such oral declarations.

Conclusion

The Board grants the Department's Motion to Dismiss because the statement that the Appellant appeals is in a letter sent by EPA in response to a meeting held at EPA, at which the Department was present. The EPA letter is not a Department letter and the Board therefore lacks jurisdiction over it and its contents. Further, even if the letter had originated from the Department, the Board finds that the statement contained therein is no more than an interpretation by a Department employee of the Department's regulations. The oral statement of the Department Program Manager is likewise not appealable at this time. The oral statement referenced in EPA's letter is not an order, directive, or prohibition. It is merely the Department's regulatory interpretation, which is not appealable.

The Appellant wants to challenge the Department's interpretation of Section 92a.47 without filing an application for a permit modification and allowing the Department to take final action on that application. The Board recognizes that the Appellant believes that the Department's interpretation imposes substantial burdens on the Appellant that it wishes to avoid. One of the burdens is the cost and effort to prepare an application for a permit modification that the Appellant is certain the Department will disapprove consistent with its interpretation of Section 92a.47. Appellant's appeal of the oral statement uttered by the Department Program

Manager and confirmed in a letter from EPA attempts to avoid the time, expense, and effort associated with preparing and filing an application for a permit modification. The Board, however, has no jurisdiction over these communications, and assuming that the permit process plays out in the manner anticipated by the Appellant, the Appellant will have to follow the Department's applicable permitting procedures if it wants to file an appeal with the Board challenging the Department's interpretation of Section 92a.47.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF ALLENTOWN	:	
	:	
v.	:	**EHB Docket No. 2016-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of September, 2017, it is hereby ordered that the Department's Motion to Dismiss is **GRANTED** and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 1, 2017

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

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

For Appellant:
Frances A. Fruhwirth, Esquire
Gary B. Cohen, Esquire
John C. Hall, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RUSSELL AND PAULINE HUMMEL	:	
	:	
v.	:	**EHB Docket No. 2015-172-M**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KING COAL SALES, INC., Permittee	:	**Issued: September 1, 2017**

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

By Richard P. Mather, Sr., Judge

Synopsis

The Pennsylvania Environmental Hearing Board dismisses the appeal filed by Mr. and Mrs. Russell and Pauline Hummel (the "Hummels" or the "Appellants") challenging the approval of the Department's Stage II Bond Release granted to King Coal Sales, Inc. ("King Coal" or "Permittee") for a portion of its Surface Coal Mining Permit No. 17050108 ("King Coal SMP") which is also known as the Knight Operation. The Appellants, who have the burden of proof in this appeal, have not demonstrated that the southeastern 5.6 acre portion of the King Coal SMP that is on property owned by the Appellants was not eligible for Stage II Bond Release.

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 §§ 1396.1-1396.19a ("Surface Mining Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams

Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

2. Appellants Russell and Pauline Hummel are individuals who reside at 118 Clearfield Street, Wallaceton, Pennsylvania.

3. King Coal is a Pennsylvania corporation that is engaged in the business of mining coal by the surface method in Pennsylvania, with an office address of 602 North Centre Street, Philipsburg, Pennsylvania.

4. In 2007, the Department issued SMP No. 17050108 to King Coal, authorizing surface coal mining on 91.2 acres of land known as the Knight Operation located in Graham and Morris Townships, Clearfield County. (Notes of Transcript, ("N.T.") at 27; C.W. Ex. 5.)

5. The Hummels own 11 acres of land located within the footprint of the Knight Operation SMP. (N.T. at 23; C.W. Ex. 4; C.W. Ex. 5).

6. The Hummels signed a Lease Agreement with King Coal in 2005 for the purpose of surface mining on their property. (N.T. at 148).

7. Approximately 70 acres of the 91 acre Knight Operation was designated as forestland with all of the Hummels' 11 acres consisting of forestland. (N.T. at 27; Exhibit **C-5)**.

8. Hummels had the timber removed from the property in or after 2005, in anticipation of the mining operation. (N.T. at 151-153).

9. The pre-mining and post-mining land use of the Hummels' land was "forestland." (N.T. at 24-25. Exhibit **C-4**).

10. Module 20.2 (a) [sic] of the mining permit provides that the Permittee consulted with the land owners prior to the post-mining activities to see that their land uses were consistent with the owners' plans. (N.T. at 29-30).

11. Topsoils from the lands in the permit area were stored on the site, were not used to fill the surface mining pit, and were spread on the mined land following restoration of approximate original contour. (N.T. at 32-33).

12. Eric Oliver ("Mr. Oliver") testified that he inspected the Hummel lands 3-4 times for purposes of determining satisfaction of the Department's regulatory requirements for Stage II Bond release on a portion of Hummels' land. (N.T. at 34). Trees and other vegetative cover were planted on the Hummel lands in 2012. (N.T. at 47). Russell Hummel testified that he removed 18 rows of trees, and intends to remove all of the rest of the trees. (N.T. at 157-158).

13. The Appellants were approached by John Murgas ("Mr. Murgas"), an employee of King Coal in 2005 about leasing their 11 acre property for strip mining. (N.T. at 141).

14. The Appellants discussed their post-mining plans for the property with Mr. Murgas. The Appellants told Mr. Murgas that they did not want trees planted on their reclaimed property. The Appellants planned to sell lots to pay for college tuition for their grandchildren. (N.T. at 141).

15. The reclamation on the Appellants' property is different than the reclamation on the adjacent piece of property, now owned by King Coal. (N.T. at 143).

16. The Hummels were living in Lewistown, Pennsylvania from July 2005 until August 2015 and had limited access to information about their property leased to King Coal. The Hummels moved to Lewistown for medical reasons related to access to medical treatment. (N.T. at 142).

17. Mr. Oliver is a surface mine conservation inspector employed by the Department. (N.T. at 15).

18. In addition to his degree in environmental sciences and training received while employed by the Department, Mr. Oliver has 25 years of work experience in the coal mining industry, both in the private and public sectors. (N.T. at 17).

19. Mr. Oliver testified as both a fact and expert witness for the Department. (N.T. at 21-22, 33-34).

20. Steven Starner ("Mr. Starner") is a surface mine conservation inspector supervisor who has been employed by the Department in that role for 29 years. (N.T. at 65).

21. David Bisko, P.G. ("Mr. Bisko") is the Chief of Permitting and Technical Services. He has been employed by the Department for 31 years. (N.T. at 75).

22. Mr. Bisko has 30 plus years of work experience in the coal mining industry, a degree in geosciences, and certification as a Professional Geologist. (N.T. at 75).

23. Mr. Bisko testified as both a fact and expert witness for the Department. (N.T. at 77).

24. The Hummel property was forestland prior to mining by King Coal. (N.T. at 24, 25, 27; C.W. Ex. 4, C.W. Ex. 6).

25. The Reclamation Plan in the SMP for the Knight Operation required the post-mining land to be forestland for the Hummel property. (N.T. at 24, 25, 27; C.W. Ex. 4, C.W. Ex. 7).

26. King Coal applied for Stage I Bond Release in 2010, and the mine site was approved for Stage I Bond Release in 2011. (N.T. at 57).

27. At the time of Stage I Bond Release, the Department concluded that the Hummel's 11 acres met the pre-mining approximate original contour ("AOC") of the land, and it

was determined that the site blended with the surrounding lands, as required by 25 Pa. Code § 174(a). (N.T. at 88).

28. The Department considered the Hummel's ground swell complaint at the Stage II Bond Release informal conference on August 10, 2015 and agreed to conduct a study to reaffirm the findings that the site met AOC. (N.T. at 87-88; C.W. Ex. 29).

29. The contouring that occurred as part of the Stage I reclamation met the AOC and did not deviate significantly from pre-mining to post-mining. (N.T. at 88).

30. The Hummels also objected to Stage II Bond Release because sedimentation ponds were installed on their property, and the area is not fully vegetated. (*See* Notice of Appeal, and N.T. at 94-97).

31. During mining, the southeastern portion of the Hummel parcel contained sedimentation ponds. (N.T. at 96, 97; C.W. Ex. 5).

32. Following the cessation of mining and a storm event, the Department required King Coal to install a sedimentation pond in the southeastern part of the Hummel property, identified as SB-E on the Operations Map. (N.T. at 95-97; C.W. Ex. 5).

33. SB-E was removed several years before King Coal applied for Stage II Bond Release. (N.T. at 96, 97; C.W. Ex. 5).

34. The area that contained SB-E was approved for Stage I Bond Release, but is not fully reclaimed and is therefore not eligible for Stage II Bond Release. (N.T. at 97-98; C.W. Ex. 5).

35. In 2011, King Coal applied for Stage II Bond Release for the Knight Operation. (N.T. at 66).

36. King Coal withdrew its Stage II Bond Release application shortly thereafter due to degradation at a water monitoring point on the Knight Operation. (N.T. at 67).

37. On May 22, 2015, the Department received King Coal's second application for Stage II Bond Release on 31 acres of its Knight Operation. (C.W. Exs. 5, 29).

38. To meet the requirements for Stage II Bond Release, the applicant must satisfy the requirements of 25 Pa. Code § 86.174(b). (N.T. at 18-19).

39. Specifically, the applicant must demonstrate that topsoil was replaced in accordance with the approved reclamation plan, vegetation has been established and covers at least 70 percent of the permit area, and that the post-mining land use has been achieved. (N.T. at 18-19).

40. The Knight Operation SMP designated the post-mining land use for the Hummels' property to be forestland. (N.T. at 25, 27; C.W. Ex. 4).

41. Only 5.4 acres of the Hummel parcel are subject to the Stage II Bond Release. (N.T. at 34-35; C.W. Ex. 5).

42. On June 4, 2015, Mr. Oliver conducted a routine inspection in response to the application for Stage II Bond Release. (N.T. at 35; C.W. Ex. 22).

43. The Hummels had contacted Mr. Oliver regarding concerns they had about the reclamation of their property. Mr. Oliver invited the Hummels to attend the June 4th inspection. (N.T. at 36; C.W. Ex. 22).

44. On June 15, 2015, the Hummels filed written objections to King Coal's application for Stage II Bond Release and requested an informal conference. (N.T. at 78; C.W. Ex. 29).

45. On August 10, 2015, the Department held an informal conference to address the Hummels' concerns. Department representatives and the Hummels attended. (N.T. at 78; C.W. Ex. 29).

46. The Hummels objected to the Stage II Bond Release on the basis that there were rocks on the surface of their land, trees had been planted, piles of dirt remained on the surface of their land, and a swale had been constructed in the extreme southeastern portion of their property. (N.T. at 79-80).

47. On September 25, 2015, Department employees David Bisko, Steven Starner, and Eric Oliver conducted a site visit to address the Hummels' concerns and conduct a field survey and soil survey. (N.T. at 80, 82; C.W. Ex. 25, 26).

48. In a letter dated October 9, 2015, the Department concluded that the area of the Knight Operation that was eligible for Stage II Bond Release met the standards because vegetation had been successfully established, topsoil was adequately replaced, and the reclamation plan had been followed. (N.T. at 81-92; C.W. Ex. 29).

49. At the outset of the hearing, Judge Mather ruled on the Permittee's Motion in Limine that any issues regarding Stage I Bond Release and approximate original contour would not be heard. (N.T. at 7-9).

50. During the September 25, 2015 field survey and soil survey, as a courtesy to the Hummels, Department employees addressed the Hummels' post-mining contouring concerns. (N.T. at 87; C.W. Ex. 29).

51. Post-mining contouring is normally evaluated as part of Stage I Bond Release; however, the Department considered it during its evaluation of Stage II Bond Release for the Knight Operation as a courtesy to the Hummels. (N.T. at 87).

52. Mr. Bisko sought the assistance of his geologist Scott Barnes, who obtained pre-mining contouring information and went on to the property using a GPS instrument to record the post-mining surface. (N.T. at 87-88).

53. From the GPS data, the geologist created a document called the Hummel Reclamation Map that showed the pre-mining and post-mining contours. (N.T. at 88).

54. Based on the pre-mining and post-mining contours, Mr. Bisko determined that AOC had been achieved and that the land did not deviate significantly from pre-mining to post-mining. (N.T. at 88; C.W. Ex. 29).

55. Mr. Bisko provided the Hummel Reclamation Map to the Hummels as part of his October 9, 2015 written response. (C.W. Ex. 29).

56. During the September 25, 2015 inspection, Mr. Bisko walked the perimeter of the Hummel property in order to investigate the Hummels' concerns that King Coal did not reclaim piles of dirt. (N.T. at 83).

57. Mr. Bisko noted that there were roughly six to seven piles of dirt that were pushed into the natural tree line of the woods where mining had not taken place. (N.T. at 83-84).

58. The piles were about one foot to two feet high and no more than six to seven piles existed. (N.T. at 83).

59. The dirt piles constituted less than one percent of the area that was eligible for bond release. (N.T. at 84).

60. Mr. Bisko determined that the dirt piles did not present any danger to the public or to the Hummels. (N.T. at 84).

61. Mr. Bisko testified that as part of the normal surface mining process, piles of dirt are pushed into the woods. (N.T. at 83).

62. During the September 25, 2015 inspection, Mr. Bisko observed dislodged cobble-sized rocks on the surface that occurred during the reclamation process of planting trees. (N.T. at 82).

63. Mr. Bisko testified that the presence of rocks does not prevent the Hummel property from achieving the approved post-mining land use of forestland. (N.T. at 82-83).

64. Mr. Starner testified that the presence of rocks does not prohibit the property from achieving its post-mining land use of forestland. (N.T. at 72).

65. During the site visit on September 25, 2015, Mr. Starner augured the soil on the Hummel property using the hand augur-to-refusal method. (N.T. at 39, 85).

66. Mr. Bisko determined the soil thickness by measuring the augured soil. (N.T. at 85).

67. Mr. Oliver took GIS measurements to locate where the soil auger measurements had been taken. (N.T. at 39, 85; C.W. Ex. 25).

68. Twenty-one soil-depth test locations were conducted on the Hummel property, in undisturbed and disturbed areas of their parcel, and on the adjacent property owned by King Coal. (N.T. at 39).

69. The post-mining soil thickness retrieved in the field on September 25, 2015 on the Hummel property and King Coal's property proved to be greater than the pre-mining soil thickness of 4 inches, measuring at a mean of 5.01 inches. (N.T. at 40, 85-86; C.W. Exs. 4, 25).

70. The post-mining soil thickness was greater than the pre-mining soil thickness by one inch. (N.T. at 40; C.W. Ex. 25).

71. Mr. Hummel testified he had no independent knowledge of the pre-mining topsoil thickness of his property. (N.T. at 166).

72. Mr. Hummel testified neither he nor anyone else conducted a pre-mining or post-mining soil evaluation on his property. (N.T. at 166).

73. The Knight Mine SMP Module 19.1 identified the Hummel property as forestland pre-mining. (N.T. at 24, 27; C.W. Ex. 4; C.W. Ex. 6).

74. The Knight Operation SMP Module 19.2 identified the post-mining land use for the Hummel property to be forestland. (N.T. at 26-27; C.W. Ex. 4).

75. Mr. Hummel testified there were trees on his property prior to mining. (N.T. at 152).

76. Mr. Hummel testified the trees were timbered before the mining operation occurred. (N.T. at 152-153, 167).

77. King Coal was required to plant trees on all properties that required a post-mining land use as forestland. (N.T. at 18-19, 24-25; C.W. Ex. 4).

78. 25 Pa. Code § 87.155(b)(2) covers the vegetation requirements when the approved post-mining land use is other than cropland. (N.T. at 19).

79. For property designated as forestland, the requirement is 400 woody plants per acre. (N.T. at 19, 45).

80. On October 4, 2015, Mr. Oliver and another Department employee conducted a vegetation survey of the Hummel parcel and an adjoining parcel using the line intersect method. (N.T. at 43; C.E. Ex. 16).

81. The line intersect method is a method approved by the Office of Surface Mining. (N.T. at 43).

82. Mr. Oliver utilized the line intersect method in two 1-acre spots on the Hummel parcel and an adjoining parcel that were both subject to the Stage II Bond Release. (N.T. at 45; C.W. Ex. 16).

83. The results of the line intersect method were recorded and then plotted by Mr. Oliver on a spreadsheet that was provided to the Hummels. (N.T. at 44; C.W. Ex. 16).

84. The ground cover study conducted on the Hummel property revealed that 91% of the area had been revegetated. (N.T. at 45).

85. Mr. Oliver concluded the ground cover on the Hummel property exceeded the regulatory requirement of 70% ground cover by 21%. (N.T. at 45).

86. Mr. Hummel testified he did not review the Department's permit file on the Knight Operation. (N.T. at 167).

87. On October 6, 2015, Mr. Oliver and a Department employee conducted a final evaluation of the Hummel property to determine the vegetative cover and concluded the vegetative cover exceeded the regulatory requirements by 21%. (N.T. at 42-45; C.W. Exs. 27-28).

88. The Hummels object in their Appeal, Pre-Hearing Brief, and Post-Hearing Brief that rocks exist on the surface of their land and not on the lands owned by King Coal, adjacent to the Hummels' property. (Notice of Appeal, Pre-Hearing Brief, Post-Hearing Brief).

89. The owner of the property adjacent to the Hummel's land sold their land to King Coal on May 26, 2011. (N.T. at 31; C.W. Ex. 7).

90. Subsequent to that sale, King Coal applied for a "Change in Land Use" with the Department requesting a change from forestland to rural residential. (N.T. at 30; C.W. Ex. 7).

91. Module 20 of the Knight Operation SMP reflects the change in land use from forestland to rural residential. (N.T. at 30; C.W. Ex. 7).

92. Mr. Hummel testified that John Murgas, a representative of King Coal at the time, met with him in the Hummel's kitchen and promised his land would be reclaimed right and the original contour would be good. (N.T. at 142, 167).

93. The Hummels did not ask King Coal to change the post-mining land use for their property. (N.T. at 143, 168).

94. The Hummels never notified King Coal they wanted the post-mining land use of the Hummel parcel changed from forestland to rural residential. (N.T. at 168).

Discussion

The Appellants object to the Department's 2015 decision to approve a Stage II Bond Release for a portion of their 11 acres that they leased to King Coal in 2005 for surface coal mining. The Appellants assert they had an understanding or agreement with King Coal to reclaim the property in a certain way based upon the representations of John Murgas who worked for King Coal when they leased the property to King Coal in 2005. According to the Appellants, Mr. Murgas agreed the property would be reclaimed with no trees so the Appellants could sell residential lots to pay college tuition for their grandchildren.

In support of their appeal, the Appellants assert several objections. First, they object to the approved post-mining land use, which they assert is inconsistent with an oral agreement the Appellants had with King Coal. Second, the Appellants claim the surface of their property is not properly reclaimed. There are rocks on the surface and ditches or swales prevent the Appellants from using their property in the manner they want; there are piles of soil in the trees along the edge of their property that should not be there; and the amount of topsoil on their property is

inadequate. Finally, the Appellants question why they were not given the same opportunity to have their land reclaimed as the adjacent property now owned by King Coal. The Department approved a change to the post-mining land use for that property after King Coal acquired it and the Appellants want their property reclaimed in a similar manner. The Board will address each of the Appellant's objections in order.

Burden of Proof and Standard of Review

The Appellants bear the burden of proof in this appeal under the Board's Rules. 25 Pa. Code § 1021.122(c)(2). A third party appealing a Department permit or approval bears the burden of proving by preponderance of the evidence that the Department abused its discretion or committed an error of law in approving the action. *County Comm'ners, Somerset County v. DER*, 1996 EHB 351. The Board defines "preponderance of the evidence" to mean that "the evidence in favor of the proposition must be greater than that opposed to it." *Clancy v. DEP*, 2013 EHB 554, 572.

The Board reviews appeals *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Michel L. Krancer explained the Board's *de novo* standard of review:

> [T]he Board conducts its hearing de novo. We must fully consider the case new and we are not bound by prior determinations made by DEP. Indeed, we are charged to "redecide" the case based on our de novo scope of review. The Commonwealth Court has stated that "de novo review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2002). Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Smedley, 2001 EHB at 156. Due to the nature of the Board's *de novo* review, the Board does not conduct a review of the record the Department relied upon to make its decision under appeal. Rather, the Board relies on the record established before the Board, which may include evidence that the Department did not consider. *Pennsylvania Trout v. Dep't of Envlt. Prot*., 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

Forestland as Approved Post-Mining Land Use

At the hearing, the Hummels testified that they discussed leasing their property for surface coal mining with John Murgas before they leased it to King Coal. Mr. Murgas was an employee of King Coal, and the Hummels told Mr. Murgas they did not want trees re-planted on their reclaimed property because they had plans to subdivide the property and sell lots for residential development to pay college tuition for their grandchildren. According to the Appellants, Mr. Murgas agreed and the Hummels leased their property to King Coal. The Hummels assert that the approved post-mining land use for their property should not have been forestland based upon their oral understanding with Mr. Murgas.

The Department disagrees that the oral agreement or understanding between the Hummels and Mr. Murgas should be honored for several reasons. First, the Department questions whether the Hummels' conversation with Mr. Murgas amounts to a binding agreement regarding the post-mining land use of the Hummels' property. Second, even if there were a binding agreement between the Hummels and King Coal, the Department was not a party to the agreement, and the agreement is not consistent with the approved post-mining land use in the reclamation plan for the Hummels' property. Finally, the Department asserts that neither the Department nor the Board have the authority to enforce the alleged oral agreement or understanding between the Hummels and Mr. Murgas who represented King Coal.

The Board agrees with the Department that the Board lacks the authority to resolve contract or lease disputes among private parties. *Creek Properties, LP v. DEP and Porter Assoc.*, 2013 EHB 587, 600-603. If King Coal agreed not to propose forestland as the post-mining land use to the Department and this commitment is part of their lease agreement, the Hummels need to pursue their contractual claim before a different tribunal because the Board lacks the authority to resolve the alleged contract or lease dispute. *Id*. at 603 ("The Court of Common Pleas must resolve this dispute [regarding a leasehold], not the Department and not this Board.").

While there may be a question regarding Mr. Murgas's oral commitment not to plant trees on the Hummels' property after surface coal mining and reclamation, there is little doubt about the approved post-mining land use for the Hummel property in the King Coal permit. The Department issued the permit in 2007, after the Hummels leased the property to King Coal in 2005. The application for the surface coal mining permit identified "forestland" as the pre-mining and post-mining land use for the Hummels' property. The Hummels timbered their land in or after 2005 in advance of the mining operation. The mining permit application that included the Hummels' property provided that King Coal consulted with the land owners regarding the proposed post-mining land use and that the proposed land use was consistent with the land owners' plans. From the time the permit was issued in 2007 until the current date, the approved post-mining land use for the Hummels' property has been "forestland." The Hummels had several years and several opportunities to ensure their understanding with Mr. Murgas was reflected in King Coal's approved permit.

The Hummels explained that they were not in the immediate area for about ten years. They moved to Lewistown for medical treatment reasons and had fewer opportunities during this

ten-year period (2005-2015) to monitor the permitting, mining, and reclamation of their property. Their lack of availability to monitor conditions does not change the Board's view that it is not the proper forum to resolve the Hummels' lease dispute with King Coal.

Compliance with Stage II Bond Release criteria for the forestland post-mining land use

The Hummels raise a number of specific objections in support of their claim that their property is not properly reclaimed. They object to the presence of rocks on the surface of the reclaimed land and assert that ditches or swales on the surface prevent them using their property as they want. They object to piles of soil pushed into the tree lines at the edge of their property. They question whether the correct amount of topsoil, which was on their property before mining, was used after mining to reclaim their property.

The Department and King Coal disagree with the Hummels that King Coal failed to comply with applicable performance standards for Stage II bond release. According to the Department and King Coal, King Coal satisfied the Stage II bond release criteria for forestland. At the hearing, the Department testified that the presence of rocks on the surface of the reclaimed land does not prevent the property from achieving the approved post-mining land use of forestland. The Department observed a number of cobble-sized rocks on the surface that had been dislodged during the tree planting and moved to the surface, but the Department decided the rocks on the surface did not prevent the trees from growing and the reestablishment of the forestland.

Regarding the piles of soil at the tree line, the Department asserted that this is a normal practice when reclaiming an area with existing trees. Heavy equipment is used to push soil piles into wooded areas and it is difficult to push soil between the existing trees so some soil is left in place to avoid disturbing the existing trees and areas that were not previously disturbed.

According to the Department, a few one to two foot piles of soil will eventually erode and won't prevent the reclaimed area from becoming a forestland.[1]

The Department also disagreed that King Coal failed to return an adequate amount of topsoil to reclaim their property. According to the Department, the Reclamation Plan in King Coal's permit required topsoil be removed, stored, and redistributed at the site to meet pre-mining soil depths that ranged from 0 to 9 inches. At the Hummels' property, the pre-mining soil depth was an average of 4 inches, and the post-mining soil depth at the Hummels' property was 5 inches.

The Hummels have the burden of proof in this appeal, and the Board agrees with the Department that the Hummels failed to carry their burden to demonstrate that King Coal failed to comply with the Stage II bond release criteria where the approved post-mining land use is forestland. The Department and King Coal addressed each of the specific concerns identified by the Hummels, and the Board finds that the reclamation of the Hummels' property included in the Stage II bond release under appeal achieved the Stage II bond release criteria for approved forestland post-mining land use.[2]

The Department presented the testimony of three Department employees who examined the Hummels' property to evaluate whether King Coal met the Stage II bond release criteria. Two of the Department witnesses were qualified as expert witnesses in surface coal mining, Eric

[1] In its Post-Hearing Brief, the Department did not address the merits of the Hummels' arguments regarding rocks and random soil piles. Department Brief at 30-31. Instead, the Department asserts that the Hummels' Brief fails to include a citation to the record to support its arguments. The Department makes a good point under the Board's Rules, but the Board will nevertheless address the merits of the Hummels' claims using the testimony of the Department's witnesses at the hearing.

[2] Stage II bond release criteria require the permittee seeking bond release to replace topsoil, ensure that the site is not contributing to suspended solids outside the permit area and comply with the approved reclamation plan. 25 Pa. Code § 86.174(b). King Coal's reclamation plan required it to reestablish forestland in the previously mined area obtaining at least 70% ground cover, with not more than 1% of the area having less than 30% cover. 25 Pa. Code § 87.155(b) (N.T. at 29).

Oliver and David Brisko, and the remaining witness, Steven Starner, has been a Department Inspection Supervisor for 29 years. The Department conducted at least three inspections of the Hummels' property in connection with the review of King Coal's Stage II bond release request and to evaluate objections raised by the Hummels. The Department also held an informal conference with the Hummels in August 2015. Mr. Oliver examined the topsoil depth, the extent of the vegetative cover, and whether there was any runoff of suspended solids outside the SMP.[3] The Department conducted a topsoil survey on the Hummels' property by hand auguring 21 samples. The findings of the survey indicated that an average of 5.01 inches of topsoil was present on the Hummels' property and the adjoining parcel, which is about an inch more than existed pre-mining on the site. While the Hummels complained about the lack of topsoil in a general manner, they did not offer any evidence to contradict the Department's topsoil survey results that indicated a greater depth of topsoil on the site post-mining and reclamation. The Hummels failed to carry their burden to establish that King Coal failed to properly replace the topsoil.

On the issues of cobble-sized rocks on the surface and a few piles of soil at the existing tree lines on the Hummels' property, the Department acknowledged that there were rocks on the surface and a few small piles of soil at the existing tree lines. The Department asserted that neither the presence of cobble-sized rocks nor a few piles of soil at the existing tree line prevented King Coal from meeting the Stage II bond release criteria. The Department determined the rocks were dislodged during the mechanized process of planting the trees and moved to the surface. The presence of rocks at the surface does not prevent the reclamation of a site from achieving the approved post-mining land use of forestland.

[3] There was evidence of a runoff of suspended solid problem several years earlier, but the Department believed that this problem had been corrected earlier. (N.T. at 96-97).

To address the Hummels' concerns about the soil piles in the existing tree lines, David Bisko walked the perimeter of the Hummels' property and observed six or seven soil piles that were about one to two feet in height at the edge of the existing tree line. The soil piles consisted of less than 1% of the area eligible for Stage II bond release. The Department determined that the piles presented no risk or danger to the public and viewed the small soil piles as a normal aspect of reclamation when soil is pushed by heavy equipment into an area with existing trees. Rather than dislodging or damaging the existing trees, the Board agrees that it is better to allow small soil piles to remain that will eventually erode.

The Hummels had concerns about the rocks on the surface and the small soil piles, but they offered no evidence to support their concern that these conditions did not meet the applicable Stage II bond release criteria for forestland. The Department offered the testimony of three witnesses who explained that neither condition prevented King Coal from meeting the Stage II bond release criteria.[4]

The Department conducted a vegetation survey using the line intersect method, which is a method approved by the federal Office of Surface Mining. The results of the survey revealed that 91% of the area had been revegetated, which exceeds the requirement of 70% ground cover by 21%. The Hummels provided no evidence to contest the Department's survey and results that the Hummels' property achieved the vegetative cover requirement for forestland. The Board finds that King Coal's reclamation of the Hummels' property did achieve the revegetation requirements applicable to forestland.

[4] The Department's testimony that neither the rocks on the surface nor the small soil piles created a concern about meeting the Stage II bond release criteria for forestland was reasonable and credible. The Hummels' primary objections were regarding the approved forestland post-mining land use and not about the criteria for this approved land use.

There are a few additional considerations which support the Department's decision that King Coal satisfied the applicable Stage II bond release criteria. The Hummels leased approximately eleven acres of land that was within the footprint of King Coal Mining permit. Only 5.4 acres of the Hummels' property is included within the area covered by the Stage II bond release. A portion of the Hummel property in the southeastern portion contained sedimentation ponds, but this area is not part of the area covered by the Stage II bond release under appeal. The Hummels introduced a large number of photographs of their property within the King Coal mining permit, but they were not always able to fully identify which photographs showed property subject to the bond release under appeal. The Appellants were not always able to distinguish between areas subject to the bond release and areas not subject to the bond release when describing the photographs. The lack of precision leads the Board to reduce the weight given to the Hummels' photographs, but even if all of the photographs were photographs of the Hummels' property included in the Stage II bond release, the Board's view would not change regarding King Coal's compliance with the Stage II bond release criteria.

Compliance with Stage I Bond Release AOC Requirements

The Hummels also assert that the condition of the surface of their reclaimed land does not meet applicable requirements. According to the Hummels, their property "was perfectly flat but now contains a swell four times the swell on the adjacent King Coal property." Appellant's Brief at 1-2. The Appellants assert that the ground swell causes drainage from the other adjoining properties to flow on to their property.

The Department and King Coal respond to this objection in two ways. First, they assert the issues regarding the conditions of the surface and the ground swell objection relate to the requirement to return the property to the approximate original contour ("AOC"). The AOC

requirement is considered during Stage I bond release that occurred in 2010-2011. King Coal applied for Stage I bond release in 2010 and the Department approved their application for Stage I bond release in 2011. The issues regarding the AOC requirements and the alleged ground swell could have been challenged in an appeal of the Stage I bond release in 2011, but these issues are now administratively final and may not be raised in the current challenge to the Stage II bond release.

Second, the Department undertook an evaluation of the contouring of the Hummel property as a courtesy to the Hummels during the Department's evaluation of their objections to the Stage II bond release. The Department used pre-mining contours of the Hummels' property and recorded post-mining contours to prepare the Hummel Reclamation Map. The Hummel Reclamation Map showed pre-mining and post-mining contours. The Department determined the pre-mining contours did not deviate significantly from the post-mining contours and the reclamation of the Hummels' property met the Stage I bond release requirements for AOC.

The Board agrees with the Department and King Coal on both of their points. The Hummels' objection regarding the alleged improper ground swell relates to the Stage I bond release and the applicable AOC requirements. The Department addressed the AOC requirements as part of its decision to approve the Stage I bond release in 2011 and this Department decision is administratively final. 25 Pa. Code § 1021.52; *Lucchino v. DEP*, 1999 EHB 214. The Hummels had a chance to challenge the Department's decision regarding the surface contours of their property and the related AOC requirements, but they did not file an appeal in 2011 after the Department approved King Coal's application for Stage I bond release. *Id*. at 220.[5]

[5] In *Lucchino*, the Board stated, "Where a party is aggrieved by an administrative action of the Department and fails to pursue his statutory appeal rights, neither the content nor the validity of either the Department's action or the regulation underlying it may be attacked in a subsequent administrative or

The Board also agrees with the Department's evaluation of the surface contours of the Hummels' property that the Department undertook as a courtesy to the Hummels. Even if the Hummels were not prevented from raising their ground swell objection in the context of their appeal of the Stage II bond release, the record before the Board demonstrates the Department made the correct decision in 2011. The Hummel Reclamation Map, which the Department provided to the Hummels in 2015, confirms that the post-mining contours of the Hummels' property did not deviate significantly from the pre-mining contours. To satisfy the AOC requirements, the final post-mining graded slopes shall approximate the general nature of pre-mining topography. 25 Pa. Code § 87.144(b); *Riddle v. DEP*, 2001 EHB 355, 357. The Department testified at the hearing that post-mining contouring was approximate to the original contouring and blended in with surrounding lands thereby meeting the Stage I bond release AOC requirements. The Hummels offered no evidence to the contrary at the hearing. The Board finds there is no legal or factual basis to revisit the Department's 2011 decision that King Coal met the Stage I bond release requirements for AOC on the Hummels' property.

Objection concerning lack of opportunity to change post-mining land use of their property

The Hummels' last and possibly primary concern with the reclamation of their property is their question of why they "were not given the same opportunity to file a change of use request like King Coal did in 2012." Appellants Brief at 4. King Coal acquired the property adjoining the Hummels' property after mining it. The post-mining land use for this property was forestland when the mining permit was issued in 2007 and when King Coal acquired it. After King Coal acquired it, King Coal filed an application with the Department to change the post-

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judicial proceeding." *Lucchino v. DEP*, 1999 EHB at 220. The Board barred the appellant in *Lucchino* from litigating matters related to Stage I bond release in an appeal of a Stage II bond release due to the doctrine of administrative finality.

mining land use for this property from forestland to rural residential. The Department approved this request in 2012, and the Hummels' question why they were not given the same opportunity as King Coal to change the post-mining land use of their property.

The Department and King Coal respond in two ways to the Hummels' objection about the lack of opportunity. First, they assert that the Hummels did not raise this objection in their Notice of Appeal. The Hummels raised five objections in their Notice of Appeal, and they assert "Their objections did not include a change in post-mining land use." Department Brief at 27. In addition, they assert that Hummels failed to cite to any reference to the record or any legal authority in support of their claim. *Id*.

Second, the Department described the process for seeking a change to the post-mining land use in the Department's surface coal mining regulations. 25 Pa. Code § 87.75. Under this provision, the mining permittee, King Coal, initiates the process to change the approved post-mining land use. If the Hummels wanted a change from the approved forestland post-mining land use, the Hummels would have had to contact King Coal and ask King Coal to request a change in the post-mining land use. The Hummels never contacted King Coal to request a change in the post-mining land use of their property at any time after the Department issued the surface coal mining permit in 2007. Without a request from King Coal to change the post-mining land use of the Hummels' property in the Reclamation Plan in King Coal's permit, the approved post-mining land use remains forestland.

The Hummels assert that King Coal should have asked them whether they wanted the post-mining land use of their property to change form forestland to rural residential, just as King Coal's property changed. The Department and King Coal assert that King Coal had no

regulatory duty to contact the Hummels to inquire about their interest in changing the post-mining land use from forestland to rural residential.

The Board agrees with the Department and King Coal regarding the opportunity to change the post-mining land use of their property from forestland to rural residential. The Hummels had an opportunity to request that King Coal apply to the Department to change the post-mining land use of their property, but there is no evidence that the Hummels ever approached either King Coal or the Department about a change until after King Coal conducted the Stage II bond release related reclamation. The Board agrees with the Department that there is no regulatory requirement imposed upon mining permittees to offer property owners an opportunity to change the approved post-mining land use of their property after mining occurs or when the post-mining land use for other property changes. If a property owner wants the Department to approve a change to the post-mining land use of their property, the property owner needs to contact the mining permittee to begin the process to apply for a change.

The Hummels have a point that they thought the post-mining land use was not forestland because they discussed their desire not to have trees planted on their property with Mr. Murgas in 2005. They assumed their discussions would be honored, but these discussions with Mr. Murgas were never part of King Coal's permit application. From the time that King Coal submitted its permit application, the post-mining land use of their property was forestland. Forestland was also the pre-mining land use. The Hummels did not raise a concern before the Department issued the surface coal mining permit to King Coal or after the permit was issued in

2007. The Hummels had a reasonable opportunity to ensure that King Coal's Reclamation Plan in its permit reflected the post-mining land use that the Hummels wanted.[6]

As was previously discussed, the Hummels may have a valid concern that King Coal never honored the discussions between the Hummels and Mr. Murgas regarding the Hummels' desire to have their property reclaimed without the return of trees. That is, however, not a concern the Board can address. The post-mining land use of the Hummels' property in the approved Reclamation Plan has always been and remains forestland. The Department approved the Stage II bond release by applying the forestland criteria, and the Hummels did not meet their burden to show that the reclamation of their property did not meet the applicable Stage II bond release criteria for forestland. The Hummels did not satisfy their burden of proof, and the Board dismisses their appeal and issues the following order.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal. 35 P.S. § 7514.

2. The Board reviews appeals *de novo*. *Smedley v. DER*, 2001 EHB 131, 156. The Board does not conduct a review of the record the Department relied upon to make its decision under appeal, but the Board relies upon the record established before the Board which may include evidence that the Department did not consider. *Pennsylvania Trout v. Dep't of Envlt. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

3. The Hummels have both the burden of proof and the burden of proceeding in this Appeal. 25 Pa. Code § 1021.122(a); *Pennsylvania Trout v. Department of Environmental*

[6] The Hummels indicated that they moved to Lewistown and out of the area for about ten years for medical reasons and were unable to closely monitor the permitting, mining, and reclamation of their property. Their limited availability does not excuse their failure to ensure the Reclamation Plan in the mining permit was consistent with their earlier discussions with Mr. Murgas.

Protection, 863 A.2d 93, 105-106 (Pa. Cmwlth. 2004*); Clancy v. Department of Environmental Protection*, 2013 EHB 554, 572.

4. To sustain their burden of proof, the Hummels must show by a preponderance of the evidence that the Department acted unlawfully, abused its discretion, or acted unreasonably. 25 Pa. Code § 1021.122(a); *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 105-106 (Pa. Cmwlth. 2004); *Clancy v. Department of Environmental Protection*, 2013 EHB 554, 572.

5. Stage II Bond Release standards are:

a. Topsoil has been replaced and revegetation has been successfully established in accordance with the approved reclamation plan.

b. The reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations thereunder or the permit.

c. If prime farmlands are present, the soil productivity has been returned to the required level when compared with nonmined prime farmland in the surrounding area, to be determined from the soil survey performed under the reclamation plan approved in Chapters 87-90.

d. If a permanent impoundment has been approved as an alternative postmining land use, the plan for management of the permitted impoundment has been implemented to the satisfaction of the Department.

6. The Hummels failed to prove that King Coal did not meet the standards for Stage II Bond Release, as set forth in 25 Pa. Code § 86.174(b).

7. The Reclamation Plan required King Coal to meet the vegetation standards set forth in 25 Pa. Code § 89.86, which, for post-mining land uses other than cropland require "a minimum of 70% ground cover of permanent plant species with not more than 1% of the area having less than 30% ground cover with no single or continuous area having less than 30% ground cover exceeding 3,000 square feet." 25 Pa. Code § 89.86(e)(2)(ii).

8. Appellants' property meets or exceeds the standards for vegetative growth. 25 Pa. Code § 86.174(b); 25 Pa. Code § 89.86(e)(2)(ii).

9. Appellants' property is not contributing suspended solids to stream flow or runoff outside the permit area. 25 Pa. Code § 86.174(b).

10. In order to change the post-mining land use, the Department's regulations at 25 Pa. Code § 87.75(3) require King Coal to submit all materials needed for approval of the alternative use of land under 25 Pa. Code § 87.159.

11. In order to change the post-mining land use to an alternative use, the Department's regulations require the description in the application to be accompanied by a copy of the comments concerning the proposed land use by the legal or equitable owner of record of the surface of the proposed permit area. 25 Pa. Code § 87.75(b).

12. King Coal did not submit a request to change the land use of the Hummel property.

13. Neither the Department nor King Coal had a regulatory duty to contact the Hummels to inquire whether the Hummels wanted King Coal to request that the Department change the post-mining land use of the Hummels' property from forestland to rural residential.

14. Any issues related to Stage I Bond Release of Hummels' property are administratively final because no appeal was filed in 2011 after the Department approved the Stage I Bond Release. *Luccino v. DEP*, 1999 EHB 214, 220.

15. The Hummels failed to prove that the Department acted unlawfully or acted unreasonably as required by 25 Pa. Code § 1021.122(a).

16. The Department did not commit an abuse of discretion when it granted King Coal's application for Stage II Bond Release. *Pennsylvania Trout v. Department of*

Environmental Protection, 863 A.2d at 105-106; *Warren Sand and Gravel v. Department of Environmental Protection*, 341 A.2d at 565; *Clancy v. Department of Environmental Protection*, 2013 EHB at 572.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RUSSELL AND PAULINE HUMMEL	:	
	:	
v.	:	**EHB Docket No. 2015-172-M**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KING COAL SALES, INC., Permittee	:	

O R D E R

AND NOW, this 1st day of September, 2017, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 1, 2017

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

For the Commonwealth of PA, DEP:
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Elizabeth K. Spangenberg, Esquire
(via electronic filing system)

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For Permittee:
David C. Mason, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee	:	**Issued: September 6, 2017**

OPINION AND ORDER ON
FARMINGTON TOWNSHIP'S PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board grants Farmington Township's petition to intervene in a third party appeal of a brine spreading plan authorized to take place within the township. The Board finds that Farmington Township has a substantial, direct, and immediate interest in the outcome of the appeal.

O P I N I O N

Introduction

Siri Lawson (the "Appellant") has appealed the Department of Environmental Protection's ("Department") Approval No. NW9517 authorizing brine spreading for dust control in Sugar Grove and Farmington Townships in Warren County ("Department Approval"). The Department Approval authorized the spreading of brine on unpaved roads and lots in Sugar Grove and Farmington Township by Hydro Transport LLC ("Hydro Transport"). Hydro Transport is a Pennsylvania Limited Liability Corporation engaged in providing services for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of

Appeal Ms. Lawson contends as follows: 1) the DEP Approval constitutes an approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Department Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Department Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for roadspreading plans.

Two petitions to intervene have been filed in this appeal. The first petition was filed by the Pennsylvania Grade Crude Oil Coalition on August 10, 2017, and will be addressed in a separate opinion. The Petition to Intervene ("Petition"), that is the subject of this opinion, was filed on August 24, 2017, on behalf of Farmington Township (the "Township"). In the Petition, the Township stated that Hydro Transport consents to the intervention by the Township and the Department does not oppose the intervention and neither filed anything with the Board in contradiction to those statements. Ms. Lawson filed an answer to the Township's Petition on August 30, 2017.[1]

Standard of Review

Section 4 of the Environmental Hearing Board Act states that "[a]ny interested party may intervene in any matter pending before the Board." *See also* 25 Pa. Code § 1021.81 (a person may petition to intervene in any matter prior to the initial presentation of evidence). The Board has held that the right to intervene in a pending appeal should be comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Logan v. DEP*, 2016 EHB 531, 533; Wilson *v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*,

[1] On August 30, 2017, Ms. Lawson also filed a Motion to Demand Verification. The Township filed a Verification to Farmington Township's Petition to Intervene on August 31, 2017 resolving the issue.

2010 EHB 433,434. A person or entity will have standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Logan*, 2016 EHB at 533, (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). This interest must be more than a general interest such that the entity seeking intervention "will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth, 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. The Board has previously noted that the "Supreme Court has ruled that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and quality of life within its borders, an interest that confers standing upon the political subdivision." *Logan*, 2016 EHB at 533 (citing *Robinson Twp. v. Cmwlth*., 83 A.3d 901, 919-920 (Pa. 2013)). Further, whether a political subdivision seeking to intervene will in fact face the impacts it alleges is not the question as long as there is an "objectively reasonable threat of adverse effects." *PA Waste LLC, v. DEP*, 2015 EHB 350, 354; (citing *Tri-County Landfill, Inc., v. DEP*, 2014 EHB 132; *Giordano v. DEP*, 2000 EHB 1154, 1156). Finally, when there is a challenge to standing in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts. *Logan*, 2016 EHB at 533 (citing *Tri-County Landfill Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3).

Analysis

The Township has raised two primary concerns with Ms. Lawson's challenge to the Department Approval in support of its Petition. It first notes that the agreement currently in

force between the Township and Hydro Transport (the "Agreement") is contingent upon the Department Approval, and a Board decision on the Department Approval in favor of Ms. Lawson would substantially and directly impact the validity of the Agreement. The Township also notes that if the Department Approval and the Agreement are invalidated by a Board decision the Township would lose a valuable tool for dust control and dust pollution prevention in and around the Township. Farmington Township states that it has standing to intervene because it could be affected both financially and operationally by the Board's decision in this appeal. Ms. Lawson opposes intervention, arguing that the Township has failed to demonstrate that it has a substantial, direct, and immediate interest in this matter. The Agreement will expire on December 31, 2017, and Ms. Lawson contends that due to the nature of Board proceedings it is unlikely that a decision will be rendered before the expiration of the Agreement. Ms. Lawson asserts that the Agreement therefore cannot form the basis for intervention because the Township's participation in the appeal will not advance its interest in the Agreement. She also argues that the Township's stated interest of utilizing roadspreading of brine in the future does not create a sufficient basis for intervention because it does not constitute an actual or imminent injury.

We hold that the Township does have a substantial, direct and immediate interest in this matter. It has a current valid agreement with Hydro Transport that may be directly affected by the outcome of this appeal. The Agreement provides the Township a significant role in where and when Hydro Transport LLC can spread brine in the Township. The fact that the Agreement on its face indicates that it is for the 2017 season does not in our opinion diminish that interest at this time. The DEP Approval that Ms. Lawson is challenging similarly expires at the end of

2017 and it is likely that it will also have expired prior to the resolution of this appeal.[2] We think it is premature at this point when considering the issue of intervention to speculate about what may occur at the end of the year.

Further, even if there were no agreement between the Township and Hydro Transport, the Township has more than a general interest in this appeal because the approved roadspreading of brine will occur within the Township and the Township asserts that it provides an important tool for the prevention and suppression of dust pollution within the Township. Farmington Township's continued ability to use brine spreading to control dust will be impacted based on the Board's ultimate decision of Ms. Lawson's appeal of the Department Approval. Farmington Township clearly has an interest in environmental and quality of life issues within the Township and will gain or lose as a result of direct operation of the Board's eventual decision in this appeal. The Board is satisfied that the threshold for intervention has been met by the Township.

Accordingly, we issue the following Order.

[2] The Board is not taking a position on the issue of mootness or whether any of the exceptions to the mootness doctrine would apply in this case. We are simply trying to point out one of the issues we see that in our opinion undercuts Ms. Lawson's argument.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 6th day of September, 2017, it is hereby ordered that Farmington Township's Petition to Intervene in this matter is GRANTED. Petitioner Farmington Township is hereby granted the right to intervene and present evidence on all issues and claims raised within Appellant's Notice of Appeal. Henceforth the caption shall read:

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

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 6, 2017

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

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For Intervenor:
Timothy M. Zieziula, Esquire
Timothy S. Wachter, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 6, 2017**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Department issued a civil penalty assessment to PQ Corporation of $1,545,741 for multiple violations of PQ's Title V Operating Permit. On appeal, the Board reduces the penalty to $215,258 because the Department based its penalty for violations of PQ's yearly NOx and CO emissions limits on data generated by PQ's continuous emission monitoring system during a time when PQ's permit provided that compliance was to be based on stack testing. The Board upholds the Department's assessment for PQ's other violations.

FINDINGS OF FACT

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

2. PQ Corporation ("PQ") owns and operates a silicate manufacturing operation at 1201 West Front Street, Chester City, Delaware County, Pennsylvania. (Stip. 2.)

3. PQ owns and operates the Number 4 Sodium Silicate Furnace ("No. 4 Furnace"), which it operates pursuant to Title V Operating Permit No. 23-00016, issued by the Department on July 6, 2000, renewed on June 11, 2010, amended on January 11, 2011, September 25, 2012, and January 12, 2015, and renewed again on April 19, 2016 (the "Permit"). (Stip. 3.)

4. PQ produces sodium silicate, a chemical compound derived from sand and soda ash, at the Chester plant using the No. 4 Furnace. (Notes of Transcript page ("T.") 923.) Sodium silicate is used in a wide variety of products, from hair coloring to drain cleaners, and is used in many different processes, from water treatment systems to filtering for beer. (T. 924.)

5. As part of the sodium silicate manufacturing process, sand and soda ash are heated inside the No. 4 Furnace, creating molten glass. (T. 929-30.) The No. 4 Furnace is, therefore, considered to be a glass melting furnace under certain Pennsylvania regulations. (T. 116, 945.)

6. Nitrogen oxide (NOx) and carbon monoxide (CO) are emitted from the No. 4 Furnace as natural byproducts of the combustion process. (T. 937.)

7. PQ has a Title V Operating Permit because the No. 4 Furnace is a "major" source of emissions for NOx. (T. 568-71; Commonwealth Exhibit Nos. ("C. Ex.") 38, 39, 40.)

8. The No. 4 Furnace is a "minor" source of CO. (T. 1455-57.)

9. PQ has permit limits for yearly and hourly emissions of NOx and CO, opacity, and data availability. (C. Ex. 38, 39, 40.)

10. In February 2009, in response to a plan approval application PQ submitted in May 2008 to augment controls for particulate matter and to replace the existing burners on its No. 4 Furnace, the Department required that CO emissions limits be established for PQ's No. 4 Furnace. (Stip. 4; T. 1095-97; PQ Exhibit No. ("PQ Ex.") 16.)

11. The Department established CO limits for PQ's No. 4 Furnace in 2009 of 1.16 pounds per hour and 5.08 tons per year. (Stip. 4; T. 1077-79, 1103-04; PQ Ex. 16.)

12. On December 3, 2012, PQ submitted a plan approval application to the Department that contained a combined request for revised CO limits and to install new Blower Air Staging (BAS). (T. 953, 1030; C. Ex. 10.)

13. PQ's CO limit remained 1.16 pounds per hour and 5.08 tons per year until the Department issued Plan Approval 23-0016C to PQ on July 16, 2013. (T. 571, 687-88; C. Ex. 38-41.)

14. On July 16, 2013, the Department approved PQ's plan approval application and increased PQ's CO limits to 20 pounds per hour and 87.6 tons per year. (T. 662-63, 680-81, 687-88; C. Ex. 41; PQ. Ex. 35.)

15. PQ's NOx emissions limit in its permit is 92.8 pounds per hour and 275.00 tons per year. (Stip. 4; C. Ex. 38, 39, 40.)

16. PQ's permit prohibits emissions of visible air contaminants such that the opacity of the emissions would be equal to or greater than 20% for a period or periods aggregating more than three minutes in any one hour, or equal to or greater than 60% at any time. (T. 731; C. Ex. 38, 39, 40.)

17. On February 10, 2014, the Department and PQ entered into a Consent Assessment of Civil Penalty to settle particulate emissions violations observed on December 21 and 22, 2010, CO emissions violations observed on May 19, 2011, a failure to submit an annual compliance certification, a failure to perform an annual stack test for 2012, a twelve-month rolling CO violation for July 2011, and twelve-month rolling NOx emissions violations for April through November 2011 and September through December 2012. (T. 737-43, 892-97; C. Ex. 33, 48.)

18. PQ's permit states "Compliance with the NOx and CO emission limits shall be based on stack testing until the installation and certification of the respective Continuous Emissions Monitoring Systems (CEMS)." (T. 568; C. Ex. 38 at 31-32 #005, C. Ex. 39 at 35 #005, C. Ex. 40 at 34 #005.)

19. Stack test data shows emissions for the process in operation during the stack test. (Stip. 15.)

20. On August 6, 2009, December 21 and 22, 2010, May 19, 2011, and December 15, 2011, PQ performed stack tests on its No. 4 Furnace for CO, NOx, and particulate matter. (Stip. 17.)

21. Facilities that operate certain type of sources, such as boilers, turbines, kilns, incinerators, refineries, and furnaces, may be required to install continuous emissions monitoring systems (CEMS) on those sources. (T. 118, 297, 461.)

22. A CEMS is a complex mechanical system that is customized so that it can continuously measure emissions from a source. (T. 199-200, 355-57.) For each pollutant a CEMS measures, it records hourly emissions data. (T. 156-57, 297, 1310.)

23. CEMS issues are highly technical and require specialized knowledge, so the Department has a special division in its Harrisburg office that handles CEMS-related issues for permitted facilities across the state (the "CEMS Section"). (T. 43-44, 496.) The Department's regional offices do not have divisions that specialize in CEMS-related issues. (T. 45.)

24. A company must complete a three-phase certification process before the Department will certify a CEMS and accept emissions data from the CEMS. (Stip. 14; T. 22-24, 297-98, 303-18, 466.)

25. The three phases consist of an application containing a monitoring plan (Phase I), performance testing pursuant to a testing protocol with a report of the results submitted to the Department (Phase II), and final approval from the Department (Phase III). (T. 22-24, 303-18; C. Ex. 1.)

26. The CEMS certification requirements are not found in any statute or regulation, but rather are described in a Department guidance document called the Continuous Source Monitoring Manual (the "CEMS Manual"). (Stip. 13; T. 20, 24, 291; C. Ex. 1.) The most recent version of the CEMS Manual, referred to as "Revision 8," became effective in 2006 (DEP Document No. 274-0300-001). (T. 47, 291, 323.)

27. It can take several months to several years for a company to complete the three-phase CEMS certification process. (T. 319-22, 410.)

28. The Department does not accept CEMS data from a company unless and until the company successfully completes the CEMS certification process. (T. 115, 466-67.)

29. After a company completes the CEMS certification process, it begins submitting quarterly emissions data to the Department through the CEMS Section's online system, which is referred to as "Greenport" or "CEMDPS*Online." (T. 24-25, 111-12, 144, 147-48, 400-01.)

30. The CEMS Section then runs the company's emissions data through a computer program that generates a Quarterly Continuous Source Monitoring Report (a "Quarterly Report"), which shows whether the company has exceeded any emissions limits in the permit. (T. 25, 111-12; C. Ex. 17-23.)

31. On September 1, 2009, PQ and the Department entered into a Consent Order and Agreement which in part provided for annual stack testing, and for the installation of a CEMS

for NOx and CO and continuous opacity monitoring system ("COMS") for particulates at the No. 4 Furnace. (Stip. 5; T. 408-09; C. Ex. 49.)

32. PQ's permit, as amended, required PQ to install, operate, and maintain CEMS on its No. 4 Furnace to monitor NOx and CO emissions and to install, operate, and maintain COMS to monitor opacity in accordance with 25 Pa. Code Chapter 139, Subpart C and the "Submittal and Approval," "Recordkeeping and Reporting," and "Quality Assurance" requirements of the Department's CEMS Manual. (T. 642; C. Ex. 38, 39, 40.)

33. On June 8, 2009, PQ submitted a monitoring plan to the Department for the NOx, CO, and opacity CEMS and COMS on the No. 4 Furnace, initiating the CEMS certification process. (Stip. 20.)

34. As part of the CEMS Phase I certification process, PQ submitted a CEMS/COMS Quality Assurance/Quality Control (QA/QC) Plan to the Department, dated June 2, 2009. (Stip. 21; T. 419-20; PQ Ex. 10.)

35. By letter dated February 9, 2011, the Department approved PQ's Phase I proposal submitted as part of its CEMS certification process. (Stip. 23; T. 420-21; C. Ex. 13.)

36. On October 31, 2011, PQ successfully completed its Phase II performance testing as part of its CEMS certification process, which is designed to ensure the data collected is true and correct. (T. 328-30, 423.)

37. Overall, it took approximately 59 months to complete the certification process for PQ's CEMS. (T. 410, 959.) Although PQ's CEMS were installed by August 11, 2011, they were not certified until May 5, 2014. (Stip. 24; T. 959.) PQ and the Department share responsibility for the extraordinarily long time it took to complete PQ's certification process. (T. 165-70, 308-12, 407-08, 410-19, 960-63.)

38. On May 5, 2014, the Department stated that it was certifying PQ's CEMS retroactive to November 1, 2011, and directed PQ to submit its CEMS emissions data by June 4, 2014 on a quarterly basis for the period of October 1, 2011 through June 30, 2013 for CO pounds-per-hour emissions and CO parts-per-million emissions, and from October 1, 2011 through March 31, 2014 for NOx pounds-per-hour emissions, NOx parts-per-million emissions, and opacity percentage. (Stip. 24; T. 27, 71-72, 835; C. Ex. 4.)

39. Because companies do not submit CEMS data to the Department until after a CEMS is certified, and because certification can take several months to several years, when a CEMS is certified retroactively, a company can be required to submit multiple quarters of past CEMS data to the Department at once. This is what happened to PQ. (T. 115, 401.)

40. PQ's CEMS generally consist of instruments for sampling emissions, which are located about 150 feet above ground in the exhaust stack of PQ's No. 4 Furnace and which are connected to a temperature-regulated "umbilical cord" (also called a sample line) that transports the emissions samples about 350 feet to equipment that analyzes the samples for NOx and CO. (T. 954, 1217, 1220.)

41. There are times when a CEMS may not work properly and, when this occurs, a CEMS may not continuously capture valid data. (T. 200.)

42. PQ's CEMS goes through a daily calibration process. (T. 968, 1218, 1240-41.) If the CEMS does not pass the daily calibration, the data from that day is considered to be invalid until the CEMS passes a new daily calibration. (T. 968, 1218-19.)

43. In each quarter, a CEMS must capture a certain amount of valid hourly data, a requirement referred to as "data availability." (Stip. 8; T. 500.) *See* 25 Pa. Code § 139.101(12).

44. PQ had a significant amount of missing and/or invalid data during the period at issue here, which it attributes in part to problems with the installation and generation of the "umbilical cord." (T. 964-67, 1217-23.)

45. PQ submitted to the Department cover letters dated July 11, 2014, July 14, 2014, July 18, 2014, August 1, 2014, August 5, 2014, and August 12, 2014, with its quarterly CEMS and COMS data for the Fourth Quarter 2011 through Second Quarter 2013. (Stip. 25.)

46. The hourly CEMS emissions data for NOx and CO, the COMS data for opacity, and the percentage of data availability contained in each of the seven CEMS Quarterly Reports from the Fourth Quarter 2011 through Second Quarter 2013 accurately reflect the hourly NOx and CO emissions and percentage opacity data that PQ submitted to the Department through the CEMDPS*Online system in July and August 2014. (Stip. 26; C. Ex. 17-23.)

47. PQ's specific pound-per-hour exceedances of CO above 1.16 pounds per hour and NOx above 92.80 pounds per hour for each 4-hour average period, rolling by one hour, as well as exceedances of the 20% and 60% opacity limits and data availability for CO, NOx, and opacity are accurately identified in each Quarterly Report, reflecting emissions and opacity data supplied by PQ. (Stip. 28.)

48. On November 17, 2015, the Department issued PQ an assessment of civil penalty in the amount of $1,739,392.00, which the Department subsequently revised to $1,545,741.00. (Stip. 29; C Ex. 43, 46.) The penalty covers the period between November 1, 2011 and June 30, 2013 (the "penalty period"). (C. Ex. 43.)

49. The Department used its Guidance for the Application of Regional Civil Assessment Procedures (DEP Document No. 273-4130-003), effective June 2, 2012, to aid in considering each of the thirteen factors set forth in Section 9.1 of the Air Pollution Control Act,

35 P.S. § 4009.1, when it calculated civil penalties for PQ's violations. (T. 708, 782-85; C. Ex. 44-47.)

50. The Department, through its compliance specialist, John Ranalli, calculated the penalties for the violations under appeal in the following ways:

a. For the NOx pounds-per-hour emissions violations, focusing on the environmental impact, Mr. Ranalli multiplied the pounds emitted over PQ's emissions limit by $2.25 for those months within a quarter (Third Quarter 2012) that completely fell within the ozone season (May 1-September 30) and $1.50 for months falling outside the ozone season. (T. 794-96.) Mr. Ranalli increased the penalty amount in this manner because ground level ozone forms at higher temperatures and NOx emissions will have a greater impact on the environment during this time. (T. 796.) Mr. Ranalli considered that southeastern Pennsylvania is nonattainment for ozone, for which NOx is a precursor, and that Pennsylvania is part of the ozone transport region, and he increased the penalty by 10 percent. (T. 794-95.) Excess NOx emissions negatively affect the goal of reaching attainment for ozone in southeastern Pennsylvania. (T. 794-96.)

b. For CO pounds-per-hour emissions violations, focusing on the environmental impact, Mr. Ranalli multiplied the pounds emitted over PQ's emission limit by $1.50. (T. 783.) Mr. Ranalli considered this a low degree of environmental impact and did not make further adjustments to the penalty. (T. 787-88.)

c. For calculating penalties for both CO and NOx pounds-per-hour violations, Mr. Ranalli characterized PQ's degree of willfulness as negligent. (T. 788-89.)

Mr. Ranalli also adjusted the penalties by 30 percent for compliance history because PQ had committed air quality violations many times before this enforcement action. (T. 784-85, 1226.) These included the following prior violations: PQ had at least four stack test failures since 2008 for NOx, CO, and particulate matter, at least ten months where PQ violated the twelve-month rolling totals for NOx and CO, a reporting violation where PQ submitted its 2011 compliance certification ten months late, and a prior failure by PQ to conduct an annual stack test in 2012. (T. 784-85.)

d. For opacity violations, Mr. Ranalli considered the environmental impact as moderate since opacity contains particles that are easily inhaled by humans. (T. 799-801.) He characterized PQ's degree of willfulness as negligent. (T. 801.) For the violations of PQ's 20% opacity standard, Mr. Ranalli chose a base penalty of $1,875. (*Id.*) For the violations of PQ's 60% opacity standard, which is a more severe violation, Mr. Ranalli chose a base penalty of $2,250. (*Id.*) Mr. Ranalli adjusted the penalty by 30 percent to account for compliance history. (T. 801-02.) Mr. Ranalli chose to calculate the penalty for the opacity violations on a monthly as opposed to daily basis. (T. 754.) Typically, for other enforcement actions for opacity (fugitive/visible emissions), he would determine penalties on a daily basis, but Mr. Ranalli believed that the amount of the penalty calculated on a monthly basis was an adequate deterrent for PQ. (T. 754-56.)

e. For assessing penalties for PQ's data availability violations, Mr. Ranalli considered environmental impact, willfulness, and compliance history as the

primary criteria for setting the base penalty of $200, because air pollution was occurring but the emissions were not being recorded. (T. 806-07.) Based on the amount of missing or unavailable data, Mr. Ranalli created a scale for between 6 and 10 percent missing data, assigning it a $400 penalty, and each additional 5 percent increment increased the penalty by $200 up to 20 percent missing data to create the base penalty. (T. 809-10.) Mr. Ranalli adjusted the data availability for compliance history, starting out with a multiplier of 20 percent and increasing the multiplier to 30 percent as the violation period continued. (T. 810.) Because of the duration of the violations, Mr. Ranalli expected that PQ would have corrected the violations, rather than allowing them to continue. (*Id.*) For NOx and opacity, Mr. Ranalli also included a 10 percent multiplier for being an ozone nonattainment area. (T. 811; C. Ex. 46.) For NOx and CO, due to the sheer volume and duration of the violations, only for the violations in the Second Quarter 2013, Mr. Ranalli increased the penalties by 10 percent because he considered the uncorrected conduct intentional. (T. 810, 812; C. Ex. 46, 47.) There were 25 months when data was unavailable between the Fourth Quarter 2011 and Second Quarter 2013. (T. 815.)

f. Mr. Ranalli also considered that the City of Chester is an Environmental Justice community and PQ's violations have an impact on its citizens. (T. 592-93, 649-50, 789, 880-81.)

(C. Ex. 44-47.)

51. The following six penalties made up the Department's assessment:

Penalty	**Amount Assessed by DEP**
NOx 12-month rolling	$ 876,330
CO 12-month rolling	$ 454,153
NOx lbs./hr.	$ 4,200
CO lbs./hr.	$ 113,750
Data availability	$ 32,620
Opacity	$ 64,688
Total Penalty	**$ 1,545,741**

(T. 826-27; C. Ex. 46; PQ Ex. 71.)

DISCUSSION

The Department bears the burden of proof in an appeal from an assessment of civil penalty, 25 Pa. Code § 1021.122(b)(1), and it must prove by a preponderance of the evidence that the underlying violations of law giving rise to the civil penalty in fact occurred, that the civil penalty is lawful, and that there is a reasonable fit between the violations and the penalty amount. *Paul Lynch Investments, Inc. v. DEP*, EHB Docket No. 2016-014-B (Adjudication, Aug. 29, 2017); *Whiting v. DEP*, 2015 EHB 799, 805; *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 198-99; *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 147-148 (citing *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008)). *See also DEP v. EQT Production Co.*, EHB Docket No. 2014-140-CP-L, slip op. at 40-41 (Adjudication, May 26, 2017) (contrasting the standard and burden of proof required in a complaint for civil penalty from when there is an appeal of an assessment of civil penalty).

When reviewing civil penalty assessments, the Board does not start from scratch, selecting what penalty the Board might independently believe is appropriate. *Taylor Land Clearing*, 2012 EHB 138, 148. Rather, the Board reviews the Department's predetermined

amount for reasonableness. *Id*.; *Thebes v. DEP*, 2010 EHB 370, 398. It is only when the Board determines the Department's calculations are not a reasonable fit that the Board will substitute its discretion and revise the assessment. *Whiting*, 2015 EHB 799, 806; *Taylor Land Clearing*, 2012 EHB at 148. The Board is guided by the factors provided for in the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015. *See Eureka Stone Quarry*, 2007 EHB at 449. Of course, for any penalty to be assessed, the alleged violations must have a factual basis and be in accordance with the law. *Boyertown Sanitary Disposal Co. v. DEP*, 2010 EHB 762, 775; *Gordon v. DEP*, 2007 EHB 264, 271.

Liability

It is unlawful to fail to comply with or to cause or assist in the violation of any of the provisions of the Air Pollution Control Act or the rules and regulations adopted under the Act, or to fail to comply with any order, plan approval, permit, or other requirement of the Department. 35 P.S. § 4008. The Department may assess civil penalties of up to $25,000 per day when a person violates the Air Pollution Control Act, as PQ has in this case. 35 P.S. § 4009.1.

The Board has already found that PQ violated its NOx pounds-per-hour emissions limit, CO pounds-per-hour emissions limit, opacity limits, and data availability requirements in its permit. *PQ Corp. v. DEP*, 2016 EHB 826. As PQ has correctly recognized, because of its prior concessions and our ruling on the parties' motions for summary judgment, the only issues remaining to be resolved in this appeal are PQ's liability for violating its twelve-month rolling NOx and CO emissions limits, and the reasonableness of all of the Department's penalty calculations.

PQ's permit sets the following emission rates for NOx for the No. 4 Furnace:

(1) 8.00 lbs/ton of sodium silicate produced from this furnace

(2) 478 ppmdv [parts per million dry volume], at 15% O2 [oxygen] (based on a 4-hour average, rolling by 1 hour)

(3) 92.80 lbs/hr (based on a 4-hour average, rolling by 1 hour)

(4) 275.00 tons/year, determined on a 12-month rolling basis

(C. Ex. 40 at 33, Condition 001.) PQ has conceded that it is liable for violating its hourly NOx limit on the following occasions:

a. Third Quarter 2012: 2 days;

b. Fourth Quarter 2012: 11 days;

c. First Quarter 2013: 21 days; and

d. Second Quarter 2013: 3 days.

PQ, 2016 EHB at 830.

PQ's permit set the following limitation with respect to opacity:

> One may not permit the emission into the outdoor atmosphere of visible air contaminants in such a manner that the opacity of the emissions is either of the following:
>
> (a) Equal to or greater than 20 percent for a period or periods aggregating more than 3 minutes in any 1 hour, or;
>
> (b) Equal to or greater than 60 percent at any time.

(C. Ex. 40 at 16, Condition 005.) PQ has conceded liability for the following exceedances of its opacity limit:

a. Fourth Quarter 2011: PQ violated its 20% opacity standard on 23 days and 60% opacity standard on 1 day;

b. First Quarter 2012: PQ violated its 20% opacity standard on 73 days and the 60% opacity standard on 3 days;

c. Second Quarter 2012: PQ violated its 20% opacity standard on 47 days and the 60% opacity standard on 3 days;

d. Third Quarter 2012: PQ violated its 20% opacity standard on 18 days and the 60% opacity standard on 1 day;

e. Fourth Quarter 2012: PQ violated its 20% opacity standard on 15 days and the 60% opacity standard on 4 days;

f. First Quarter 2013: PQ violated its 20% opacity standard on 47 days and the 60% opacity standard on 1 day; and

g. Second Quarter 2013: PQ violated its 20% opacity standard on 40 days.

PQ, 2016 EHB at 830-31.

PQ's permit set the following requirements regarding the availability of monitoring data:

> (a) In accordance with 25 Pa. Code § 139.101(12), CEMS [Continuous Emission Monitoring Systems] for NOx, CO, and O2 shall comply with the following data availability requirements:
>
> (1) In each calendar month, at least 90% of the time periods for which an emission standard applies, shall be valid as set forth in the "Quality Assurance" section of Revision No. 8 of the Department's Continuous Source Monitoring Manual, 274-0300-001.
>
> (2) In each calendar quarter, at least 95% of the hours shall be valid as set forth in the "Quality Assurance" section of Revision No. 8 of the Department's Continuous Source Monitoring Manual, 274-0300-001.
>
> (b) In accordance with 25 Pa. Code § 139.103, the COMS [Continuous Opacity Monitoring System] for PM [particulate matter] shall comply with the following data availability requirements:
>
> (1) Opacity measurements shall be converted to represent plume opacity as described in the Department's Continuous Source Monitoring Manual, 274-0300-001. The conversion method shall be approved by the Department.
>
> (2) Opacity monitoring systems shall meet at least one of the following minimum data availability requirements unless other data availability requirements are stipulated elsewhere in this title for a particular process:
>
> (i) At least 90% of the hours in each calendar month shall be valid hours as set forth in the "Quality Assurance" section of the Department's Continuous Source Monitoring Manual, 274-0300-001.

(ii) At least 95% of the hours in each calendar quarter shall be valid hours as set forth in the "Quality Assurance" section of the Department's Continuous Source Monitoring Manual, 274-0300-001.

(C. Ex. 40 at 40, Condition 031.) PQ has conceded liability for the following violations of its data availability requirements:

a. In November 2011 and the Fourth Quarter 2011, the #4 Furnace had 88.06% valid hours and 93.52% valid hours, respectfully, for opacity;

b. In July 2012, PQ had 80.24% valid 4-hour averages and 80.51% valid hours for NOx. In August 2012, it had 68.68% valid 4-hour averages and 68.95% valid hours for NOx. During the Third Quarter 2012, PQ had 80.43% valid 4-hour averages and 80.43% valid hours for NOx;

c. In July 2012, PQ had 85.48% valid 4-hour averages and 86.02% valid hours for CO. In August 2012, PQ had 69.89% valid 4-hour averages and 70.3% valid hours for CO. In September 2012, PQ had 87.92% valid 4-hour averages and 81.39% valid hours for CO. During the Third Quarter 2012, PQ had 81.39% valid hours and 81.39% valid hours for CO;

d. In October 2012, PQ had 58.88% valid 4-hour averages for NOx and 59.54% valid hours for NOx and 82.53% valid 4-hour averages and 83.06% valid hours for CO. In November 2012, PQ had 67.5% valid 4-hour averages and 68.61% valid hours for NOx and 79.44% valid 4-hour averages and 79.44% valid hours for CO. In December 2012, PQ had 62.77% valid 4-hour averages and 62.77% valid hours for NOx and 88.31% valid 4-hour averages and 88.31% valid hours for CO. During the Fourth Quarter 2012, PQ had 62.77%

valid 4-hour averages and 62.77% valid hours for NOx and 83.65% valid 4-hour averages and 83.65% valid hours for CO;

e. In January 2013, PQ had 70.03% valid 4-hour averages and 71.64% valid hours for NOx and 77.82% valid 4-hour averages and 78.63% valid hours for CO. In February 2013, PQ had 63.69% valid 4-hour averages and 64.88% valid hours for NOx and 72.47% valid 4-hour averages and 72.77% valid hours for CO. In March 2013, PQ had 84.68% valid 4-hour averages and 85.48% valid hours for NOx and 87.23% valid 4-hour averages and 88.17% valid hours for CO. During the First Quarter 2013, PQ had 74.31% valid 4-hour averages and 74.31% valid hours for NOx and 80.09% valid 4-hour averages and 80.09% valid hours for CO;

f. In January 2013, PQ had 84.01% valid hours for opacity. In February 2013, PQ had 79.46% valid hours for opacity. In March 2013, PQ had 87.37% valid data for opacity. During First Quarter 2013, PQ had 83.75% valid hours;

g. In April 2013, PQ had 88.61% valid 4-hour averages and 89.17% valid hours for NOx. In May 2013, it had 83.87% valid 4-hour averages and 84.68% valid hours for NOx. During the Second Quarter 2013, PQ had 90.84% valid 4-hour averages and 90.84% valid hours for NOx; and

h. In May 2013, PQ had 69.49% valid hours for opacity. In June 2013, PQ had 3.47% valid hours for opacity. During Second Quarter 2013, PQ had 57.74% valid hours for opacity.

PQ, 2016 EHB at 831-33.

PQ's permit contained the following emission limits for CO for the No. 4 Furnace:

(a) 10 ppmdv, at 15% O2 (based on a 4-hour average, rolling by 1 hour)

(b) 1.16 lbs/hr (based on a 4-hour average, rolling by 1 hour)

(c) 5.08 tons/year, determined on a 12-month rolling basis

(C. Ex. 40 at 33, Condition 002.) In response to the Department's motion for partial summary judgment, PQ presented certain defenses to its alleged liability for violations of its hourly CO limit that did not relate to the fact that the exceedances had in fact occurred. We rejected those defenses to liability while reserving to PQ the right to contest the amount of the civil penalty for the hourly CO violations. PQ did not contest that the following exceedances in fact occurred:

a. Fourth Quarter 2011: 12 days;

b. First Quarter 2012: 84 days;

c. Second Quarter 2012: 89 days;

d. Third Quarter 2012: 82 days;

e. Fourth Quarter 2012: 70 days;

f. First Quarter 2013: 51 days; and

g. Second Quarter 2013: 78 days.

PQ, 2016 EHB at 833-34.

With respect to the only remaining issues regarding liability, i.e. PQ's liability for its alleged violations of its *yearly* NOx and CO limits, PQ argues that the Department has failed to meet its burden of proving that it violated those limits because the Department improperly relied upon PQ's CEMS data. We agree. Condition 005 for the No. 4 Furnace in PQ's permit provides that "[c]ompliance with the NOx and CO emission limits shall be based on stack testing until the installation and certification of the respective Continuous Emission Monitoring Systems (CEMS)." (Finding of Fact ("FOF") 18.) This language is clear and unambiguous and makes perfect sense. As demonstrated in this case, the CEMS installation and certification process can

take a long time with sustained back-and-forth between the Department and permittee. It would logically follow that the Department would want to retain some way of ensuring compliance during what might be a multi-year period, namely, through stack test data. PQ's CEMS were not certified until May 5, 2014, nearly five years after PQ initiated the CEMS process. Therefore, the determination of whether PQ complied with its NOx and CO limits before May 5, 2014 needed to be based on stack testing. We cannot support the Department's effort in this case to disregard the legally binding and enforceable permit by acting as if PQ's compliance could be based on CEMS data that had not yet been certified. We find no support in the law for the Department's fiction that the 2014 certification was "retroactive" to 2011 for purposes of imposing civil penalties. *See Boyertown Sanitary Disposal Co. v. DEP*, 2010 EHB 762, 775 (in proposing civil penalty, Department must be able to substantiate that its practice is supported by statute, regulation, or binding precedent).[1] The Department has not produced enough evidence, calculations, or argument based on stack testing alone to support a finding that PQ exceeded its yearly NOx and CO limits during the penalty period. The Department concedes as much. (DEP Reply Brief at 12.) Accordingly, it has failed to satisfy its burden of proof and its civil penalty assessment for those alleged violations cannot stand.

The Department argues that PQ waived this argument by not including it in its pre-hearing memorandum. Our Pre-Hearing Order No. 2, which we issued in this case, says, "A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum." (¶ 8.) *See generally Borough of St. Clair v. DEP*, 2015 EHB 290, 307-

[1] To the extent the Department has sought to incorporate the entire CEMS Manual and all revisions thereto into PQ's permit, *see, e.g.*, C. Ex. 38 at 34, Condition 012, and that otherwise nonbinding guidance creates a retroactive certification procedure, the more specific and directly applicable Condition 005 controls. *Cf.* 1 Pa.C.S.A. § 1933 (particular controls general in statutory construction); Pa.R.C.P. No. 132 (same regarding Rules of Civil Procedure); *Clairton Slag, Inc. v. Dep't of Gen. Servs.*, 2 A.3d 765, 773 (Pa. Cmwlth. 2010) (same regarding contracts).

08; *DEP v. Seligman*, 2014 EHB 755, 759. However, PQ clearly complained about the retroactive application of the CEMS data in its memorandum. (*See, e.g.*, PQ Pre-Hearing Memo, Legal Issues in Dispute at ¶ 7.) Retroactive application was improper in part because of Condition 005. The application of Condition 005 is subsumed within the broader retroactivity objection, as the Department seems to acknowledge. (Reply Brief at 2-3.) We also note the retroactivity issue was clearly raised in PQ's Notice of Appeal. (Objections at ¶ 8.) In any event, we cannot bring ourselves to overlook the Department's attempt to disregard the clear term of the permit it wrote.[2]

The Department protests that it "told" PQ many times during the CEMS certification process that the CEMS certification would be retroactive back to the date when PQ completed its performance specification testing in 2011. Where the permit clearly states that compliance will be based on stack testing until certification is complete, we think it is irrelevant under the circumstances what the Department "told" PQ or what PQ supposedly "should have known." *See Perano v. DEP*, 2011 EHB 587 (exchange of correspondence not a proper method of modifying a permit).

The Department says it should not be precluded from using the CEMS data because it is the best data available regarding what the actual emissions were. That may be true, but the Department has only itself to blame. Most obviously, it wrote the permit condition that it now seeks to disregard. It could have written that results sworn to be accurate by the permittee may be used even if certification is pending, but it did not. It could have modified the permit. It could have acted with greater dispatch in certifying the results. It seems that both parties share

[2] The Department says it could have put on evidence regarding Condition 005 if it was more clearly on notice that it was an issue. It has not identified what evidence that would have been. Condition 005 was identified in the Department's own proposed findings of fact. (Proposed FOF 20.) Condition 005 is quite clear and requires no parole evidence to understand or interpret it.

the blame for the inexcusably long time for the certification process to be completed in this case, June 2009 until May 2014, but it strikes us as unfair to blindside PQ with hundreds of thousands of dollars in penalties under such circumstances. Among other things, there was credible testimony that the Department told PQ not to worry about the problems it was experiencing during the interminable certification process because certification had not been completed. (T. 962, 963, 966, 967, 1050.)

Penalty Amount

> The Department, in assessing a civil penalty, must consider the following factors:
>
> the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department, the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

35 P.S. § 4009.1. We have frequently held that deterrence is an important factor. *See DEP v. EQT*, slip op. at 81-84; *PQ*, 2016 EHB at 837; *Eureka Stone Quarry*, 2007 EHB at 457. In the case of the Air Pollution Control Act, it is written right into the statute. To repeat, when reviewing the Department's assessment, we do not pick our number; we look for whether there is a reasonable fit between the violations and the penalty amounts. *Keinath v. DEP*, 2003 EHB 43, 53.

Hourly NOx Violations

As previously mentioned, PQ conceded liability for its violations of its hourly NOx limit. The Department assessed a penalty of $4,200 for PQ's violations of the hourly NOx limit. Perhaps not surprisingly given the size of the penalty relative to the other parts of the assessment, PQ has not developed any arguments in its post-hearing brief that the assessment is

unreasonable, and even at times seems to concede the point. (*See, e.g.*, PQ Brief at 73 (arguing that the yearly penalty would be reasonable if it was based on the hourly penalty).) Accordingly, we have no reason to disturb that assessment.[3]

Opacity

PQ also conceded liability for its opacity violations. It has limited itself to arguing on less than two full pages in its 105-page brief that the penalty is too high by half. It says the penalty should be $32,344 instead of the $64,688 assessed by the Department.

We find that there is a reasonable fit between the Department's assessment and PQ's many violations of its opacity standards. If anything, it is likely too low. Environmental compliance must be seen as just as important as a facility's production. *See EQT*, slip op. at 83; *DEP v. Angino*, 2007 EHB 175, 207-08, *aff'd*, No. 664 C.D. 2007 (Pa. Cmwlth. Jun. 26, 2008) (quoting *Leeward*, 2001 EHB at 890, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003), *pet. for allowance of appeal denied*, 827 A.2d 431 (2003)). We are not sure that, given the sheer volume of PQ's admitted violations over an extended period of time, the Department's penalty creates the necessary incentive to deter what appears to have been an ongoing, unresolved problem at the end of the penalty period. PQ violated the 20 percent opacity standard on 263 days and its 60 percent opacity standard on 13 days. There was no obvious trend toward improved compliance over time. Opacity is a condition caused by the emission of particulates, some of which are below 2.5 microns, which can be particularly harmful to human health. PQ is in a nonattainment region for particulate matter. PQ was fully aware of the problem, going back even before the penalty period, yet there is no credible evidence that it took appropriate measures to correct it. PQ says in passing that it has performed preventative maintenance on its particulate control batch

[3] We are aware that the hourly NOx and CO and opacity violations are based on retroactively certified CEMS and COMS data. However, PQ has repeatedly conceded liability for the violations.

wetting system (T. 936), but clearly it needed to try harder during the penalty period to resolve the ongoing problem. The Department only assessed one penalty per month instead of for each day of violation, which seems odd but which in any event dramatically reduced the assessment that justifiably could have been imposed.

Data Availability

Again, PQ has conceded liability for its data availability violations. Although it reserved the right to challenge the reasonableness of the penalty amount, other than a passing statement that the penalty should be "nominal," PQ has given us little explanation for why the Department's assessment of $32,620 is not a reasonable fit.

The Department has satisfied its burden of proving that there is a reasonable fit between its assessment and PQ's data availability violations. As with opacity, the sheer volume of violations coupled with the lack of any consistent trend toward improvement shows that the additional incentive of a civil penalty will hopefully inspire improved performance. There were 25 months where data was not sufficiently available for one or more pollutants. Environmental compliance is based in part on having data available to ensure necessary corrections can be made if violations are occurring. *See DEP v. Breslin*, 2006 EHB 130, 141 (self-monitoring and reporting are a critical part of the Department's permitting programs). PQ is in a nonattainment area for ozone (related to NOx) and particulate matter, and PQ is a major source of emissions.

Hourly CO Emissions

At the summary judgment stage, PQ did not concede liability regarding hourly CO emissions, and it raised certain defenses. We rejected those defenses and held that PQ was liable for the violations. PQ has not maintained a challenge to our holding in its post-hearing brief. It has, however, argued essentially the same theories to contend that there is not a reasonable fit

between its 466 days of violations and the Department's assessment of $113,750, which works out to an average penalty of $244 per violation.

Although $244 per violation of a permitted emission rate strikes us as already quite low, PQ variously argues that the total penalty should be zero, or $3,000 ($6.43 per violation), or $28,438 (a 75 percent reduction) ($61.02 per violation). In support of its position that it should only be required to pay nothing, $6.43, or $61.02 per violation, PQ argues that its hourly CO permit limit was unreasonably stringent. However, as we said in our summary judgment Opinion, the time for arguing that the permit limit was too low was when the limit was imposed. *PQ*, 2016 EHB at 834 (citing *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 87). A permittee is required to comply with its permit unless and until it is modified. *Id*. An action involving a subsequent civil penalty for violation of a previously unappealed permit provision is not the proper place to litigate the merits of that provision. *Sunoco, Inc. (R&M) v. DEP*, 2004 EHB 191, 241-42, *aff'd*, 865 A.2d 960 (Pa. Cmwlth. 2005). That said, the fact that the Department later relaxed the CO limit such that PQ's earlier exceedances might in some cases have no longer constituted violations suggests that there must not have been untoward damage to the public health or environment from some of those earlier violations. This fact might help explain why the Department's relatively modest assessment is so low. It does not, however, justify a further reduction.

PQ says it would have applied to modify the limits earlier if the Department had not suggested that it postpone doing so until PQ needed to modify its permit for other reasons. The record is not entirely clear that this ever happened. (T. 687, 1102-22, 1167-68, 1176, 1211-13.) It is interesting that PQ deposed and identified the Department employee who allegedly made the suggestion but did not call him as a witness. If we assume *arguendo* that such a suggestion was

made, as we held in our summary judgment Opinion, PQ was free to ignore the suggestion. Further, years had already gone by before the suggestion was allegedly made. We do not see this as a basis for further reducing the Department's already modest assessment. It would support our conclusion that the Department's assessment is not unreasonably low.

PQ argues more generally that the Department has failed to show that PQ gained any economic advantage as a result of the CO violations. It says there was no showing that it failed to install the proper pollution control equipment. It says that its dealings with the Department have been marked by undue confusion, a lack of knowledge, mixed signals, and delay, all of which were the Department's fault at least in part. It says the Department's method for calculating penalties is unduly formulaic and does not give due regard to the case-by-case evaluation mandated by the Air Pollution Control Act.

Even if we assumed for purposes of discussion that all of these points have at least some merit, we would not conclude that the Department's assessment of $244 per violation is unreasonable. Emission limits are at the very heart of PQ's permit and the air pollution control program in general. A penalty of $244 per violation is not much of an incentive for PQ to ensure that it timely takes whatever measures are necessary to comply with its permit. We were not left with the sense following the hearing that PQ has consistently implemented effective environmental compliance management, including appropriate training. (*See* T. 238-47, 279-80, 962-63, 978-79, 994-1000, 1017, 1051, 1218-23, 1227-28.) PQ is a multinational corporation with furnaces around the world. As with PQ's other violations during the penalty period, the violations were numerous and long-lasting and there was no trend toward improvement. Indeed, it was a rare day when PQ did not exceed its limit. PQ often deviated dramatically from its permit limit. Although its limit was 1.16 pounds, PQ had emissions as high as 64 pounds in an

hour. (C. Ex. 47.) The violations were persistent, dating back to before the penalty period and continuing thereafter. CO is a criteria pollutant and an asphyxiate that affects the nervous and cardiovascular systems. This is not the first enforcement action against PQ. To the contrary, it has a significant history of violations of the Air Pollution Control Act. The Department's assessment reasonably fits PQ's violations.

Conclusion

For these reasons, we uphold the Department's penalty assessments for PQ's violations of its hourly NOx and CO limits, opacity standard, and data availability requirements as follows:

Penalty	**Amount Assessed by DEP**
NOx lbs./hr.	$ 4,200
CO lbs./hr.	$ 113,750
Data availability	$ 32,620
Opacity	$ 64,688
Total Penalty	**$ 215,258**

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in an appeal from an assessment of civil penalty. 25 Pa. Code § 1021.122(b)(1).

3. The Department must prove by a preponderance of the evidence that the underlying violations of law giving rise to the civil penalty in fact occurred, that the civil penalty is lawful, and that there is a reasonable fit between the violations and the penalty amount. *Paul Lynch Investments, Inc. v. DEP*, EHB Docket No. 2016-014-B (Adjudication, Aug. 29, 2017); *Whiting v. DEP*, 2015 EHB 799, 805; *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 198-

99; *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 147-148 (citing *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008)).

4. When reviewing civil penalty assessments, the Board does not select what penalty the Board might independently believe is appropriate; rather, the Board reviews the Department's predetermined amount for reasonableness. *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 148; *Thebes v. DEP*, 2010 EHB 370, 398.

5. The Board may substitute its discretion and revise the assessment when it determines the Department's calculations are not a reasonable fit. *Whiting v. DEP*, 2015 EHB 799, 806; *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 148.

6. In reviewing civil penalty assessments, the Board is guided by the factors provided for in Section 9.1 of the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015. 35 P.S. § 4009.1. *See Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449.

7. Any violations must have a factual basis and be in accordance with the law for a penalty to be assessed. *Boyertown Sanitary Disposal Co. v. DEP*, 2010 EHB 762, 775; *Gordon v. DEP*, 2007 EHB 264, 271.

8. The Board previously found that PQ violated the NOx pounds-per-hour emissions limit, CO pounds-per-hour emissions limit, opacity standard, and data availability requirements contained in its permit. *PQ Corp. v. DEP*, 2016 EHB 826. PQ has not preserved a challenge to those findings.

9. The Department's reliance on retroactive CEMS data to establish liability for violations of PQ's 12-month rolling NOx and CO limits was contrary to the clear and unambiguous language contained in Condition 005 for the No. 4 Furnace in PQ's permit.

10. PQ did not waive the issue that, because of Condition 005 in PQ's permit, the Department improperly relied on PQ's CEMS data to establish liability for PQ's alleged violations of its 12-month rolling NOx and CO limits. *See generally Borough of St. Clair v. DEP*, 2015 EHB 290, 307-08; *DEP v. Seligman*, 2014 EHB 755, 759.

11. The Department did not meet its burden of proof to sustain violations of PQ's 12-month rolling NOx and CO limits on the basis of PQ's stack testing data alone.

12. Having not established violations of PQ's 12-month rolling NOx and CO limits, the Department cannot recover penalties for those alleged violations.

13. The Department's civil penalty assessment is a reasonable fit for PQ's violations of its hourly NOx and CO limits, its opacity standard, and its data availability requirements.

14. The Board upholds the Department's civil penalty assessment for PQ's violations of the Air Pollution Control of PQ's hourly NOx and CO limits, its opacity standard, and its data availability requirements, in the aggregate amount of $215,258.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of September, 2017, it is hereby ordered that PQ's appeal is sustained in part. PQ shall pay the Department a penalty of $215,258. Upon notification of payment, PQ's bond will be released by further order of the Board. The Department's motion to strike evidence of settlement discussions is denied as moot.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 6, 2017

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

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
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For Appellant:
Mark K. Dausch, Esquire
Chester R. Babst III, Esquire
Varun Shekhar, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	**Issued: September 7, 2017**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses a stone quarry's appeal of a Department letter amending the stone quarry's reclamation plan. The Department's modifications to hasten reclamation efforts in order to expeditiously abate the propagation of sinkholes in the area caused by the quarry are reasonable and in accordance with the law.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency entrusted with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 3301 – 3326, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Stipulation of the Parties No. ("Stip.") 7.)

2. New Hope Crushed Stone & Lime Company ("New Hope") is a Pennsylvania corporation that owns and operates a limestone quarry with its principal place of business located at 6970 Phillips Mill Road, New Hope, Solebury Township, Pennsylvania 18938. (Stip. 1, 2.)

3. New Hope's quarry in Solebury Township is operated as a noncoal surface mine pursuant to Permit No. 7974SM3. (Stip. 9.)

4. Intervenor Solebury Township (the "Township") has offices located at 3092 Sugan Road, Solebury Township, Pennsylvania 18963. (Stip. 6.)

5. Intervenor Solebury School (the "School") is a co-educational college preparatory day and boarding school located on approximately 90 acres in Bucks County, Pennsylvania, which serves approximately 230 day and boarding students in grades 7 through 12. (Stip. 4, 5.)

6. The Board previously issued an Adjudication on July 31, 2014, rescinding a depth correction the Department had issued to New Hope, which would have allowed it to mine 50 feet deeper to a level of 170 feet below mean sea level (-170 MSL), and determining that the quarry's mining and dewatering of the water table was creating a public nuisance by causing numerous sinkholes to open up on the School's campus and on other surrounding properties. *Solebury School v. DEP*, 2014 EHB 482. (Stip. 10, 23; Department Exhibit No. ("DEP Ex.") 1.)

7. New Hope filed an appeal of the Board's Adjudication before the Commonwealth Court, but discontinued the appeal before any decision was rendered. (Stip. 11.)

8. Following the 2014 Adjudication, the Department requested that New Hope submit appropriate documentation and revisions to its surface mining permit, its NPDES permit, and its reclamation plan to bring both permits into compliance with the 2014 Adjudication and to address the existing public nuisance. The back-and-forth between the Department and New Hope extended from September 2014 through August 2015. (Stip. 12, 13, 14, 15, 16; Notes of Transcript page ("T.") 29, 32; DEP Ex. 1.)

9. The Department repeatedly asked New Hope to submit a reclamation plan that proposed to expeditiously abate the public nuisance, and New Hope continually failed to do so. (T. 29, 32-33; DEP Ex. 1.)

10. New Hope's reclamation plan submissions to the Department consistently had timelines based on the amount of time needed to remove all mineable mineral reserves from the quarry instead of being based on the amount of time required to restore the groundwater levels to pre-mining conditions to abate the public nuisance. (T. 29, 32-33, 83-84; 347-49; DEP Ex. 1, 14, 16, 26.)

11. On October 1, 2015, the Department issued a Compliance Order requiring New Hope to modify its reclamation plan to expeditiously abate the public nuisance, and to submit to the Department "[a] reclamation plan based on the amount of time required to reclaim the quarry, not based on mineable reserves." (Stip. 17; T. 32-33; DEP Ex. 1, 14.)

12. The October order found that New Hope was in violation of Sections 7(c)(5) and 10 of the Noncoal Surface Mining Act, 52 P.S. §§ 3307(c)(5) and 3310. The order stated:

> NHCS [New Hope Crushed Stone] has failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. Specifically, NHCS has failed to submit to the Department an adequate Reclamation Plan and Sequence that addresses an acceptable timeline for reclamation of the quarry and how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater. Specifically, the reclamation plan provided by NHCS fails to address the following: (1) The reclamation plan provided by NHCS is based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The reclamation plan does not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 is unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The reclamation plan does not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the

Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit. (4) The reclamation plan does not address installation of a monitoring well on Solebury School's campus to monitoring [sic] groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requests an update regarding the installation of the above-referenced monitoring well. (5) The reclamation plan does not identify approximate acreages that will be reclaimed during the proposed timeframe, nor does it identify these areas on a map.

(DEP Ex. 14.)

13. The October order required New Hope to submit the following:

1. A reclamation plan based on the amount of time required to reclaim the quarry, not based on mineable reserves. Mining may occur concurrently with reclamation, however timely abatement of the public nuisance caused by NHCS's lowering of the water table under Solebury School is required.

   At a minimum, the reclamation plan and schedule submittal must include the following:

   A) A timetable for the reclamation of each highwall area of the quarry. This timetable must include a specific description of the reclamation methods for each highwall (i.e., blasting and/or backfilling), and the associated estimated reclamation costs. For each method to be utilized, the description must include the following:

      1) The amount of blasting needed for each highwall area in order to achieve the required final reclamation grades. This description must include, at a minimum, the required number of blasts, the time required to drill and blast each area and any other associated or pertinent information.

      2) The amount of excavation, filling and/or grading work required to achieve the final reclamation grades. This description must include, at minimum, the volumes of fill material required for each highwall area, the source of the fill material, the equipment to be utilized to achieve reclamation slopes, and the estimated time required for this equipment to backfill highwall areas.

      3) The reclamation plan must include a proposed timeframe for reclaiming all affected acreage within the surface mining permit. A map showing the stages of reclamation must be included.

      4) A detailed cost estimate, to include line items for each phase of reclamation.

   B) A timetable for the stream restoration work required under the existing Primrose Creek Consent Order and Agreement. The stream restoration

timetable must be detailed in the same manner as the timetable for reclamation required under Section A above.

2. A schedule describing when the lower lifts of the quarry will be flooded. The EHB decision requires abatement of the public nuisance, thus restoration of water table under the school must be conducted concurrently with the reclamation plan.

3. A plan to install a monitoring well on Solebury School's campus to monitor groundwater elevations.

(DEP Ex. 14.)

14. New Hope was required to submit a revised reclamation plan and the other requested information by October 30, 2015. At New Hope's request, that deadline was extended to November 30, 2015 by an order dated November 2, 2015. (Stip. 17; DEP Ex. 1, 14, 16.)

15. New Hope appealed both the October and November 2015 compliance orders at EHB Docket Nos. 2015-164-L and 2015-187-L, respectively. (Stip. 18; T. 34.)

16. On February 11, 2016, New Hope entered into a Consent Assessment of Civil Penalty (CACP) with the Department to resolve the two compliance orders and New Hope's appeals of those orders. (T. 29-31; DEP Ex. 1.)

17. In the CACP, the Department made the following findings, which New Hope agreed were accurate and agreed not to challenge in any future proceeding involving the Department:

F. Section 7(c)(5) and (10) of the Noncoal Surface Mining Conservation and Reclamation Act, Act No. 1984-219, 52 P.S. § 3307(c)(5) and (10) provides that:

> (c) Reclamation plan: The applicant shall also submit a complete and detailed plan for the reclamation of the land affected. Each plan shall include the following: (5) A detailed timetable for the accomplishment of each major step in the reclamation plan the operator's estimate of the cost of each step and the total cost to the operator of the reclamation program; and (10) Such other information as the Department may require.

G. On July 31, 2014, the Environmental Hearing Board (EHB) rescinded a depth correction that authorized NHCS to mine from -120' MSL to -170' MSL, citing that the quarry's ongoing dewatering operations are causing unabated

sinkhole formation at the nearby Solebury School. The EHB also declared the quarry a public nuisance. Following the EHB's Adjudication, the Department and NHCS exchanged a series of correspondences culminating in the Compliance Order dated October 1, 2015.

H. On September 11, 2014, the Department sent NHCS a deficiency letter requesting revisions to the mining and NPDES permit to bring both permits into compliance with the EHB adjudication. The revisions were due October 11, 2014. These revisions included requests for information concerning the Reclamation Plan for the quarry in Solebury Township.

I. On September 15, 2014, the Department received an email from EarthRes Group (ERG), NHCS' consultant, requesting an additional month as well as requesting a meeting with the Department.

J. On October 10, 2014, ERG sent a response to the Department's deficiency letter.

K. On February 24, 2015, the Department sent NHCS a letter stating that the October 10, 2014 response was unacceptable and again asked NHCS to provide the information requested in the September 11, 2014 deficiency letter.

L. On March 24, 2015, ERG, on behalf of NHCS, sent a letter attempting to address the Department's deficiency letter.

M. On May 13, 2015, Department staff, NHCS and its technical representatives met at the Pottsville District Mining Office to discuss Department expectations for how to bring the mining and NPDES permits into compliance with the EHB adjudication. The Department gave NHCS ninety days to provide a response.

N. On June 30, 2015, ERG, on behalf of NHCS, sent the Department a letter with a proposed reclamation and mine closure sequence for the quarry in Solebury Township.

O. On July 10, 2015, the Department sent NHCS a letter explaining why the proposed reclamation and mine closure sequence was unacceptable. The letter also gave NHCS thirty days to file a response.

P. On August 7, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department.

Q. On August 11, 2015, the Department sent a response to NHCS stating the Reclamation Plan was unacceptable and providing NHCS with fifteen days to file an acceptable plan.

R. On August 26, 2015, ERG submitted another Reclamation Plan on behalf of NHCS which the Department found to be unacceptable.

S. On October 1, 2015, the Department issued Compliance Order No. 15-5-048-N requiring NHCS to submit the deficient information for its Reclamations Plan to the Department by 8:00 AM on October 30, 2015. The Compliance Order stated that NHCS failed to conduct mining and/or mining related

activities in accordance with the terms and conditions of the permit and applicable rules and regulations of the Department. Specifically, NHCS failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. NHCS failed to submit an adequate Reclamation Plan and Sequence that addresses how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater within an acceptable schedule. The Reclamation Plan provided by NHCS did not address the following: (1) The reclamation plan provided by NHCS appeared to be based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The Reclamation Plan did not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 was unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The Reclamation Plan did not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit. (4) The Reclamation Plan did not address installation of a monitoring well on Solebury School's campus to monitor groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requested an update regarding the installation of the above-referenced monitoring well. (5) The Reclamation Plan did not identify approximate acreages that will be reclaimed during the proposed timeframe, nor did it identify these areas on a map.

T. On November 2, 2015, the Department issued Compliance Order No. 15-5-048-N(A) to amend the compliance date from October 30, 2015 as specified in Compliance Order No. 15-5-048-N to November 30, 2015. All terms and conditions specified in Compliance Order No. 15-5-048-N remained in full force and effect.

U. On November 30, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department. After review, the Department determined that the November 30, 2015 Reclamation Plan was also deficient.

V. On January 29, 2016, the Department issued a letter to NHCS modifying the November 30, 2015 proposed Reclamation Plan.

(T. 30-31; DEP Ex. 1.)

18. Pursuant to the CACP, New Hope agreed to pay a penalty of $4,000 and withdraw its appeals of the two orders within five days. (T. 34; DEP Ex. 1.)

19. New Hope withdrew the appeals of the October and November compliance orders on February 12, 2016. (Stip. 21; T. 34.)

20. Before entering into the CACP, New Hope submitted a revised reclamation plan to the Department on November 30, 2015. (Stip. 19; T. 58; DEP Ex. 17(2).)

21. New Hope's proposed plan involved backfilling the quarry and allowing the water levels to rise in the pit. (T. 101, 130; DEP Ex. 17(2).)

22. Reclamation by backfilling is done by piling up soil at the top of the quarry highwall and pushing it over the edge with a bulldozer. (T. 310-11.)

23. The slope is then built out until it reaches the appropriate reclamation slope, which is the angle of repose, or the angle at which a given material will naturally settle if placed in a pile. (T. 44, 54, 310-11.)

24. The November 30, 2015 plan dedicated a reclamation crew of two people, one using a loader/excavator and one using a haul truck, moving 100 cubic yards of fill material per hour. (T. 61-62; DEP Ex. 17(2).)

25. The November plan envisioned that stream restoration work on Primrose Creek would be completed in May 2017, upon which time reclamation would begin and be completed in July 2022, approximately 5.23 years later. (T. 59-60; DEP Ex. 17(2).)

26. New Hope proposed to lower its pumping rate to 500,000 gallons per day (gpd) after the completion of reclamation in July 2022. (T. 60, 74; DEP Ex. 17(2).)

27. According to the plan, the water level in the quarry pit would be at -2 MSL in July 2022 with a goal of reaching a final elevation of +98 MSL at an undetermined point in the future. (T. 60, 348-49; DEP Ex. 17(2).)

28. New Hope's plan contemplated that mining and reclamation would occur simultaneously. (T. 335-36; DEP Ex. 17(2).)

29. New Hope's plan proposed to conduct reclamation for 46 weeks per year, allowing two weeks for holidays, two weeks for vacation, and two weeks for "inclement weather." (DEP Ex. 17(2).)

30. On January 29, 2016, the Department issued the letter that is the subject of this appeal, determining that New Hope's November 30, 2015 reclamation plan remained deficient because, among other things, the plan did not expeditiously abate the previously identified public nuisance. (Stip. 20; T. 29; DEP Ex. 26.)

31. The Department's objective in issuing the letter was to restore groundwater beneath the School and in the surrounding area as soon as possible to abate the public nuisance. (T. 74-75, 77-78, 100, 103, 120, 174.)

32. The Department's letter, among other things, added additional personnel and equipment to reclamation activities, required a greater amount of fill be placed, and lowered the quarry's pumping rate to 500,000 gpd. (T. 57, 61-63, 65, 67, 108-11, 162; DEP Ex. 26.)

33. Specifically, the January 2016 letter made the following modifications to New Hope's reclamation plan:

> 1. The Primrose Creek stream work and/or the highwall reclamation work currently underway shall continue to be conducted on a continuous basis until completed to the Department's satisfaction.
> 2. NHCS shall conduct the stream and reclamation work for a minimum of 160 hours per week, utilizing at least four (4) workers/laborers who each work a 40 hour week.
> 3. NHCS shall place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during the highwall reclamation phases of operation.
> 4. The flooding of the quarry and lowering of the required daily pumping of pit water to the permit-required minimum of 500,000 gallons per day shall begin immediately. Pumping rates may increase only if water levels rise to an

elevation that prohibits safe reclamation of the quarry walls. There shall be at least two (2) safety benches below the active highwall reclamation area and the pit water. The Department reserves the right to modify pumping rates based on site conditions and other related issues.

5. A reclamation progress report shall be included with the quarterly groundwater and surface water monitoring report.
6. The quarterly report shall include the Mine & Reclamation Phase Development Plan map with the current +48' MSL contour and the inflow and outflow structure locations highlighted.
7. NHCS shall install a monitoring well designed to monitor groundwater elevations on the Solebury School property within 90 days of the date of this letter. Prior to installation of the monitoring well, NHCS shall discuss NHCS' plans for placement and design of the monitoring well with the Department.

(DEP Ex. 26.)

34. After reviewing New Hope's November 2015 reclamation plan, the Department performed its own reclamation timetable calculations based upon the information provided by New Hope and determined that New Hope could reasonably complete reclamation and stream restoration work in approximately 3.12 years. (T. 60-63; DEP Ex. 23.)

35. The Department modified New Hope's reclamation schedule as proposed in its November plan by adding two additional people to work on reclamation—one using a 65-ton haul truck, and one using a bulldozer—with equipment already present onsite. (T. 61-63, 65, 108-10, 111, 112; DEP Ex. 23.)

36. New Hope's existing loader/excavator has the capacity to service two 65-ton haul trucks for reclamation work. (T. 61-62, 111.)

37. The Department estimated that adding an additional truck would allow New Hope to move 200 cubic yards of fill per hour as opposed to 100 cubic yards per hour, thereby approximately cutting in half the time needed to complete reclamation. (T. 61-61; DEP Ex. 23.)

38. At the time the Department made the modification, New Hope's onsite equipment included four 65-ton haul trucks, one 30-ton haul truck, one loader/excavator, and one bulldozer. (T. 61, 111; DEP Ex. 23.)

39. The January letter also allows for the further modification of the reclamation plan if safety or environmental concerns arose, and permits New Hope to submit its own work plan as an alternative to the modified reclamation plan, subject to the approval of the Department. (T. 72-73, 121-23; DEP Ex. 26.)

40. New Hope has requested waivers from the reclamation activities outlined in the January 2016 letter and the Department has granted these requests when appropriate, some on the basis of inclement weather. (T. 72-73, 123, 350-351.)

41. Through proper planning and engineering, and by employing standard industry practices, a quarry can safely conduct reclamation activities concurrently with active mining even in the winter, as is done in many other quarries. (T. 37, 39, 42-54, 55, 72, 75-77, 108, 120-21, 201, 204; DEP Ex. 25.)

42. The January letter imposed a 500,000 gpd limit on the water that New Hope pumps out of the quarry from the discharge point to Primrose Creek east of the quarry. (T. 67, 162, 210-11; DEP Ex. 26, 30.)

43. The Department chose that rate because it would allow the water level in the quarry to rise as quickly as possible to abate the nuisance while still maintaining adequate flow to Primrose Creek as it exists downstream of the quarry. (T. 163-64, 168-69, 174.)

44. The rate of 500,000 gpd had been previously set in New Hope's NPDES permit as a minimum pumping rate that was designed to replicate the flow to the downstream portion of

Primrose Creek that existed naturally prior to New Hope's mining through the creek to connect its two quarry pits. (T. 115, 163, 164; DEP Ex. 29, 30.)

45. New Hope previously pumped an average of more than 2 million gpd to keep the quarry dry and facilitate mining. (T. 115, 116, 167; DEP Ex. 21.)

46. By adhering to the 500,000 gpd pumping limit, the water level in the quarry pit will return to pre-mining conditions in approximately 3.5 years. (T. 164-68, 211-12; DEP Ex. 21.)

47. The pumping limit of 500,000 gpd provides flow to Primrose Creek that is comparable to that in similar streams (T. 264), and it is a reasonable temporary measure until water fills the quarry pit (T. 261, 262-63, 279-80).

48. Once the quarry pit fills, water will naturally outflow from the pool and into Primrose Creek. (T. 280, 281.)

49. Groundwater levels beneath the School will not begin to rise until there has been a significant rise in water levels in the quarry. (T. 223, 224-25.)

50. At least seven collapse sinkholes have opened near the School's campus in the time from the Board's July 31, 2014 Adjudication until the conclusion of the hearing on the merits on March 21, 2017. (T. 212-13.)

51. On January 13, 2017, New Hope completed installation of the monitoring well on the School's property, as required by the January 2016 letter. (Stip. 35.)

52. The requirements of the January 2016 letter are consistent with the October and November compliance orders, including the requirement that restoration of the water table take place concurrently with quarry reclamation. (T. 83-84; DEP Ex. 14, 16, 26.)

DISCUSSION

New Hope Crushed Stone & Lime Company ("New Hope") has appealed the Department of Environmental Protection's (the "Department's") January 29, 2016 letter disapproving and modifying New Hope's reclamation plan for the limestone quarry it operates in Solebury Township, Bucks County. Mining at the quarry property has taken place since at least 1829. The Department issued New Hope its first mining permit in 1976. This Board's first involvement was in 2002 when Solebury Township challenged the Department's decision to renew New Hope's NPDES permit. We issued an Adjudication in that case holding that the Department failed to adequately consider the impact to the area's hydrologic balance caused by the quarry's continued operation. *Solebury Twp. v. DEP*, 2004 EHB 95. There have been several appeals involving the quarry since then. (*See* EHB Docket Nos. 2005-183-MG, 2006-116-MG, 2011-135-L, 2011-136-L, 2015-164-L, 2015-187-L, and 2016-132-L.)

The appeal docketed at EHB Docket No. 2011-136-L culminated in the Board's issuance of an Adjudication on July 31, 2014 rescinding a depth correction the Department had issued to New Hope, which would have allowed it to mine 50 feet deeper to a level of 170 feet below mean sea level (-170 MSL). *Solebury School v. DEP*, 2014 EHB 482. The Adjudication followed a hearing lasting ten days during which numerous fact and expert witnesses testified and hundreds of exhibits were admitted into evidence. That appeal was initiated by Solebury School, a private school whose campus is located immediately adjacent to the New Hope quarry. Solebury School complained that New Hope's quarrying, and the associated need to pump water out of the quarry to keep it dry to facilitate mining, had depressed the water table beneath the School by approximately 100 feet, which led to the propagation of at least 29 collapse sinkholes between 1989 and the time of the hearing in the fall of 2013. Some of the sinkholes were as

large as a quarter of an acre in size, while others were small but no less dangerous. We ultimately agreed with the School in that appeal and concluded that New Hope was causing a public nuisance.

Our Adjudication rescinding the depth correction did not otherwise affect New Hope's existing surface mining permit authorizing the quarry to be mined to a depth of -120 MSL. New Hope continued to mine out its reserves above the -120 MSL level. A prolonged back and forth between the Department and New Hope followed the Adjudication as the Department worked with New Hope to revise its reclamation plan to address the abatement of the public nuisance New Hope was causing. The Department eventually determined that New Hope's submissions of a revised reclamation plan were inadequate and issued an order on October 1, 2015, finding that New Hope was in violation of Sections 7(c)(5) and 10 of the Noncoal Surface Mining Act, 52 P.S. §§ 3301 – 3326, and formally requiring New Hope to revise its reclamation plan so that it was based on the amount of time required to reclaim the quarry and not on the amount of time needed to mine out the rest of the quarry's reserves above -120 MSL. The Department issued another order on November 3, 2015, granting New Hope's request for an extension to comply with the October order.

New Hope appealed those compliance orders to the Board. (*See* EHB Docket Nos. 2015-164-L and 2015-187-L.) New Hope also submitted a reclamation plan to the Department on November 30, 2015 in an effort to comply with those orders, but the Department again found the plan to be inadequate to timely abate the nuisance. On January 29, 2016, the Department issued the letter that is the subject of the current appeal, modifying New Hope's plan so that it satisfied the requirements of the two orders and timely abated the nuisance. New Hope filed the current appeal on February 29. Both Solebury School and Solebury Township intervened. Meanwhile,

New Hope entered into a Consent Assessment of Civil Penalty (CACP) with the Department and withdrew its appeals of the October and November orders on February 12, 2016. On May 5, 2016, we held a hearing on New Hope's petition for supersedeas. At the parties' request, we ruled from the bench and denied the petition.

As we first observed in our ruling at the supersedeas hearing, the scope of the instant appeal is actually quite narrow. In response to a motion for a protective order filed by the School earlier in this appeal, we wrote at length in a five-judge opinion about how the boundaries of this appeal have been hemmed in by the doctrines of administrative finality and collateral estoppel due to New Hope's withdrawal of its appeals of the October and November compliance orders and entering into the CACP with the Department, the findings in which New Hope agreed not to challenge. *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666. In granting the protective order in large part, we found:

> [B]ecause the Board's role in hearing an appeal is necessarily circumscribed by the action under appeal, *Love v. DEP*, 2010 EHB 523, 530; *Winegardner v. DEP*, 2002 EHB 790, 793, the focus of this case is narrowly confined to the letter and the modifications to New Hope's reclamation plan made by the letter. Our role will be to decide whether the Department, in determining that New Hope's reclamation plan was deficient and modifying the plan in the way that it did, acted reasonably and in accordance with the law, whether its decision is supported by the facts, and whether the decision is consistent with the Department's obligations under the Pennsylvania Constitution. *See Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op at 12 n.2 (Adjudication, Feb. 29, 2016); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.
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> Any attempt by New Hope to contest what has already been determined by the underlying orders is outside the scope of this appeal. The doctrine of administrative finality precludes a future attack on an action that was not challenged by a timely appeal. *Kalinowski v. DEP*, EHB Docket No. 2016-032-R, slip op. at 3 (Opinion, Jun. 28, 2016) (citing *Dep't of Envtl. Res. v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977)). "It is well-settled that a party may not use an appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action." *Love v. DEP*, 2010 EHB 523, 525. By the same token, if a party appeals an order and then

> later withdraws that appeal before it is adjudicated, that order becomes final and cannot be attacked in another, separate appeal. *White Glove, Inc. v. DEP*, 1998 EHB 372. New Hope withdrew its appeals of the October and November orders and these orders are now final. Every aspect of the underlying orders has now been established and cannot be attacked in the current appeal of the letter.
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> Because the underlying compliance orders are final, the factual predicate giving rise to New Hope's submission of a revised reclamation plan is now beyond the purview of this appeal. Therefore, that New Hope's existing reclamation plan was in violation of the Noncoal Surface Mining Act and that it was required to revise its reclamation plan in a way that more expeditiously abated the nuisance being caused by the quarrying are determinations that are now final. New Hope can no longer contest that its prior reclamation plan was deficient in the ways that the Department found in its two orders. New Hope can no longer challenge whether it had to submit a new reclamation plan. New Hope cannot challenge that it had to submit a reclamation plan that timely abates the public nuisance. It cannot contest that the restoration of the water table underneath the School must occur with all deliberate speed concurrently with reclamation. All that remains, then, is the specifics of the reclamation plan, including the pumping schedule. The operative question being: Do the details of the plan as modified by the Department reflect a lawful and reasonable exercise of the Department's discretion?

Id. at 684-85.

Therefore, what we are tasked with deciding here is whether the Department's modifications of New Hope's reclamation plan are reasonable, supported by the facts, and in accordance with the law, including the Department's obligations under the Pennsylvania Constitution.[1] We conclude that they are.

[1] During the hearing on New Hope's petition for supersedeas, the parties agreed that the Department's January 2016 letter was the functional equivalent of an order from the Department. Under our rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4). This burden also carries over to the similarly aligned intervenors, Solebury School and Solebury Township. The Department and Intervenors must prove by a preponderance of the evidence that the Department's issuance of the letter to New Hope and the modifications contained therein constitute a lawful and reasonable exercise of the Department's discretion and that the letter is supported by the facts. *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 14 (Adjudication, Apr. 10, 2017); *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Mgmt. Co. v. DEP*, 2010 EHB 456, 474-75. The Department's action must also be consistent with its obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 24-25 (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). *See also Pa. Envtl. Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017). The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v.*

In New Hope's posthearing brief it only addresses Requirements 2, 3, and 4 in the January 2016 letter—those being, conducting at least 160 hours of reclamation work per week (using four individuals working 40-hour weeks) (Requirement 2), placing at least 200 cubic yards of fill per hour for reclamation purposes (Requirement 3), and pumping no more than 500,000 gallons per day (gpd) out of the quarry (Requirement 4). Under our rules, "[a]n issue which is not argued in a posthearing brief may be waived." 25 Pa. Code § 1021.131(c). *See, e.g., B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 12 (Adjudication, Aug. 9, 2017); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246. Therefore, it appearing that Requirements 1, 5, 6, and 7 are uncontested, we will only address Requirements 2, 3, and 4.[2]

Requirements 2 and 3

Requirements 2 and 3 are intertwined. They both involve New Hope's obligations to conduct reclamation work on a sustained and continuous basis week by week so that reclamation occurs concurrently with rising water levels and so the quarry can be properly reclaimed around the same time that it becomes flooded. The Department's modifications of New Hope's reclamation plan in this regard are straightforward. New Hope proposed in its November 2015 plan to use two of its employees working eight-hour shifts moving 100 cubic yards of fill per hour to conduct reclamation work throughout the year. One employee would operate a loader/excavator and the other would operate a haul truck. The Department's modifications merely add two more people to the reclamation crew operating two additional pieces of equipment.

DEP, 2015 EHB 577, 593; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[2] We note that New Hope has already installed a monitoring well on the School's campus per Requirement 7. (Finding of Fact ("FOF") 51.)

The Department's modifications are relatively minor and generally consistent with the thrust of New Hope's own plan from November 2015. In response to the now final Department orders requiring New Hope to submit a reclamation plan that timely abated the public nuisance, New Hope proposed to backfill the quarry and let the water levels rise in the quarry and eventually underneath the School. The Department determined that New Hope's proposal would not accomplish this quickly enough.

In terms of backfilling, the Department looked at New Hope's proposal to use one 65-ton haul truck and one loader, and augmented it by an additional 65-ton truck and a bulldozer, both of which New Hope already had onsite. The Department determined that New Hope's loader/excavator had the capacity to accommodate filling two trucks instead of just one. The Department noted that New Hope did not have any equipment in its plan designated for pushing fill or doing final grading work so the Department utilized New Hope's bulldozer. (T. 65.) The Department concluded that doubling the haul trucks from one to two would essentially cut in half New Hope's predicted time for completing reclamation. Thus, instead of moving 100 cubic yards of fill per hour as New Hope proposed, the Department required 200 cubic yards per hour to be moved. This requirement was simply a result of relying on New Hope's own projections and concluding that, by adding two more people, New Hope could double the amount of reclamation it conducted per hour.

It is hard to see the argument of how the Department's modifications are not reasonable. Michael Menghini, the Department's District Mining Manager, reclamation expert, and author of the letter under appeal, credibly testified that the backfilling requirements imposed on New Hope did not amount to moving a significant amount of dirt, and that other quarries move much more material than that. (T. 121-22.) The School's reclamation and geotechnical engineering expert,

Michael Byle, P.E., testified that Menghini's calculations were accurate and that the reclamation requirements were achievable and will help ensure the timely reclamation of the quarry. (T. 208-09.) Indeed, Byle believed that the Department could have been imposed more stringent requirements. (T. 207.) He opined that the reclamation could be completed more quickly, and that there should have been requirements for more detailed reporting, better monitoring, and additional controls. (T. 228, 231.) Even New Hope's own mining and reclamation expert and long-time consulting hydrogeologist, Lou Vittorio, P.G., testified that as a general matter using four employees for reclamation activities is "certainly reasonable." (T. 325.) We do not think the Department has made an unreasonable demand on the quarry by requiring four people to be devoted to reclamation work moving 200 cubic yards of fill per hour.

New Hope primarily argues against the Department's requirements by contending that they ignore significant safety concerns, mostly due to winter weather conditions. Lou Vittorio testified that reclamation is riskier in the winter because of freezing and thawing. (T. 310-13.) He contrasted reclamation work from the mining that New Hope routinely conducts during the winter by saying that mining takes place on rock, which is more stable than the soil where reclamation is conducted. Vittorio said that soil can be influenced by precipitation, which could become unstable during freeze and thaw conditions. Vittorio was particularly concerned about the potential for a slip to develop on the highwall and someone falling over the edge. He also said that vegetation does not have the chance to develop on the reclamation slopes during the winter, which would provide greater stability to the slopes. (T. 320.) Vittorio opined that working beneath unvegetated slopes (conducting mining) poses a safety risk in that rocks or boulders could dislodge from the reclamation slope and tumble down to where people could be

working. He maintained that New Hope needs to continue to mine while conducting reclamation work in order to pay for the reclamation. (T. 355-56.)

Michael Byle credibly testified that concurrent mining and reclamation can be done safely in any season if it is properly planned and engineered through measures such as engineering stable slopes and installing catch berms on the benches. Byle testified that the materials being used for reclamation were crucial to determining the appropriate slopes that would remain stable, and that reclamation could occur safely even during the winter if such matters were taken into account like material specifications, material placement, and the sequencing of reclamation. (T. 204.) The overarching theme of Byle's testimony is that there are always safety issues that go along with conducting mining or reclamation in a quarry, but through thoughtful and proper planning, design, and engineering, the safety concerns can be allayed, including those raised by New Hope.

We tend to agree. The Department presented significant evidence of other quarries conducting concurrent reclamation and mining even during the winter months. (T. 42-54, 72, 108, 120-21; DEP Ex. 25.) In fact, since the 1990s newly permitted noncoal surface mines have been required to conduct concurrent mining and reclamation pursuant to 25 Pa. Code § 77.595.[3]

[3] 25 Pa. Code § 77.595 provides:

> (a) Reclamation procedures, including backfilling, grading, topsoil replacement and revegetation of land that is disturbed by noncoal surface mining shall be kept concurrent with the progress of the proposed operation to the greatest extent possible in conformance with §§ 77.456, 77.592—77.594, this section, § 77.596 and the approved reclamation plan.
>
> (b) If site conditions dictate that reclamation cannot begin until mineral extraction is terminated, the reasons for this delay shall be detailed in the reclamation plan required under § 77.456 (relating to reclamation information).
>
> (c) Reclamation shall begin within 30 days of when mineral extraction is terminated, and be completed within the period specified in the approved reclamation plan.
>
> (d) Mineral extraction is considered to be terminated when the permitted extent of the mineral reserves has been extracted.

Notably, New Hope's own proposed reclamation plan from November 2015 only carved out two weeks for what it called "inclement weather." (DEP Ex. 17(2).) It is not clear why New Hope now takes an uncompromising stance against reclaiming in the winter in this litigation. The Department testified that the only difference between its reclamation calculations and New Hope's was the addition of two people and two pieces of equipment. (T. 65.) We take this to mean that the Department has left intact New Hope's two-week buffer for unfavorable weather conditions. In any event, based on the evidence and testimony, we do not believe that there is a categorical bar against performing reclamation in the winter due to safety reasons. As a general matter, winter reclamation can be safely performed so long as appropriate precautions are taken such as those outlined by Michael Byle, some of which are inherent to reclaiming even during optimal weather conditions.

Nevertheless, should New Hope experience weather-related issues or any other complications, the Department has provided an avenue for relief in the form of what it calls a waiver request. The January letter provides:

> The Department reserves the right to modify this work plan should safety or environmental concerns arise that were not considered or known at this time.
>
> New Hope Crushed Stone & Lime Co. may propose its own work plan at any time. However, any plan submitted by NHCS requires formal, written approval from the Department prior to its implementation. Until the Department approves an alternate work plan, NHCS shall perform stream and reclamation work in accordance with the requirements set forth in this letter.

(DEP Ex. 26.) Michael Menghini testified that he did consider potential seasonal impacts to New Hope's work, which is why this provision was placed in the letter. (T. 121-23.) The Department says that in the event New Hope experiences difficulty complying with the requirements of the letter due to unforeseen issues, New Hope may request a temporary waiver of those requirements. The Department has in fact granted New Hope waivers in the past,

allowing New Hope to suspend reclamation activities on the basis of inclement weather or hazardous site conditions. (T. 72-73, 123.) Menghini even suggested that, if New Hope did not want to reclaim at all in the winter, New Hope could, for instance, submit a plan that shows how it would conduct increased amounts of reclamation during warmer months to make up for the deficit. (T. 122.) The text of the letter appears to explicitly reserve the possibility that safety or environmental concerns could arise for which the letter on its face does not account. Therefore, we believe New Hope's weather concerns are overstated.

New Hope also argues that the Department did not consider the appropriate sequencing of reclamation when it mandated that 200 cubic yards of fill be moved per hour. The Department reasonably responds that it left the sequencing of the reclamation work to the best judgment of New Hope. New Hope's sequencing complaint stems from one of the primary sources of dispute over the reclamation requirements, which is a difference of opinion between the Department and New Hope over what should take precedence at the quarry, mining or reclamation. New Hope believes that it should be mining, and that it is entitled to mine out the stone in the quarry that exists above the -120 MSL mark. The Department's position is that reclamation has priority over mining and that New Hope's mining is more or less incidental to its obligation to reclaim the quarry—some mining can occur but mostly as a way to facilitate the reclamation. (T. 78, 103, 120.) In the event that New Hope determines that it cannot concurrently mine and reclaim the quarry, the Department expects New Hope to stop mining and conduct reclamation work. (T. 147.) We find the Department's position to be reasonable. New Hope's obligation to timely abate the nuisance is administratively final. It is up to New Hope to determine the appropriate sequencing for its reclamation, even if that means it will at times need to sacrifice mining.

New Hope also spends a significant amount of time critiquing the reclamation requirements on the basis of the difficulties it says it will experience in complying with the Department's directives to meet the reclamation objectives. New Hope says it does not have enough people to conduct the required reclamation work while still conducting mining. New Hope's Chief Financial Officer, Christina Cursley, testified that New Hope has suffered attrition in its workforce recently and it has had a difficult time hiring and retaining new employees. (T. 367-69.) She said that New Hope has also had a hard time finding qualified workers, and that it has had to hire unskilled workers and then spend time training them, which has slowed down the reclamation work.[4] (T. 370-72.) Vittorio likewise testified that, while the Department's allocation of four people for reclamation was generally reasonable, it was excessive for New Hope because of its staffing issues. (T. 325.) Because of these staffing issues, which New Hope contends the Department did not consider, New Hope argues that the reclamation requirements in the letter are unreasonable.

However, if a directive is objectively reasonable, as the directive to New Hope is, the recipient's ability to comply with the directive due to its own individual, say, financial circumstances is irrelevant in determining the validity of the directive and whether it is a lawful and reasonable exercise of the Department's discretion. *B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 19-20 (Adjudication, Aug. 9, 2017); *Rozum v. DEP*, 2008 EHB 731, 735; *M & M Stone Co. v. DEP*, 2008 EHB 24, 67; *Starr v. DEP*, 2003 EHB 360, 373; *Wasson v. DEP*, 1998 EHB 1148, 1158; *Ramey Borough v. Dep't of Envtl. Res.*, 351 A.2d 613, 615 (Pa. 1976). The issue of one's ability to comply based on its individual circumstances, if it is to be

[4] On cross-examination, Cursley admitted that New Hope has not reached out to any contractors or unions in order to compensate for any staffing shortfalls. (T. 378-79.) New Hope has already contracted out the stream restoration work for Primrose Creek. (T. 339, 376.)

raised at all, is properly addressed to an enforcement proceeding, not in an appeal to this Board. *Dirian v. DEP*, 2013 EHB 224, 232.

Requirement 4

The fourth requirement in the Department's letter imposes a limit on the amount of water that the quarry can pump out, which the Department set at 500,000 gpd. The quarry previously pumped more than 2 million gpd out of the quarry in order to keep it dry to facilitate mining. The water pumped from the quarry discharges to Primrose Creek. The rate of 500,000 gpd had been earlier established in New Hope's NPDES permits as a minimum pumping rate that was designed to replicate the flow to the downstream portion of Primrose Creek that existed naturally prior to New Hope's mining through the creek to connect its two quarry pits. (T. 164; DEP Ex. 29, 30.) *See also Solebury Twp. v. DEP*, 2007 EHB 729; *Solebury Twp. v. DEP*, 2007 EHB 713. The Department chose to impose that rate in the January letter because it would allow the water level in the quarry to rise as quickly as possible while still maintaining adequate flow to Primrose Creek. By pumping out less water the quarry has begun to fill up. Under the current pumping rate, the Department estimates that the quarry will fill up approximately three-and-a-half years from the date of the January 2016 letter.

The School presented the expert testimony of Jennifer Wollenberg, PhD, who evaluated stream flow in streams comparable to Primrose Creek and determined that the 500,000 gpd pumping limit was in the same range as the comparison streams. (T. 264.) She credibly opined that the pumping limit was a reasonable means of providing adequate flow to Primrose Creek as a temporary measure while allowing groundwater within the quarry's zone of influence to rise. (T. 261, 279-80.) Once the quarry pit fills then the downstream portion of Primrose Creek will naturally outflow from the pool within the pit.

New Hope allots only around one page of its posthearing brief to Requirement 4, arguing that the 500,000 gpd pumping limit is arbitrary because the Department did not evaluate other, higher pumping limits. Given the entirely reasonable goal of expeditiously abating the public nuisance, we find the limit to be appropriate.

New Hope somewhat relatedly argues that the Department did not undertake an analysis of alternative means to achieve the abatement of the nuisance that were not merely allowing the quarry to fill with water as expeditiously as possible, and which would not hinder the quarry's mining. New Hope critiques the Department for not performing any studies or exploring other potential engineering solutions to prevent the propagation of sinkholes in the area and on the School's campus. For instance, New Hope contends that the Department should have considered things like geotechnical investigations to identify sinkhole-prone areas on the School's campus and on other neighboring properties. The Department takes the altogether rational position that the onus was on New Hope to propose other plausible solutions to abating the public nuisance. The Department points out that New Hope never proposed any of these alternative ideas in its own reclamation plans. The Department never received any submission from New Hope with respect to geophysical testing (T. 118), which the Department's expert hydrogeologist, Michael Kutney, P.G., credibly testified would do nothing with respect to restoring groundwater levels beneath the School (T. 179). The Department gave New Hope several opportunities to propose an appropriate plan, and each time New Hope's submissions did not reflect an effort to expeditiously abate the public nuisance. The Department merely took New Hope's own proposal of backfilling and flooding the quarry and tweaked it so that it would occur faster than what New Hope proposed.

Further, our standard of review does not require the Department to have reached the "best" plan possible in making its modifications, or to have investigated the entire universe of possibilities for stopping sinkholes around the quarry; it only requires the Department to have acted reasonably and in accordance with the law. *Cf. Borough of Kutztown v. DEP*, 2016 EHB 80, 94 (in the context of sewage facilities planning, recognizing that it is not the Department's responsibility to determine whether a municipality has selected the "best" plan, but merely to ensure that the plan satisfies the regulations and is otherwise reasonable); *Guerin v. DEP*, 2014 EHB 18, 25 (recognizing under the Hazardous Sites Cleanup Act that there is nothing requiring the Department to choose the "very best" location for installing a monitoring well, only a reasonable location).

New Hope contends that its November 2015 reclamation plan went a long way to expeditiously abating the public nuisance. It emphasizes that it voluntarily sacrificed significant mineable reserves, shortening the operational life of the quarry by more than five years. According to the reclamation timeline New Hope submitted with its November 30, 2015 plan, it projected that the water level inside the quarry would reach -2 MSL by July 2022 when it concluded its reclamation work. (DEP Ex. 17(2).) At that point, New Hope intended to reduce its pumping to 500,000 gpd. (T. 74.) However, -2 MSL is still 100 feet below the quarry's elevation of +98 MSL. It is unclear how long beyond the July 2022 projection before the water level would have reached +98 MSL, although Menghini postulated that under New Hope's proposal it could have taken until 2026. (T. 74.) A plan that does not provide for restoring groundwater levels for more than a decade is unreasonable, and it does not satisfy the requirements of the now final October and November 2015 orders to submit a plan that timely abates the nuisance.

New Hope's Other Arguments

New Hope devotes the bulk of its arguments in its posthearing brief to attempting to relitigate the past, whether that is our 2014 Adjudication, the decision we made in our Opinion and Order granting in part the School's protective order, or in subsequently relying on that Opinion to grant in part a motion in limine filed by the School to preclude the testimony of two of New Hope's experts, and to restrict the testimony of its third, Lou Vittorio. For instance, New Hope maintains that administrative finality and collateral estoppel do not apply in this case (and for the first time New Hope provides legal support for its contentions that its claims should not be barred by these doctrines). It says we improperly restricted discovery and precluded its experts from testifying about sinkhole causation. To the extent that New Hope presents any new arguments, we nonetheless find them unavailing.

We have already addressed these issues extensively, as indicated by the quote from our earlier Opinion near the beginning of our discussion. We incorporate additional points here:

> Collateral estoppel has considerable application here. Many of the facts and legal conclusions underpinning the Department's letter cannot be relitigated in this appeal. For example, although we did not specifically direct the Department to do anything in our Adjudication, we did find that it had the legal authority, and indeed a duty, not to allow a noncoal operator to perpetuate an ongoing threat to the public's health and safety. We held that New Hope was perpetuating such a threat by continuing to draw down groundwater, which was in turn causing hazardous sinkholes on an ongoing basis. We held that the only way to abate the threat was to allow the groundwater to return to normal levels. These matters were all essential to our conclusion that a rescission was needed, which we decided in the course of rendering a final decision on the merits in a case vigorously disputed by the same parties in this case.
>
> With these concepts of relevance, administrative finality, collateral estoppel, and proportionality in mind, we turn to New Hope's disputed discovery requests. The School argues that most if not all of New Hope's discovery requests are improper and burdensome because they seem to be aimed at the issue of sinkhole causation, and specifically New Hope's efforts to attribute causation to the School's use of its own property. The School contends that not only is sinkhole causation not relevant to the narrow appeal of the Department's letter modifying the quarry's reclamation plan, but that causation has already been conclusively established by

our 2014 Adjudication and the Department's compliance orders. The School says that causation has been attributed to the quarry's pumping, and New Hope is barred from relitigating this in the current appeal.

New Hope responds that its discovery requests are not seeking information regarding causation, but rather its discovery is necessary to assess the effects of the Department's letter on the School. New Hope reiterates slight variations of this rather vague statement throughout its response. ("The desired discovery will assist [New Hope] in the important task of insuring that the Letter's requirements properly impact the area of the quarry"); ("discovery is needed for evaluation of the Letter's requirements related to the response at the quarry"); (discovery will "help us determine what advances safety and health at the School"); (discovery will "help [New Hope] determine how the requirements of the Letter affect the environmental conditions in the area of the quarry, the School, and the vicinity"); ("help determine the effect of the letter"); ("help assess the safety of the School"); and ("assess…whether the actions that are currently being taken are having any impact on the School"). We are certainly receptive to explanations of why discovery is relevant when the relevance is not obvious to us, but these vague statements are not particularly helpful. We have already held that the School grounds are unsafe because of the ever present threat of collapse sinkholes being caused by the quarry's groundwater pumping, and that the only way to make the School safe again is to allow groundwater levels to return to normal. Again, although we did not specifically require it to do so, the Department took our findings to heart and is requiring New Hope to immediately allow groundwater levels to gradually recover so that the School can, some day, eventually return to providing a safe environment for the children and faculty that live on and use its grounds. New Hope withdrew its appeals from the compliance orders requiring it to allow groundwater levels to begin to recover, and it signed a consent assessment promising not to challenge the Department's findings.

The basic flaw in New Hope's response is that it never truly articulates how the School's building records, historical construction of buildings and stormwater facilities since 1978, geotechnical studies, sinkhole remediation efforts, and groundwater use relate to any of the requirements of the letter. New Hope never tells us, for example, that if the School's gymnasium was built in such a way that it will exacerbate sinkhole formation, it somehow follows that the Department's limitation on the quarry's groundwater pumping should be lower or higher. The only reason we can think of why information regarding construction of the gymnasium would be relevant is if we were trying to determine what is causing sinkholes to form on the campus, but that issue is off the table. We simply cannot imagine how details regarding the School's gymnasium could possibly relate to the Department's modifications, nor should we need to. New Hope has not supplied an explanation.

New Hope never explains why it needs, say, a detailed history of the School's sinkhole repairs in order to be able to challenge the requirement that the quarry devote a certain number of man-hours per week to reclamation. It never connects the dots between the School's management of sewage going back to 1978 and the

> requirement to place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during highwall reclamation. We could go on along these lines, but the point is that we agree with the School's conclusion that the only logical reason for inquiring into these matters is to relitigate the sinkhole causation issue, and that we will not allow.
>
> New Hope says that it "is attempting to address health and safety. It is attempting to determine the effect of the Letter's requirements on that health and safety and whether the requirements are arbitrary and capricious. Details relating to construction and safety will be able to determine whether the Department's requirements in the Letter are appropriate. Therefore, the information is relevant." We have a difficult time following New Hope's chain of deductive reasoning. While safety was of particular concern the last time around, and while that case serves as important context, this appeal is really about whether the Department's modifications to the reclamation plan are reasonable to bring about a goal that is no longer subject to challenge. New Hope never tells us how it reaches the conclusion that the information it seeks is relevant apart from stating it as self-evident when its relevance is in fact not readily apparent.
>
> At one point New Hope argues that it "is not re-litigating the cause of the sinkholes—it is attempting to determine the effect of the Letter. Even if it were at this time, this would not be barred by collateral estoppel." Once again, we are not sure what this means. To the extent New Hope is arguing that, while collateral estoppel may bar issues from being relitigated at trial it does not operate to bar *discovery* on these issues, New Hope offers no support for this argument, and it is deeply flawed. If an issue is barred from being litigated at trial, we do not see how it can possibly be relevant to the subject matter of the appeal, and thus a proper topic of discovery.

New Hope Crushed Stone & Lime Co., 2016 EHB at 686-90.

Although New Hope complains that we improperly limited its discovery, as just demonstrated, New Hope presented a series of weak and conclusory arguments in response to the School's motion for a protective order, and its arguments were no more convincing when it came back seeking reconsideration, which we denied in another five-judge Opinion:

> Our primary issue with New Hope's motion for reconsideration is that New Hope never cites to or otherwise addresses what it is required to show under our rules on reconsideration of final or interlocutory orders. New Hope never discusses the extraordinary circumstances it believes justifies reconsideration of our Opinion and Order. It never cites to any case in support of its position. In fact, the motion does not contain any legal authority apart from a somewhat errant reference to the Department's authority under the Noncoal Act to issue orders to abate nuisances. *See* 52 P.S. § 3311(b). Our rule permits a party seeking reconsideration to file a memorandum of law with its motion or petition, but no memorandum of law was

> filed here. Our Order did not rest on a legal ground or a factual finding that had not been proposed by any party. New Hope presents no new crucial and inconsistent facts.
>
> In fact, New Hope has not presented anything new at all. New Hope essentially does nothing more in its motion for reconsideration than repeat the same vague assertions that it made in its original response to the School's motion for a protective order that it needs the discovery to assess the "effect of the letter." It continues to fail to explain what that means or why, say, building plans from the 1970s would help it assess those effects in the narrow appeal before us. New Hope understandably disagrees with our earlier decision, but mere disagreement is not an appropriate basis for reconsideration. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118. Reconsideration of interlocutory orders demands extraordinary circumstances because it asks for extraordinary relief. *Harriman Coal Corp. v. DEP*, 2001 EHB 1, 5. New Hope has failed to allege, let alone demonstrate, that any such circumstances exist.

New Hope Crushed Stone & Lime Co. v. DEP, 2016 EHB 741, 744-75 (footnote omitted).

New Hope also says that the Board exceeded its authority in "unilaterally" declaring that the quarry was creating a public nuisance when we found that New Hope was causing the unabated, unpredictable, and dangerous formation of collapse sinkholes across the School's campus and throughout the surrounding area, constituting a significant threat to the health, safety, and welfare of the students and faculty who live on and attend the campus as well as to the other neighbors of the quarry. We are not sure what New Hope has to gain in the context of the current appeal even if the words "public nuisance" were not employed in our 2014 Adjudication. Sinkhole causation was aggressively and exhaustively litigated by the parties in the prior action, and after ten days of hearing and a plethora of evidence, it was clear that the cause was undeniably New Hope and its prolonged dewatering of the area water table. Even New Hope agreed in that case that quarry dewatering was at least a contributing factor to sinkhole formation. *See, e.g., Solebury School*, 2014 EHB at 521 ("In fact, there is actually no dispute in this case that New Hope's continued mining is at the very least contributing to an intolerable and dangerous sinkhole problem at the School."); *id.* at 529 ("Perhaps somewhat

surprisingly, none of the credible experts disagree that New Hope's mining is at least a contributing factor that is causing the hazard.")

In any event, the time for New Hope to challenge any factual or legal conclusions in our 2014 Adjudication was in an appeal to the Commonwealth Court, which it filed and then discontinued before any decision was reached (*see* Cmwlth. Ct. Docket No. 1497 C.D. 2014), not in an appeal of a separate and subsequent Department action to the Board. We have evaluated the merits of the Department's action that is the subject of *this* appeal and find ample evidence to uphold the modifications to New Hope's reclamation plan in the face of New Hope's protestations.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof when it issues an order or a directive that otherwise has the effect of an order. 25 Pa. Code § 1021.122(b)(4).

3. The Department and Intervenors must prove by a preponderance of the evidence that the Department's issuance of the letter to New Hope and the modifications contained therein constitute a lawful and reasonable exercise of the Department's discretion and that the letter is supported by the facts. *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 14 (Adjudication, Apr. 10, 2017); *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Mgmt. Co. v. DEP*, 2010 EHB 456, 474-75.

4. The Department's action must also be consistent with its obligations under the Pennsylvania Constitution. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B,

slip op. at 24-25 (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, aff'd, 131 A.3d 578 (Pa. Cmwlth. 2016). *See also Pa. Envtl. Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017).

5. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

6. "An issue which is not argued in a posthearing brief may be waived." 25 Pa. Code § 1021.131(c). *See, e.g., B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 12 (Adjudication, Aug. 9, 2017); *DEP v. Seligman*, 2014 EHB 755; *Gadinski v. DEP*, 2013 EHB 246.

7. New Hope did not contest in its posthearing brief Requirements 1, 5, 6, and 7 in the letter under appeal.

8. New Hope's obligations under the October and November 2015 compliance orders are administratively final. *New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 684-85; *White Glove, Inc. v. DEP*, 1998 EHB 372.

9. If a directive is objectively reasonable, the recipient's ability to comply with the directive due to its own individual circumstances is irrelevant in determining the validity of the directive and whether it is a lawful and reasonable exercise of the Department's discretion. *B&R Res., LLC v. DEP*, EHB Docket No. 2015-095-B, slip op. at 19-20 (Adjudication, Aug. 9, 2017); *Rozum v. DEP*, 2008 EHB 731, 735; *M & M Stone Co. v. DEP*, 2008 EHB 24, 67; *Starr v. DEP*, 2003 EHB 360, 373; *Wasson v. DEP*, 1998 EHB 1148, 1158; *Ramey Borough v. Dep't of Envtl. Res.*, 351 A.2d 613, 615 (Pa. 1976).

10. Our standard of review does not require the Department to have reached the "best" plan possible in making its modifications, or to have investigated the entire universe of possibilities for stopping sinkholes around the quarry; it only requires the Department to have acted reasonably and in accordance with the law. *Cf. Borough of Kutztown v. DEP*, 2016 EHB 80, 94; *Guerin v. DEP*, 2014 EHB 18, 25.

11. The issue of the cause of sinkholes opening up on the School's property and in the surrounding area is barred by the doctrine of collateral estoppel. *New Hope Crushed Stone & Lime Co.*, 2016 EHB 666, 686-90.

12. The Department's modifications to New Hope's reclamation plan were lawful, reasonable, and supported by the facts.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	

O R D E R

AND NOW, this 7th day of September, 2017, it is hereby ordered that New Hope Crushed Stone & Lime Company's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 7, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor	:	**Issued: September 11, 2017**

OPINION AND ORDER ON PENNSYLVANIA GRADE CRUDE OIL COALITION'S PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board denies a petition to intervene by the Pennsylvania Grade Crude Oil Coalition in a third party appeal of a brine spreading plan where the Coalition has not demonstrated a direct, immediate, and substantial interest in the appeal.

O P I N I O N

Introduction

Siri Lawson (the "Appellant") has appealed the Department of Environmental Protection's ("Department") Approval No. NW9517 authorizing brine spreading for dust control in Sugar Grove and Farmington Townships in Warren County ("Department Approval"). The Department Approval authorized the spreading of brine on unpaved roads and lots in Sugar Grove and Farmington Township by Hydro Transport LLC ("Hydro Transport"). Hydro Transport is a Pennsylvania Limited Liability Corporation engaged in providing services for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of Appeal Ms. Lawson contends as follows: 1) the DEP Approval constitutes an approved discharge

of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Department Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Department Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for roadspreading plans.

Two petitions to intervene have been filed in this appeal. A petition was filed on August 24, 2017, on behalf of Farmington Township. That petition was granted by the Board by opinion and order dated September 6, 2017. The petition that is the subject of this appeal was filed by the Pennsylvania Grade Crude Oil Coalition ("Coalition") on August 10, 2017 ("Petition"). In its Petition, the Coalition states that Hydro Transport consents to intervention and the Department does not oppose the intervention. Neither the Department nor Hydro Transport filed anything with the Board in contradiction to those statements. Ms. Lawson filed an answer to the Coalition's Petition on August 23, 2017 asserting that the Petition should be denied.

Standard of Review

Section 4 of the Environmental Hearing Board Act states that "[a]ny interested party may intervene in any matter pending before the Board." *See also* 25 Pa. Code § 1021.81 (a person may petition to intervene in any matter prior to the initial presentation of evidence). The Board has held that the right to intervene in a pending appeal should be comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Logan v. DEP*, 2016 EHB 531, 533; *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433,434. A person or entity will have standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Logan*, 2016 EHB at 533, (citing *Fumo v. City of Philadelphia*, 972 A.2d

487, 496 (Pa. 2009)). This interest must be more than a general interest such that the entity seeking intervention "will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth, 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. When there is a challenge to standing in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts. *Logan*, 2016 EHB at 533 (citing *Tri-County Landfill Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3). An organization has standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228, (Pa. Cmwlth. Jul. 26, 2016).

Analysis

According to its Petition, the Coalition "is a non-profit entity that works to represent and promote environmentally sound practices on behalf of the conventional oil and gas industry in Pennsylvania." (Petition, para. 8). Its members include conventional oil and gas providers, oil and gas industry service providers, and other individuals and entities related to the conventional oil and gas industry. (Petition, para. 9). The Coalition states that it is seeking to intervene in this matter to defend its members' interest in maintaining roadspreading as a brine management option. (Petition, para. 27). The Coalition asserts it has standing because "[a]t least one Coalition member supplies brine to Hydro Transport for roadspreading and dust control" and "[a]t least two of its members supply brine for roadspreading in Farmington Township and Sugar

Grove Township." (Petition, paras. 12, 13). The Coalition argues that it should be permitted to intervene for the following reasons: First, it alleges that if the Board concludes that roadspreading of brine is not permissible, a significant method of brine management for its members could be eliminated. Second, the Coalition states that a revision of the standard conditions in plan approvals could increase the cost of roadspreading and potentially eliminate a cost effective method of brine management.

Ms. Lawson opposes intervention by the Coalition, arguing that the Coalition has failed to demonstrate that it has a substantial, direct, and immediate interest in this matter. She asserts that the information provided to support standing in the petition is vague and unsubstantiated. She notes that, although the Coalition claims that one of its members supplies brine to Hydro Transport, the Petition does not provide any information by which to verify this claim, including the member's name or address or an affidavit supporting the member's standing. She also points out that although the Coalition states that two of its members provide brine for roadspreading in Farmington and Sugar Grove Townships, once again no information is provided by which to verify this claim.

An organization has standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228, (Pa. Cmwlth. Jul. 26, 2016); *Raymond Proffit Foundation v. DEP*, 1998 EHB 677. Based on the information provided in the Coalition's Petition, we cannot conclude that it has demonstrated that any of its members have standing. The Petition contains no specificity, details or supporting documentation about any of the Coalition's members.[1] It makes a claim that "[a]t

[1] The Coalition states in the Petition that an organization is not required to identify any of its members by name to be able to intervene citing *Tri-State River Products, Inc. et al. v. DEP* 2001 EHB 556. We do not see that case as supporting the Coalition's position but regardless the lack of disclosure of the member names is not a significant basis for our decision on this Petition but rather the decision turns on finding

least one [Coalition] member supplies brine to Hydro Transport for roadspreading and dust control," but provides no information regarding the member or whether the roadspreading and dust control takes place in Farmington or Sugar Grove Township, the subject area of the Department Approval. It claims that the unnamed member's rights and obligations under its contract with Hydro Transport would be affected but fails to provide any evidence of such a contract or to explain how those rights and obligations would be impacted by a decision in this case. While we accept the verified facts of the Petition, we find that the lack of information provided raises sufficient concerns regarding the lack of a substantial and direct interest in this case by the unnamed member. We do not have enough information to conclude that the unnamed member will gain or lose by direct operation of our decision on the DEP Approval under review in this case. The Petition also states that two of the Coalition's members provide brine for roadspreading in Farmington Township, but, again, it does not provide sufficient information on the members' activities or whether the roadspreading for which the brine is provided is conducted by Hydro Transport, the permittee in this matter. Notably, the Petition never alleges that any of the Coalition's members supply brine to Hydro Transport for roadspreading in Farmington or Sugar Grove Township under the DEP Approval under appeal in this case. The limited information provided is insufficient to establish that any of the members of the Coalition has a substantial, direct and immediate interest in the Board's decision in this case to support standing and intervention.

The overall concerns expressed by the Coalition are more generalized in nature and are focused on the permitting and practice of roadspreading of brine in general and the impact the Board's decision in this case may have on that activity. The Board has held that a concern

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that there is a lack of a substantial, direct or immediate interest on the part of the members based on the information that was provided.

regarding the legal precedent that may be established by a Board decision is not a sufficient basis on which to grant intervention. *JS Mining, Inc. v. DEP*, 2003 EHB 507. Coalition members aggrieved by any future Department actions that are impacted by our decision in this case will have an opportunity to appeal those specific actions. The Coalition has not demonstrated that any member independently has standing in this appeal or that the Coalition or its members will gain or lose as a direct operation of the Board's eventual decision in this appeal. An interest in the legal precedent that may be set by this case is not a basis to grant intervention. We conclude that the Coalition has not demonstrated a substantial, direct, or immediate interest in this matter and allowing intervention by the Coalition is not appropriate.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 11th day of September, 2017, it is hereby ordered that Pennsylvania Grade Crude Oil Coalition's Petition to Intervene in this matter is DENIED.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 11, 2017

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE	:	**Issued: September 19, 2017**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies Appellant's Motion for Summary Judgment. Section 275.312 is not applicable to general permits issued pursuant to Chapter 271. In addition, we find that there are significant issues of material fact regarding whether the Department complied with 25 Pa. Code §§ 271.915(f), 271.902(g), and 271.913(h) and whether it acted arbitrarily in its approval of the Borough of Bellefonte's application to apply biosolids to land in Benner Township.

O P I N I O N

Background

On April 1, 2016, Benner Township Water Authority ("Appellant") filed an appeal of the Department's March 2016 issuance of a permit to the Borough of Bellefonte that would allow Bellefonte to apply biosolids to land in Benner Township. Appellant's concern is that the biosolids and contaminants from the biosolids will migrate into Appellant's well recharge area and its supplying aquifer. This concern is primarily based on the alleged presence of fractured bedrock, the lack of overlying soil, and the land gradient.

In 2015, the Department contracted with SSM Group to prepare source water protection plans for small water systems whose annual budgets were below a specific amount. Two of the water systems, which were included in the proposal, belonged to Appellant. In 2016, a Draft Plan for Appellant's systems was created and funded through the Department's Small System Water Protection Program. Its costs were covered jointly by the United States Environmental Protection Agency and the Commonwealth of Pennsylvania. The Draft Plan has not yet been submitted by Appellant to the Department for review and approval. During this time period, the Department approved the Borough of Bellefonte's permit application to apply biosolids to land in Benner Township. The Appellant filed an appeal with the Board to challenge the Department's decision as being inconsistent with the Draft Plan.

On December 23, 2016, Appellant filed a Motion to Compel Discovery over allegations that the Department was preventing contact between Appellant and a Department employee. On January 10, 2017, the Board issued an Opinion and Order denying Appellant's request because informal meetings are not governed by discovery rules. The Board further denied Appellant's request that the Department employee in question be represented by separate counsel because this type of relief is unavailable under the Board's rules and was not appropriate here.

On July 11, 2017, Appellant filed a Motion for Summary Judgment. On August 10, 2017 the Department filed its Response to Benner Township Water Authority's Motion for Summary Judgment, and later that same day, the Permittee filed its Response. Appellant filed its Reply Brief on August 24, 2017. We address the Parties' arguments below.

Standard of Review

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94(a); *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 343. The standard for

considering summary judgment motions is set forth at 25 Pa. Code § 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94(a)(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. 25 Pa. Code § 1035.2(1). Second, summary judgment may be available

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

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

In this appeal, summary judgment is "proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Service, Inc. v. DEP*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *PQ Corporation v. DEP*, EHB Docket No. 2015-198-L, slip op.

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

at 4 (Opinion and Order, Nov. 17, 2016); *Friends of Lackawanna v. DEP and Keystone Sanitary Landfill, Inc., Permittee*, EHB Docket No. 2015-063-L, slip op. at 2 (Opinion and Order, Sept. 2, 2016); *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

Discussion

In its Motion, the Appellant outlined four arguments in support of a grant of summary judgment: (1) The Department's approval of the Borough of Bellefonte's permit application to apply biosolids to land in Benner Township was incorrect because the Department ignored certain requirements of 25 Pa. Code § 275.312(2); (2) the Department's approval of the permit application was in violation of 25 Pa. Code §§ 271.915(f) and 271.902(g), regarding agronomic rate and the protection of water supply; (3) the Permittee failed to submit soil samples from all fields on which it intends to spread biosolids, as required by 25 Pa. Code 271.913(h); and (4) the Department acted arbitrarily by failing to properly review the permit application.

Whether the Department Failed to Apply Chapter 25, Subchapter D

Appellant's first argument centers on the requirement of 25 Pa. Code § 275.312(2) that "No person or municipality may apply sewage sludge to a site unless the site complies with the following: (2) The soils have a minimum depth from surface to bedrock of 20 inches." It is the Appellant's position that the Department should have adhered to Section 275.312(2) and refrained from granting approval. The Appellant bases its argument on the proposition that the Department must implement regulations as written, and in an analysis of the regulation that includes both its language and history.

Appellant relies on a series of cases that hold that the Department cannot modify permit terms by unofficial agreement, cannot implement a permit review standard of its own devising,

and cannot invent a rule that is contrary to its own regulations. Appellant's Motion for Summary Judgment ("Appellant's Motion") at 6-7. With this understanding, Appellant proceeds to make the argument that the Department has done what is tantamount to acting contrary to its regulations because 25 Pa. Code § 275.312(2) applies here and was ignored.

The crux of Appellant's argument is that although final revisions to Chapters 271 and 275 were finalized in 1997, those changes did not affect Section 275.312(2)'s applicability to permits issued thereafter. The Appellant argues that "no site criteria or operating requirements of Chapter 275, Subchapter D were revised or rescinded by the 1997 rulemaking," i.e., the requirement that sewage sludge may not be applied to a site unless the soils have a minimum depth of 20 inches remains applicable to general permits. *Id*. at 10. While the Appellant acknowledges language present in the preamble suggesting the Section's inapplicability, Appellant asserts that "when a regulation has not been amended or rescinded, a preamble cannot do so by implication." *Id*. at 11.

It is the Appellant's position that the Preamble's statement that "the remainder of Chapter 275, as amended by this rulemaking, will remain in effect for the limited purposes of regulating the operation and enforcement of individual solid waste permits issued under Chapter 275" is, in effect, not binding on the Board. *Id*. Further, the Appellant sees it as being the only statement in the record regarding any intent to limit Chapter 275's applicability and reminds the Board that the Department "cannot issue a statement of policy and treat it as a binding norm the moment it is issued." *Id*. The statement in the Preamble is, according to the Appellant, no more than an nonbinding statement of intent. *Id*.

Rather, the Appellant argues that the actual effect and intent of the rulemaking are identifiable without any consideration given to the Preamble. The Environmental Quality Board

("EQB") did nothing in its amendment that might limit it to existing individual permits, though it might have done so had it wished. *Id*. at 11. Appellant directs our attention to the revised Section 275.201(b), which [Appellant argues] states that Chapter 275 continues to apply to existing individual permits but says nothing to suggest that the provisions no longer apply to land application of biosolids under the new general permits. *Id*.

Again, Appellant asserts that if the EQB had meant to preclude the restrictions of Section 275, Subchapter D from applying to the application of biosolids under a general permit, it could have been explicit and included such a provision under the new Chapter 271, Subchapter J. *Id*. In the Appellant's view, the fact that the EQB did not do this or revise Chapter 275 Subchapter D to state that the requirements for agricultural use do not apply to those applying biosolids pursuant to a general permit issued under Chapter 271 suggests to the Appellant that Chapter 275 Subchapter D remains applicable regulation. *Id*. Further, Appellant argues that EQB "certainly understood the interaction of old and new regulations" – the EQB certainly would have made explicit any intent to render Chapter 275 Subchapter D inapplicable. *Id*. It is the Appellant's position that the site restrictions of Chapter 275 Subchapter D "remain 'on the books' and in effect." *Id*. at 12. The Department's belief that that the regulation does not apply "is not legally sufficient to rescind a properly promulgated regulation." *Id*.

Appellant's final argument here is that logic dictates Chapter 275, Subchapter D still applies. There has been no scientific change or discovery that would affect the reasonability or necessity of the 20-inch soil depth requirement and cause its adjustment. *Id*. Appellant refers to its expert, who has found that the criterion has a sound scientific basis and is consistent with other Department land disposal of sewage regulations. *Id*. It is Appellant's position that the new permitting procedure adopted in Chapter 271 made no change to the science of environmental

protection and therefore, absent any mention in the record, "there is no reason to presume that EQB (or DEP) concluded sometime during the 1997 rulemaking that the 20 inch soil criterion for all biosolids applications should be rescinded." *Id*. at 12-13.

Both the Permittee and the Department disagree with Appellant's reading of Chapter 275, Subchapter D and that it applied to the matter here. In its brief, Permittee again summarizes the histories of Chapter 275 and Chapter 271 and asserts that following the adoption of Subchatper 271, Subchapter J, the Department has issued general permits and regulated land application of biosolids pursuant to those general permits under Chapter 271, therefore rendering moot any need to continue applying Chapter 275. Permittee's Brief in Opposition to Appellant's Motion for Summary Judgment ("Permittee's Brief") at 9. The Permittee acknowledges that the only exception to this is the applicability of Chapter 275 to permits that had been originally issued under Chapter 275 and remained in effect at the time of the EQB's regulatory revisions. *Id*.

Permittee points out the language of Section 271.903(e), which explains that "[t]he interim guidelines for the use of sewage sludge for agricultural utilization or land reclamation will remain in effect for the limited purposes of providing guidance for persons operating under, and for the enforcement of, individual solid waste permits issued prior to May 27, 1997, under Chapter 275." *Id*. at 8-9. This regulatory language is supported by the Preamble, which confirmed that "there is no need to retain Chapter 275 other than to provide a permitting mechanism until Subchapter J becomes effective, and to enforce existing Chapter 275 permits until they expire." *Id*. at 9.

According to the Permittee, none of the cases upon which the Appellant relied stand for the notion that the Department is bound to enforce regulations that have been "rendered inapplicable and unnecessary by the adoption of new regulatory framework." *Id*. The Permittee

argues that the situation here is not one where the Department "invented" a new rule that is contrary to its regulations. *Id*. Nor is it a case of an agency-issued policy statement being treated as a binding norm. *Id.* Rather, what has occurred here is the establishment of a new regulatory structure that replaced an old one, rendering the original inapplicable to new permits issued under the new structure. *Id*. The Permittee asserts that were Chapter 275 to apply alongside Chapter 271, the result would be "two separate regulatory structures that would surely conflict." *Id*. at 10.

The Department's position largely mirrors that of the Permittee. The Department agrees that Chapter 275 is inapplicable to the matter here. Department's Brief in Support of Its Response Opposing Appellant's Motion for Summary Judgment ("Department's Response") at 5. The Department points out that Chapter 275 makes abundantly clear that it applies only to those permits that have been issued under it. *Id*. Specifically, Section 275.201(b) lays out the requirements for sewage sludge that is applied to land "under a permit issued under this chapter." *Id*. "This chapter" refers to Chapter 275. The permit at issue in this hearing was issued under the authority of Chapter 271 and, as such, is not bound to the requirements of Chapter 275. *Id*. at 6.

The Board agrees with the positions of the Permittee and the Department – Chapter 275, by its express terms, does not apply to general permits issued under Chapter 271. Regulatory language persuades us that Chapter 275 was not meant to continue to apply to new general permits following the 1997 amendments. We think the language of 25 Pa. Code §§ 275.201(a) and 275.201(b), discussed by the Department in its Response, is clear in demonstrating that only permits issued under Chapter 275 must comply with the requirements of Chapter 275. In pertinent part, the language of Section 275.201(b) – that is, Chapter 275, Subchapter C – reads:

> A person or municipality that land applies sewage sludge under a permit issued under this chapter shall comply with the following:

> (1) The requirements of the act, this subchapter and the additional operating requirements for the specific type of operation that are in Subchapter D, E or F (relating to additional requirements for agricultural utilization; additional requirements for land reclamation; and additional requirements for surface land disposal).

25 Pa. Code § 275.201(b)(1). The first sentence of the regulation clarifies that Chapter 275 applies only to those persons and municipalities with a permit issued under Chapter 275. This directive is neither vague nor does it suggest the inclusion of persons or municipalities who have been issued permits under other Chapters, e.g. Chapter 271. Section 275.201(b)(1) makes it still more apparent that the *requirements* of Chapter 275 are only requirements for those persons and municipalities with permits issued pursuant to Chapter 275.

Additionally, an examination of the language of Section 275.311 – that is, Chapter 275, Subchapter D – further supports the understanding that the requirements of Chapter 275 apply only to those with permits issued pursuant to Chapter 275. Section 275.311 confirms that the requirements of Subchapter C apply to any person or municipality that applies sewage sludge to land and simply directs that in addition to the requirements of Subchapter C, those persons or municipalities must comply with further requirements under Subchapter D. 25 Pa. Code § 275.311(a). Because Chapter 275, Subchapter C clarifies that Chapter 275 applies only to those who have a permit pursuant to Chapter 275, it follows from Subchapter D's language that Subchapter D also only applies to those with a permit issued under Chapter 275. This regulatory language would be sufficient for the Board to find in the Department and Permittee's favor, but further support can be found in the regulatory language of both Chapter 271 itself and in the Preamble to the 1997 Notice of Final Rulemaking ("NFRM").

Section 271.903(e) – Chapter 271, Subchapter J – explains that "[t]he interim guidelines for the use of sewage sludge for agricultural utilization or land reclamation will remain in effect

for the limited purposes of providing guidance for persons operating under, and for the enforcement of, individual solid waste permits issued prior to May 27, 1997, under Chapter 275 (relating to land application of sewage sludge) . . . .” 25 Pa. Code § 271.903(e). Between this language and the language of the discussed sections of Chapter 275 above, it is readily apparent that the Chapter 275 regulations were not meant to apply to persons or municipalities who are issued permits under Chapter 271. This intent is further supported and explained by the language of the Preamble to the NFRM.

The Preamble states that “the remainder of Chapter 275, as amended by this rulemaking, will remain in effect for the limited purposes of regulating the operation and enforcement of individual solid waste permits issued under Chapter 275.” 27 Pa. Bulletin 521. Further, “there is no need to retain Chapter 275 other than to provide a permitting mechanism until Subchapter J becomes effective, and to enforce existing Chapter 275 permits until the expire.” *Id*. To us, this seems like persuasive language regarding the intent of the 1997 amendments. The discussion in the Preamble is, contrary to the Appellant’s position, fully supported by the regulatory language in Chapters 271 and 275 discussed above.

Both the Department and Permittee accurately point out that the Board has heard a similar argument being made in the context of a Petition for Supersedeas in one of Judge Labuskes’s cases. In *Measley v DEP*, 2001 EHB 706, Judge Labuskes denied a Petition for Supersedeas to halt the application of biosolids to land. The petitioners in that case made arguments under both Chapters 271 and 275, having to do with setback requirements. The Department argued that Chapter 275 did not apply and Judge Labuskes ultimately agreed, finding that the EQB’s Preamble was sufficiently persuasive as to convince him that the petitioners would likely not succeed on the merits of their claim that Chapter 275 controlled. *Id*.

at 710-11. We feel the same here: the EQB's preamble, when read in conjunction with the regulatory language, persuades us that Chapter 275 does not apply to permits issued pursuant to Chapter 271.

The Appellant is correct in its view that a statement in a preamble is not controlling law. The Board has said as much in earlier cases. *See, e.g., Nat'l Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 945 (Where Judge Beckman wrote, "We remain skeptical about importing concepts and discussion from regulatory preambles and giving them equal weight with the actual language of the properly promulgated regulations."); *UMCO Energy v. DEP*, 2006 EHB 489, 575 (Where the Board needed "far more than this preamble to depart from the letter of the law itself"); *but see Wheeling Pittsburgh Steel Corp v. DEP*, 2008 EHB 338, 365 (Where the Department's reliance on a preamble made a strong case for its argument regarding intent). Here, the 1997 Preamble is not our sole source of information regarding regulatory intent of Section 275.312(2) and its applicability to general permits issued under Chapter 271. We may rely on the regulatory language present in both Chapter 275 and Chapter 271. That regulatory language makes clear that Chapter 271, Subchapter J controls here, not Chapter 275, Subchapter D.

Whether the Department Violated Sections 271.915(f) and 271.902(g)

The Appellant's second argument in its Motion for Summary Judgment is that the Department violated 25 Pa. Code §§ 271.915(f) and 271.902(g) regarding agronomic rate and protection of water supply.

Calculation of Agronomic Rate

Appellant argues that the Department accepted inadequate data and an incomplete analysis with respect to the agronomic rate of the land to which the biosolids would be applied. Appellant's Motion at 13. The Appellant asserts that it is necessary for the agronomic rate

calculation to include a consideration of the site's soil characteristics: depth and permeability. *Id*. at 14. According to the Appellant, the application did not appear to take into consideration these necessary specifics. *Id*. at 14-15. For example, the Appellant notes that the worksheets used to compute the agronomic rate lack any place to indicate root depth for the field and crop under consideration. *Id*. at 15. Further, there is no place for the Permittee to offer a discussion of the basis for selecting a crop's specific nitrogen requirement. *Id*. These alleged omissions are particularly alarming to the Appellant because there is a huge variation in soil depth across the mapped fields. *Id*. at 16. Appellant's position is that the regulation requires calculating the agronomic rate using actual crop needs and protection from bypass of the root zone, but that the Department instead chose to go a simpler route and follow a "pick a generic value" method. *Id*.

Both the Permittee and Department dispute the Appellant's assertions regarding agronomic rate. Permittee acknowledges that the rates included are examples. Permittee's Brief at 11. Permittee agrees that the "agronomic loading rate is specific to the soils on the farm, the crops grown there, and the source of the biosolids. *Id*. However, Permittee argues that because of this, they *must* be examples because the agronomic rate is not "general" or "typical" or "static." *Id*. The agronomic rate must be determined on a case-by-case basis. *Id*. In other words, exact rates cannot be included in an application because they simply do not exist yet.

Extrapolating from this, the Permittee further argues that the Appellant is erroneously assuming that Permittee will automatically violate the agronomic rate limitations. *Id*. at 12. The Permittee can only include an anticipated application rate, which is subject to adjustment at the time of actual application in order to "avoid running afoul of regulatory limits." *Id*. at 11-12. Appellant submitted no evidence that the Permittee will apply biosolids at a rate exceeding the

agronomic rate and, in fact, biosolids have not yet been applied to the site – something which would allow Appellant to prove its assertion. *Id*. at 12.

Finally, the Permittee clarifies that in preparing its agronomic worksheet it was permitted to derive the total crop nitrogen requirement from soil analysis, historical data, or the Penn State Agronomy Guide. *Id*. All three sources "inherently include considerations of soil type and depth." *Id*. Therefore, according to the Permittee, the Appellant's argument that soil type and depth were not considered in the application is incorrect and "unfounded." *Id*.

The Department argues generally that the Appellant and Permittee have a fundamental disagreement with what should be included in an application: soil data, the interpretation of the soil data, the meaning of the agronomic rate calculations, and the requirements that the Permittee is required to meet before it may apply biosolids to the site in question. Department's Response at 9. The Department asserts that the general disagreements regarding the general permit requirements and their evaluation precludes the Board from granting the Appellant's Motion for Summary Judgment. We are inclined to agree.

The Board thinks that there are material issues of fact here. At a minimum, there are disagreements over what the agronomic rate calculations entail. The Appellant insists that the crop's nitrogen needs, soil mapping unit, and the depth of the root system must be considered. The Permittee says that the depth of the root system may be inferred from crop type and soil mapping unit and is therefore implicitly factored into the agronomic rate calculation. The Appellant takes issue with the fact that Permittee's calculations are for example scenarios and views this as evidence that the Permittee will not comply with the agronomic rate requirements. The Permittee counters that *because* agronomic rates are highly specific to site, situation, and crop, it is only able to include examples in its application, and highlights Appellant's lack of

evidence regarding the assertion that Permittee will violate the agronomic rate requirement when it begins to spread biosolids. We think a hearing is necessary to resolve the disagreement among the Parties and to make a determination on this issue.

Protection of Water Supply

The Appellant also argues that the Department failed to take measures to implement Section 271.902(g) and act to protect groundwater from a significant known risk of pollution. Appellant's Motion for Summary Judgment at 16. Section 271.902(g) provides, "[a] person may not apply sewage sludge in a way that will cause surface or groundwater pollution, . . . adversely affect private or public water supplies, or cause any public nuisance." 25 Pa. Code § 271.902(g). The Appellant states that "soil science and hydrology establish the undisputed fact that applying pollutants to thin rocky soils overlying highly fractured bedrock creates a high risk of groundwater pollution." Appellant's Motion for Summary Judgment at 16-17. According to the Appellant, the soil on the site in question is thin and rocky in some areas and overlies highly fractured bedrock. *Id*. at 25. There is concern that pollutants that make it past the shallow soil will be conveyed directly into the public water supply. *Id*. It is the Appellant's position that the Department ignored these risks when reviewing Permittee's application, despite being fulling apprised of their existence. In support of this, Appellant points to the Department reviewer's testimony that he was "aware of the concept of the need to protect groundwater" but nonetheless "did not consider the risk to the local water supply when approving the Notice." *Id*. Appellant states, "in spite of knowledge of the risky conditions of the Spicer Farm . . . DEP's reviewer completely ignored it and took no steps either to evaluate the risk or to determine if any special restrictions might be appropriate to ameliorate it." *Id*.

The Permittee counters that there is no evidence that biosolids will be applied at the Spicer Farm in a manner that will result in surface or groundwater contamination. Permittee's Brief at 13. The Permittee notes that while Appellant's experts "have opined about the *possibility* of such contamination," the Appellant is again speculating about future events. *Id*. Permittee also takes issue with Appellant's allegation that the Department failed to consider the risks. *Id*. It is the Permittee's view that the record demonstrates that the Department did in fact evaluate the relevant risks to the site. *Id*. Further, Chapter 271, Subchapter J regulations "contain an inherent risk assessment methodology that accounts for mitigating the prospect of such contamination." *Id*. The fact that the Department analyzed possible risks and determined that those risks were properly mitigated and addressed through management practices does not rise to the level of a violation of Section 271.902(g). As it did regarding the calculation of agronomic rates, the Department again thinks that there is a disagreement regarding whether there is a "significant risk of contamination" and that this disagreement translates into material issues of fact that preclude summary judgment from being granted. Department's Response at 11.

The Board agrees that there appear to be material issues of fact regarding the risk of contamination to surface and groundwater. The Appellant and Permittee disagree about the inevitability of contamination. The expert report submitted by the Appellant suggests somewhat more ambivalence than what was presented in Appellant's Motion. The expert report posits that:

> The conditions stated as necessary for contribution of waters from the Spicer Farm to the Grove Park well all appear to be met with regards to lands to the South of Route 550. Biosolids leachates that might enter inclined carbonate rocks north and northwest of Route 550 appear unlikely to be transported under non-pumping conditions or induced by pumping to the Grove Park well based on the limited information available for this complex geological area. However, farm and domestic wells located adjacent to these northern parcels would be at risk.

Appellant's Ex. D, p. 27. While the report notes that farm and domestic wells located adjacent to the northern parcels would be at risk, it also couches its assessment in noncommittal terms: conditions "appear to be met" and biosolids leachates that "might enter inclined carbonate rocks."

The Appellant and Permittee further disagree on whether the Department sufficiently considered the risks of contamination. The Appellant's position is that the Department blatantly ignored and was dismissive of known risks to water, that the Department reviewer insisted that bare compliance with the regulations was all that was necessary to ensure environmental protection. Appellant's Motion for Summary Judgment at 17. The Permittee argues that the Department did not dismiss the risk of water contamination and, in fact, considered it before determining that the risk was properly mitigated. The Board finds that these conflicting views on the facts give rise to a need for a hearing on the merits in order to make a determination regarding actual risk to surface and groundwater posed by the spread of biosolids on the site.

Whether the Permittee Failed to Submit Soil Samples From All Fields, As Required by Section 271.913(h)

The Appellant's third argument is that the Permittee did not comply with the regulations of Section 271.913(h) because it failed to submit soil samples from all of the fields outlined in its application. The relevant section of the regulation states,

> [P]rior to the first time a site is used for land application, the first person who prepares sewage sludge . . . shall obtain, at a minimum, one representative soil chemical analysis for each field on which sewage sludge is land applied.

25 Pa. Code § 271.913(h). The Permittee's application provides a list of fields and a map of the site which, all together, indicate a total of 15 fields within the proposed application area. Appellant's Motion for Summary Judgment at 18. According to the Appellant, there are fields 1-12, plus fields number 1A, 5A, and 8A. *Id*. The Permittee provided soil analyses only from fields

1-12 and failed to provide them for fields 1A, 5A, and 8A. Because of this, Appellant alleges that the Permittee's application was deficient and therefore should not have been approved. *Id*.

The Permittee argues that while it did not provide soil samples and analyses for fields 1A and 5A, it never intended (nor currently intends) to spread biosolids on those fields. Permittee's Brief at 14. Specifically, fields 1A and 5A have setbacks that make land application impractical. *Id*. The Permittee also points out that the three "additional" fields were all part of the original twelve and that a soil sample may represent up to 20 acres of land. This, the Permittee asserts, is why it did not submit a separate analysis for field 8A: the combined acreage for fields 8 and 8A is 16, therefore the soil sample from field 8 extends to field 8A. *Id*.

The Department again contends generally that these disagreements between the Appellant and Permittee represent material issues of fact and, again, the Board is inclined to agree. The Board reviews all appeals de novo, meaning it is allowed to consider information not originally considered (or known) by the Department at the time of its own review. *See Borough of St. Clair v. DEP*, 2014 EHB 76; *Natiello v. DEP*, 2008 EHB 640; *Smedley v. DEP*, 2001 EHB 131; *O'Reilly v. DEP*, 2001 EHB 19. Here, that means that we may consider Permittee's assertion that it does not intend to apply biosolids to fields 1A and 5A. The Appellant asserts that there are 15 fields. The Permittee agrees with the Appellant's assessment that it did not submit samples for fields 1A and 5A, but qualifies this by saying it never intended to spread biosolids on those fields and that, further, a sample may cover up to 20 acres. The Department says that there are 12 fields with three fields broken into adjoining sections and that it received a sufficient number of samples to satisfy its requirements. There is clear disagreement here over not only what should have been provided, but whether what was provided was sufficient. We find that this presents material issues of fact and must be resolved at a hearing on the merits.

Whether the Department Acted Arbitrarily by Not Properly Reviewing the Application

Appellant's fourth and final argument is that the Department acted arbitrarily by not properly reviewing the Permittee's application. The Appellant breaks this argument into two sub-arguments. First, the Appellant argues that the information included in the application was inadequate to properly characterize the site. Appellant's Motion for Summary Judgment at 18. Specifically, the Appellant points to data from test trenches that showed soil depth of less than a foot coupled with the Department's knowledge of both these results and the underlying limestone. *Id*. The Appellant believes that these test results should have prompted the Department to take further action by requesting more testing to determine which areas of the farm had an adequate soil depth to support the provided agronomic rate calculations. *Id*. The Department did not do this. Rather, the Department accepted the test results without further examination. *Id*. at 18-19. The Department reviewer also did not consult with a geologist regarding the highly fractured bedrock underlying the site. *Id*. at 19. This, according to the Appellant, is inadequate and evidence of a lack of responsible review. *Id*. at 20.

The Appellant's second sub-argument is that the Department did not comply with its duty to impose more stringent requirements when it was appropriate. *Id*. at 20. First, the Appellant contends that the Department may not "blindly rely" on regulations at the expense of the environment. *Id*. at 21; *citing Coolspring Twp. et. al. v. DER*, 1983 EHB 151. It is the Appellant's position that the Department has blindly relied on the information submitted to it by the Permittee, at the expense of the environment. *Id*. For support, Appellant points to statements from the Department reviewer who apparently stated that "nothing seems to be amiss technically" and that he believed minimal compliance with the regulations was sufficient. *Id*.

Next, the Appellant argues that in addition to not being permitted to "blindly rely" on regulations, the Department also may not stand by and do nothing in the face of significant risk:

> [T]he existence of an unacceptable risk must be assumed when there is evidence of exposure to harmful materials and there is not enough information to rule out the likelihood of harmful effect . . . this precautionary principle allows a regulatory authority to act where complete scientific inquiry is unavailable if the risk of not acting may lead to serious or irreversible consequences.

Id. at 22; *quoting Defense Personnel Support Center v. DEP et al.*, 1998 EHB 512, 531-32. According to the Appellant, the Department has not followed this principle. *Id*.

The Permittee disputes any allegation that the Department's review of the application was deficient or that the Department erred in the exercise of its discretion. Permittee's Brief at 15. The Permittee further responds that, in fact, the Department did consider the conditions of the site and that the Appellant mischaracterizes the statements of the Department reviewer. *Id*. The Department reviewer employed his expertise while reviewing the site and determined that the site was suitable for land application – even where soils were shallow. *Id*. The Permittee contends that there was never any need for the Department to employ a geologist because there is no requirement that a geologist be employed – the Department's failure to do so is not in violation of applicable regulations. *Id*. Upon the conclusion of its review, the Department concluded that the "risks to groundwater [were] being properly contained by compliance with the [applicable] regulations." *Id*. The Permittee disagrees that the Department engaged in "blind reliance" and asserts that the Department adhered to the requirements of the regulation.

The Board again agrees with the Department that there are disputed material issues of fact regarding the Department's review. One party asserts that the Department did no more than check boxes on a form without conducting any accompanying analysis or engaging in scrutiny of the plan or site. The other party argues that, in fact, the Department did consider the site and the

data provided about the site, analyzed that data, and formed a conclusion based on that data. There are clearly disputed issues of material facts. We think that a hearing on the merits will allow us to develop a full record to evaluate and resolve the Parties' disagreements.

Conclusion

In addition to determining that Chapter 275 does not apply to general permits issued pursuant to Chapter 271, we find that there are significant issues of material fact that require a hearing to determine whether the Department complied with 25 Pa. Code §§ 271.915(f), 271.902(g), and 271.913(h). Further, a hearing will clarify whether the Department acted arbitrarily in its review of Permittee's application. Though the Appellant has presented a great deal of information, we nonetheless find that, when viewed in a light most favorable to the nonmoving party, the Appellant does not meet the burden for summary judgment. Therefore, we deny the Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE	:	

O R D E R

AND NOW, this 19th of September, 2017, in consideration of Appellant's Motion for Summary Judgment, it is hereby ordered that the Motion is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 19, 2017

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

For the Commonwealth of PA, DEP:
Dawn M. Herb, Esquire
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For Appellant:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREEN GLOBAL MACHINE, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-052-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 28, 2017**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS

By: Judge Richard P. Mather, Sr.

Synopsis

The Board grants the Department's Motion to Dismiss appeal because the record reflects that Appellants' Notice of Appeal ("NOA") was filed at least two (2) days outside of the 30-day appeal period mandated by 25 Pa. Code § 1021.52(a)(1). The Appellant's filing of the appeal was untimely and the Board lacks jurisdiction over the appeal.

O P I N I O N

Background

Green Global Machine, LLC ("Green Global" or "Appellant") filed an appeal of a Department letter ("Suspension Letter") notifying Appellant of the suspension of its permit for the 221 Mine ("Mine") and of the Department's intent to forfeit the bonds associated with the Mine. This Suspension Letter was the latest in a line of Department contacts with the Appellant.

Contact between the Department and Appellant began last year when the Department issued a compliance order to the Appellant on December 21, 2016 (mailed on January 4, 2017) for the removal of backfilling equipment necessary for the completion of the Mine reclamation,

in violation of 25 Pa. Code § 77.651(a). The violation was to be abated by January 23, 2017. The Department conducted an inspection on February 6, 2017 and determined that the violation had not been abated as ordered. It then issued a failure to comply cease order on February 9, 2017.

On February 13, 2017, the Department mailed the Appellant a letter notifying it of the existing violations identified in the two compliance orders, Appellant's potential civil penalty liability, and the Department's intent to suspend Appellant's permit if the violations were not corrected within 30 days of receipt of the letter. The Department's June 7, 2017 Suspension Letter, appealed here, was the last in this chain of communications. The Department has provided records confirming that the Appellant received each of the Department's notifications in a timely fashion.

Records show that the Suspension Letter, which was sent via certified mail, was picked up from the post office on June 9, 2017.[1] The Board received Appellant's Notice of Appeal on July 12, 2017. This was two (2) days outside of the 30-day appeal period defined by the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.52(a)(1).

On August 10, 2017, the Department filed a Motion to Dismiss, asserting that Appellant's appeal was not timely based on the aforementioned reasons. On August, 31, 2017, the Appellant responded with a two-fold argument against the Department's Motion to Dismiss. First, the Appellant alleges that the letter was mailed to an incorrect address. Second, the Appellant alleges that the mail was recovered by an individual who was not authorized to accept service of legal papers directed to Green Global Machine, LLC.

[1] In its Notice of Appeal, Appellant states that it received notice of the Department action on May 12, 2017. Presumably, this date is in error, as the Department did not mail the Suspension Letter until June 7, 2017.

The Department filed a reply on September 22, 2017 responding to the Appellant's response.[2] In its Response, the Department articulated its reasoning as to why the Appellant failed to present an appropriate defense for missing the notice of appeal filing deadline. The Department denies that the certified letter it mailed to the Appellant was mailed to an incorrect address and asserts that it "mailed the Suspension Letter to the only address that the Department has on file for Green Global." Department's Reply at 2. The address provided is indeed the Appellant's address: P.O. Box 277; Southwest, PA 15685.[3] Additionally, the compliance letter was delivered to the correct address and picked up by an individual whose address it was. The Department argues that these facts demonstrate the Suspension Letter was sent to the correct address.

The Department next addresses the Appellant's assertion that Ms. Tracy Blackburn, the individual who collected the Suspension Letter from the P.O. Box, was not authorized to collect legal papers directed to Green Global. The Department disputes this claim and argues that even if Ms. Blackburn is not an employee of the Appellant, the letter was nevertheless properly served.[4] The Department cites a Pennsylvania Commonwealth Court case, *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217 (Pa. Cmwlth. 1994), for the proposition that the appeals clock begins when a Department correspondence is collected. Department's Reply at 4. The Department also directed our attention to the principle that notice

[2] Due to Department counsel having an unforeseen medical emergency, the Board granted an extension of the deadline for the Department's Response.

[3] It appears that some of the confusion may have been due to the Appellant's misunderstanding of the address box on the "Green Card," which had been filled out with information regarding the Appellant and its permit. However, both the Suspension Letter itself and the front of the envelope in which it was mailed contained the Appellant's correct address.

[4] The Department's electronic database contains information supplied by Green Global that lists Ms. Blackburn as the Treasurer and Secretary of Green Global. *See* Exhibit A, Affidavit of Jeffrey V. Parr, Paragraph 8 on page 2 and Attachment 3 to the Affidavit.

of administrative action is constitutionally adequate if the notice "is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, *quoting Milford Twp. Bd.*, 644 A.2d at 219. It is the Department's position that the letter was properly served. For the reasons that follow, we agree with the Department and grant its Motion to Dismiss.

Discussion

The Board has jurisdiction over timely appeals. *West Pike Run Township Municipal Authority v. DEP*, 2014 EHB 1071, 1071-72. With few exceptions, an appeal must be filed within 30 days of the Appellant receiving notice of the Department action at issue. *Simons v. DEP*, 1998 EHB 1131, 1134; 25 Pa. Code § 1021.52. The appeal period's start depends on how and to whom the Departmental action is noticed. *Id.* The person to whom the action is directed or issued has 30 days from the date on which he receives written notice of the action. Any other person who is aggrieved by an action must file their appeal within 30 days of one of the following: (1) the date on which notice of the action is published in the *Pennsylvania Bulletin*, or (2) the date on which he received actual notice of a Departmental action which was *not* noticed in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i)-(ii). In this case, the Appellant had 30 days from June 9, 2017 – the date on which the Department's Suspension Letter was retrieved from the post office – to file an NOA.

The Board lacks jurisdiction over appeals that are filed beyond the 30-day appeal period and has routinely dismissed such cases. *Lucey v. DEP*, 2016 EHB 882, 883, citing *Mark Stash v. DEP*, 2016 EHB 509, 510; *Melvin J. Steward v. DEP*, 2016 EHB 209, 210; *Boinovych v. DEP*, 2015 EHB 566; *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756; *Spencer v. DEP*, 2008 EHB 573; *Weaver v. DEP*, 2002 EHB 273. Additionally, the 30-day rule is firm. Even one

day late is enough to trigger the Board's loss of jurisdiction over an appeal. *See Burnside Twp. v. DEP*, 2002 EHB 700; *Milford Twp Bd. of Supervisors*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994) (affirming Board's dismissal of appeal filed by township thirty-one days after delivery of order to township's correct address); *Taylor v. DER*, 1992 EHB 257. It is well-established that the "limited right of appeal is jurisdictional in nature and cannot be extended as a matter of grace." *Ametek v. DEP*, 2014 EHB 65, 68. Because the rules governing the Board are regulations that have been promulgated pursuant to statute, they have the force of binding law. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth, 1976).

Here, Appellant received notice of the Department action being appealed on June 9, 2017, upon Ms. Blackburn's collection of the Suspension Letter from the post office. Although the Appellant argued (1) that the letter was sent to the incorrect address, and (2) that Ms. Blackburn did not have the authority to collect the letter, we find that these arguments are lacking in merit and agree with the Department that we do not have jurisdiction over this appeal.[5]

The Board agrees with the Department that the Suspension Letter was sent to the correct address. It is apparent from the record that there was no error in the Suspension Letter's address, as it arrived at the Appellant's correct address and was picked up by someone who shared that address. The letter and the envelope both included the correct P.O. box number, city, state, and zip code.

The Board also agrees with the Department that personal receipt of the notice is not required. As the Department points out, if the notice "is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" it is sufficient. Further,

[5] As noted in footnote 4 on page 3, Ms. Blackburn is still listed in the Department's files as the Treasurer and Secretary of Green Global. This fact is not necessary, however, because personal receipt is not required if the required notice was mailed to the party's last known address.

> [The notice] requirement is satisfied when notice of the action is mailed to the interested party's last known address. In addition, this court has previously held that personal receipt of the notice is not required when the notice was mailed to the party's last known address.

Milford Twp. Bd., 644 A.2d at 219. Here, the Suspension Letter was sent to the Appellant's last known address. There is no requirement that an individual at an address be "authorized" to accept legal mail. Rather, all that matters is whether the Appellant had constitutionally adequate notice of the Suspension Letter as of June 9, 2017. We find that it did.

Despite having notice on June 9, 2017, Appellant did not file a notice of appeal until July 12, 2017, two days outside of the 30-day appeals window. Because the "limited right of appeal is jurisdictional in nature," the Board cannot extend it or carve out an exception for individual Appellants who missed the deadline. *Ametek v. DEP*, 2014 EHB 65, 68. While we understand that the Appellant may not have read the Department's letter until sometime after June 9, 2017, this is irrelevant as a matter of law. As Commonwealth Court stated in *Milford Twp. Bd*: "Any prejudice which may have been created [for Appellant] was a direct result of the [Appellant's] actions, not those of the DEP." *Milford Twp. Bd.*, 644 A.2d at 219. If Green Global failed to read its mail until June 15, 2017, it is not the Department's fault and this delay on the Appellant's part does not extend its appeal period.

For these reasons, the Board grants the Department's Motion to Dismiss Appeal. The Board has jurisdiction over timely appeals. Timeliness is defined by 25 Pa. Code § 1021.52 and provides generally that an appellant has 30 days from that date on which he has received notice of an action to appeal that action. Where a Notice of Appeal is filed outside of that 30-day window, the Board no longer has jurisdiction over the appeal and must dismiss the matter. Here, Appellant filed its NOA two days late. Therefore, the Board lacks jurisdiction.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREEN GLOBAL MACHINE, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-052-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of September, 2017, in consideration of the Department's Motion to Dismiss appeal, it is hereby ordered that the appeal in the above-captioned matter is dismissed. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 28, 2017

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Katherine Knickelbein
(*via electronic filing system*)

For Appellant:
Christopher F. Spina, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS ADVOCATING A CLEAN HEALTHY ENVIRONMENT	:	
v.	:	**EHB Docket No. 2017-037-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SENECA RESOURCES CORPORATION, Permittee	:	**Issued: October 16, 2017**

OPINION AND ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal because the appellant citizens' group has failed to obtain counsel and has evinced an intention not to pursue this appeal.

O P I N I O N

Citizens Advocating a Clean Healthy Environment ("CACHE") filed this appeal on May 16, 2017 from the Department of Environmental Protection's (the "Department's") issuance of a well permit to Seneca Resources Corporation ("Seneca"). On July 5, 2017, the Department advised us by letter that it had been unsuccessful in its repeated attempts to contact a representative of CACHE using the contact information listed in CACHE's notice of appeal to confer regarding settlement as required by our Pre-Hearing Order No. 1. On July 28, Seneca filed a motion asking us to issue to CACHE a rule to show cause why its appeal should not be dismissed for failure to obtain counsel. CACHE did not respond to the motion. On August 21, we issued a rule to CACHE to show cause why its appeal should not be dismissed. The rule was returnable on September 20. CACHE has not responded to the rule and, as of the date of this Opinion and Order, no counsel has entered an appearance on behalf of CACHE.

Section 1021.21 of the Board's rules requires all parties, except individuals appearing on their own behalf, to be represented by an attorney at all stages of the proceedings subsequent to the filing of the notice of appeal. 25 Pa. Code § 1021.21. CACHE is not an individual appearing on its own behalf, so it must obtain counsel. CACHE's failure to do so justifies dismissal of its appeal. *L.A.G. Wrecking v. DEP*, 2015 EHB 338, 339; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209, 210. In addition, CACHE's nonresponsive conduct evinces an intention to no longer pursue this appeal. Dismissal is also appropriate under such circumstances. *Id.*; *Casey v. DEP*, 2014 EHB 908, 910-11.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS ADVOCATING A CLEAN HEALTHY ENVIRONMENT	:	
	:	
v.	:	**EHB Docket No. 2017-037-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SENECA RESOURCES CORPORATION, Permittee	:	

O R D E R

AND NOW, this 16th day of October, 2017, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 16, 2017

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 16, 2017**

OPINION AND ORDER ON
PETITION FOR LIMITED RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for limited reconsideration except to provide minor clarification. The Department failed to show that the factual allegations in its petition support a conclusion that the Board erred in finding in its Adjudication that the appellant was not liable for the violations in question.

O P I N I O N

PQ Corporation ("PQ") brought this appeal from the Department of Environmental Protection's (the "Department's") assessment of civil penalties for violations of the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, at its silicate manufacturing operation in Chester, Pennsylvania. Among other things, the Department assessed a penalty against PQ for violating the limit in its Title V operating permit of 5.08 tons per year of carbon monoxide (CO) from its No. 4 sodium silicate furnace. We overturned the Department's assessment as it related to PQ's alleged violation of its yearly CO limit in our Adjudication. We found the Department failed to prove that PQ was liable because the Department improperly based its finding of liability on data generated by PQ's continuous emissions monitoring system (CEMS) during a time when PQ's

permit specifically provided that compliance with the CO limit was to be based on stack testing alone. As a result, we reduced the Department's assessment of a civil penalty for the violation of the yearly CO limit to zero.

The Department has filed a petition asking us to reconsider our ruling regarding three of the twenty-three months that PQ allegedly violated its yearly CO limit. The Department says that not all 23 months of violations were based on PQ's CEMS data. Rather, three months at the beginning of the penalty period – August, September, and October of 2011 – were based on stack test data alone in its view. Therefore, the Department argues that it satisfied its burden of proving PQ violated its yearly CO limit for those three months using proper evidence, namely, stack test data, not CEMS data. It asks us to impose a $142,086 penalty for those three months that the Department calculated in its petition by using its penalty assessment guidance document. PQ opposes the petition.

The Department's petition for limited reconsideration was timely filed on September 18, 2017. PQ's opposition was timely filed on September 28, 2017. Rather than try to address the petition in the five business days remaining before the appeal period to Commonwealth Court expired, we granted the petition on September 29, 2017, not on the merits, but in order to give the Board a meaningful time to deliberate.

Rule 1021.152(a) of the Board's rules sets forth our standard for granting reconsideration of final orders. 25 Pa. Code § 1021.152(a). "Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons." *Id.* Reasons that may justify reconsideration of a final order, include, but are not limited to, the following:

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

(ii) Are such as would justify a reversal of the Board's decision.
(iii) Could not have been presented earlier to the Board with exercise of due diligence.

Id. See generally Consol Pa. Coal Co., LLC v. DEP, 2015 EHB 117, 118.

The Department correctly points out that at one point in our Adjudication we mistakenly defined the "penalty period" as the time period between November 1, 2011 and June 30, 2013. (Adjudication at 8.) In fact, the penalty period began on August 1, 2011 with respect to the CO violations, not November 1, 2011. However, our creation of the defined term "penalty period" for readability purposes had no impact on our analysis. We noted that the Department's assessment for the yearly CO violation was $454,153, and we were aware the 23 months included August, September, and October of 2011. There was no dispute or actual misunderstanding on our part that the Department's assessment included penalties for CO violations in August, September, and October of 2011. Our holding was not limited to November 2011 through June 2013 notwithstanding our mistaken description of the "penalty period" in a finding of fact. In other words, we did not overturn the Department's penalties for August, September, and October of 2011 because they were outside the "penalty period." It was not a "crucial fact" justifying reconsideration.

The Department's more substantive concern is that the Board was under the mistaken impression that the Department relied exclusively upon PQ's CEMS results to support its finding that PQ violated its yearly CO limit in August, September, and October of 2011. (The other 20 months of the alleged yearly CO violations are not at issue here.) The Department says it instead relied on stack testing alone for those three months. To the extent our Adjudication can be read to have found that the Department's penalty assessment was based on CEMS alone for August, September, and October of 2011, we hereby clarify that the Department's assessment for those

three months was in fact solely based on two spreadsheets that were admitted at the hearing as Commonwealth Exhibits 34 and 35. (T. 579-81.)

It is relatively clear that the Department relied on Exhibits 34 and 35 for CO emissions for August, September, and October 2011 to find PQ liable and prepare its assessment. The values cited for PQ's calculated yearly CO emissions for those three months in the penalty assessment match the values in the exhibits. That is where clarity quickly starts to fade away. It is not clear that the emission numbers set forth in Exhibits 34 and 35 represent PQ's actual emissions properly calculated based on the proper underlying data.

PQ in its response to the petition for reconsideration suggests that it is not even clear that Exhibits 34 and 35 represent calculations based on stack test data. However, PQ entered into the following stipulation with the Department:

> On December 15, 2011 and January 8, 2013, PQ provided Heather Henry, an Air Quality Specialist in the Department's Southeast Regional Office, with the spreadsheet containing 12-month rolling sums that it calculated from stack test data for the Number 4 Furnace. Authentic copies of that spreadsheet are provided in the Department's Exhibits C – 34 and C – 35.

(Jt. Stip. 19.) Although neither party directly cited the stipulation in the petition or response, PQ is obviously bound by the stipulation.

PQ, however, has not stipulated that the exhibits establish liability. The Department relies on the documents as the exclusive basis for finding PQ liable for the months in question, but in our view, the exhibits fall short of providing an exclusive basis for holding PQ liable for those three months. The parties had originally intended to resolve PQ's liability in a consent assessment of civil penalty for the CO violations in those three months. Although the parties were able to settle upon a penalty for PQ's other violations, there apparently was enough confusion regarding what PQ's true CO emissions were for August 11 through December 14,

2011 that the parties agreed to leave the issue unresolved until CEMS data were available. (T. 581-86, 588-89; C. Ex. 48.) That never happened, but the point here is that PQ's actual emissions were unclear then based on stack testing, and they remain so now.

We heard abundant testimony that there were significant discrepancies among PQ's various submissions related to its emissions. (E.g. T. 581-82, 740, 1235-38. *See also* C. Ex. 36.) The Department acknowledges these discrepancies in its post-hearing brief. (Brief at 16, ¶¶ 77-79.) PQ's spreadsheets were described as "confusing." (T. 895.) No Department witness could testify from personal knowledge exactly where the spreadsheets originated or how they were prepared or whether they were accurate. (E.g. T. 588, 761, 917.) PQ's witnesses did not fill in the gaps or explain the discrepancies. (E.g. T. 1235-38.)

We are missing some basic foundation to help us understand the documents. There is no evidence that the exhibits report results based upon valid stack test data. We do not know what calculations were performed. There was no evidence that the stack tests were conducted in accordance with applicable testing methodology requirements, or that PQ made any representation to that effect. There is an unresolved dispute between the parties whether the results in Exhibits 34 and 35 are from stack tests that should have been used for compliance purposes. We note that the Department cross-examined a PQ witness using PQ's stack test report from December 15, 2011 (for purposes of showing that PQ's CO emissions were apparently well below its pounds-per-hour limit), but the Department never attempted to move that document into evidence. (T. 1159-60, 1166.)

Although the documents are authentic and admissible, it is one thing to be admissible and quite another to serve as the sole basis for holding PQ liable for tens of thousands of dollars in penalties. In any event, we have no need to resolve all of our doubts regarding Exhibits 34 and

35 now. The more fundamental point is that a petition for reconsideration is an inappropriate vehicle for engaging in such an exercise. Suffice it to say that the Department has failed to establish that the Board erred in concluding that the Department did not satisfy its burden of proving that PQ was liable for exceeding its yearly CO limits in August, September, and October of 2011.

Even if we assumed that PQ was liable for the three months in question, we would not impose the $142,086 penalty requested by the Department. Initially, the Department's requested penalty is out of line with the total penalties of $215,258 that we assessed in our Adjudication for all of the established violations. We also note that the Department's requested penalty here for three months of violations is approximately one-third of the Department's initial assessment of yearly CO penalties for 23 months of alleged violations ($454,153). More fundamentally, the Department did not provide testimony laying out penalty calculations derived from stack test data at the hearing on the merits. We would feel extremely uncomfortable, to say the least, in calculating a penalty using the Department's guidance documents for the three months in question, particularly since we have concerns about the Department's penalty policy more generally and its formulaic implementation of the penalty factors that are to be considered on a case-by-case basis under the Air Pollution Control Act, but we need not get into that here. Because the Department has failed to establish liability in its petition for reconsideration, holding another hearing to determine an appropriate penalty amount, as the Department requests in the alternative, is not necessary.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of October, 2017, it is hereby ordered that the Department's request that we revise our Adjudication and Order in this matter is **denied** except as set forth in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 16, 2017

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

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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 17, 2017**

OPINION AND ORDER ON
MOTION TO LIFT STAY

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to lift a stay of proceedings regarding an application for fees and costs because there is still a possibility of an appeal to Commonwealth Court, which could affect the amount of the fee in whole or in part.

O P I N I O N

This appeal has had an unusual procedural history. On October 11, 2013, we issued an Adjudication sustaining in part Rausch Creek Land, LP's ("Rausch Creek's") objections to the Department of Environmental Protection's (the "Department's") renewal of a surface mining permit issued to Porter Associates, Inc. ("Porter"). We suspended the permit and remanded it to the Department for further consideration of, among other things, the site's reclamation plan and its erosion and sedimentation controls. Both Rausch Creek and Porter filed appeals with the Commonwealth Court. The Court *sua sponte* quashed both appeals. It ruled that the appeals did not satisfy the criteria for the allowance of an appeal from an administrative remand under Pa.R.A.P. 311(f). Rausch Creek then filed a petition asking us to certify the matter for an interlocutory appeal, which we denied.

Rausch Creek filed a timely application for reimbursement of its attorneys' fees and costs. The Department moved to stay proceedings regarding the application, arguing that there was no final action due to the remand. On December 24, 2013, we granted the Department's motion to stay the fees proceedings. Rausch Creek's application has remained on hold since that time.

On August 16, 2017, Rausch Creek filed a new appeal, which we docketed at EHB Docket No. 2017-070-L. This latest appeal is from the Department's latest renewal/reissuance of Porter's surface mining permit. Although it is early in the case and a record still needs to be developed, it would appear that the renewed/reissued permit may be at least in part the Department's response to our remand order of 2013. According to Rausch Creek's notice of appeal, the Department has since forfeited Porter's bonds for the site. Porter did not appeal the bond forfeiture. The renewed permit is for reclamation activities only. Rausch Creek in its appeal questions why the Department would issue a permit to a forfeited operator that no longer has a license. It says the Department, which it says will now be responsible for reclaiming the site, "is clearly trying to avoid reclaiming the site to AOC [approximate original contour]."

Rausch Creek has now filed a motion to lift the stay of proceedings regarding its application for fees and costs in the 2011 matter. It says its 2017 appeal "focuses more on the legal issues regarding the issuance of a permit renewal to a forfeited operator on a site with outstanding compliance issues, rather than the technical issues addressed in this [the 2011] appeal." However, we note that Rausch Creek incorporated its entire 2011 notice of appeal into its 2017 notice of appeal. It continues to argue about the definition of AOC at the site, which was at the very heart of the earlier appeal.

The Department opposes the motion to lift the stay. It says that "the Department addressed the Board's concerns raised in its adjudication in EHB Docket No. 2011-137-L in the permit Appellant's appealed that is docketed at EHB Docket No. 2017-070-L. The outcome of Appellant's appeal in EHB Docket No. 2017-070-L may affect its request for fees and costs in this matter."

The Department may be correct, but perhaps more importantly, any appeal to Commonwealth Court that Rausch Creek files from our Adjudication in the 2017 appeal may include any objections (that, presumably, are not otherwise moot) that it continues to have with our 2013 Adjudication. We must assume that those earlier concerns are still very much alive, particularly given the objections in the 2017 notice of appeal, which incorporates the objections in the 2011 appeal. Porter might be able to refile its earlier quashed appeal as well.

There is no rule or requirement that expressly prevents the Board from ruling upon an application for fees before the opportunity for all appeals has expired, but we have traditionally deferred ruling on an application pending the exhaustion of all appeals on the merits, for good reason. *See, e.g., UMCO v. DEP*, 2009 EHB 24. For example, if the Court were to overturn our ruling that was largely in Rausch Creek's favor in 2013, it is difficult to imagine that we would still award fees to Rausch Creek. In addition, fees incurred on appeal can be recoverable. *See, e.g., Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764.

Although it is unfortunate that the administrative process has dragged on as long as it has, we are nevertheless still not in a position to act upon Rausch Creek's application. Accordingly, we issue the Order that follows.

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	:	

O R D E R

AND NOW, this 17th day of October, 2017, the Appellant's motion to lift the stay is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: October 17, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
	:	
v.	:	**EHB Docket No. 2015-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 20, 2017**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR STAY PENDING APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board denies a Motion for Stay Pending Appeal where the Appellants seeking the stay fail to show that they are likely to prevail on the merits of their appeal, any risk of irreparable harm is limited and there is some risk of environmental harm and health threats to the public from a delay in plugging the abandoned wells that are the subject of the Department's Order.

O P I N I O N

Introduction

On August 9, 2017, the Board issued its Adjudication and Order dismissing B&R Resources, LLC's ("B&R Resources") and Richard F. Campola's ("Mr. Campola") appeal of the Department of Environmental Protection's ("Department") June 22, 2015 Administrative Order ("2015 Order"). On September 6, 2017, B&R Resources and Mr. Campola appealed the Board's Adjudication and Order to the Commonwealth Court challenging the Board's determination that Mr. Campola was personally liable under the participation theory. One week later on September

13, 2017, the Department filed a Petition to Enforce the 2015 Order with the Commonwealth Court. The Commonwealth Court has scheduled a hearing on the Petition to Enforce for November 1, 2017.

On October 3, 2017, B&R Resources and Mr. Campola filed a Motion for Stay Pending Appeal with the Board pursuant to Rule 1781 of the Pennsylvania Rules of Appellate Procedure ("Stay Motion"). In the Stay Motion, B&R Resources and Mr. Campola request that all proceedings in this matter against Mr. Campola in his individual capacity be stayed until the Commonwealth Court reaches a final disposition and all rights to appeal are exhausted. The Department filed a Response in Opposition to Appellants' Motion for Stay Pending Appeal on October 17, 2017. The Board held a conference call with the attorneys for the parties on October 19, 2017 to discuss several questions it had with the Stay Motion. The Board is now ready to address the Stay Motion.

Analysis

Our first concern when reviewing the Stay Motion was the purpose of asking the Board for a stay in this proceeding and what impact, if any, granting a stay would have on the parties. Our Adjudication and Order did not require B&R Resources or Mr. Campola to take any action and there are currently no proceedings in this matter pending in front of the Board other than the Stay Motion. The Petition to Enforce filed by the Department is pending before the Commonwealth Court and any stay we may grant in this proceeding would, to the best of our understanding, have no impact on the Petition to Enforce in front of the Commonwealth Court. After the conference call with the attorneys and review of prior Board cases, it is apparent that the Stay Motion in this case was filed for procedural purposes pursuant to Rule 1781. Pa. R.A.P. 1781(a) states that: "Application for a stay or supersedeas of an order or other determination of

any government unit pending review of an appellate court on petition for review shall ordinarily be made in the first instance to the government unit." Under Pa. R.A.P. 1781(b), a request for a stay can be made directly to the Commonwealth Court but "the application must show that application to the government unit is not practicable, or that application has been made to the government unit and denied, with the reasons given by it for the denial, or that the action of the government unit did not afford the relief which the applicant had requested." The Board has previously read Pa. R.A.P. 1781(a) in conjunction with Pa. R.A.P. 1701(b)(1) as granting clear authority to stay its adjudications pending review by the Commonwealth Court. See *Kennametal, Inc. v. DER*, 1992 EHB 90. While we may have authority to grant a stay and there are cases where requesting a stay may make sense because an order of the Board requires one of the parties to undertake a specific action, we are not sure that in this case we are the proper government unit to seek review from in the first instance under Pa. R.A.P. 1781(a). If B&R Resources and Mr. Campola are seeking a stay of the Department's Petition to Enforce, the request for the stay may have been better directed to the Department as the government unit seeking to enforce its order or directly to the Commonwealth Court under Pa. R.A.P. 1781(b). However, the Stay Motion has been filed with the Board, and despite our reservations, we will give it consideration.

The Board has held that when ruling on an application for stay pending appeal, we employ the same criteria as that in ruling on a petition for supersedeas. *Lang et. al v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 116, 117, citing *Heston S. Swartley Transportation Co., Inc v. DEP* 1999 EHB 160, 163 and *E. Marvin Herr v. DEP,* 1997 EHB 977. The Board considers the following factors: irreparable harm, the likelihood of the applicant prevailing on the merits in its appeal, and the likelihood of injury to the public or the other parties. *Id.* B&R

Resources and Mr. Campola argue in their Stay Motion that these factors favor the granting of the stay and the Department argues that they do not. We agree with the Department and therefore, we deny the Stay Motion.

We do not think that B&R Resources and Mr. Campola will prevail on the merits of their appeal. They argue that the merits of their position are clear and that the application of the participation theory to Mr. Campola does not stand on the Commonwealth Court's established precedent citing to *Kaites v. DER*, 529 A.2d 1148 (Pa. Cmwlth. 1987). They further argue that the Board's Adjudication and Order improperly relied on the Board's holding in *Whitemarsh Disposal Corp., Inc v. DEP*, 2000 EHB 300, which B&R Resources and Mr. Campola assert "softened the elements of the participation theory." Stay Motion at Para. 16, p. 4. The Board considered both the Commonwealth Court decision in *Kaites* and the Board's prior decision in *Whitemarsh* in reaching the decision set out in its Adjudication. The Stay Motion does not raise any new arguments that were not considered by the Board at the time of its decision. We reached our decision that Mr. Campola was subject to personal liability under the participation theory after a detailed review of the hearing testimony and the legal arguments set out by the parties on this issue in their post-hearing briefs. We hesitate to predict how the Commonwealth Court may rule on an appeal of our Adjudication and Order. However, we continue to believe that we reached the right decision regarding Mr. Campola's liability and therefore, given the lack of any new information in the Stay Motion that causes us to reconsider that decision, we conclude that B&R Resources and Mr. Campola are unlikely to prevail on the merits of the claim in their appeal.

B&R Resources and Mr. Campola argue that Mr. Campola will suffer irreparable harm without a stay because he may be required to plug the wells that are the subject of the 2015

Order and may be liable for future civil penalties if he fails to comply. We agree that there may be some risk that Mr. Campola will be required to plug some wells but that risk is limited because of the ongoing action in the Commonwealth Court on the Department's Petition to Enforce the 2015 Order. A hearing in the Petition to Enforce is currently scheduled for November 1, 2017. Therefore, in short order, Mr. Campola will have an opportunity to argue that he should not be forced to plug wells at this time. If he prevails, he obviously will not suffer any irreparable harm. If he is unsuccessful, it can hardly be said that being required to comply with your rightful obligations under the 2015 Order is an irreparable harm. Further, Mr. Campola can mitigate any potential irreparable harm by having B& R Resources begin plugging the abandoned wells.

The third factor we consider is the likelihood of harm to the public or other parties. B&R Resources and Mr. Campola argue that there will be no harm to the Department or the public if the stay is granted. They assert that B&R Resources is not contesting its liability so it is responsible to begin plugging wells and further note that the Department did not identify any environmental risks or human health threats when it inspected the abandoned wells. The Department admits that when it previously inspected the wells subject to the 2015 Order, it did not note any immediate environmental risks or threats to human health but argues that as long as the wells remain unplugged, they pose an ongoing risk to the environment and a threat to human health. We conclude that the likelihood of harm to the public of granting a stay is low but to the extent it exists at all, it favors denying the stay because of the continuing and ongoing environmental and health risks posed by the unplugged abandoned wells.

When we balance all three factors we consider in evaluating whether to grant a stay request, denying B&R Resources' and Mr. Campola's Stay Motion is the proper result. The

most significant factor in that decision is our conclusion that they are unlikely to prevail on the merits of their claim on appeal. Further, we think the risk of irreparable harm is limited by the ongoing Commonwealth Court action on the Petition to Enforce and while we agree that the risk of harm to the public and the Department is low, the limited risk that does exist supports a ruling denying the stay request.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 20th day of October, 2017, it is hereby ordered that B&R Resources, LLC's and Richard F. Campola's Motion For Stay Pending Appeal is **denied.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 20, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-085-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNEAST PIPELINE COMPANY, LLC, Permittee	:	**Issued: October 24, 2017**

OPINION AND ORDER ON
PETITION FOR LEAVE TO APPEAL NUNC PRO TUNC

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for leave to file an appeal nunc pro tunc largely because the petitioner did not act promptly to remedy its failure to file a timely appeal.

O P I N I O N

On February 7, 2017, the Department of Environmental Protection (the "Department") issued a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), for a pipeline project to be built by PennEast Pipeline Company ("PennEast"). The Department published notice of the issuance in the *Pennsylvania Bulletin* ("*Pa. Bulletin*") on February 25, 2017. The notice said,

> Any person aggrieved by this action may file a petition for review pursuant to Section 19(d) of the Federal Natural Gas Act, 15 U.S.C.A. § 717r(d), with the Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106-1790 within 30 days of publication of this notice, or within 30 days of receipt of written notice of this action, whichever occurs first. Important legal rights are at stake, so you should show this document to a lawyer at once.

47 Pa.B. 1220 (Feb. 25, 2017). The notice did not mention the Environmental Hearing Board.

The Delaware Riverkeeper Network (the "Riverkeeper") quickly filed a petition for review from the Department's certification with the U.S. Court of Appeals for the Third Circuit on February 28, 2017. The Riverkeeper made no attempt to file an appeal from the 401 certification with this Board within 30 days of publication in the *Pa. Bulletin*, as is required in EHB appeals. *See* 25 Pa. Code § 1021.52.[1] Instead, the Riverkeeper waited 205 days after publication of the notice in the *Pa. Bulletin* to file the petition for leave to file an appeal nunc pro tunc that is now before us.

The Riverkeeper contends that it was misled by the statement in the *Pa. Bulletin* that said any person aggrieved by the Department's action may file a petition for review with the Third Circuit. However, the Riverkeeper has not provided any explanation for why it waited until now to attempt to file an appeal. It seems to intimate in its petition that it is acting in response to an August 30, 2017 decision of the Third Circuit, which discussed jurisdictional issues in an unrelated pipeline case, *Delaware Riverkeeper Network v. Secretary, Pa. Department of Environmental Protection*, 870 F.3d 171 (3d Cir. 2017), but it never actually says that or explains why that decision has impelled it to suddenly attempt to file an untimely appeal at this late date. PennEast and the Department oppose the petition.

The Board's rules allow for nunc pro tunc appeals, as follows:

> The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

[1] There is no question that the Board has jurisdiction to review the Department's issuance of 401 certifications generally, *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990 (Pa. 2007), and in our opinion, with respect to pipeline projects, *Lancaster Against Pipelines v. DEP*, EHB Docket No. 2016-075-L (Opinion and Order, May 10, 2017); *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2015-060-M (Opinion and Order, June 2, 2017).

25 Pa. Code 1021.53a. There is case law to support the notion that good cause can be shown if a would-be appellant reasonably relies to its detriment upon incorrect information from a governmental authority regarding the need or manner to appeal. *See Cal. Univ. of Pa. v. Zoning Hearing Bd. of Cal.*, 107 A.3d 241 (Pa. Cmwlth. 2014); *Dep't of Transp. v. Moore*, 554 A.2d 130 (Pa. Cmwlth. 1988). However, the would-be appellant must act with reasonable diligence once the mistake is revealed. *Ercolani v. Dep't of Transp.*, 922 A.2d 1034, 1037 (Pa. Cmwlth. 2007); *Barchik v. DEP*, 2010 EHB 739, 743; *Reading Anthracite Co. v. DEP*, 1998 EHB 602, 606-07. Typically, a nonnegligent failure to file a timely appeal must be corrected within a "very short time." *Bass v. Cmwlth.*, 401 A.2d 1133, 1135-36 (Pa. 1979); *Eljen Corp. v. DEP*, 2005 EHB 918, 933.

The Department's notice in the *Pa. Bulletin* was misleading or, at best, incomplete. Nevertheless, we have difficulty accepting the Riverkeeper's representation that it actually relied on the *Pa. Bulletin* notice because extremely able counsel for the Riverkeeper has filed simultaneous appeals with this Board and the Third Circuit in at least one other pipeline case, *Lancaster Against Pipelines, et al. v. DEP*, EHB Docket No. 2016-075-L. If there was reliance in fact, we also question whether that reliance was reasonable given the uncertainty in the law about the appropriate forum for an appeal of a 401 certification, an uncertainty about which the Riverkeeper was fully aware given its filings in the Third Circuit matter. The Riverkeeper has actually argued for months in the Third Circuit case that jurisdiction lies with this Board, yet it did not until this late date take the relatively simple step of filing an EHB appeal to preserve its rights. The Riverkeeper could very easily have filed simultaneous appeals before the Third Circuit and this Board. There was certainly no downside to doing so, given the minimal expense and effort associated with filing an EHB appeal.

Even assuming there was reasonable reliance, however, the Riverkeeper quite clearly failed to act with due diligence to preserve its rights. As noted above, it has not provided us with any explanation of why it waited 205 days to file its petition. Waiting 205 days hardly constitutes a "very short time." We have been left to wonder what triggered its belated attempt to pursue an appeal before this Board. If the Third Circuit's recent decision in an unrelated case provided the impetus, we deserved an explanation and a justification. We received neither. The Riverkeeper waited almost three weeks after the court's decision to file its petition, which shows that its petition was not filed with necessary dispatch even if we assume that the court's decision was an appropriate triggering event.

Nunc pro tunc appeals are typically only permitted in "unique and compelling cases." *Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001); *Twp. of Robinson v. DEP*, 2007 EHB 139, 145. This is not such a case. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2017-085-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNEAST PIPELINE COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 24th day of October, 2017, it is hereby ordered that the petition for leave to file an appeal nunc pro tunc is **denied.**

ENVIRONMENTAL HEARING BOARD

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

s/Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 24, 2017

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

For the Commonwealth of PA, DEP:
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David Stull, Esquire
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For Permittee:
Peter J. Fontaine, Esquire
Christine Soares, Esquire
Robert Dell'Osa, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC and ANNA P. VANSCYOC	:	
v.	:	**EHB Docket No. 2013-052-R (Consolidated with 2015-053-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, LP, Permittee	:	**Issued: October 24, 2017**

OPINION AND ORDER ON EMERALD COAL RESOURCES, L.P.'S MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellants have presented a compelling argument that this matter falls within the exceptions to the automatic stay of bankruptcy. Therefore, the Permittee's Motion to Dismiss is denied, and the stay is lifted.

O P I N I O N

On May 2, 2013, the Appellants, David Vanscyoc and Anna P. Vanscyoc, appealed to the Environmental Hearing Board (Board) an order of the Pennsylvania Department of Environmental Protection (Department) directing Emerald Coal Resources, LP (Emerald) to pay the amount of $36,831 to the Appellants as compensation for alleged subsidence damage to structures on property owned by them in Greene County, Pennsylvania. The Department's order found that the damage to the Appellants' property was caused by Emerald's mining. The Appellants contend that the amount of damage to their property was higher than the amount

ordered by the Department. A second appeal was filed on April 16, 2015 regarding a second order issued by the Department directing Emerald to pay the amount of $4,526.98 as further compensation for alleged damage to the Appellants' property. The appeals are consolidated at EHB Docket No. 2013-052-R.

On August 7, 2015, Emerald filed with the Board a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of Proceedings (Notice). The Notice advised the Board that on August 3, 2015, Alpha Natural Resources, Inc., and certain of its subsidiaries, including Emerald, had filed petitions for Chapter 11 bankruptcy relief in the United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court"). The Notice further advised the Board that the Bankruptcy Court had issued an order granting the automatic stay protections afforded under Section 362 of the Bankruptcy Code, 11 U.S.C. § 362. Section 362(a) states in relevant part:

> Except as provided in subsection (b) of this section, a petition filed [under the relevant provisions of the Bankruptcy Code] operates as a stay. . .of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title….

11 U.S.C. § 362(a)(1).

Based on the filings submitted by the parties, the Board stayed this appeal pursuant to Section 362(a)(1), and ordered the filing of periodic status reports. Upon the death of Appellant Anna P. Vanscyoc on October 18, 2016, David Vanscyoc became the sole Appellant in this appeal.

Emerald has filed a motion to dismiss this appeal on the grounds that Mr. Vanscyoc has no recourse before the Environmental Hearing Board. Emerald argues that Mr. Vanscyoc's only

means of relief is in the proceeding before the Bankruptcy Court. According to its motion, "the Appellants can secure no additional relief in the matters before this Board beyond the payment of its [sic] unsecured claim before the bankruptcy court." (Emerald Motion, para. 10)

The Department of Environmental Protection objects to dismissal of the appeal on the grounds that Emerald has asserted no legal or factual basis for its motion. Mr. Vanscyoc also objects to dismissal of his appeal and renews his argument that the stay should be lifted and his case before the Environmental Hearing Board should be allowed to proceed.

The Board may grant a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *City of Allentown v. DEP*, EHB Docket No. 2016-144-M (Opinion and Order issued September 1, 2017), *slip op*. at 6-7 (citing *West Buffalo Twp. v. DEP*, 2015 EHB 780, 781; *Brockley v. DEP*, 2015 EHB 198, 198-99; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282). Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *City of Allentown, supra* (citing *Brockley, supra*; *Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558). For the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *City of Allentown, supra* (citing *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 122-23, *aff'd*, *Consol Pa. Coal Co. LLC v. Dep't of Envtl Prot.*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390.) Based on our review of the parties' filings, we find that the motion to dismiss cannot be granted. We disagree with Emerald that there is no relief that can be granted to Mr. Vanscyoc in his appeal before the Environmental Hearing

Board. We further find that the stay should be lifted, and this matter should be permitted to proceed.

The Board has jurisdiction to determine whether proceedings pending before the Board are subject to the automatic stay of bankruptcy. *Vanscyoc v. DEP*, EHB Docket No. 2013-052-R (Consolidated with 2015-053-R) (Opinion and Order issued December 8, 2015), *slip op*. at 853 (citing *Department of Environmental Resources v. Ingram*, 658 A.2d 435, 437 (Pa. Cmwlth. 1995); *DEP v. Frisch*, 2008 EHB 105, 106, n. 1). As explained in *Frisch*, "[t]he general policy behind the automatic stay is to grant the debtor complete and immediate, albeit temporary, relief from creditors while preventing the dissipation of the debtor's assets before an orderly distribution can take place." *Frisch, supra* (citing *Penn Terra*, 733 F.2d 267, 271 (3d Cir. 1984)).

The Bankruptcy Code provides certain exceptions to the automatic stay. Specifically, Section 362(b)(4) provides that the filing of a bankruptcy petition does not act as a stay of the following:

> the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4).

Mr. Vanscyoc argues that his appeal should be allowed to proceed because it is an exercise of the police power of the Commonwealth of Pennsylvania and the regulatory power of the Department of Environmental Protection and, as such, falls within the exception set forth above. In his response, Mr. Vanscyoc avers that due to subsidence caused by Emerald's mining,

(1) a radio tower[1] on his property collapsed and has created a nuisance and public safety hazard; (2) damage to his home occurred and has not been adequately repaired by Emerald's contractor; and (3) due to his age (81 years) and poor health, Mr. Vanscyoc has been unable to address the collapsed radio tower and other damage. (Response, para. 3 – 13) Mr. Vanscyoc argues that Emerald's failure to restore his property to its pre-mining condition is a failure to fulfill its statutory and regulatory duties under the Mine Subsidence Act.

In our prior decision in this matter, we examined the applicability of the bankruptcy stay in Environmental Hearing Board proceedings:

> The question of the applicability of the automatic stay protection of Section 362 in proceedings before the Board has been addressed in various contexts. *Frisch*, *supra*, involved a complaint for civil penalties filed by the Department against a defendant who subsequently filed for bankruptcy. In that case, Judge Labuskes held that the Board's adjudication of a Department complaint for civil penalties did not constitute an action to enforce a monetary judgment and, therefore, was not stayed under the Bankruptcy Code. In *Ingram*, *supra*, the Commonwealth Court held that a Department enforcement order directing the bankruptcy petitioner to clean up mine drainage was not subject to the automatic stay of the Bankruptcy Code. In both of those cases, a determination was made that the action fell within the exception of subsection (b)(4) and the stay was not applicable.

Vanscyoc, 2015 EHB at 854-55.

As explained in *Frisch*:

> [T]he automatic stay does not apply to an action or proceeding in which a governmental unit is exercising its police or regulatory powers, unless the government is trying to enforce a money judgment. The police and regulatory powers exception, as it is often referred, protects against the risk of bankruptcy courts becoming a sanctuary for those who violate environmental laws. [*citing U.S. v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988)].

[1] Although Emerald previously disputed the question of whether the radio tower was a structure entitled to compensation under the Mine Subsidence Act, in its motion it states that it no longer contests this issue. (Motion, para. 9)

2008 EHB at 107.

Mr. Vanscyoc directs us to the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. § 1406.1 *et seq*., and its amendments on June 22, 1994, known as "Act 54," under which the Department issued the orders that are the subject of this consolidated appeal. Section 2 of the Act sets forth its purpose, in relevant part, as follows:

> This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth . . . to provide for the restoration or replacement of or compensation for surface structures damaged by underground mining. . . .

52 P.S. § 1406.2.

In our earlier review of this matter, we stayed further action on this appeal because the Department's orders required the payment of money to the Vanscyocs and it appeared that this matter did not fall within the exception of Section 362(b)(4). However, as Mr. Vanscyoc points out, compensation is not the sole remedy prescribed by the Mine Subsidence Act when the Department finds that subsidence has occurred. Section 5.4 of the Mine Subsidence Act states that whenever underground mining operations conducted under the Act cause damage to any of the structures enumerated therein, the operator of such mining operation "shall repair such damage *or* compensate the owner of such building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable." 52 P.S. § 1406.5d (emphasis added). Thus, Section 5.4 requires the Department to exercise its police power to order the mine operator either to repair damage caused by underground mining or to compensate the landowner for the restoration or cost of replacement.

The Mine Subsidence Act provides the landowner with an administrative remedy ensuring that repairs are made to structures that have suffered from mine subsidence. In this case, the Department has determined that mine subsidence caused damage to the Vanscyoc home and resulted in the collapse of a radio tower which Mr. Vanscyoc alleges has created a public nuisance. Although we originally held that this matter appeared to involve a money judgment, we now agree with Mr. Vanscyoc that:

> [i]f the appeal is carried to its conclusion it will not result in a money judgment in the favor of the Appellants. The purpose of the Act is to establish a scheme for the protection of structures overlying mineable seams of coal.

Mr. Vanscyoc states:

> In this instance, the Appellants are seeking only to require Emerald to remove the collapsed radio tower from their property to eliminate a public safety hazard and secure repairs to their residence restoring it to its pre-mining condition to be undertaken and completed in a good and workmanlike manner.

(Vanscyoc Response, para. 24)

If Emerald's mining has caused subsidence damage to Mr. Vanscyoc's home, as determined by the Department, and has created a nuisance on Mr. Vanscyoc's property with the collapse of the radio tower, Emerald has an obligation under the Mine Subsidence Act to repair the damage. This obligation falls within the regulatory and police power exception of Section 362(b)(4).

Even if the Board upholds the Department's orders and finds that Mr. Vanscyoc is entitled to *compensation* for the repair or replacement of the damaged structures, this matter still falls within the exception of Section 362(b)(4). As noted earlier, the automatic stay of bankruptcy does not apply to an action or proceeding in which a governmental unit is exercising its police or regulatory powers, *unless* the government is trying to enforce a money judgment.

An adjudication by the Board upholding the Department's orders in this matter is *not* the enforcement of a money judgment. In *Frisch*, we held that the Board's assessment of a civil penalty was not a money judgment since our role was limited to the assessment, not enforcement, of the penalty. There, we held:

> This Board's role is limited to assessing civil penalty liability. We have no power to enforce our adjudication. Absent voluntary payment, the Department typically will institute measures with the prothonotary of a court of common pleas to convert our adjudication into a judgment. The Board's adjudicatory process is one step removed.

2008 EHB at 108. Likewise, here a finding by the Board that Mr. Vanscyoc is entitled to compensation or repair is not the enforcement of a money judgment and, therefore, this matter falls within the Section 362(b)(4) exception of the automatic stay of bankruptcy.

Therefore, the motion to dismiss is denied and the stay is lifted.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID VANSCYOC and ANNA P. VANSCYOC	:	
	:	
v.	:	**EHB Docket No. 2013-052-R**
	:	**(Consolidated with 2015-053-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD COAL RESOURCES, LP, Permittee	:	

O R D E R

AND NOW, this 24th day of October, 2017, the *motion to dismiss* is **denied** and the *stay* in this matter is **lifted**. A telephone status conference will be scheduled by separate order.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 24, 2017

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

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For Permittee:
Blair M. Gardner, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor	:	**Issued: November 3, 2017**

OPINION AND ORDER ON PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS' PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board grants a petition to intervene by the Pennsylvania State Association of Township Supervisors ("PSATS") in a third party appeal of a brine spreading plan where PSATS has demonstrated that it has organizational standing because at least two of its members have a direct, immediate, and substantial interest in the appeal.

O P I N I O N

Introduction

Siri Lawson ("Ms. Lawson") has appealed the Department of Environmental Protection's ("Department") Approval No. NW9517 authorizing brine spreading for dust control in Sugar Grove and Farmington Townships in Warren County ("Department Approval"). The Department Approval authorized the spreading of brine on unpaved roads and lots in Sugar Grove and Farmington Township by Hydro Transport LLC ("Hydro Transport"). Hydro Transport is a Pennsylvania Limited Liability Corporation engaged in providing services for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of

Appeal Ms. Lawson contends as follows: 1) the DEP Approval constitutes an approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Department Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Department Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for roadspreading plans.

Three petitions to intervene have been filed in this appeal. A petition was filed on August 24, 2017, on behalf of Farmington Township that was granted by the Board by opinion and order dated September 6, 2017. A petition was filed by the Pennsylvania Grade Crude Oil Coalition ("Coalition") on August 10, 2017, and denied by the Board in an opinion and order dated September 11, 2017. A third petition, which is the subject of this opinion, was filed by PSATS on October 13, 2017 ("Petition"). In its Petition, PSATS states that Hydro Transport and Intervenor Farmington Township consent to intervention, and the Department does not oppose the intervention. Ms. Lawson filed an answer to the PSATS's Petition on October 30, 2017 ("Answer") asserting that the Petition should be denied, or if the Petition is granted that the Board should limit the scope of PSATS's participation. On October 30, 2017, the Department filed a letter with the Board stating that it does not oppose the Petition.

Standard of Review

Section 4 of the Environmental Hearing Board Act states that "[a]ny interested party may intervene in any matter pending before the Board." *See also* 25 Pa. Code § 1021.81 (a person may petition to intervene in any matter prior to the initial presentation of evidence). The Board has held that the right to intervene in a pending appeal should be

comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Logan v. DEP*, 2016 EHB 531, 533; Wilson *v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433,434. A person or entity will have standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Logan*, 2016 EHB at 533, (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). This interest must be more than a general interest such that the entity seeking intervention "will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth, 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. When there is a challenge to standing in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts. *Logan*, 2016 EHB at 533 (citing *Tri-County Landfill Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3). An organization has standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228, (Pa. Cmwlth. Jul. 26, 2016).

Analysis

According to its petition PSATS, "is a statutorily-authorized unincorporated association" that "provides member services to and represents the interests of over 1,400 townships of the second class in the Commonwealth of Pennsylvania." (Petition, para. 7, 8). In Paragraph 9 of its Petition, PSATS states "Included among PSATS's membership are Intervenor Farmington Township and Sugar Grove Township, both of which will be directly impacted by the Board's

decision in this matter because they contracted with Hydro for dust control services on their township-owned roads." PSATS goes on to assert that many others member Townships will be affected by the Board's decision in this case and have contacted PSATS to voice their concerns. PSATS states that it seeks to intervene in this appeal to represent the interests of those of its members that will be impacted if the Board issues a decision prohibiting the spreading of brine on unpaved rural roads.

In her Answer, Ms. Lawson opposes intervention by PSATS, arguing that the PSATS has failed to demonstrate that it has a substantial, direct, and immediate interest in this matter. She asserts that PSATS relies on Rockdale and Summit Townships to establish standing and not Farmington Township or Sugar Grove Township. Ms. Lawson alternatively argues that if PSATS's intervention is granted the Board should limit the scope of its participation to whether the Department actions were lawful and reasonable, and exclude any PSATS discussion of economic impact.

An organization has standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228, (Pa. Cmwlth. Jul. 26, 2016); *Raymond Proffit Foundation v. DEP*, 1998 EHB 677. PSATS states that Farmington Township and Sugar Grove Township are members of PSATS and that both of these PSATS members will be directly impacted by the Board's decision. Ms. Lawson admits to this information in her Answer. Based on the Board's prior Opinion and Order dated September 6, 2017, granting Farmington Township's Petition to Intervene, it is clear that at least two members of PSATS, Farmington Township and Sugar Grove Township, have standing in their own right to intervene. Both member municipalities have a substantial, direct and immediate interest in this matter. They each have a current valid agreement with Hydro

Transport that may be directly affected by the outcome of this appeal. Based on the admission by Ms. Lawson in her Answer that Farmington Township and Sugar Grove Township are members of PSATS and our undisputed conclusion that these two townships have standing to participate in this matter in their own right, we conclude that PSATS has standing to intervene in this matter because at least two members of the organization have standing.

Ms. Lawson requests that if we do allow intervention by PSATS, that we limit PSATS participation to issues raised by Ms. Lawson in her Notice of Appeal. In its Petition, PSATS states that it intends to present argument to the Board regarding, among other things, the significant financial impact on municipalities beyond Farmington Township and Sugar Grove Township that may result from the Board's decision as well as on the various legal issues raised in Ms. Lawson's appeal. (Petition, para. 27). Under our rules, the Board may, when granting a petition to intervene, specify the issues as to which intervention is allowed. 25 Pa. Code § 1021.81(f). Ms. Lawson's Notice of Appeal is a direct and broad challenge to the Department's practice of approving brine spreading including the claim that the Department lacks authority to issue roadspreading approvals under federal or state law, regulations or rules and that the approvals violate Article 1, Section 27 of the Pennsylvania Constitution. Given the broad nature of the claim, we are not convinced that it is appropriate to limit the issues as to which PSATS's intervention is allowed at this early point in the proceeding. We do understand, and to some extent share, Ms. Lawson's concern about the relevancy of testimony addressing the potential financial impact of a Board decision in this case to PSATS member Townships beyond Farmington and Sugar Grove, but we think that is an issue that may be better addressed at a later time.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 3rd day of November, 2017, it is hereby ordered that Pennsylvania State Association of Township Supervisors' Petition to Intervene in this matter is GRANTED. Henceforth the caption shall read:

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

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 3, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: November 8, 2017**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board in a third-party appeal from the renewal of Keystone Sanitary Landfill's solid waste management permit adds a condition requiring Keystone to prepare a groundwater assessment plan with respect to groundwater degradation being seen in one of its monitoring wells in accordance with 25 Pa. Code § 273.286. The Board rejects all of the third party's other objections to the permit renewal.

FINDINGS OF FACT

The Parties

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and authority to administer and enforce the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101 – 4000.1904 ("Act 101"), and the rules and regulations promulgated under those statutes, including the municipal waste regulations codified at 25 Pa. Code Chapters 271 - 285.

2. The Permittee, Keystone Sanitary Landfill, Inc. ("Keystone"), owns and operates a municipal solid waste landfill located in Dunmore and Throop Boroughs, Lackawanna County pursuant to Solid Waste Management Permit No. 101247. (Friends of Lackawanna Exhibit No. ("FOL Ex.") 1.)

3. A portion of Dunmore Borough is a designated Environmental Justice Area. (Notes of Transcript page ("T.") 1132, 3302-05; FOL Ex. 176; Commonwealth Exhibit No. ("C. Ex.") 5.)

4. Friends of Lackawanna ("FOL") is a Pennsylvania registered Non-Profit, Non-Stock, 501(c)(3) corporation with its registered address located at 201 South Blakely Street #305, Dunmore, Lackawanna County, Pennsylvania 18512. (T. 186; FOL Ex. 292.)

5. FOL was created in October 2014 to oppose the continued operation and proposed expansion of the Keystone Landfill. (T. 168, 186, 188-89; FOL Ex. 292.)

6. FOL's articles of incorporation filed with the Pennsylvania Department of State provide that its "purposes shall include, but shall not be limited to: supporting the health, welfare and education of individuals in need in Northeastern Pennsylvania." (FOL Ex. 292.)

7. FOL's mission includes protection of the environment in the area of the landfill. (T. 69-70, 96-97, 117-20, 185-90, 200-02, 204-05, 270, 290-91, 307; FOL Ex. 8, 9, 12, 13, 14, 292.)

8. FOL holds events and educational seminars, organizes members of the community to attend public meetings involving the landfill, puts on happy hour events and fundraisers, and raises awareness in the community about the landfill through the information it disseminates at its events, online, through social media, and through radio and television interviews. (T. 120, 186, 201-02.)

9. FOL has been involved in borough council meetings and zoning hearing board proceedings and has participated in other public hearings regarding the Keystone Landfill. (T. 119-20, 201.)

10. FOL has prepared and submitted comments to the Department on the proposed expansion, and made a presentation to the Department's Environmental Justice Advisory Board regarding its concerns over the impacts from the landfill to the community. (T. 186-87; FOL Ex. 12, 13, 14.)

11. FOL's comments express concerns that include landfill leachate impacting groundwater, subsurface fires at the landfill, and impacts from the landfill on local property values and on the region's reputation. (T. 190, 270, 290-91, 307; FOL Ex. 13, 14.)

12. FOL is also concerned that there have been no health studies done on the impact of the landfill's odors on the local community, and it has requested that health studies be performed by the Department of Environmental Protection and the Department of Health. (T. 180-82, 291, 305, 337.)

13. FOL maintains a website containing information about its activities, events, and its mission. (T. 117-18, 144; FOL Ex. 8, 9.)

14. FOL considers people to be members of the organization if they have engaged with the organization, supported its cause, shown up to FOL's meetings, written a letter in opposition of the landfill, signed a petition, participated in canvassing or fundraising events, "liked" FOL's Facebook page, donated to FOL's causes, or are on FOL's mailing list. (T. 119, 185-86.)

15. FOL presented the testimony of three individuals closely associated with FOL at the hearing on the merits, Beverly Mizanty, Katharine Spanish, and Patrick Clark. (T. 69, 115, 185.)

16. Beverly Mizanty joined FOL when it first organized. She has attended meetings and events organized by FOL, contributed to its campaign, and gone to public hearings before government agencies in her role as a member of FOL. (T. 69-70, 89, 97.)

17. She considers herself a member of FOL by province of joining its Facebook page, attending its meetings and open sessions, and by donating to its cause. (T. 69-70, 96.)

18. Mizanty receives emails from FOL that keep her informed of what is going on with the group's activities. (T. 97.)

19. Mizanty has lived in Dunmore within a quarter-mile of the landfill, which she can see from her house, for more than 25 years. (T. 62-64.)

20. Mizanty is primarily concerned about the landfill's odors and their impact on her health, which have a chemical smell and make her nauseous. (T. 65, 67, 96.)

21. Mizanty has lodged more than 15 complaints with the Department in the last five years regarding odors either by phone, online, or in writing. (T. 88-89; DEP Ex. 31.)

22. Mizanty is also concerned about water contamination and fires from the landfill due to the proximity of the landfill to her house. (T. 67-68.)

23. Katharine Spanish is a member of FOL and the secretary of its board. She attends weekly board phone calls, is active in FOL's social media presence, email distribution network, and website, and she participates in FOL's community activities. (T. 115.)

24. She lives about a half-mile from the landfill with her three children who attend school and daycare about a quarter-mile from the landfill. (T. 109, 111.)

25. Spanish experiences odors from the landfill at her home and throughout the community, which she describes as strong, pungent, and foul, and which have become more persistent over the last seven years. (T. 112-13, 163-64.)

26. Spanish has experienced noxious odors one to two dozen times within the last several years, and she has complained to the Department about odors approximately a dozen times. (T. 129-30.)

27. She is concerned about the health of her children while at daycare due to the odors. (T. 135.)

28. In addition to air quality she is also concerned about leaking leachate, possible fires, radioactive material, and litter. (T. 114, 158, 172.)

29. Patrick Clark, who lives approximately two miles from the landfill, is a member of FOL, he is on the board of directors, and he is the organization's treasurer. (T. 177, 185, 202.)

30. He is considering no longer allowing his children to play soccer at nearby Sherwood Park because of his concerns over air quality. (T. 179-80, 313.)

31. Clark is also concerned over the landfill's impacts on the local economy and on the reputation of the region as the landfill continues to accept more waste. (T. 184-85, 273.)

32. Clark authored the comments FOL submitted to the Department on the landfill's expansion. (T. 211-12; FOL Ex. 13, 14.)

33. FOL also introduced for purposes of establishing standing a transcript of testimony of Joseph May given before the Dunmore Zoning Board on March 26, 2015. (T. 355-56, 1375-76; FOL Ex. 3a.)

34. Joseph May is a member of FOL. (FOL Ex. 3a (at 62).)

35. May lives within a quarter-mile of the landfill with his wife and daughter. (FOL Ex. 3a (at 31).)

36. May passes the landfill every day on his way to work and frequently walks his dog and rides his bicycle and motorcycle in the vicinity of the landfill. (FOL Ex. 3a (at 32-34).)

37. May has experienced a distinct, pungent odor that he attributes to the landfill, which he smells at his house almost every day. (FOL Ex. 3a (at 34, 39).)

38. May is concerned about the health impacts to his family from the landfill. (FOL Ex. 3a (at 52-53).)

39. The odors FOL's members experience become stronger the closer they get to the landfill. (T. 66, 79-80, 170, 179; FOL Ex. 3a (at 42-44).)

The Site

40. The Board conducted a site view with all parties in attendance on October 26, 2016.

41. The landfill site is located very close to Exit 1 of Interstate 380. (T. 3056-57; FOL Ex. 294; Keystone Sanitary Landfill Exhibit No. ("KSL Ex.") 36, 49; C. Ex. 1.)

42. Keystone's permit covers 714 acres, 335 acres of which have been approved for waste disposal. (C. Ex. 1.)

43. The site has been consistently used for waste disposal since the 1950s. (T. 1603, 2867-71.)

44. Before it was used for waste disposal, the site was extensively mined for coal by surface and underground methods. (T. 2867-69, 3367-84; KSL Ex. 64A, 64B, 64C, 64D.)

45. Keystone has been permitted and operating at the site for more than 30 years. (FOL Ex. 200, 322; C. Ex. 1.)

46. Keystone's permit has been renewed and modified several times over the years. (FOL Ex. 200, 201, 205, 211, 215, 216, 217; KSL Ex. 40C, 40D, 40E, 40F; C. Ex. 1-4.)

47. The Keystone site consists of separate waste disposal areas, commonly known as Keystone/Dunmore Landfill, Phase I (Tabor and Logan), and Phase II. (T. 2867-71; KSL Ex. 36, 36A, 96A (at 4).)

48. The original Keystone/Dunmore Landfill operated from the early 1970s through the late 1980s by filling old strip mine pits. The original Keystone/Dunmore Landfill was active before the existing landfill regulations were enacted in 1988 and it is an unlined disposal site. (T. 2867-71, 3367.)

49. The Tabor and Logan sites, which made up Phase I, are double-lined disposal areas that were permitted by the Department in July 1988. Waste disposal activities commenced in Phase I in May 1990. (T. 2870-71, 3390; KSL Ex. 36, 36A.)

50. Keystone closed the Tabor portion of Phase I by 2003 and the Logan portion of Phase I by 2007. (T. 2871.)

51. The Department approved a major permit modification for the Phase II expansion at the Landfill on June 10, 1997. The Phase II expansion added 186 acres of waste disposal area to the facility. Phase II is the current disposal area of the landfill. (T. 2871, 3057; FOL Ex. 201; C. Ex. 1.)

52. Keystone began waste placement in Phase II in 2005. (T. 3024.)

53. On April 3, 2012, the Department approved a major permit modification for an increase in the average and maximum daily volume limits for the landfill. The average daily volume was raised from 4,750 to 7,250 tons per day and the maximum daily volume was raised from 5,000 to 7,500 tons per day. (C. Ex. 2, 6.)

54. On January 13, 2014, the Department approved a minor permit modification for a project intended to relocate approximately 8.8 million tons of waste from the Keystone/Dunmore site to a new lined area of the landfill. (FOL Ex. 215.)

55. On February 24, 2015, the Department approved a minor permit modification for Keystone to construct and operate a new leachate treatment plant at the landfill with a capacity of 150,000 gallons per day. The existing treatment plant was to be refurbished and kept as a backup facility. (FOL Ex. 216.)

56. On August 3, 2015, the Department approved a minor permit modification for the construction of a new access road to the Keystone facility. The construction included a new guard house, access gates, employee parking lot, access road, and sediment traps 1, 2, and 3. (FOL Ex. 217.)

57. On August 25, 2016, the Department approved a minor permit modification authorizing Keystone to make improvements to the two existing leachate storage lagoons at the site, including elimination of existing penetrations within the lagoons, replacement of the existing gravity discharge system with leachate pumping system and double containment force main pipelines, and installation of a new liner system over the existing primary liner. The new system will include a primary liner, a secondary liner, a leachate detection zone with a side slope riser pump with pressure transducers, alarms, and automated pumping protocols. (C. Ex. 4.)

58. Keystone completed and submitted the Form 37 as-built certification package to the Department on October 17, 2016 for the west lagoon, being the first phase of the lagoon improvements project authorized by the Department's August 25, 2016 modification to the Permit. The second phase of this project, being the east lagoon improvements, was scheduled to commence in mid-2017. Currently, only the re-lined west lagoon is being used for leachate

storage, with the east lagoon being used only for potential backup. (T. 1593-94, 1597-98, 3142-46; KSL Ex. 115, 130.)

59. Keystone upgraded its on-site treatment plant. (T. 3140-41; KSL Ex. 52.)

60. Keystone has an application pending for a permit modification that would allow it to expand within the existing permit limits in the area where some of the waste in the Keystone/Dunmore area is to be excavated and relocated as part of Phase II. (C. Ex. 5.) This appeal does *not* involve the expansion application.

61. Prior to the renewal that is at issue in this appeal, Keystone's landfill permit was last renewed on March 4, 2005, which allowed the landfill to operate for ten more years, until April 6, 2015. (FOL Ex. 205.)

62. On February 11, 2014, Keystone filed an application for the latest renewal of the permit. (FOL Ex. 266.)

63. The Department approved the application and issued the permit renewal on April 6, 2015. (FOL Ex. 1.) This appeal is from that permit renewal.

64. The permit renewal allows Keystone to operate the landfill for an additional ten years, until April 6, 2025. (FOL Ex. 1.)

65. The permit renewal did not add any new conditions or terms to the underlying permit. (FOL Ex. 1.)

Groundwater

66. Leachate is a liquid that has permeated through or drained from solid waste. 25 Pa. Code § 271.1.

67. Leachate generated by a landfill can be characterized by elevated levels of nitrate, ammonia, alkalinity, sodium, chloride, calcium, total organic carbon, volatile organic compounds

(VOCs), total dissolved solids (TDS), and/or potassium. (T. 1983-84, 2007-08, 3433-35, 3589, 3728.)

68. In order to minimize and control the potential for contamination of groundwater from leachate, landfills are required to install groundwater monitoring wells. 25 Pa. Code §§ 273.281 – 273.288.

69. Keystone's landfill has an extensive groundwater monitoring well system, which consists of 34 wells. (T. 1703-04, 2404; FOL Ex. 218-23, 304, 325; KSL Ex. 103, 104, 107, 110, 111, 112; C. Ex. 34.) The regulations require a minimum of four wells (one upgradient, three downgradient). 25 Pa. Code §§ 273.282.

70. The landfill's monitoring wells are frequently sampled to ensure the landfill is not polluting the groundwater. (T. 3512-13; FOL Ex. 218-23, 325; KSL Ex. 93, 104; C. Ex. 16.)

71. With the exception of the area in the vicinity of monitoring well MW-15 (discussed below), the landfill's existing monitoring well network provides adequate coverage both horizontally and vertically for detecting any degradation of the groundwater resulting from landfill practices. No additional wells have been shown to be necessary at this time. (T. 1703-06, 1757-59, 1783, 3398-3418, 3440-41, 3451-53, 3460-63, 3482-83, 3499-3501, 3586, 3591-93, 3760-63, 3876-78, 3890-3900, 3932-33, 3973-74, 4064-68; FOL Ex. 218-23, 304, 325; KSL Ex. 64A, 93, 96B, 96C, 110, 111, 112; C. Ex. 34.)

72. With the exception of MW-15, Keystone's monitoring system has not detected any groundwater contamination that can reasonably be attributed to landfill operations at this time. (T. 1621-24, 1651, 1721-31, 1757-59, 2182-83, 3500-03, 3512-19, 3526-28, 3543, 3614-15, 3731-33, 3770, 3782-83; FOL Ex. 218-23, 243, 248, 249; KSL Ex. 93, 158.)

73. Elevated levels of sodium and chloride are being detected in some monitoring wells but it has not as of yet been demonstrated that those elevated levels can be attributed to the landfill's activities. (T. 1713, 2006-08, 2182-83, 2537-43, 3434-37, 3534-38, 3613-15, 3728-33, 3749-51, 4144-56; FOL Ex. 221; KSL Ex. 41 (at 22-24), 41A, 90, 93, 155, 158, 173, 174, 175[1]; C. Ex. 16.)

74. With the exception of groundwater being monitored at MW-15, it has not been shown that groundwater quality at the landfill requires further assessment at this time. (T. 1624, 1628, 1704-06, 1754-55, 1761-62.)

75. The landfill is contaminating the groundwater with leachate that is being detected in MW-15. (T. 1630, 1666-71, 1716-19, 1774-75, 1976-79, 1983, 2047-48, 3517-19, 3589, 3654; FOL Ex. 218, 219, 220, 232, 234, 250 263, 297; KSL Ex. 93; C. Ex. 5, 12, 14, 17, 18, 21, 22, 23.)

76. The contamination in MW-15 has been present since at least 2002. (T. 1521, 1629-30, 3654; FOL Ex. 218-24, 243, 245, 248; KSL Ex. 93; C. Ex. 18.)

77. Increases have included nitrate (the most significant one), potassium, chloride, sodium, alkalinity, total organic carbon, and biological oxygen demand (BOD). (T. 1629-30, 1974-75.)

78. The contamination exceeds the maximum contaminant limits (MCLs) for drinking water for nitrate (averaging about 120-130 mg/l since 2014) (standard = 10 mg/l), chloride (around 600-750 mg/l since 2013) (standard = 250 mg/l), and total dissolved solids (consistently above 2,000 mg/l since 2013) (standard = 500 mg/l). 25 Pa. Code § 109.202 (incorporating 40

[1] Two different exhibits were inadvertently marked and admitted as KSL Ex. 175. (*See* T. 4150, 4191, 4280, 4358-59.) The exhibit cited in support of this Finding of Fact is a PennDOT construction drawing for the Lackawanna Valley Industrial Highway. (T. 4150.)

CFR Part 141, Subpart G; 40 CFR § 143.3). (T. 1979, 3733; FOL Ex. 249, 263; KSL Ex. 93; C. Ex. 17, 18.)

79. The contamination has not been shown to present any immediate risk to human health or safety. (T. 1279-80, 1521, 1706, 1755-60, 1768-69, 3386-89, 3561, 3572-73, 3733-34, 3834-38, 4340, 4354; FOL Ex. 249; KSL Ex. 136.)

80. MW-15 is a shallow well, with a depth of about 109 feet below the surface. (FOL Ex. 224.)

81. MW-15 monitors shallow groundwater, much of which is flowing through abandoned coal workings. (T. 1628, 1701, 1827.)

82. The well produces about three to five gallons per minute. (T. 3709.)

83. A nearby deep well, MW-16, is not showing contamination. (T. 1723.)

84. MW-15 is very close to the downgradient and downdip border of the site, which suggests that there is an as yet undetermined possibility that the landfill may be contaminating groundwater offsite. (T. 1981-84, 1991-92, 2012-13, 2063-64, 2307-12, 3636, 3657, 3971-72; C. Ex. 12, 34.)

85. MW-15 is close to and downgradient of Keystone's treatment plant and leachate storage lagoons. (T. 1721-22, 3517-19, 3634-35, 3657, 3971-72; FOL Ex. 218, 219, 221, 222, 223; KSL Ex. 153; C. Ex. 34.)

86. Although the leachate storage lagoons are potentially a source of the contamination being detected in MW-15, it has not been shown that they are in fact the source of the contamination. (T. 1046, 1058-63, 1278-79, 1291-92, 1512-14, 1521-24, 1532-34, 1600-01, 1667-68, 2565-67, 3711-18, 4016-27, 4321; FOL Ex. 206, 207, 208, 232, 337 (at 104-10); KSL Ex. 62, 132; C. Ex. 12, 22.)

87. Although MW-15 is not a remediation well, groundwater is regularly pumped from the well and put in the lagoons. (T. 2015, 3533-34; FOL Ex. 249.)

88. The Department by letter and other informal action has been requesting Keystone to assess the MW-15 area contamination since 2003. (C. Ex. 17.)

89. The source of the contamination being seen in MW-15 has not been determined. (T. 1046-49, 1058-63, 1278-79, 1291-92, 1512-14, 1521-24, 1718-35, 1788, 2565-67, 4011-13, 4016-27, 4321; FOL Ex. 229, 337 (at 104-10); KSL Ex. 62, 130, 132; C. Ex. 12.)

90. The groundwater contamination at MW-15 has yet to be fully or adequately characterized or assessed. (T. 1718-35, 1784-86, 2578, 4321.)

91. Despite the lengthy investigations conducted over several years of possible nearby sources of the contamination and repairs to the treatment plant and the lagoons, Keystone has still not been able to pinpoint or arrest the source of contamination being detected in MW-15. (T. 1046-48, 1053, 1158-59, 1718-35, 1780-81, 1788, 3517-24, 3634-36, 3656-61, 3671-74, 4009-19; FOL Ex. 207, 208, 218-24, 235, 238, 242, 243, 245, 248, 249, 327; KSL Ex. 4A, 62, 93, 94, 108, 130; C. Ex. 17, 18.)

92. On November 9, 2016, the Department issued a Notice of Violation (NOV) to Keystone. (FOL Ex. 297.)

93. At the time of the hearing, Keystone had submitted a proposal to the Department to perform additional characterization work near MW-15 in an effort to pinpoint the source and take appropriate remedial action, which would include lagoon improvements and drilling three more monitoring wells, one of which would be a deep well. (T. 1591-94; KSL Ex. 130; C. Ex. 4.)

94. The Department approved the well locations. (KSL Ex. 175.[2])

95. The Department did not require Keystone to take any action with respect to the groundwater contamination being detected in MW-15 as a condition for the renewal of its permit. (FOL Ex. 1.)

96. Part of the liner system below waste disposal areas is a leachate detection zone (LDZ), which under current standards must rapidly detect and collect liquid entering the zone. 25 Pa. Code § 273.255.

97. Flow rates in the LDZs at Keystone have not been shown to exceed the action level established in the solid waste regulations of 10 gallons/acre/day, 25 Pa. Code § 273.255. (T. 1675-77, 1738-48, 1763; FOL Ex. 221, 222, 223, 251, 257 (at A0006686), 258.)

98. It is not expected that LDZs will have absolutely no flow in them. (T. 1738-48, 3236-41, 4282, 4337-39.)

99. The low flows being measured in the LDZs at Keystone do not support a finding that the landfill liners have been breached. (T. 1738-48, 1760, 3146-50, 3236-41, 4282, 4337-39.)

100. However, actual leachate flow in the Tabor LDZ is unknown because proper metering access is not possible due to the way in which the LDZ manholes were constructed, so Keystone uses and the Department accepts a calculated number derived through a process of elimination using known flows from the other disposal areas. (T. 1645-50, 1730-31, 1787; C. Ex. 21.)

101. The Department is also not satisfied with the measurement of actual flows in the LDZ at the Logan area. (T. 1645-46; FOL Ex. 220, 258; C. Ex. 21.)

[2] The exhibit cited in support of this Finding of Fact is a letter from the Department dated January 4, 2017 responding to and approving Keystone's proposal (KSL Ex. 130) to perform additional groundwater characterization around MW-15. (T. 4358-59.) (*See* note 1, *supra*.)

102. There is insufficient evidence at this time to show that disposal areas at the landfill are contributing to the contamination being detected at MW-15. (T. 1650-51, 1705-06, 1730-31, 1743-44, 1758-59, 1787-90, 3502.)

103. MW-29U was an upgradient monitoring well installed at or near the highest point on the landfill's property to monitor background groundwater quality, that is, the quality of groundwater before it flows under disposal cells at the landfill. (T. 1710-13, 1777, 2015-16, 2374-75; FOL Ex. 256; C. Ex. 16, 34.)

104. MW-29U was abandoned in 2012 after it was determined that there was a crack in the well casing and problems with the pump, and it was replaced in 2013 with MW-29UR, which is approximately 50 feet from the location of MW-29U. (T. 1625-27, 1712, 1825, 1832-33, 2017; FOL Ex. 211, 256.)

105. MW-29UR has levels of chloride, sodium, calcium, barium, alkalinity, and TDS that are higher than the levels of those constituents that were measured in MW-29U. (T. 1625-26, 1713, 1771-72, 2016.)

106. MW-29UR yields about one gallon per minute. (T. 3975.)

107. There is not a sufficient basis at this time to attribute the elevated parameters being seen in MW-29UR to the landfill because it appears that groundwater under disposal areas would unrealistically need to flow updip across bedding planes to get to the area of the well. (T. 1712-13, 3910-16; KSL Ex. 153; C. Ex. 16, 34.)

108. Based on the existing record, MW-29UR is located at a point hydraulically upgradient from the disposal areas in the direction of increasing static head, and it has not been shown that it is incapable of providing data representative of groundwater not affected by the facility. (*Id.*)

109. There is no credible record evidence of any actual or likely hydrogeological connection between the landfill and Pennsylvania American Water Company's Dunmore Reservoir No. 1, a backup drinking water supply located about 900 feet from the landfill and on the other side of the Lackawanna Valley Industrial Highway from the landfill. (T. 2189-91, 2199, 2313-14, 3912-16; KSL Ex. 43 (at KSL002776-78), 44 (Exhibit DC, DF), 125 (Section B.6).)

Compliance History Review

110. The Department reviewed Keystone's operational and compliance history before deciding to renew Keystone's permit. (T. 1128, 1281-89.)

111. The purpose of reviewing an applicant's compliance history is to determine whether any adjustments need to be made to the applicant's operations, and to predict future performance, based on past performance, and decide whether the applicant is willing and able to comply with the law going forward. (T. 3263-64, 4320.)

112. The Department relies upon formal, memorialized violations in conducting its review of Keystone's compliance history, but the Department, with rare exceptions, never memorializes any of Keystone's violations. (T. 1281-83, 2789-90, 2826-27, 2834.)

113. The Department has guidance documents that require its personnel to record violations even if the violations are minor and/or corrected. (T. 1144-50; FOL Ex. 298, 299.)

114. The Department ignored these guidance documents with respect to Keystone. (T. 1144-48, 1280-83, 2831-34.)

115. The Department conducted a limited review of the compliance history of Keystone's related parties. (T. 1153-54, 2767-78, 2788-90, 2799-2801, 2804-05, 2814-19, 2827-30, 2845-47, 4129-33; FOL Ex. 269-78; KSL Ex. 170, 171, 172; C. Ex. 25.)

116. Keystone did not supply in its compliance history submission, and the Department did not consider, Keystone's compliance history with the Susquehanna River Basin Commission (SRBC). (T. 1353-54, 1356-59, 1361-63, 1409-10, 2777-78, 2829-30; FOL Ex. 32, 34, 36, 37, 270, 272, 273.)

117. That SRBC matters were resolved with an agreement with the SRBC. (T. 1351-53, 1364-69; FOL Ex. 31; KSL Ex. 128.)

118. David Golobek, the Department inspector at the landfill since 2007, has never identified a violation at the facility. (T. 637, 721.)

119. Until 2006, the only NOVs the Department issued to Keystone was for two daily tonnage exceedances. (T. 721, 1281, 1289, 2754.)

120. The Department has never issued any NOVs or taken any enforcement action against Keystone for odors. (T. 1084, 1280-81, 1288-89.)

121. The Department has not recorded or considered any violations for Keystone's direct discharges of untreated leachate to the POTW. (T. 1281, 1285-86, 1289, 1318.)

122. The Department did not issue any NOVs relating to MW-15 degradation for 14 years, until November 9, 2016. (T. 1053-54, 1056-57; FOL Ex. 297.)

123. The Department did not issue any NOVs or take other enforcement action with respect to exceedances of reserve capacity in Keystone's leachate lagoons. (T. 1058, 1281, 1289; KSL Ex. 42A, 42B, 42C, 42D, 42E.)

124. Mr. Roger Bellas, the Department's Regional Manager of the Waste Program for the Northeast Region and the person responsible for approving the permit renewal, was generally aware of operational issues at the landfill and considered them before issuing the renewal. (T. 1073, 1131-32, 1138-39, 1140-41, 1283-89.)

125. Based on his review, Mr. Bellas "did not hesitate for a second" before approving the renewal. (T. 1285.)

126. Keystone's compliance history does not demonstrate a lack of ability or willingness to comply with the law during the renewal period. (T. 1257-58.)

Odors

127. A landfill will typically have odors associated with the garbage disposed of at the site as well as with the gas and leachate generated by the landfill. (T. 1078.)

128. Keystone has a Nuisance Minimization and Control Plan that, among other things, outlines the steps it takes to control odors at the site. (KSL Ex. 49.)

129. Landfills apply daily cover to the working face of the landfill to control garbage odors. (T. 1079.)

130. There is limited ability to control landfill gas odors from the working face of a landfill. (T. 1079-80.)

131. The Department conducts its own odor patrols to determine whether offsite odors are emanating from the landfill. (T. 1207-08.)

132. An offsite odor is an odor observed by Department staff that can be traced back to a source. (T. 1082.)

133. The Department has received hundreds of odor complaints from citizens regarding the Keystone Landfill from January 2011 through October 2016. (T. 88-89, 129-30; C. Ex. 31.)

134. Odors from the landfill have negatively affected persons who live near and/or use the area surrounding Keystone. (T. 65-67, 79-80, 96, 112-13, 135, 163-64, 170, 179-80, 313; FOL Ex. 3a (at 34, 39, 42-44, 52-53).)

135. Despite numerous inspections documenting odors and landfill gas issues at the site, the Department has never issued a violation to Keystone for the odors. (T. 663-64, 673, 697, 1084-91, 1094-1104, 1280-81, 1289; FOL Ex. 88, 150, 153-57.)

136. On November 9, 2011, the Department conducted an inspection at Keystone and documented three areas that were potential sources of odors. The Department used a flame ionization detector (FID) to detect volatile organic compounds (assumed to be methane from a landfill) in excess of 500 ppm, which is a federal regulatory action level for landfill surface monitoring. Although methane does not have an odor itself, it is typically associated with decomposing organic matter, which emits other odor-causing compounds. No violations were noted. (T. 1085-88, 1090; FOL Ex. 150.)

137. On August 4, 2012, during the course of an odor patrol conducted by the Department and in response to citizen complaints the Department noticed mild gas odors before noticing "strong and constant/lasting gas odors." The Department contacted Keystone and requested a written report addressing the cause of the odors and outlining measures to control and minimize offsite odors going forward. No violations resulted. (T. 1092-94; FOL Ex. 153.)

138. The following day, August 5, 2012, the Department noted "strong and constant/lasting gas odors deriving from KSL" lasting 15 minutes during an odor patrol. The Department met with Keystone and Keystone attributed the continuing odors to a perforated leachate pipe that had not yet been repaired. No violations were issued. (T. 1095-96; FOL Ex. 154.)

139. On August 10, 2012, the Department detected offsite odors that were traced back to Keystone. No violations were issued. (T. 1096-97; FOL Ex. 155.)

140. On August 21, 2012, using an FID, the Department detected four exceedances of the 500 ppm limit for landfill gas. The Department also observed "strong landfill gas odors." No violations were noted. (T. 1098-1102, 1104; FOL Ex. 156.)

141. On August 24, 2012, the Department again observed "strong landfill gas odors" and six elevated readings were detected with the FID monitor. The Department suggested that Keystone review and modify its Nuisance Minimization and Control Plan to address monitoring and controlling odors. No violations were noted. (T. 1103-04; FOL Ex. 157.)

142. Generally, the Department does not issue a violation for offsite odors traced back to a facility unless the facility is not following its Nuisance Minimization and Control Plan or it has not followed the Department's recommendations for further controlling odors. (T. 1090-92.)

143. The Department may also decide to issue a violation if the offsite odor meets the criteria of a "malodor" from the Department's air quality regulations, 25 Pa. Code § 121.1. (T. 673-74, 1210.)

144. A malodor is defined as "[a]n odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1.

145. The Department interprets a malodor to be a strong, persistent odor that is detected by the Department on a complainant's property during an inspection while the complainant is present and it is determined by the Department that the odor affects the general public. (T. 674.)

146. The Department over time has recommended and requested that Keystone take additional measures to control odors, including installing additional gas wells, using a temporary

synthetic cap, conducting odor patrols, and revising its Nuisance Minimization and Control Plan. (T. 1083-84, 1104, 3095, 3326-27; FOL Ex. 148, 150, 157.)

147. The Department has found that Keystone has followed its Nuisance Minimization and Control Plan even on occasions when offsite odors were traced back to the landfill. (T. 1082-83.)

148. Despite the persistence of odors from the facility, Keystone has taken measures to control and minimize odors, including enhancements to its gas collection system and implementing temporary synthetic cap in the intermediate slope areas. (T. 663-64, 676, 1200-06, 3282-83, 3315; FOL Ex. 90, 211; KSL Ex. 49.)

Leachate Management

149. Keystone has two onsite leachate lagoons. (T. 361, 1020.)

150. Each lagoon holds approximately 5.5 million gallons of leachate. (FOL Ex. 177, 178.)

151. Any water that comes into contact with the landfill's waste areas or leachate is to be directed into the leachate collection system. (T. 371-72.)

152. When leachate is generated in the disposal areas, it flows through double-lined HDPE piping to the leachate lagoons. (T. 473, 1020.)

153. Keystone pumps the leachate from the lagoons into the treatment plant. (T. 473.)

154. The treatment plant has a number of components that are involved in treating the leachate, including an ammonia stripper. (T. 473-74.)

155. The effluent is then discharged to the Scranton Sewer Authority system. (T. 474-75.)

156. Rainfall in the disposal areas will ultimately result in leachate in the lagoons, and as the landfill receives rainfall, the levels in the lagoons may rise. (T. 481-82.)

157. This can be due to rainfall percolating through waste, or to open construction areas where a primary liner has been installed in a cell and connected to the leachate collection system. (T. 1028-29.)

158. Keystone has used more than 25 percent of the total leachate storage capacity of its lagoons on a regular basis, as late as 2015. (T. 482, 509-22, 712-14, 851-52, 961, 1021-22, 2541-42, 2545-47, 2568-69, 2571-72; FOL Ex. 54-60, 62, 88, 247, 311; KSL Ex. 127.)

159. The Department considers Keystone's exceedances of the 25 percent level to be violations of 25 Pa. Code § 273.275(b). (T. 2658-68, 2713-16.)

160. The Department has never issued an NOV to Keystone for exceeding the 25 percent level. (T. 650-51, 713-14, 1281, 1289.)

161. The lagoons have never overflowed. (T. 952-54.)

162. Keystone, at the time of the hearing, was engaged in refurbishing and upgrading the lagoons. (T. 648, 694; KSL Ex. 147; C. Ex. 4.)

163. Keystone's solid waste management operating permit provides that Keystone will collect its leachate and pretreat it before discharging it to a POTW. (T. 2547-48, 2621; FOL Ex. 200 (at 24).)

164. The permit renewal did not change this condition. (FOL Ex. 1.)

165. There is no exception for the condition in the permit. (FOL Ex. 1, 200.)

166. When Keystone constructed its new leachate treatment plant, its minor permit modification provided that Keystone could only discharge leachate from that plant to a municipal wastewater treatment facility after pretreatment. (FOL Ex. 216 (Condition 5).)

167. Keystone is authorized by the Scranton Sewer Authority to discharge industrial wastewater in the form of landfill leachate from the landfill to the Authority's publicly owned treatment works. (T. 2646; FOL Ex. 50.)

168. Keystone discharges its leachate to the Authority at discharge points known as Drinker Street and Reeves Street. (T. 847-48.)

169. Keystone normally pretreats its leachate before sending it to the Authority. (T. 912, 2621.)

170. However, Keystone has on occasion directly discharged leachate without pretreatment from its leachate lagoons to the Scranton Sewer Authority. (T. 591, 849-51, 853, 881-83, 912, 961, 1023-28, 2541-42, 2545-46, 2572; FOL Ex. 110, 111; KSL Ex. 126, 127; C. Ex. 24.)

171. Keystone pays the Scranton Sewer Authority for the amount of pre-treated leachate it sends to the Authority for treatment. Keystone also pays surcharges to the Authority if certain constituents in the discharge, such as ammonia, exceed certain levels. (T. 599, 609-10.)

172. The discharges have not caused any upset conditions to the Authority's system or violations of the effluent limits contained in the Authority's NPDES permit. (T. 820, 1012-13.)

173. The extent to which the Department was aware of all of the direct discharges that have occurred is not clear. (*See* T. 862, 911-12, 1023-27, 2688.)

174. There are unexplained discrepancies between the amount of "leachate treated" that Keystone has reported to the Department and the amount of leachate that Keystone has reported to the Authority. (T. 521-29, 598-604, 609, 629-32; FOL Ex. 61-68.)

175. Notwithstanding Keystone's permit condition requiring pretreatment, it is the Department's position that Keystone may send untreated leachate to the Scranton Sewer

Authority so long as the Authority is amenable to it and it does not cause problems with the Authority's operations. (T. 849, 855, 911, 2646-47, 2689, 3325-26.)

176. The Department does not care if Keystone is sending untreated leachate to the Authority so long as the Authority is okay with it. (T. 855-60; 2688-89.)

Miscellaneous

177. Keystone's Department-approved Nuisance Minimization and Control Plan addresses known and potential nuisances that may arise from the handling and disposal of solid waste, collection and treatment of leachate, the generation, collection, and distribution of methane gas, and on-site quarry operations. The plan outlines Keystone's measures to prevent and mitigate conditions that may cause a nuisance to neighbors and surrounding communities and addresses weather monitoring, traffic, noise, vector and bird control, dust, odor, litter, and transportation compliance vehicle safety. (KSL Ex. 49.)

178. The Department credibly concluded after a thorough investigation that a strong odor that emanated from a sewer line near the landfill on the night of September 24, 2015 could not be attributed to a discharge from Keystone into the line. (T. 389, 398, 402-03, 1030, 1189-98; FOL Ex. 80, 112, 121.)

179. Birds inevitably congregate at the landfill (T. 1266-67; KSL Ex. 125 (Section C.6); C. Ex. 5.)

180. The presence of an unnatural congregation of birds at and near the landfill is a nuisance to local citizens including members of FOL, but it cannot be completely eliminated. (T. 1267; FOL Ex. 3 (at 39-42); C. Ex. 5.)

181. Keystone is required pursuant to its Nuisance Minimization and Control Plan to reduce the tendency of the landfill to attract an excessive amount of birds. (KSL Ex. 49.)

182. Pursuant to a contract with Keystone, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service Wildlife Services manages bird populations at the landfill. (KSL Ex. 125 (Section C.6).)

183. Keystone has effectively managed bird populations at the landfill to the extent possible by, among other things, maintaining a compact working face, applying daily cover, and employing nonlethal harassment measures such as noisemakers. (T. 3060-61, 4335-36, 4351; KSL Ex. 125 (Section C.6); C. Ex. 5.)

184. Keystone operates pursuant to a Title V air quality operating permit. (KSL Ex. 59.)

185. Keystone controls gas emissions with an active gas extraction system. (T. 3067-81; KSL Ex. 37, 59.)

DISCUSSION

Standing

Keystone has vigorously contested FOL's standing to maintain this appeal throughout the duration of the case. The Department has not contested FOL's standing. We previously denied Keystone's motion for summary judgment seeking a determination that FOL lacks standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641. In our full Board Opinion, we found that FOL has standing in its own right and on behalf of its members. *Id.* at 643-49. Keystone has preserved and reiterated its challenge in its post-hearing brief, which it is fully entitled to do. When challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant such as FOL must demonstrate by a preponderance of the evidence at the hearing on the merits that it has standing, even where a motion for summary judgment by opposing parties has been denied. *See*

Stedge v. DEP, 2015 EHB 577, 594; *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2001 EHB 713, 729-30.

We hereby adopt and incorporate our summary judgment Opinion herein in its entirety. Although that Opinion was based on the summary judgment standard, we have no hesitation in concluding that FOL has demonstrated by a preponderance of the evidence following the hearing on the merits that it has standing itself and on behalf of its members.

FOL is a 501(c)(3) organization that was created in October 2014 to oppose the proposed expansion of the Keystone Landfill, which then gradually included opposition to the continued operation of the landfill pursuant to the renewal permit. (T. 168, 186, 188-89; FOL Ex. 292.) FOL primarily engages in community education activities, holding events and educational seminars and getting people to attend public meetings involving the landfill. (T. 186.) FOL also organizes happy hour gatherings and fundraisers, and its members have spoken to other communities about waste disposal issues. (T. 120.) FOL maintains a website containing information about its activities and events and its mission. (T. 117-18, 144; FOL Ex. 8, 9.) FOL raises awareness in the community about the landfill through its events and through the information it disseminates online, through social media, and through radio and television interviews. (T. 201-02.)

FOL considers people to be members of FOL if they have engaged with the organization, supported its cause, shown up to FOL's meetings, written a letter in opposition of the landfill as a member of FOL, signed a petition, participated in FOL's canvassing or fundraising events, "liked" FOL's Facebook page, donated to FOL's causes, or if they are on FOL's mailing list. (T. 119, 185-86.) People can resign as a member of FOL by sending an email to the organization. (T. 119.)

FOL presented the testimony of three self-identified members at the hearing on the merits, Beverly Mizanty, Katharine Spanish, and Patrick Clark.[3] Beverly Mizanty is a member of FOL. (T. 69.) She joined FOL when it first organized, she has attended meetings and events organized by FOL, and she has contributed to its campaign. (T. 69-70, 89, 97.) Ms. Mizanty has gone to public hearings before government agencies in her role as a member of FOL. (T. 70.) She considers herself a member of FOL by reason of joining its Facebook page, attending its meetings and open sessions, and by donating to its cause. (T. 69-70, 96.) She receives emails from FOL keeping her informed of what is going on with the organization's activities. (T. 97.) Ms. Mizanty has email addresses for the people in leadership at FOL and she could send them an email if she wanted to cancel her membership. (T. 106, 119.)

Ms. Mizanty has lived in Dunmore in the Swinick development, within a quarter-mile of the Keystone Landfill, for more than 25 years. (T. 62-64.) She can see the landfill from her house. (T. 64.) Her biggest concern from the landfill is the odors, which she attributes to the landfill because the smell becomes stronger down by the reservoir, which is near the landfill. (T. 65-66, 79-80.) She is concerned about the impact on her health from the odor, which she says has a chemical smell. (T. 67.) She gets nauseous over the landfill smell. (T. 96.) Ms. Mizanty has lodged more than 15 complaints with the Department in the last five years either by phone, online, or in writing. (T. 88-89; DEP Ex. 31.) She has smelled odors many times and not called the Department, but has called the Department recently (and filed online complaints) because she says the odors have increased. (T. 85-86.) She would have registered more complaints with the Department but she felt that, because the odors were an ever-present problem, there was nothing

[3] FOL also introduced, without objection to its admissibility, for purposes of establishing standing, a transcript of testimony of FOL member Joseph May given before the Dunmore Zoning Board on March 26, 2015. (T. 1376; FOL Ex. 3a.)

she could do about it. (T. 90-91.) Ms. Mizanty is also concerned about water contamination and fires from the landfill due to the proximity of the landfill to her house. (T. 67-68.)

Katharine Spanish is a member of FOL and the secretary of the board. (T. 115.) She attends weekly board phone calls, is active in FOL's social media presence, email distribution network, and its website, and she participates in FOL's community activities. (T. 115.) She lives about a half-mile from Keystone with her three children who attend school and daycare about a quarter-mile from the landfill. (T. 109, 111.) Odors are the most prominent impact Ms. Spanish experiences from the landfill, with what she describes as a strong, pungent, foul smell. (T. 112.) She smells the odor at her home and throughout the community. (T. 112-13.) She attributes the odors to the landfill because the smell is stronger as she gets closer to the landfill. (T. 170.) She says that the odors have been more persistent over the last seven years. (T. 163-64.) She is concerned about the health of her children while at daycare due to the odors. (T. 135.) Ms. Spanish has experienced noxious odors one to two dozen times within the last several years. (T. 129.) She has complained to the Department about odors approximately a dozen times during her 35 years of living in Dunmore. (T. 129-30.) In addition to air quality she is also concerned about leaking leachate, possible fires, radioactive material, and litter. (T. 114, 158, 172.) Ms. Spanish says she has been fighting on behalf of FOL to make sure her children are afforded their constitutional right to clean water and air. (T. 169-70.)

Patrick Clark is a member of FOL, he is on the board of directors, and he is the organization's treasurer. (T. 185.) He lives in Dunmore approximately two miles from Keystone. (T. 177, 202.) He experiences odors while driving up the Lackawanna Valley Industrial Highway. (T. 179.) He is considering no longer allowing his children to play soccer at nearby Sherwood Park because of his concerns over the air quality. (T. 179-80, 313.) Mr. Clark

is concerned over the reputation of the region with respect to the landfill and its expansion and acceptance of more waste. (T. 184-85, 273.) He is also concerned with the landfill's impact on the local economy. (T. 273.) Mr. Clark has sent emails and letters to the Department and had phone conversations with the Department regarding his concerns with the landfill. (T. 204.) Mr. Clark authored comments FOL submitted to the Department on Keystone's expansion. (T. 211-12; FOL Ex. 13, 14.)

Joseph May is also a member of FOL and he lives within a quarter-mile of Keystone. (FOL Ex. 3a at 31, 62.) Mr. May has lived in the vicinity of the landfill for most of his life. (FOL Ex. 3a at 30-32.) Almost every day at his house he smells what he describes as a pungent odor that he attributes to the landfill. (FOL Ex. 3a at 34, 39.) Mr. May is concerned about the health impacts of the landfill to his family. (FOL Ex. 3a at 52-53.)

FOL as an organization has been involved in borough council meetings and zoning hearing board proceedings and has participated in other public hearings on the Keystone Landfill. (T. 119-20, 201.) FOL has made a presentation to the Department's Environmental Justice Advisory Board regarding FOL's concerns over the impacts from the landfill to the community. (T. 186-87; FOL Ex. 12.) FOL has prepared and submitted comments to the Department on the proposed expansion. (FOL Ex. 13, 14.) FOL's comments express concerns about landfill leachate impacting groundwater, subsurface fires at the landfill, and impacts from the landfill on local property values and on the region's reputation. (T. 190, 270, 290-91, 307.) FOL is also concerned that there have been no health studies done on the impact of the landfill's odors on the local community, and it has requested that health studies be performed by state agencies. (T. 180-82, 291, 305, 337.) FOL's advocacy efforts with respect to the landfill for all intents and purposes serve as a surrogate for voicing the concerns of its members.

Without repeating everything we said in our earlier Opinion, by way of summary, an organization has standing if at least one individual associated with the group has standing. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)). Our review of the record shows that Mizanty, Spanish, and Clark are individuals actively and legitimately associated with FOL. They have advanced and directed the mission and work of FOL. They have all credibly testified that they use the area affected by Keystone's activities and they have in fact been adversely affected by those activities, which the Department's renewal decision will perpetuate. If nothing else, they all credibly testified that they have suffered and continue to suffer from the noxious odors that regularly emanate from the facility. Joseph May provided similar testimony.

Their interest in the Department's decision to allow these conditions to continue is substantial, direct, and immediate, which gives them and FOL standing to pursue this appeal. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975). Their interest is substantial because being impacted in their daily lives by the landfill's odors surpasses a general interest of all citizens in having Keystone comply with the law; it is direct because they have shown a causal connection between the odors they routinely experience and the landfill; it is immediate because the connection between the odors and the landfill is not remote or speculative. *Id. See also Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009); *Funk*, 144 A.3d 228, 244. It is notable that Keystone's post-hearing brief does not say anything about why FOL's individual members would not have standing in their own right.[4] Keystone never cites to the record in its brief to

[4] Keystone asserts that FOL has not demonstrated that the permit renewal will result in harm to anyone. However, a merits inquiry is not appropriate for a standing analysis. *Sierra Club v. DEP*, EHB Docket

contest the standing of FOL's members, and Keystone comes close to conceding that they would have had standing as named appellants. (KSL Brief at 88-89.) Because Mizanty, Spanish, Clark, and May have standing, FOL has associational standing.

With respect to FOL itself, the record has confirmed beyond any doubt that FOL's mission includes protection of the environment in the vicinity of the landfill. (Finding of Fact ("FOF") 7.) Therefore, FOL itself has standing in addition to the standing it has on behalf of its constituents who have standing. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839.

As discussed in our prior Opinion, Keystone's continuing, rather odd insistence on discussing standing concepts at considerable length regarding the standing of persons to sue in federal courts under federal law has no relevance here. *Housing Auth. of the Cnty. of Chester v. Pa. State Civ. Serv. Comm'n*, 730 A.2d 935, 940-41 (Pa. 1999). *See also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability…."); *In re Hickson*, 821 A.2d 1238, 1243 n.5 (Pa. 2003) (state courts are not governed by Article III and are not bound to adhere to the federal definition of standing).[5]

No. 2015-093-R, slip op. at 12 (Opinion and Order, Jul. 10, 2017) ("an appellant need not prove its case on the merits in order to establish standing"); *Delaware Riverkeeper v. DEP*, 2004 EHB 599, 632 (same); *Ziviello v. State Conservation Comm'n*, 2000 EHB 999, 1005 (same). *See also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal…").

[5] It is perhaps worth noting that, even if we were to apply the "indicia of membership" test in assessing FOL's associational standing under the standard sometimes applied by federal courts, *see Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344-45 (1977), Mizanty, Spanish, and Clark clearly have the indicia of membership in FOL. Here, as in *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663 (E.D. La. 2010),

> [FOL] has a clear and understandable membership structure: a person becomes a member through active, voluntary involvement, such as by attending neighborhood or strategy

Keystone also makes the argument that FOL lacks standing to assert challenges under Article I, Section 27 of the Pennsylvania Constitution because it is a corporate entity. We are not aware of any separate standing inquiry for constitutional claims. In *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), a majority of the Pennsylvania Supreme Court Justices joined in the standing analysis and found standing for an organization to assert challenges to the Oil and Gas Act of 2012, which included challenges premised on Article I, Section 27. 83 A.3d 901, 921-23. The Pennsylvania Supreme Court never parsed out the constitutional claims or carved out different standards for an organization making constitutional challenges. The individual members of FOL, on whose behalf FOL is litigating, are precisely the sort of people

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> team meetings, providing input, canvassing, and networking. [FOL] has three or four dozen "active members" who regularly attend meetings, keep up to date on issues, meet with other members, and organize their community. New members join because they are "quite energized about meeting their neighbors." Although a formal list of members is not maintained, members are linked through informal networks, and email contact lists.

686 F. Supp. 2d at 675. *See also United Automobile Workers v. Brock*, 477 U.S. 274 (1986), where the United States Supreme Court said,

> [T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring); *see NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (association "is but the medium through which its individual members seek to make more effective the expression of their views"). The very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.

477 U.S. at 290; and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2017 U.S. Dist. LEXIS 84663 at *18 (D. Mass. Jun. 2, 2017) ("where [SFFA] has consistently, and recently, in highly public ways, pursued efforts to end alleged racial discrimination in college admissions through litigation, and where its members voluntarily associate themselves with the organization, it can be presumed for the purposes of standing that SFFA adequately represents the interests of its current members without needing to test this further based on the indicia-of-membership factors"). In short, we have no doubt that, for purposes of an "indicia of membership" inquiry, FOL "provides the means by which [its members] express their collective views and protect their collective interests." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 345 (1977).

that Article I, Section 27 is designed to protect, and FOL unquestionably has standing to advance Article I, Section 27 challenges on their behalf.

Finally, although we have tried to avoid repeating our earlier Opinion, one point that we made there is worth reiterating here:

> To this we would add that any effort to delve into the internal workings of [FOL] tends to bump up against our often expressed concern that citizens should not be intimidated and unduly harassed simply because they pursue their constitutionally protected right to due process review of a Department action that adversely affects them. Indeed, we have already so held in this case. *Friends of Lackawanna v. DEP*, 2015 EHB 772, 774. *See also Sludge Free UMBT v. DEP*, 2014 EHB 939, 950; *Hanson Aggregates PMA, Inc. v. DEP*, 2003 EHB 1, 6. If details regarding every particular of an organization's incorporation, operation, hierarchy, and membership list were relevant, they would be discoverable and the subject of examination at the hearing, which would have the intended or unintended but unavoidable consequence of enabling the very intimidation tactics that must be avoided. It is, at best, a distraction that does not contribute in any way to the Board's statutory duty to ensure that the Department has acted lawfully and reasonably.

Friends of Lackawanna, 2016 EHB at 647.

Standard and Scope of Review

FOL contends the Department erred by unconditionally renewing Keystone's operating permit for another ten years.[6] The Department erred in FOL's view for three main reasons. First, the facility is adversely affecting groundwater. There is known degradation in one area and enough reason to suspect degradation in other areas that at a minimum further investigation should have been required. Second, the Department's review of Keystone's operations and compliance history was inadequate, but even the limited review that was conducted demonstrates that Keystone lacks the ability and intent to comply with the law. At a minimum, additional

[6] FOL has said in passing that renewing the permit for ten years is too long a period of time. FOL has not explained why some period less than ten years would be appropriate based on, e.g., limited remaining capacity. Keystone is entitled to cut back on the waste that it receives, keeping in mind that it is legally obligated to reserve enough capacity in Phase II for the relocation project.

protective measures should have been required. Third, by renewing the permit, the Department failed to fulfill its responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

Keystone and the Department[7] concede that the landfill has caused groundwater degradation in one area, but they say the degradation is minor and it is being addressed. Otherwise, they dispute all of FOL's contentions. Keystone adds that the scope of the Board's review in this case is extremely limited by the doctrines of administrative finality and prosecutorial discretion.

The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017). In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

As the third-party appellant challenging the Department's action, FOL bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). It is important to keep in mind that we do not so much review the Department's review process leading up to a final decision as the final decision itself. *Chester Water Auth. v. DEP*, 2016 EHB 280, 289-90; *Shuey v. DEP*, 2005 EHB 657, 712. Even though we have full authority and power to take whatever action we deem appropriate regarding

[7] With limited exceptions (e.g. standing; whether Keystone exceeded regulatory reserve capacity requirements in its lagoons; administrative finality), Keystone's and the Department's positions are the same. The Department has vigorously defended its decision to renew Keystone's permit. Accordingly, unless otherwise noted, when we refer to Keystone's positions, we are including the Department.

the Department's action if we determine the Department erred, we generally will not correct harmless errors. *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Shuey, supra*.

Exactly what statutory and regulatory standards the Department applies in reviewing an application for a renewal of a municipal waste landfill permit is somewhat of a mystery. Unfortunately, the Department's brief sheds very little light on the subject, other than to say that "typically, renewal applications are reviewed to determine if the facility has any compliance related issues that would prohibit the renewal, and it would be reviewed to determine if there are any new operating requirements, technology, and management practices that apply to the facility." (DEP Brief at 54.) The Department does not cite any authority in support of this review standard.

The only regulation undeniably on point is 25 Pa. Code § 271.223, which reads as follows:

> § 271.223. Permit renewal.
>
> (a) A permittee that plans to dispose of or process municipal waste after the expiration of the term set under § 271.211 (relating to term of permits) shall file a complete application for permit renewal on forms provided by the Department. The complete application for a processing facility shall be filed at least 270 days before the expiration date of the permit term and for a disposal facility at least 1 year before the expiration date of the permit term…
>
> (b) An application for renewal of a municipal waste disposal permit shall include a clear statement of the remaining permitted capacity of the facility, with documentation, in relation to the requested term of the permit renewal.
>
> (c) A permit renewal, if approved by the Department, may only continue the term of the permit on its presently permitted acreage, including the terms and conditions of the permit. An applicant that seeks to add permitted acreage or change the terms or conditions of the permit shall also file an application for a permit modification.
>
> (d) A permit renewal shall be for a term not to exceed the term of the original permit.

Despite the rather limited review apparently contemplated by Section 271.223, we agree with the testimony of Roger Bellas, the Regional Manager of the Waste Program for the Northeast Region of the Department, who was ultimately responsible for issuing the permit, that the Department clearly has the authority to condition a permit at the renewal stage. (T. 1062.) Indeed, if circumstances warrant, the Department can modify, condition, or even revoke a solid waste permit at *any* time. 35 P.S. §§ 6018.104, 6018.503, 6018.602; 25 Pa. Code §§ 271.3(b), 271.211, 271.422. Section 503(c) of the Solid Waste Management Act, 35 P.S. § 6018.503, provides in part that the Department may deny, suspend, modify, or revoke any permit if it finds that the permittee has failed or continues to fail to comply with the law or its permit, or the permittee has shown a lack of ability or intention to comply with the law or its permit as indicated by past or continuing violations. Section 503(d) says that a permittee shall be denied a permit if it has engaged in unlawful conduct unless it demonstrates to the satisfaction of the Department that the unlawful conduct has been corrected. 35 P.S. § 6018.503(d). The waste management regulation codified at 25 Pa. Code § 271.211(d) provides:

> The Department will, from time to time, but at intervals not to exceed 5 years, review a permit issued under this article. In its review, the Department will evaluate the permit to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices. The Department may require modification, suspension or revocation of the permit when necessary to carry out the purposes of the act, the environmental protection acts and this title. The Department will require the operator to provide a summary of changes to the operations since the initial permit or latest major permit modification was approved.

Thus, regardless of whether the general "criteria for permit issuance or denial" set forth in 25 Pa. Code § 271.201 apply to permit renewals, a point on which FOL and Keystone (but not the Department) strongly disagree, we think the Department, and, therefore, this Board, may consider the issues raised by FOL in this appeal in the context of a permit renewal application.

For example, the Department would have the discretion under appropriate circumstances to deny or condition a renewal of a permit for a facility that is polluting the waters of the Commonwealth. Similarly, no one would argue that the Department lacks the authority to deny or condition the renewal of a permit for a facility that has a continuing, abysmal compliance record. Indeed, all of the issues raised by FOL can arguably be characterized as compliance history issues. Since the Department has the authority to deny or condition a renewal, its decision *not* to exercise that authority is equally reviewable by this Board.

Of course, the Department's and our review must be informed by the fact that the subject of our inquiry is a permit *renewal*, not a permit for a new facility. Although conditioning a renewal is not necessarily an extreme measure, denial of a renewal would be the equivalent of requiring that the facility be shut down. The Department in 1997 approved an operation that was expressly designed to extend beyond the initial 10-year term of the initial approval. The permittee has legitimate and substantial investment-based expectations based upon that permitting decision. Although those expectations must be tempered by the fact that renewals are neither an entitlement nor certain, they are nevertheless entitled to be recognized in the course of our review.

Regardless of which statutory or regulatory provisions apply, Article I, Section 27 applies to the Department's decision to renew a municipal waste landfill permit.[8] The Department may not take such an action in derogation of its constitutional responsibilities. Article I, Section 27 reads as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including

[8] The regulatory harms-benefits test set forth at 25 Pa. Code §§ 271.126 and 271.127 does not apply to permit *renewals*.

> generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

We recently described the Department's duties and responsibilities under the Pennsylvania Constitution in *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017) ("*CCJ*"), wherein we applied the Pennsylvania Supreme Court's recent holding in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). We had this to say in *CCJ*:

> The Supreme Court [in *PEDF*], citing *Robinson* [*Twp. v. Cmwlth*. 83 A.3d 901 (Pa. 2013)] held that Section 27 grants two separate rights to the people of Pennsylvania. The first right, which the Supreme Court describes as a prohibitory clause, places a limitation on the state's power to act contrary to the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic, and esthetic values of the environment. The second right reserved under Section 27, according to the Supreme Court, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. The Supreme Court then notes that the third clause of Section 27 creates a public trust, with the natural resources as the corpus of the trust, the Commonwealth as the trustee and the people as the named beneficiaries.
>
> The Supreme Court in *PEDF* next turns its attention to defining the Commonwealth's responsibilities as trustee. After discussing private trust law principles, it finds that the Commonwealth has two basic duties as trustee: 1) prohibit the degradation, diminution, and depletion of our public natural resources, whether the harms result from direct state action or the actions of private parties and 2) act affirmatively via legislative action to protect the environment. The Supreme Court further states that
>
> > Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and trustee's fiduciary duties, and does not equate 'to mere subjective judgment.' The trustee may use the assets of the trust 'only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.'

Id., slip op. at 57-58 (citations omitted). We held in *CCJ* that the proper approach in evaluating the Department's decision under the first part of Article I, Section 27 is, first, for the Board to

ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be. *Id*. *Cf. Blue Mtn. Preservation Ass'n. v. DEP*, 2006 EHB 589 (failure to conduct proper analysis alone justifies a remand); *Hudson v. DEP*, 2015 EHB 719 (same). We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. *CCJ*, slip op. at 60-61.

In *CCJ*, we expressly rejected the notion, advocated here by Keystone, that "the Article I, Section 27 Constitutional standard [is] coextensive with compliance with the statutes and the regulations governing clean water. The Supreme Court in *PEDF* clearly rejected such an approach when it rejected the *Payne* [*v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978)] test." *Id*., slip op. at 62. Thus, in theory, an operation may be compliant with all specific regulatory requirements and yet not be permittable due to the unreasonable degradation it will cause. This is admittedly a rather vague standard, but as the Department has correctly pointed out, it is not that different from the standard that this Board has employed for decades, *Solebury School v. DEP*, 2014 EHB 482, 519; *Coolspring Twp. v. DER*, 1983 EHB 151, 178, and it is not unlike the judgment that must be brought to bear regarding other constitutional provisions, *see, e.g.*, *Commonwealth v. Henderson*, 47 A.3d 797 (Pa. 2012) (discussing tension between privacy and law enforcement in the context of search and seizure under Article I, Section 8 of the Pennsylvania Constitution); *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004) (analyzing the balance in a defamation action between freedom of expression in the First Amendment to the United States

Constitution and Article I, Section 7 of the Pennsylvania Constitution and a citizen's right to reputation under Article I, Section 1 of the Pennsylvania Constitution).

Turning our attention to the second right granted to the people by Article I, Section 27, we identified that right in *CCJ* as being the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id*., slip op at 63. We held that the streams at issue in *CCJ*, including streams not in the public park, were without question the type of public natural resources covered by Section 27.

We next described the Department's duties as trustee of those public natural resources. We held that the plain language of the Constitution

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

Id., slip op. at 63-64 (citations omitted).

Keystone strenuously argues that state action is required in order for Section 27 to apply. If that is true, the state action here is obvious: the Department's permitting action, without which Keystone would no longer be able to operate a landfill. The state may not sanction the use of

private property that will impermissibly infringe upon the constitutional rights of others. *See Machipongo Land & Coal Co. v. Dep't of Envtl. Prot.,* 799 A.2d 751, 754-55 (Pa. 2002) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-492 (1987)); responsibility of government to protect environment from private injury is clear).

In summary, we must decide based on our *de novo* review of the facts whether the Department's decision to renew Keystone's permit complied with all applicable laws. We must ensure that the Department has fully considered the environmental effects of its action. Any infringement of the people's constitutional right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment must not be unreasonable. Finally, we must determine whether the Department has acted with respect to the beneficiaries of the natural resources impacted by the permitted activity, which include the air and waters in the area, with prudence, loyalty, and impartiality.

Administrative Finality

Defining the precise boundaries of what should be evaluated in a permit renewal can undoubtedly be challenging. Permit "renewals require something more than the mindless application of a rubber stamp but something less than a reexamination of the merits of any earlier permitting decisions regarding the landfill." *Friends of Lackawanna*, 2016 EHB 815, 819. Our review of a permit renewal, of course, is not whether the landfill should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *See Sierra Club v. DEP*, EHB Docket No. 2015-093-R, slip op. at 6 (Opinion and Order, Jul. 10, 2017). A party may not use an appeal from a later Department action as a vehicle for reviewing

or collaterally attacking the appropriateness of a prior Department action. *Love v. DEP*, 2010 EHB 523, 525. However, we have repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835. Permits are issued with limited terms for precisely that reason. Here, even without a renewal application pending, the Department is required to "from time to time, but at intervals not to exceed 5 years, review permits issued under [the municipal waste] article…[and] evaluate the permit to determine whether it reflects currently applicable operating requirements, as well as current technology and management practices." 25 Pa. Code § 271.211(d).

In *Wheatland Tube Co. v. DEP*, 2004 EHB 131, we reiterated our support for our holding in *Tinicum Township v. DEP*, 2002 EHB 822, that the Department, and in turn the Board, must ensure the continuation of a permitted activity is still appropriate in the context of current information and standards:

> The Department argued [in *Tinicum Township*] that the Board was only permitted to consider whether the permit limits had changed, and if so, whether the changes were appropriate. We rejected the argument. We explained that, even in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.

Wheatland Tube, 2004 EHB at 135-36. *See also Sierra Club*, *supra*, slip op. at 6 ("A permit renewal is an appropriate time to ensure that an operation is being run in accordance with the law." (quoting *Rausch Creek, LP v. DEP*, 2011 EHB 708, 727)).

Keystone has argued throughout this case that the proper scope of FOL's appeal is significantly restricted by the doctrine of administrative finality and that we cannot consider many if not all operational issues associated with the landfill.[9] Keystone's position is somewhat difficult to follow because it never asserts that *the Department* was precluded from considering Keystone's operational status or its compliance history, but it seems to argue that we are.[10] For example, Keystone acknowledges that "the Department was fully aware of, and considered, Keystone's current and historic operations and compliance when vetting the Permit Renewal application…." (KSL Brief at 112.) Keystone's posited dichotomy makes no sense to us. Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision. *See Love v. DEP*, 2011 EHB 286, 291.

[9] Keystone asserts that the following issues are off the table because they could have or should have been raised, were necessarily considered, were a factor, relate to, or were actually addressed during prior Department actions regarding the landfill: (1) the siting and location of the landfill; (2) the engineering design, construction, and operation of the landfill; (3) the characterization of the geologic and hydrogeologic setting of the landfill; (4) the adequacy of the monitoring well network; (5) the groundwater impact observed at MW-15A; (6) the potential for subsidence and related mitigation at the site; (7) the adequacy of the landfill liner systems; (8) the adequacy of the leachate collection and detection systems; (10) the adequacy of the lagoons; (11) the adequacy of the wastewater treatment facilities; (12) the adequacy of the gas management and collection systems; (13) the adequacy of the stormwater management system; (14) the acceptance and disposal of drill cuttings; (15) noise; (16) vibrations; (17) odors; (18) dust; (19) vectors; (20) thermal events; (21) potential impacts to streams, wetlands, and other water bodies; (22) impact on Dunmore Reservoir No. 1 and associated watershed impacts; (23) impacts on fish, wildlife, plants, aquatic habitat, and water quality; and (24) potential harms and benefits related to Phase II and the ongoing operation of Phase II of the landfill. (*See* KSL Brief at 115-16.) In other words, virtually everything, and certainly everything actually considered by the Department in its review.

[10] The Department also discusses administrative finality in its brief, saying that the concept should influence the scope of review in this appeal, but the Department does not tell us what issues should or should not be litigated in the appeal. The Department does not argue that FOL should be precluded from raising all operational issues associated with the landfill.

Trying to parse out certain issues as off limits as a result of the doctrine of administrative finality in the context of a permit renewal as Keystone has attempted to do is doomed to failure. Take, for example, Keystone's position that this Board is not allowed to consider whether the characterization of the hydrogeological setting of the landfill is accurate because that characterization was done in connection with earlier permitting actions. The characterization is written in stone and can never be reevaluated when a permit is modified or comes up for a renewal, according to Keystone. Thus, if significant new information has come to light in the last few years, that information must be ignored, even if it unquestionably shows that the earlier characterization was severely flawed. We cannot endorse such willful ignorance. Furthermore, it is beyond reasonable dispute that the Department should consider whether the landfill is actively polluting the groundwater, but it is impossible for the Department (or us) to address that issue without a basic understanding of the hydrogeological setting of the landfill.

Keystone points out that the only change to its permit made by the renewal was the extension of its operating term to April 6, 2025; no other conditions of the permit were changed. However, as *Wheatland Tube* makes clear, whether or not permit conditions have changed is not the sole or even primary focus of our inquiry. The actual facial change in a permit may belie the consideration that went into deciding whether to grant or deny the permit renewal and, if granted, under what terms and conditions. Simply because only one permit condition was changed here does not mean that our review is correspondingly limited. *Cf. Love*, 2011 EHB 286, 290-91 ("When the Department reconsiders a matter, its decision becomes subject to Board review. The fact that the Department arrives at the same conclusion upon reconsideration is largely irrelevant. Appealability turns on whether a properly requested application or request was considered on its merits and acted upon by the Department.") Indeed, as we recently held in *PQ Corp. v. DEP*,

EHB Docket No. 2016-086-L (Opinion and Order, Aug. 21, 2017), an adversely affected party should not be precluded from challenging a Department action even if that action was a renewal of a permit without any changes. "Whether there should have been changes is well within the appropriate scope of our review at the renewal stage. The Department's decision not to make any changes is no less a decision of the Department subject to the Board's review than a decision to make changes." *Id.*, slip op. at 6.

The testimony of Department witnesses over several days of hearing suggests that it conducts a rather extensive review of renewal applications that appears entirely consistent with our articulation of our own review of permit renewals. Roger Bellas testified that in a review of a renewal application the Department conducts an engineering review, a review of general operations, and a review of a facility's compliance history. (T. 1128.) To this end, the Department's review of Keystone's renewal application involved a team of program staff, including the waste engineer, the primary facility inspector, the lead hydrogeologist, and the compliance specialist. (T. 1130.) Bellas stated that if there are any ongoing operational issues at a facility then they should be addressed in the renewal. (T. 1128, 1130.) Tracey McGurk, the Department's Waste Management Facilities Supervisor, likewise testified that she understood a permit renewal to provide an opportunity to review a facility's operations and any operational issues from the prior renewal period to determine whether the facility could continue to operate. (T. 3319.) She also testified that, in its review of Keystone's renewal application, the Department drew upon its entire base of knowledge of the Phase II operation since that area was first permitted in 1997. (T. 3344.)

We have no idea why, as Keystone argues, all operational issues arising during the last renewal period would be insulated from review in a Board appeal of a permit renewal, or how we

could fully evaluate whether the Department's decision to renew the permit was reasonable if all operational issues are off the table. The Department has a clear obligation to ensure that the landfill operations should be allowed to continue knowing what is known now. The environmental effects of a major landfill in close proximity to residential areas are too great to allow the operation to continue indefinitely without meaningful periodic evaluations.

We do not detect any effort by FOL to collaterally attack any now-final decisions the Department made in the past with respect to the Keystone Landfill. FOL is not challenging whether the landfill should have been permitted in the first place or whether the Phase II expansion should have been permitted. Instead, its challenges in this appeal are focused mostly on compliance issues in the form of various aspects of the landfill's operations occurring during the most recent permit term. Our consideration of these issues is not precluded by the doctrine of administrative finality.

Enforcement Discretion

Keystone correctly argues that the Board does not review the Department's exercise of its enforcement discretion. Enforcement discretion, or prosecutorial discretion, is a term used to describe the Department's decision regarding whether or not it will pursue enforcement against a party it is tasked with regulating. *Bernardi v. DEP*, 2016 EHB 580, 586. In *Law v. DEP*, 2008 EHB 213, we described the concept as

> deriv[ing] from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department.

2008 EHB at 215 (citations omitted). *See also Klesic v. DEP*, EHB Docket No. 2015-150-M, slip op. at 26 (Adjudication, Jun. 9, 2017); *Ridenour v. DEP*, 1996 EHB 928; *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 268-69.

Keystone contends that FOL's arguments related to the landfill's operational issues are essentially a backdoor challenge to the Department's enforcement discretion. Under Keystone's construct, we cannot consider any problem at the site if the Department did not take enforcement action with respect to that problem. However, whether or not the Board can order the Department to take an enforcement action on the basis of alleged violations, *see Mystic Brooke Dev., L.P. v. DEP*, 2009 EHB 302, 304, there is no question that we can certainly review issues with the ongoing operations of a facility in the context of a permit renewal to see if the renewal was properly issued. It is important to focus on what Department action is being reviewed. Here, we are not reviewing the Department's decisions to take or not take any enforcement action against Keystone during the prior permit term. Rather, we are reviewing the Department's decision to renew the permit. Relevance in conducting that review does not turn on whether the Department took any enforcement action with respect to any particular issue. Deciding whether the operational concerns identified by FOL render the Department's renewal of Keystone's permit unreasonable in any way is neither a direct nor indirect review of the Department's enforcement discretion.

Groundwater

FOL says that the Department erred by renewing the permit because the landfill is polluting the groundwater. At a minimum, it says the Department should have conditioned the renewal on a requirement that Keystone conduct a groundwater assessment in accordance with

25 Pa. Code § 273.286 with respect to the contamination being detected in monitoring wells MW-15, MW-29UR, and perhaps more generally for the whole site.

However, there is no evidence that Keystone is causing widespread groundwater contamination at the site. Furthermore, FOL has not carried its burden of proving that an assessment of possible groundwater contamination is needed anywhere on the site except with respect to MW-15. We are unable to credit the opinion of Daniel Fisher, FOL's expert hydrogeologist, to the contrary. Except as discussed below regarding MW-15, we see no refinements that should have been mandated in Keystone's groundwater monitoring system in connection with the permit renewal.

MW-15

There was no dispute in this case that groundwater degradation is being detected in MW-15.[11] There is also no dispute that the degradation is being caused by landfill operations. Section 273.286 creates a clear requirement and Keystone violated the law by not complying with it.[12] Section 273.286(a) reads as follows:

> A person or municipality operating a municipal waste landfill shall prepare and submit to the Department a groundwater assessment plan within 60 days after one of the following occurs:
>
> (1) Data obtained from monitoring by the Department or the operator indicates groundwater degradation at any monitoring point for parameters

[11] Keystone says its "first priority is to mitigate the source of the nitrates found in MW-15." (KSL Brief at 147.) "Groundwater degradation" is defined as a measurable increase in the concentration of one or more contaminants in groundwater above background concentration for those contaminants. 25 Pa. Code § 271.1.

[12] *See also* 25 Pa. Code § 273.301 (facility must be operated to prevent release of solid waste constituents to the waters of the Commonwealth); 25 Pa. Code § 273.281 (landfill operator must install, operate, and maintain a monitoring system that can detect the entry of solid waste, solid waste constituents, leachate, contaminants, or constituents of decomposition into the groundwater). Failure to comply with a regulation constitutes "unlawful conduct." 35 P.S. § 6018.610. Failing to correct unlawful conduct can be a basis for denying a permit renewal. 35 P.S. § 6018.503. In light of Keystone's clear regulatory duty to assess groundwater degradation, we need not resolve the parties' debate, in which the Department has vigorously supported Keystone's position, whether Keystone's degradation constitutes "pollution" as that term is used in 25 Pa. Code § 273.241.

> other than chemical oxygen demand, pH, specific conductance, total organic carbon, turbidity, total alkalinity, calcium, magnesium and iron.
>
> (2) Laboratory analysis of one or more public or private water supplies shows the presence of degradation that could reasonably be attributed to the facility.

25 Pa. Code § 273.286(a). Section 273.286 goes on to describe exceptions not applicable here and the specific contents of the plan and the procedures to be followed.

The degradation being observed in MW-15 is certainly not enough to justify denying Keystone's application for a renewal. However, renewing the permit without requiring that this violation be corrected and the longstanding groundwater degradation be addressed as a condition of the renewal was unreasonable. It is also inconsistent with the Department's duties as trustee of the Commonwealth's natural resources. Surely a trustee of ordinary prudence who discovers that the trust corpus under its care is actively being degraded must take meaningful steps to ensure that the cause of that degradation is revealed. Otherwise, the corpus cannot be conserved and maintained. The Department's action was particularly unreasonable because MW-15 is close to the downgradient and downdip border of the site, which raises a legitimate concern that off-site pollution may be occurring.[13]

The Department has rather belatedly addressed the MW-15 issue by issuing a Notice of Violation (NOV) on November 9, 2016, five days before the beginning of the hearing in this matter. The NOV in pertinent part reads as follows:

> The Pennsylvania Department of Environmental Protection ("Department") has determined that Keystone Sanitary Landfill, Inc. ("Keystone") was in violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. Sections 6018.101 et seq. ("Solid Waste Management Act"), and the Municipal Waste Management Rules and Regulations found at 25 Pa. Code Chapters 271 to 285, as follows:

[13] An assessment plan that Keystone submitted in 2003 (C. Ex. 17) is obviously out of date and does not support the Department's renewal decision. Keystone's 14-year long effort to identify the source pursuant to the Department's informal requests is not a proper substitute for an assessment plan conducted in accordance with Section 273.286.

….

2. As a result of the Department's review of files, including, but not limited to the March 2016 Geophysical Survey and Keystone's May 17, 2016 response to the Department's environmental assessment review letter dated October 13, 2015, the Department has determined that leachate lagoon liner leakage and/or pipe boot penetration leakage and/or pipe leakage has been occurring at the west lagoon. Therefore, Keystone failed to maintain sufficient structural integrity to prevent failure of the lagoon(s), in violation of 25 Pa. Code §§ 285.123(5) and 273.201(c).

   The Department acknowledges that Keystone has applied and received approval for a minor permit modification for leachate storage lagoon improvements.

3. As a result of the Department's review of groundwater analysis data in the area of the leachate lagoons, the Department has determined that groundwater degradation has occurred. Therefore, Keystone has failed to store waste in a manner that does not cause groundwater degradation, in violation of 25 Pa. Code §§ 285.116(c) and 273.201(c).

   The Department acknowledges that Keystone has conducted investigations into potential sources of contaminants and implemented measures in an attempt to abate the introduction of contaminants into the environment.

Within fifteen (15) days of receipt of this notice, please submit a response to the Department that identifies how Keystone will prevent these violations from occurring in the future.

Keystone's response should also include an explanation and status of how the groundwater in the area of the lagoons and/or effluent pump station has been or is currently impacted. Keystone should include a plan for any proposed abatement and a plan and schedule to, at a minimum, monitor MW-8, MW-4AR, MW-15A, and MW-23. The response should be sent to my attention at the letterhead address.

You are hereby notified of both the existence of the violations as well as the need to provide for prompt correction. Under the Solid Waste Management Act, each day a violation continues is considered a distinct and separate offense. The violations noted herein may result in an enforcement action under the Solid Waste Management Act.

This Notice of Violation is neither an Order nor any other final action of the Department. It neither imposes nor waives any enforcement action available to the Department under any of its statutes. If the Department determines that an enforcement action is appropriate, you will be notified of the action.

(FOL Ex. 297.)

The NOV does not correct the Department's error in issuing the permit renewal without requiring a groundwater assessment plan. To begin with, the NOV is not a binding, legally enforceable document. Although Keystone was complying with the recommendations in the NOV when the record closed, the NOV itself does not prevent Keystone from stopping at any time. Secondly, the NOV does not direct Keystone to perform a groundwater assessment plan in accordance with 25 Pa. Code § 273.286. Although Keystone's response sounds like it is for all intents and purposes a groundwater assessment plan, the permit should specifically require it. Third, an assessment plan should not define the cause of the degradation in advance. The Department's NOV reads as if there is no doubt the contamination is being caused by Keystone's leachate storage lagoons. That defeats the entire purpose of the investigation. It creates an illusory requirement. It puts the rabbit in the hat before the investigation is even conducted, which is not scientifically or otherwise justified. After 18 days of hearing in this appeal, it is not at all clear that the leachate lagoons are in fact the source of contamination.

FOL describes what it believes the assessment plan should contain in order to be compliant with 25 Pa. Code § 273.286. For example, it says that the plan should provide for a more comprehensive investigation that determines whether disposal areas (such as Tabor) are contributing to the contamination being seen at MW-15. We believe that FOL's request is premature. The permit should require an assessment plan but not try to dictate in advance what should be in it, other than it should comply with Section 273.286. Similarly, FOL's demand that the permit should also include a requirement for an *abatement* plan under 25 Pa. Code § 273.287 is likewise premature. The Department will need to decide if an abatement plan is necessary following its review of the results of the assessment plan. An informed review of an abatement

plan should not be conducted without an assessment plan that complies with regulatory requirements.

No action other than adding a permit condition mandating a groundwater assessment is necessary in order to bring the Department's action into harmony with Article I, Section 27. Although the groundwater at the site is clearly a public natural resource entitled to protection under the constitution, and there is, of course, no right to pollute water simply because it is already polluted, *CAUSE v. DEP*, 2007 EHB 632, 689-90, context matters. As part of our calculus in evaluating whether the Department's decision to renew Keystone's permit was reasonable in spite of the groundwater degradation, we include the fact that MW-15 is a shallow well with very low flow measuring acid mine drainage associated with decades of historical coal mining. The water mixes in with billions of gallons of acid mine drainage-impacted water from numerous old mines in the valley and is ultimately discharged through old mine tunnels into the river. Some of the parameters involved are naturally occurring. The levels are not extraordinarily high. There has been no showing of an adverse effect on any use of the water, and no showing of any immediate threat to the public health or safety.

In assessing whether the Department's action is reasonable despite the groundwater degradation, we must not forget that all people have an inherent right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. However, we must also bear in mind that, until society figures out a way to eliminate all waste, landfills will remain a public necessity. *Eagle Envtl. II, L.P. v. Dep't of Envtl. Prot.*, 884 A.2d 867, 880 (Pa. 2005). Environmental incursions that must unfortunately be disproportionately borne by the waste disposal site's neighbors will accompany waste disposal wherever it occurs. By prohibiting waste disposal at one location, so long as waste must be disposed of somewhere,

we are simply moving the harm. The renewed use of an existing facility, to the extent it can be done lawfully and without unduly infringing upon its neighbors' rights to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the environment, reduces the need to develop new sites that would perforce affect new neighbors' rights.

Keystone says that, in assessing the constitutionality of the Department's action, we should not forget that the people's right to enjoy a quality environment is served by having a relatively safe, heavily regulated place to dispose of waste. While this is true, it must be taken with a healthy pinch of salt at this particular facility because it is mostly the environment and residents of New York, New Jersey, and Connecticut who are benefiting from access to a disposal site while the residents of Pennsylvania, who live near the landfill, must bear more than their share of the unavoidable side effects of waste disposal. In 2015, it appears that 65 percent of the waste disposed at Keystone came from New York, New Jersey, and Connecticut. (FOL Ex. 164; *see also* FOL Ex. 163 (66 percent in 2014).) Approximately 10 to 11 percent of the waste comes from Lackawanna County, the location of the landfill. It also appears that there is no shortage of regional disposal capacity. (T. 342, 3004, 3287; C. Ex. 5.)

MW-29UR

FOL also points to monitoring well MW-29UR as evidence that Keystone is causing groundwater pollution, but FOL's arguments here are less convincing. MW-29UR was drilled as a replacement well for MW-29U after problems were encountered with MW-29U. (The "R" indicates that it is a replacement well.) Both wells are at or near the highest point on Keystone's property. They were installed in an effort to comply with 25 Pa. Code § 273.282(a)(1), which requires a monitoring well to be installed hydraulically upgradient from the disposal area to obtain data representative of groundwater not affected by the facility. Upon installation of MW-

29UR, sampling revealed that some parameters, such as alkalinity, sodium, TDS, barium, potassium, and calcium, were higher than they were in the original well. FOL's primary critique is that neither Keystone nor the Department conducted an appropriate investigation of the cause of the heightened parameters. FOL complains that Keystone was not required to develop a groundwater assessment plan under 25 Pa. Code § 273.286(a) in response to observing the sustained elevations of parameters in MW-29UR.

The difficulty with FOL's argument is that FOL has not shown that MW-29UR is anything other than a hydraulically upgradient well that is only monitoring background water quality. FOL has offered no proof that there is any way for groundwater impacted by the landfill's disposal areas to be getting into the area of MW-29UR. FOL's expert, Mr. Fisher, speculated that there might be fractures that might allow groundwater to buck all of the other flow patterns at the site and essentially travel uphill, but he offered no proof to support that conjecture. Indeed, FOL concedes that "Mr. Fisher did not postulate a release mechanism for what was in MW-29UR…." (FOL Brief at 243.) On the other hand, Keystone's expert credibly opined that it is unlikely that the landfill disposal areas are causing the elevated parameters that are being seen in MW-29UR. The Department's hydrogeologist concurred.

FOL says that the mere fact that MW-29UR is detecting higher levels of certain parameters than the levels that were seen in the well it replaced, MW-29U, deserves an investigation. However, FOL does not explain why it would be meaningful to compare the results from two upgradient wells both of which are measuring nothing but background water quality. Without any evidence that the landfill could possibly be the cause of the difference in the levels, the comparison is meaningless.

Mr. Fisher expended considerable effort in attempting to show that the water quality in MW-29UR is similar to the chemistry of flowback water from gas drilling operations. Putting aside our doubts about whether the two chemistries are in fact similar, we are once again left to wonder why it matters. Even if we assume that Keystone accepted wastes with flowback-like chemistry, without even a hint of a showing of a possible pathway for water impacted by that waste to get to MW-29UR, the comparison has no value.

We do not mean to suggest that MW-29UR is not worthy of *any* attention going forward. The Department says it is continuing to evaluate trends at MW-29UR. (T. 1073.) We note that the well does appear to have somewhat elevated levels of some parameters, and those levels are not going down. We simply hold that FOL has failed to prove that there is enough evidence relating to water quality in MW-29UR to carry its burden of proving that the Department erred in renewing Keystone's permit without requiring an assessment plan under Section 273.286 for that area of the site.

FOL adds that the MW-29UR results show that there is cause for concern that the landfill could contaminate Pennsylvania American Water's nearby Dunmore Reservoir No. 1. However, the best that FOL could do to support that concern was speculative, unsubstantiated testimony from its expert, Mr. Fisher, that there might be a series of fractures in the area that might theoretically act as a conduit if there were any contamination. (*See* T. 2199.) Of course, no contamination from the landfill in this area has been shown to exist, but even if it did, FOL presented no credible proof of any actual or even likely hydrogeological connection between the landfill and the reservoir.

The Department's Compliance History Review

FOL objects to Keystone's permit renewal based upon the adequacy of the Department's investigation of Keystone's operational status and compliance history. FOL accuses the Department of having conducted a rather slipshod investigation into Keystone's compliance history as part of its review of Keystone's application for a permit renewal.

As we mentioned above, we focus for the most part on the Department's final decision, not the process it used to get there. *Chester Water Auth.*, 2016 EHB at 289-90; *Shuey*, 2005 EHB at 712. The Department's decision with respect to Keystone's history was that (1) no operational changes needed to be made at the facility as a condition of renewing the permit, and (2) Keystone's history did not demonstrate an inability or unwillingness to comply with the law in the future. (T. 1128-30, 1257-58, 1285, 1288, 1317.) Our role is to determine based upon our *de novo* review of the record developed before us whether those conclusions are supported by the facts, and if they are, whether the Department's action based on those conclusions – renewal of the permit without condition – was lawful and reasonable. With respect to inability or unwillingness to comply with the law, we rarely remand a compliance history review for further consideration, viewing it as the responsibility of the complaining party to come forward with specific allegations rather than a generalized claim of an inadequate review. *O'Reilly v. DEP*, 2001 EHB 19, 45.

Regarding the adequacy of the Department's review of Keystone's ongoing operations, with perhaps a few isolated examples, FOL has failed to show that the Department is anything less than fully knowledgeable about conditions at the site. Mr. Bellas credibly testified that he is very familiar with operational issues at the site and that he thoroughly considered those issues before renewing the permit. (E.g. T. 1285.) With the exception of the groundwater degradation

at MW-15, FOL failed to show that there are specific additional environmentally protective measures Keystone can and should be taking that it is not taking that would support a finding that the Department erred.

Regarding the adequacy of the Department's review of Keystone's compliance history as a predictor of future compliance, we tend to agree with FOL that the Department's compliance review was rather less than exhaustive. The biggest deficiency with the Department's review was that it relied almost entirely on recorded violations, yet the Department almost never records any violations at Keystone, even if they undeniably occurred. The Department's own policies say that even minor and/or corrected violations are to be documented (FOL Ex. 298, 299), but the Department routinely ignores that policy. Indeed, surprisingly, the Regional Manager did not appear to know the policy existed. (T. 1144-49.) The Department may internally have a comprehensive understanding of the issues at Keystone, but it conducts its oversight in what can hardly be considered a formalized or transparent manner. By never memorializing any violations, the Department essentially guarantees that the permittee will pass the formal compliance history review with flying colors.

It is true that the Department, after 14 years, issued an NOV requesting (not requiring) Keystone to address groundwater degradation at MW-15. However, that, and NOVs based on two overweight vehicles, are the sum total of Keystone's recorded violations after decades of operation, even though the Department itself concedes there were, in fact, other violations. Our independent review of the record would clearly suggest that there have been odor violations, but the Department has consistently limited itself to informal requests that Keystone address the situation, usually only after a chorus of community complaints. The NOV regarding degradation at MW-15 was issued five days before the hearing in this matter, and it is difficult to believe it

was issued for any purpose other than to bolster Keystone's and the Department's litigation position in this case. Other less jarring deficiencies in the Department's compliance review include the Department's rather limited review of Keystone's related parties[14] and a failure to consider a compliance matter that Keystone had with the Susquehanna River Basin Commission involving Keystone's consumptive use of water without approval. (T. 2777-78, 2829-30; FOL Ex. 31, 32.) Nevertheless, we cannot conclude that FOL met its burden of proof on this issue. It has not convinced us that the Department erred in finding that Keystone is willing and able to comply with the law, and it has not convinced us that further review of Keystone's compliance history would add any value in connection with the renewal determination.

Odors

FOL also contends that Keystone's permit should not have been renewed because the landfill consistently produces offsite odors. There are two regulations the parties have referred us to that relate to offsite odors. The performance standard for municipal waste landfills is set forth at 25 Pa. Code § 273.218(b), which reads as follows:

> (1) An operator shall implement the plan approved under § 273.136 (relating to nuisance minimization and control plan) to minimize and control public nuisances from odors. If the Department determines during operation of the facility that the plan is inadequate to minimize or control public nuisances, the Department may modify the plan or require the operator to modify the plan and obtain Department approval.
>
> (2) An operator shall perform regular, frequent and comprehensive site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation.

[14] A "related party" is a person or municipality engaged in solid waste management that has a financial relationship to a permit applicant or operator. The term includes a partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor, agent, or principal shareholder of another person or municipality, or a person or municipality that owns land on which another person or municipality operates a municipal waste processing or disposal. 25 Pa. Code § 271.1. *See also* 35 P.S. § 6018.503(c), which provides in part that "[i]n the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act."

> (3) An operator shall promptly address and correct problems and deficiencies discovered in the course of inspections performed under paragraph (2).

Interestingly, the regulation does not so much prohibit offsite odors outright as require regular inspections and compliance with the landfill's nuisance minimization plan, and modification of that plan if it is not working. In other words, it seems that the operator does not violate the regulation if it is causing offsite odors so long as it is doing everything that can be done to minimize the problem.

The second regulation is 25 Pa. Code § 123.31(b), which reads as follows:

> A person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated.

Under Section 123.31(b), it would seem that trying hard is not enough. Offsite malodors are prohibited. A malodor is an "odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1. It can be difficult to prove a malodor violation. Board precedent suggests that a representative of the Department and more than one member of the public must experience the odor at the same time and place. *See DER v. Franklin Plastics Corp.*, 1996 EHB 645, 661-62.

These regulations obviously leave the Department with a lot of discretion, and the Department has exercised that discretion in this case by *never* citing Keystone for any odor violations. Nevertheless, FOL has failed to show that there is anything else that Keystone can do to further minimize offsite odors. Keystone implements its nuisance minimization and control plan and has amended that plan in response to requests from the Department. Keystone applies daily cover to the working face of the landfill, conducts its own odor patrols, and maintains a log of those patrols. Keystone has also upgraded its landfill gas management system.

Unfortunately, despite Keystone's efforts, offsite odors have been detected on innumerable occasions and there can be little doubt those odors will continue. In the words of Mr. Bellas, "garbage stinks." (T. 1080.) FOL has pointed out several Department inspections that were either in response to odor complaints, self-discovered during the Department's odor patrols, or were noted during the course of routine inspections. Some of these inspection reports document "strong odors." (FOL Ex. 153, 154, 156, 157.) The Department also maintains a log of odor complaints, which reflects more than 300 citizen complaints from January 2011 to October 2016. (C. Ex. 31.) FOL's members described the odors as strong, pungent, foul, distinct, and chemical in nature. It is by far the most burdensome aspect of the landfill on FOL's members and we presume on the greater community. One of FOL's members, Beverly Mizanty, even seemed resigned to accept the odors as part of her daily life, testifying that she would have filed more complaints with the Department but she thought there was nothing she could do about the persistent smell. (T. 90-91.)

We cannot review the Department's exercise of its enforcement discretion, but we can decide whether the Department erred in renewing Keystone's permit in light of the landfill's apparently unavoidable propensity to produce offsite odors. In addition to regulatory compliance, the Department has correctly recognized that offsite landfill odors are a cognizable injury subject to evaluation and control pursuant to Article I, Section 27 of the Pennsylvania Constitution. (T. 3266; C. Ex. 5.) The people have a right to clean air, and offsite landfill odors unquestionably interfere with that right. The question, then, is whether those odors are causing an *unreasonable* degradation or deterioration of the environment and the quality of life of the landfill's neighbors such that the Department violated the neighbors' constitutional rights by renewing the permit and thereby effectively allowing the odors to continue for another ten years.

Without discounting the aggravation that must be associated with being subjected to landfill odors on a regular basis, we nevertheless are not willing to conclude that FOL carried its burden of proving that the Department erred in renewing Keystone's ability to use its existing, previously permitted capacity. Shutting down this facility at this juncture is simply too extreme a resolution in the context of a permit renewal.

We do have some doubts about whether the Department has fulfilled its responsibilities as a prudent, loyal, and impartial trustee of the public natural resources. The record does not demonstrate that it has consistently exercised vigorous oversight of the landfill consistent with its regulatory and constitutional responsibilities with just as much concern about the rights of the landfill's neighbors as the rights of the landfill. The Department appears to have been rather tolerant of chronic odor and leachate management issues. At one point, a Department witness cynically speculated that community complaints regarding odors seem to go up when Keystone has a permit application pending. (T. 1309.) The record does not support that allegation. The witness was not willing to opine on the extent to which odor complaints go down when it becomes clear that they are falling on deaf ears. (T. 1310.) Aside from the odor issue, it is difficult to understand how the Department could allow the groundwater degradation being seen at MW-15 to go unresolved for 14 years. The Department's limited oversight has in turn resulted in what appears to be a less than comprehensive review of the landfill's compliance history in support of the renewal decision. Article I, Section 27 requires effective oversight by the Department over a solid waste disposal facility accepting up to 7,500 tons of waste per day operating in such close proximity to densely populated areas. If the Department is unable or unwilling to exercise that responsibility, the permit cannot be renewed consistent with Section

27. The lack of effective oversight will almost certainly lead to an impingement of the neighbors' constitutionally assured rights.

Leachate Management

The landfill generates leachate when rainfall comes in contact with the waste. Keystone operates a leachate collection system that transports the leachate to two 5.5 million gallon holding lagoons. Leachate is taken from the lagoons to Keystone's treatment plant, and it is then discharged to the Scranton Sewer Authority's POTW. At the time of the hearing, Keystone was in the midst of refurbishing and upgrading the lagoons, which included work on the liners.

Section 273.275(b) provides:

> An onsite leachate storage system shall be part of each leachate treatment method used by the operator. The storage system shall contain impoundments or tanks for storage of leachate. The tanks or impoundments shall have sufficient storage capacity at least equal to the maximum expected production of leachate for any 30-day period for the life of the facility estimated under § 273.162 (relating to leachate treatment plan), or 250,000 gallons, whichever is greater. No more than 25% of the total leachate storage capacity may be used for flow equalization on a regular basis.

25 Pa. Code § 273.275(b).

FOL has accurately pointed out that Keystone has used more than 25 percent of the total leachate storage capacity of the lagoons on a regular basis. Although the Department in its post-hearing brief writes a lengthy apologia on behalf of Keystone explaining that excess levels are understandable (DEP Brief at 79-87), it nevertheless believes that Keystone's exceedances constitute violations of 25 Pa. Code § 273.275(b). However, it has never issued an order or an NOV calling for correction of the violations. The Department's engineer testified that the issue is "not important to me." (T. 2568-69, 2667.)

Keystone argues that the Department is interpreting the regulation incorrectly. It says that the 25 percent requirement should relate to the *calculated* storage capacity needed at the

particular site, not the actual, constructed capacity of the lagoons. Keystone has failed to comply with the 25 percent requirement if the regulation refers to constructed capacity, as the Department contends, but not if it refers to the calculated storage needs as contended by Keystone. Keystone says an operator should not be punished for voluntarily building excess capacity into its leachate management system. The Department stands by its position that 25 percent applies to the constructed capacity.

We need not resolve this difference in interpretation here. The point that emerges is that, even though the Department has repeatedly found Keystone in violation of the law, it at best considered those violations informally as part of its compliance review. Because the Department in violation of its own policy never formalizes the violations, the public is left unaware and the legality of Keystone's conduct is never formally recorded or resolved.

Keystone generally directs its landfill leachate to the Scranton Sewer Authority after Keystone treats that leachate in its leachate treatment plant. Keystone has a permit from the Scranton Sewer Authority for this purpose. (FOL Ex. 50.) However, as late as 2015, Keystone has occasionally discharged untreated leachate directly to the Authority's system, which Keystone says is an aberration from the norm that occurs because of significant storm events resulting in the generation of substantially more leachate and/or problems with its plant.

FOL argues that Keystone's direct discharges of leachate to the Scranton Sewer Authority are an example of Keystone's lack of an ability or intent to comply with the law. FOL points to Keystone's solid waste management operating permit, which provides: "Leachate shall be collected and handled by direct discharge into a permitted publicly-owned treatment works, following pretreatment, or other permitted treatment facility." (FOL Ex. 200 (at 24).) Keystone's February 2015 minor permit modification authorizing the construction and operation

of a new leachate treatment plant provides: "The new LTP [leachate treatment plant] is a pre-treatment facility and shall only discharge pre-treated effluent to a municipal wastewater treatment facility for additional treatment." (FOL Ex. 216 (Condition 5).)

Notwithstanding these clear permit conditions, the Department takes the position that the permit may be disregarded as long as the Scranton Sewer Authority continues to meet its own NPDES permit requirements. The Department construes Keystone's leachate treatment permit condition as one of many "generic recitation[s] of conditions applicable to all landfills." (DEP Brief at 89.) The Department is not concerned if Keystone occasionally violates its permit and discharges leachate to the Authority's system without first pretreating that leachate. The Department argues that Keystone's operating permit contains a truncated restatement of the relevant portion of the applicable regulation pertaining to leachate treatment, which provides:

> (a) Except as otherwise provided in this section, leachate shall be collected and handled by direct discharge into a permitted publicly-owned treatment works, following pretreatment, **if pretreatment is required by Federal, State or local law** or by discharge into another permitted treatment facility.

25 Pa. Code § 273.272(a) (emphasis added). The Department contrasts the language at the end of Subsection (a) adding a caveat that pretreatment is only necessary if required by federal, state, or local law, as opposed to the more categorical pretreatment requirement in Keystone's permit.

Although Keystone's permit, issued in 1990, appears to predate the promulgation of the regulation in 2000, it is not clear why Keystone's permit has not been changed at the renewal stage or otherwise to reflect the current regulatory requirements, if they are in fact different. (*See* FOL Ex. 1, 201, 205.) The minor permit modification issued in 2015 did not modify the categorical pretreatment requirement. (FOL Ex. 216.)

It is true that Keystone's direct discharges have not impacted the Authority's operations to the extent that the discharges have caused upset conditions or exceedances of the Authority's

effluent limitations contained in its NPDES permit. However, conditions in a permit create binding requirements that should be honored, not ignored by both the permittee *and* the Department. *See PQ Corp. v. DEP*, EHB Docket No. 2015-198-L, slip op. at 18-19 (Adjudication, Sep. 6, 2017). The Department's argument that Keystone's permit really just means that pretreatment is optional is not a persuasive reading of the permit language. The Department does not provide any legal support for its apparent argument that some permit conditions are more important or more binding than others.

There is no indication on the record that the Department gave any consideration to Keystone's direct discharges in considering Keystone's renewal application. (*See* T. 1023.) Clearly the issue was worthy of some attention, at least as part of considering Keystone's overall leachate management issues. If nothing else, the Department could have adjusted the permit language to reflect its view of what the regulations require. However, once again, FOL has not directed us to specific measures that should be taken that are not being taken. The lagoons have never overtopped or been shown as ever having been in imminent danger of overtopping.[15] FOL presented no evidence that the lagoons are undersized from an engineering rather than regulatory perspective.[16] Keystone's leachate management has not been shown to have caused or threatened any demonstrable harm to the environment or the public health or safety.

Furthermore, Keystone's reserve capacity issues and its direct discharges to the Scranton Sewer Authority do not so clearly reflect a lack of ability or intent to comply with the law as to warrant the Department's denial of Keystone's permit renewal. The evidence shows that

[15] That may be in part because Keystone, contrary to the terms of its permit, has discharged untreated leachate directly from the lagoons to the Authority's POTW.

[16] Keystone on at least one occasion accepted leachate from another landfill for storage and treatment at its landfill. FOL refers us to this incident but does not explain why this constituted a violation. The Department approved Keystone's request to accept the waste, although it is not clear that Keystone has been permitted to accept off-site leachate.

Keystone pretreats its leachate at its treatment plant the majority of the time before sending it to the Authority for further treatment. Indeed, it has built a treatment plant capable of treating 150,000 gallons per day for that very purpose. Importantly, it does not appear that Keystone is routinely discharging untreated leachate to the Authority to the detriment of the Authority's operations or the Authority's ability to comply with its NPDES permit. Neither the Authority nor the Environmental Protection Agency, which administers the pretreatment program, have expressed any concerns.

FOL refers us to an odor incident that occurred in a sewer line near the landfill on the night of September 24, 2015. An overpowering chemical-type odor emanated from a sewer line that night. After a thorough investigation, the Department credibly concluded that the odor could not be attributed to a discharge from Keystone into the line. Even assuming *arguendo* that Keystone did cause the odor, that isolated incident either by itself or in combination with Keystone's other operational issues would not justify overturning the Department's renewal decision.

Miscellaneous

FOL has previously raised issues associated with truck traffic at the facility, but has not pursued those issues with any degree of specificity in its brief. We will consider them no further here. FOL notes that there have been some outbreaks of what appear to be leachate through the cover material on disposal areas at the site. These outbreaks have been referred to as "seeps." The record indicates that such outbreaks have been properly repaired and have not been shown to have resulted in any environmental damage. (T. 3153-56; FOL Ex. 220, 228, 253, 254; KSL Ex. 129.) FOL says the Department should have required a "health study" before issuing the renewal. It did not provide any evidence to back up that claim.

FOL says in its proposed findings of fact that there have been four "thermal events" at the landfill. These events are not uncommon even at properly operated landfills and consist of small areas of waste smoldering under the surface. (T. 1163-74, 1274.) Keystone properly addressed those incidents. (T. 1174.) There was no evidence of any environmental damage.

Birds tend to congregate in unnatural numbers at Keystone, or at any other landfill for that matter. Keystone has managed the bird population at the landfill to the fullest extent possible. No additional measures are called for. Nevertheless, excessive birds cannot be completely eliminated and some local citizens consider them to be a nuisance.

In addition to its concerns regarding odors, FOL complains about Keystone's air emissions more generally. It points out that Keystone is the county's largest, or one of its largest, emitters of ammonia, NOx, carbon monoxide, and particulate matter below 2.5 microns. (FOL Ex. 332-35.) However, Keystone operates pursuant to a Title V operating permit (KSL Ex. 59), which was not appealed, and there is no evidence that Keystone has violated its permit. FOL presented no credible evidence that Keystone's air quality controls are inadequate or that its emissions pursuant to its permit are resulting in an unreasonable deterioration of the peoples' right to clean air.

FOL faults the Department for failing to conduct a thorough enough investigation into whether Keystone was the source of carbon monoxide and perhaps other gases that migrated from somewhere underground into nearby residences from some unknown source twenty years ago. The presiding judge excluded evidence offered by FOL regarding the investigation conducted by the Department and others in 1997 due to its age, the admitted inconclusiveness of the investigation, and FOL's failure to call any expert witness on the issue. Among other things, the judge struck the testimony of Robert Gadinski, a former employee of the Department, for the

above reasons, and because it became clear that Mr. Gadinski's supposed factual testimony regarding the 1997 investigation was actually expert testimony in disguise. Mr. Gadinski was neither offered nor qualified as an expert.

FOL has preserved a challenge to this evidentiary ruling in its post-hearing brief. (FOL Brief at 280, 306.) However, other than restating that Mr. Gadinski had knowledge regarding the facts related to the investigation, FOL does not explain why facts related to an inconclusive investigation conducted in 1997 (eight years before Keystone's previous permit renewal) would have any material, probative value in reviewing the Department's renewal decision. FOL seems to intimate that mysterious forces were at work to squelch the investigation just when things started pointing to the landfill as the source. It ventures that the landfill may still be a "potential source." However, this is pure, unsubstantiated speculation. Even if it were true, we fail to see how mysterious forces squelching an investigation twenty years ago would factor into our review. FOL has not substantiated a claim that some sort of gas migration study should have been conducted as a condition of the renewal. Any such claim would have required expert testimony to back it up based on current information. FOL had neither expert testimony nor any current information. The Board held 18 days of hearings in this matter and afforded FOL considerable leeway in an appeal from a permit *renewal*. Even if we assume FOL's unfounded claims regarding a decades-old migration study had any probative value, that value was clearly outweighed by undue delay and wasting time and resources. Pa.R.E. 403; *M & M Stone Co. v. DEP*, 2009 EHB 213, 218; *F. R. & S., Inc. v. DEP*, 1999 EHB 241, 272-73.

CONCLUSIONS OF LAW

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

2. When challenged in a pre-hearing memorandum and in a post-hearing brief, an appellant must demonstrate by a preponderance of the evidence at the hearing on the merits that it has standing, even where a motion for summary judgment by opposing parties has been denied. *See Stedge v. DEP*, 2015 EHB 577, 594; *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 564; *Giordano v. DEP*, 2001 EHB 713, 729-30.

3. FOL has standing as a representative of its members. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Cmwlth.*, 83 A.3d 901 (Pa. 2013)); *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643-49.

4. FOL's members have an interest in the Department's decision to renew Keystone's permit that is substantial, direct, and immediate, which gives them standing to pursue this appeal. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975).

5. FOL's members' interest is substantial because being impacted in their daily lives by the landfill's odors surpasses a general interest of all citizens in having Keystone comply with the law; it is direct because they have shown a causal connection between the odors they routinely experience and the landfill; it is immediate because the connection between the odors and the landfill is not remote or speculative. *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012); *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009); *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975); *Funk v. Wolf*, 144 A.3d 228, 244 (Pa. Cmwlth. 2016).

6. FOL as an organization itself has standing in addition to the standing it has on behalf of its members because FOL's mission includes protection of the environment in the

vicinity of the landfill. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643-49; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839.

7. The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017).

8. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

9. As the third-party appellant challenging the Department's action, FOL bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

10. A permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359; *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835.

11. Our review of a permit renewal is not whether an operation should have been permitted in the first instance, but whether it should continue, and if so, under what terms and conditions. *Sierra Club v. DEP*, EHB Docket No. 2015-093-R, slip op. at 6 (Opinion and Order, Jul. 10, 2017); *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135-36; *Tinicum Township v. DEP*, 2002 EHB 822.

12. The Board's review of a permit renewal is not confined to the facial changes, if any, that were made to a permit during the renewal. *PQ Corp. v. DEP*, EHB Docket No. 2016-086-L, slip op. at 6 (Opinion and Order, Aug. 21, 2017); *Love v. DEP*, 2011 EHB 286, 290-91.

13. FOL is not precluded by reason of administrative finality from raising ongoing operational issues with the Keystone Landfill in this appeal.

14. Keystone violated 25 Pa. Code § 273.286 by failing to prepare a groundwater assessment of the groundwater degradation that is causing at monitoring well MW-15.

15. Renewing Keystone's permit without requiring that the violation at MW-15 be corrected and the longstanding groundwater degradation be addressed as a condition of the renewal in the form of a groundwater assessment plan was unreasonable and a violation of the Department's duties as trustee of the Commonwealth's natural resources. PA. CONST. art I, § 27; 25 Pa. Code § 273.286.

16. The Department may deny, suspend, modify, or revoke any permit if it finds that the permittee has failed or continues to fail to comply with the law or its permit, or the permittee has shown a lack of ability or intention to comply with the law or its permit as indicated by past or continuing violations. 35 P.S. § 6018.503(c).

17. Except for the groundwater degradation associated with MW-15, FOL did not meet its burden of proving by a preponderance of the evidence that the Department acted unreasonably or not in accordance with the law, including Article I, Section 27, in renewing Keystone's operating permit without conditions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 8th day of November, 2017, it is hereby ordered that, as a condition of its renewal, Keystone Sanitary Landfill, Inc.'s Solid Waste Management Permit No. 101247 is revised to contain the following condition:

> The Permittee within 60 days shall prepare and submit to the Department a groundwater assessment plan in accordance with 25 Pa. Code § 273.286 that addresses the groundwater degradation detected in Monitoring Well 15.

This appeal is in all other respects dismissed. Keystone's request for oral argument is denied.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 8, 2017

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRADLEY AND AMY SIMON	:	
	:	
v.	:	**EHB Docket No. 2017-019-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: November 8, 2017**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR SANCTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Appellants' motion asking the Board to impose sanctions for alleged past violations of the terms of the Board's previously issued supersedeas order because they have not cited any legal basis for imposing such sanctions.

O P I N I O N

On March 15, 2017, Bradley and Amy Simon ("Simon") filed an appeal of the Department of Environmental Protection's (the "Department's") issuance to Sunoco Pipeline, L.P. ("Sunoco") of two permits associated with earthmoving work related to the construction and installation of two parallel natural gas liquids pipelines known as the Mariner East 2 project ("ME2"). The Simon appeal of the ME2 permits concerns only the portions of the permits that authorize Sunoco to do work on the Simon property in Nottingham Township, Washington County.

On April 5, 2017, Simon filed a petition for supersedeas. Following a hearing, we issued an order granting in part Simon's petition for supersedeas. The order in effect modified

Sunoco's permit in four ways. First, it required Sunoco to begin and complete all earth disturbance work on Simon's property (with the exception of some restoration activities) within 30 days. Second, it prohibited Sunoco from starting earth disturbance on the Simon property until the Department and/or the Washington County Conservation District inspected and approved the E&S controls on the site. Third, it required Sunoco to send all of its inspection reports to the Department and the Conservation District, with a copy to Simon. Fourth, it required Sunoco to have a licensed professional available for immediate consultation during construction. Although we quoted some other portions of Sunoco's permit to provide context, importantly, we do not consider that permit language to be part of our order. For example, Sunoco's permit, *but not our order*, required Sunoco to provide temporary stabilization under certain circumstances.

On September 15, 2017, Simon filed a motion that he styled as a "motion for sanctions." The motion alleges that Sunoco violated our supersedeas order and requests that the Board impose sanctions on Sunoco for those violations. Simon alleges that Sunoco failed to complete the work that it was required to complete by our order within 30 days. Simon does not allege that Sunoco violated any of the other terms that we consider to be part of our order as opposed to a term of the permit itself. In other words, he does not allege that Sunoco began construction before having its E&S controls approved, failed to submit inspection reports, or failed to have an environmental professional available for immediate consultation. Instead, in addition to the 30-day issue, he says that Sunoco did a substandard job in completing the project. However, to repeat, whether Sunoco did a substandard job in, say, installing proper temporary stabilization is not the subject of our order. If Sunoco failed to install proper stabilization, it may have violated its permit but it did not violate our order. We are obviously not in the business of instituting

enforcement action with respect to the Department's permits. *See DER v. Landmark Int'l, Ltd.*, 570 A.2d 140, 141 (Pa. Cmwlth. 1989).

With respect to Simon's allegation that Sunoco violated the 30-day requirement in our order, Simon asks the Board to order sanctions against Sunoco in the form of directing the Department to issue "fines" for Sunoco's violation, suspend Sunoco's permit, make a factual finding that Sunoco has deposited excess sediment into ponds on Simon's and a neighbor's property and a stream, make a legal finding that Sunoco is "financially responsible" for the removal of the sediment, and award Simon the fees and costs he incurred in this appeal. The Department and Sunoco oppose the motion.

The fundamental problem with Simon's motion is that he fails to provide us with any legal basis for imposing sanctions for a past violation of our supersedeas order, let alone the specific sanctions that he has requested. Simon cites 25 Pa. Code § 1021.161, Pa. R.C.P. 4019, and 1 Pa. Code §§ 31.27 and 31.28. Rule 4019 relates to sanctions for failures to comply with discovery requirements. Sunoco has not been accused of failing to comply with discovery requirements. Our rule codified at Section 1021.161 reads as follows:

> 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. The rule is related to sanctions that maintain the integrity of the litigation process. *Kleissler v. DEP*, 2002 EHB 617, 619. The rule authorizes us to issue sanctions for violations of our procedural requirements or discovery obligations, not to punish a party for violations of the substantive requirements set forth in our adjudications or opinions and

orders. 1 Pa. Code § 31.27 relates to contemptuous conduct at a hearing, and 1 Pa. Code § 31.28 relates to an agency's right to suspend or disbar persons from the privilege of appearing before it. Neither of those regulations relate to anything Sunoco has done or the sanctions requested by Simon. Thus, Simon has failed to refer us to any legal provision that gives us the authority to impose the sanctions he has requested.

Sunoco and the Department have characterized Simon's motion as essentially a petition to enforce. However, Simon's motion does not seek anything in the way of future compliance on the part of Sunoco. The active work on Simon's property has already been completed. Simon has not asked us to order Sunoco or the Department to do anything going forward, let alone comply with our order. Simon's motion is entirely limited to complaints and remedies regarding Sunoco's past conduct.

Simon conceivably could have asked us to modify or clarify our order, *Rausch Creek Land, LP v. DEP*, 2012 EHB 54, 56, but he has not done so. In any event, because he is focused entirely on *past* events, a modification of our order regarding *future* conduct does not comport with the relief he is seeking. Similarly, there is nothing in our rules preventing a party from filing multiple petitions for supersedeas if circumstances warrant, but yet again, Simon's motion is focused on punishment for past events, not on controlling future activity. The motion also obviously fails to comply with our rules regarding petitions for supersedeas.

Assuming *arguendo* that we could award sanctions in this situation, our authority to impose "sanctions" does not extend to ordering the Department to summarily impose "fines" or for us to make factual and legal findings without a hearing about purported excessive sedimentation of ponds. We are not empowered to grant purely declaratory relief disembodied from a Department action under review or to "issue reprimands." *Lucchino v. DEP*, 1996 EHB

583, 595. Simon's request for an award of attorney's fees does not comport with *any* of the Board's substantive or procedural requirements or standards for obtaining such an award. Finally, suspending Sunoco's permit as requested by Simon while post-construction restoration is progressing would serve no purpose whatsoever.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRADLEY AND AMY SIMON	:	
	:	
v.	:	**EHB Docket No. 2017-019-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 8th day of November, 2017, it is hereby ordered that the Appellants' motion for sanctions is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: November 8, 2017

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(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: November 13, 2017**

OPINION AND ORDER ON
MOTION FOR CLARIFICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion styled as a motion for clarification of the Board's stipulated supersedeas order because the motion does not in fact seek clarification of a Board order.

O P I N I O N

On February 13, 2017, the Department of Environmental Protection (the "Department") issued Sunoco Pipeline, L.P. ("Sunoco") three Chapter 102 erosion and sediment control permits under 25 Pa. Code Chapter 102 and seventeen Chapter 105 water obstruction and encroachment permits under 25 Pa. Code Chapter 105 in connection with Sunoco's Mariner East 2 pipeline project. The Appellants filed a notice of appeal objecting to the issuance of the permits. On February 14, 2017, the Appellants filed a petition for supersedeas and an application for temporary supersedeas seeking an immediate halt to activity authorized under the permits. On February 17, 2017, the Board issued an order denying the application for temporary supersedeas and scheduling an evidentiary hearing on the supersedeas petition. The hearing on the petition

for supersedeas concluded on March 3, 2017. Upon conclusion of the hearing, the parties requested that the Board rule from the bench. We denied the petition for supersedeas.

Several months later, on July 19, 2017, the Appellants filed a second petition for partial supersedeas and an application for temporary partial supersedeas seeking an immediate halt to horizontal directional drilling ("HDD") activities authorized under the permits. On July 25, 2017, the Board granted the Appellants' application for temporary partial supersedeas and scheduled a hearing on the petition for partial supersedeas.

Prior to the scheduled hearing, the parties negotiated an agreement to resolve the Appellants' application for temporary partial supersedeas and petition for partial supersedeas. On August 8, 2017, the parties submitted to the Board a proposed stipulated order setting forth the terms and conditions of their agreement. Paragraph 1 of the proposed stipulated order stated, in pertinent part, "[t]he Board hereby retains jurisdiction over enforcement of this Stipulated Order." The following day, the Board signed and approved the stipulated order, but only after it crossed out and removed the above-quoted language pertaining to enforcement of the order. The Board initiated this change. All parties agreed to include this change in the final corrected stipulated order entered on August 10, 2017.

As part of the negotiations resulting in the resolution of the application for temporary partial supersedeas and petition for partial supersedeas, the parties agreed on revisions to three Pollution, Prevention and Contingency Plans for the project, including the HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan ("PPC plans"). Paragraph 15 of the stipulated order provides, in relevant part, that "[t]he parties have agreed to revisions to…[the three PPC plans]…as revised, such revisions dated August 8, 2017. Sunoco agrees to abide by these Plans, as revised."

The Appellants now come before the Board with what they have styled as a motion for clarification of the stipulated order. The Appellants argue that the Department in the course of its oversight of the project is incorrectly interpreting the monitoring and inadvertent return protocols in the PPC plans. The Department is only requiring that less stringent protocols be applied when an inadvertent return occurs in an upland as opposed to a wetland or water body, they contend. They argue that the most stringent protocols set forth in Section 5.1.5 of the PPC plans should apply to all inadvertent returns regardless of location. The Appellants ask us to issue an order confirming that their interpretation is the correct one.

Sunoco and the Department oppose the motion. Among other things they argue that the Board lacks jurisdiction to address the motion. However, we see the motion more as raising questions regarding the limits of the Board's authority to act in a case in which it has jurisdiction. The Board clearly has the authority to modify or clarify its own orders, including supersedeas orders. *See Simon v. DEP*, EHB Docket No. 2017-019-L (Opinion and Order, Nov. 8, 2017); *Rausch Creek Land, LP v. DEP*, 2012 EHB 534; *Lang v. DEP*, 2006 EHB 147; *Sky Haven Coal Co. v. DER*, 1995 EHB 591; *Booher v. DER*, 1990 EHB 618. However, that is not what the Appellants have asked us to do. Our order does not contain any of the language that the Appellants have asked us to "clarify" in their motion. The language at issue about inadvertent returns in uplands versus wetlands is in the PPC plans, not in our order. Our order simply provides that Sunoco is required to comply with its PPC plans, and that requirement is not in need of any clarification. Instead, the Appellants have asked us to interpret entirely separate documents, namely, Sunoco's PPC plans. Those plans were only mentioned indirectly in our order. They are not incorporated into our order. They were not previously presented to the

Board for review or approval, and we neither reviewed them nor approved them. The plans were not attached as exhibits to our order.

Since the motion does not in reality seek clarification of our order, we look to whether the Appellants have referred us to any other legal basis for granting the relief they request in the context that they have requested it. The only authority they cite other than our ability to clarify our own orders is 25 Pa. Code § 1021.161 and the Board cases applying that rule. However, as we recently explained in *Simon*, *supra*, Section 1021.161 provides the Board with the authority to sanction litigants for failing to comply with procedural requirements, not for failing to comply with the substantive requirements in our adjudications, opinions, and orders on the merits. In any event, the Appellants have asked for an interpretation of a document, not sanctions. The Appellants cite no other authority in support of their requested relief.

In a brief footnote, the Appellants ask that we alternatively consider their motion as another petition for supersedeas. Dropping such a footnote in a motion to clarify obviously falls well short of compliance with our rules and standards applicable to petitions for supersedeas. *See* 25 Pa. Code § 1021.62.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 13th day of November, 2017, it is hereby ordered that the Appellants' motion for clarification is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 13, 2017

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

PROPERTY ONE, LLC and MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2016-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 15, 2017**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPELLANTS' AMENDED MOTION FOR SUMMARY JUDGMENT AS TO APPELLANT MARIA SCHLAFKE

By Steven C. Beckman, Judge

Synopsis

The Board grants a partial summary judgment to the Department regarding Property One and Maria Schlafke's liability for certain violations identified in the civil penalty assessment. Property One and Maria Schlafke contested certain issues in their earlier Notices of Appeal that were dismissed by Board and under the doctrine of *res judicata*, they may not re-litigate these issues in this case. Other violations were admitted by Property One and Maria Schlafke in discovery. Property One and Maria Schlafke may contest any remaining violations for which the Department is seeking a civil penalty in the assessment where partial summary judgment was not granted and may contest the lawfulness of the civil penalty and whether the civil penalty is a reasonable and appropriate exercise of the Department's discretion.

O P I N I O N

Introduction

This matter has a long history in front of the Board that is relevant to the issues now awaiting our decision. In October 2012, the Department of Environmental Protection ("DEP or

the "Department") issued an Order to Property One, LLC ("Property One") and Maria Schlafke to address alleged environmental issues at the Doral Estates Mobile Home Park located in Summit Township, Crawford County, Pennsylvania ("2012 Order"). Property One and Ms. Schlafke filed separate Notices of Appeal ("NOA") to the 2012 Order on November 13, 2012. These NOAs were docketed at 2012-186-B ("Property One NOA") and 2012-187-B ("Schlafke NOA"), but following review, the separate appeals were consolidated at 2012-186-B ("2012 NOAs"). The Board issued two Orders to Property One requiring it to obtain legal counsel pursuant to 25 Pa. Code § 1021.25(b). Property One failed to respond to either of the Orders and failed to have counsel enter an appearance on its behalf. On January 14, 2013, the Board issued an Order dismissing Property One's NOA for failure to comply with two Board Orders and the requirement to obtain legal counsel as required by 25 Pa. Code § 1021.25(b) ("January 2013 Order"). Property One did not appeal the January 2013 Order.

In its January 2013 Order the Board stated that Ms. Schlafke could proceed with her appeal of the 2012 Order, and she elected to do so *pro se*. Ms. Schlafke's individual appeal of the 2012 Order moved through discovery and the deadline for the filing of dispositive motions. Ms. Schlafke proceeded without counsel and had difficulty with the discovery process and Board procedures in general and failed to comply with the Board's repeated Orders addressing discovery issues. These issues ultimately led the Board to sanction Ms. Schlafke by limiting the evidence she could present at the hearing. On September 30, 2013, the Board issued its standard Pre-Hearing Order No. 2 requiring the Department and Ms. Schlafke to file their pre-hearing memorandum on specified dates and scheduling a three day hearing for mid-December 2013. The Department filed its pre-hearing memorandum on October 29, 2013, in compliance with Pre-Hearing Order No. 2. Ms. Schlafke failed to file her pre-hearing memorandum as required.

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

We now come to the current matter. On August 17, 2016, Appellants Property One and Maria Schlafke filed a NOA challenging the Department's Assessment of Civil Penalty dated June 30, 2016 ("2016 Assessment"). The 2016 Assessment assessed a civil penalty of $218,568.00 against Property One and Ms. Schlafke for alleged violations of the Pennsylvania Safe Drinking Water Act. The Parties sought and received extensions to both the discovery and dispositive motion deadlines. On July 31, 2017, the Department filed a Motion for Partial Summary Judgment incorporating a Statement of Undisputed Material Facts and a Brief in Support of the Motion for Partial Summary Judgment. On August 1, 2017, Property One and Ms. Schlafke filed a Motion for Summary Judgment, Proposed Undisputed Findings of Fact and a Memorandum of Law in Support of Appellants' Motion for Summary Judgment. In response to a Motion to Strike filed by the Department, the Board struck Property One and Ms. Schlafke's Motion for Summary Judgment and Undisputed Material Facts with leave to file amended versions of those documents. On August 23, 2017, Property One and Ms. Schlafke filed an Amended Motion for Summary Judgment as to Appellant Maria Schlafke and Amended Proposed Undisputed Findings of Fact in Support of Motion for Summary Judgment. On September 15, 2017, the Department filed a Response to the Amended Motion for Summary Judgment and Property One and Ms. Schlafke filed a Response in Opposition to the Department's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment. Finally, on October 2, 2017, the Department filed a Reply Brief in Support of its

Motion for Partial Summary Judgment and Property One and Ms. Schlafke filed a Memorandum of Law in Reply to the Department's Response in Opposition to Appellants' Amended Motion for Summary Judgment as to Appellant Schlafke. The Board is now prepared to rule on the various pending summary judgment motions filed by the parties in this case.

Legal Standard

The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP,* 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 76, 81. The record on which the Board decides a summary judgment motion consists of the parties' filings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

We also want to set out the relevant part of our standard for addressing a civil penalty assessment from the Department because it bears on our approach to the summary judgment issues presented by the parties. The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that: (1) the violations that led to the assessment in fact occurred; (2) the imposed penalty is lawful under the applicable law; and (3) the penalty is a reasonable

and appropriate exercise of the Department's discretion. *Whiting v. DEP*, 2015 EHB 799, 805, citing *Thomas Gordon v. DEP*, 2007 EHB 268.

Analysis

The Department's Motion for Partial Summary Judgment seeks to have the Board decide the first step of our civil penalty assessment analysis in its favor. It seeks a Board ruling that the violations that led to the 2016 Assessment in fact occurred and that Property One and Ms. Schlafke are liable for those violations. The Department asserts that there are two types of violations covered by the 2016 Assessment and that it is entitled to partial summary judgment on Property One and Ms. Schlafke's liability for both types of violations. The first type of violations are those set forth in the 2012 Order ("Regulatory Violations"). The Department argues that because Property One and Ms. Schlafke appealed the 2012 Order and those appeals were ultimately dismissed as sanctions for failing to comply with Board Orders, the Regulatory Violations and Property One and Ms. Schlafke's liability for those violations are established under the doctrines of *res judicata* and collateral estoppel.

The Department is also seeking summary judgment for violations of the 2012 Order itself ("Order Violations"). The 2012 Order required Property One and Ms. Schlafke to take several actions to address the alleged violations identified in the 2012 Order. The Department argues that Ms. Schlafke admitted in her deposition that both she and Property One failed to undertake many of the actions required under the 2012 Order and therefore, the Department is entitled to partial summary judgment on the occurrence of and their liability for the Order Violations. In addition, the Department argues that Property One and Ms. Schlafke are collaterally estopped from challenging their non-compliance with the 2012 Order as a result of a Crawford County

Court of Common Pleas ruling in the Department's favor on a Petition to Enforce the 2012 Order.

In addition to filing their own Motion for Summary Judgment as to Appellant Maria Schlafke, and subsequent Amended Motion for Summary Judgment as to Appellant Maria Schlafke ("Schlafke SJ Motion"), Property One and Ms. Schlafke filed a Response in Opposition to the Department's Motion for Partial Summary Judgment and a Cross Motion for Partial Summary Judgment that also incorporated their Motion. In their various filings, Property One and Ms. Schlafke set forth several arguments in opposition to the Department's *res judicata* and collateral estoppel arguments as well as affirmative arguments for rejecting the Department's position that Ms. Schlafke is personally liable for the Regulatory Violations and Order Violations. In general, Property One and Ms. Schlafke assert that the legal elements necessary for applying *res judicata* and collateral estoppel are not present in this case or, in the alternative, that if *res judicata* and/or collateral estoppel do apply, the impact of those doctrines are more limited than proposed by the Department. They do concede that there may be some merit to the Department's position regarding certain of the Order Violations as to Property One but maintain the position that Ms. Schlafke does not have any personal liability for any violations. The Cross-Motion for Summary Judgment challenges the penalties associated with the Order Violations and the Department's additional claim for a penalty based on alleged economic benefits on the basis that they are unreasonable under the circumstances of the case. Property One and Ms. Schlafke's remaining arguments in their Schlafke SJ Motion and response to the Department's Motion for Partial Summary Judgment center around legal arguments concerning the personal participation theory asserted by the Department, factual issues regarding the ownership and operation of the water system at Doral Estates Mobile Home Park and Ms. Schlafke's actions both before and

after the issuance of the 2012 Order. Property One and Ms. Schlafke appear to concede that the Board only needs to reach these arguments and factual issues if it rules against the Department on its *res judicata* and collateral estoppel arguments. We agree that the key question that must be decided initially by the Board is the impact on the current appeal of the Board's earlier dismissals of Property One and Ms. Schlafke's appeals of the 2012 Order.

Res Judicata and Collateral Estoppel – Regulatory Violations

The Department argues that the Board's dismissal of the 2012 NOAs establishes as matter of law the fact of the Regulatory Violations and Property One and Ms. Schlafke's liability for them by application of the doctrines of *res judicata* and collateral estoppel. Both doctrines address the impact of a prior judgment on a subsequent action. In order for either *res judicata* or collateral estoppel to apply, the earlier action must be litigated to a final judgment. *Rausch Creek v. DEP*, 2011 EHB 1, 10; *Dunkard Creek Coal v DER*, 1993 EHB 536, 539. *Res judicata* requires that four common elements must exist between the earlier judgment and the subsequent action: identity of the thing being sued upon or for; identity of the cause of action; identity of the persons or parties to the action; and identity of the quality of or capacity of the parties suing or being sued. If these four elements are present, matters which were or could and should have been litigated in the prior proceeding may not by relitigated or litigated in a subsequent action. *Rausch Creek v. DEP*, 2011 EHB 1, 10 citing *Solebury Twp., et al v. DEP*, 2007 EHB 744, 746-47. Collateral estoppel is a broader concept than *res judicata*. It applies if the same issue is presented in both actions and the party who may be subject to a claim of collateral estoppel was a party in the earlier case and had a full and fair opportunity to litigate the issues. *Dunkard Creek*, 1993 EHB 539-40. Unlike *res judicata*, collateral estoppel does not require that the cause of action be the same. *Id.* Collateral estoppel is subsumed by the doctrine of *res judicata*,

therefore, if *res judicata* is established there is no need to determine if collateral estoppel applies. *City of Pittsburgh v. Zoning Hearing Board of Adjustment*, 559 A.2d 896, (Pa. 1989).

The Department contends that the Board's dismissals of the 2012 NOAs constitutes final judgments and that the four common elements required for *res judicata* clearly exist in this present action. If *res judicata* does not apply, the Department argues that collateral estoppel would still apply and Property One and Ms. Schlafke are estopped from challenging the Regulatory Violations and their liability for those violations. Ms. Schlafke and Property One argue that *res judicata* and collateral estoppel do not apply because it is not clear that the Board's dismissals of the 2012 appeals constitute final judgments for *res judicata* and collateral estoppel purposes. They further argue that the requirements for *res judicata* and collateral estoppel are not all satisfied in this pending matter.

We first turn our attention to the issue of whether the Board's dismissals of Property One and Ms. Schlafke's appeals of the 2012 Order are final judgments for *res judicata* and collateral estoppel purposes. In support of its argument that the dismissals are final judgments, the Department points to the Board's prior decision in *Carl L. Kresge & Sons, Inc. v. DEP*, 2000 EHB 30 ("*Kresge*"). In *Kresge*, the Board partially granted a Department motion for summary judgment on the basis of *res judicata* and collateral estoppel. The Board held that a dismissal of an appeal as a sanction was the equivalent of a sanctioned default judgment with prejudice and had full *res judicata* and collateral estoppel effect. *Kresge*, 200 EHB 30, 45. Property One and Ms. Schlafke argue that *Kresge* is distinguishable and that the Board's holding in *Kresge* relies on a Board rule that was subsequently modified and therefore, *Kresge* is no longer valid. Their second argument is that a dismissal of an appeal as a sanction is not the same as a default judgment and the Board should not have held that it was. And finally, they argue that the facts

of this case compel application of the holding in *Kent Coal Min. Co. v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988) (*"Kent Coal").* In its reply, the Department maintains that *Kresge* is still valid despite the rule change and we should reject the arguments raised by Property One and Ms. Schlafke.

We find that the Board's ruling in *Kresge* remains valid and governs our determination that the dismissals of Property One's and Ms. Schlafke's separate appeals of the 2012 Order constitute final judgments for the purposes of *res judicata* and collateral estoppel. Property One and Ms. Schlafke's argument that the subsequent rule change undermines the *Kresge* ruling is unconvincing. Our review of the Board's opinion in *Kresge* leads us to conclude that the Board did not rely exclusively on the former Board rule (25 Pa. Code § 1021.120(b)) that a voluntary withdrawal was with prejudice in deciding that a dismissal as a sanction should also be with prejudice. It was simply supporting its decision that a dismissal as sanction should be considered final by citing to the fact that a party that had its appeal dismissed as a sanction should not be better off than a party whose voluntary withdrawal was with prejudice under the rule existent at that time. This discussion and subsequent rule change should not be read as justification for lessening the impact of a sanctions based dismissal as suggested by Property One and Ms. Schlafke.

The Department points out that in addition to the discussion centered on the prior Board rule, the Board opinion in *Kresge* also relies on two appellate court decisions that remain good law. Property One and Ms. Schlafke argue that the Board's reliance on these cases in *Kresge* was misplaced. They assert that the Board was incorrect to rely on the discussion of default judgments in *Zimmer v. Zimmer*, 326 A. 2d 318 (Pa. 1974) ("*Zimmer*") because there is no such thing as a default judgment in the Board's practice and that the equivalent of a default judgment

for failing to answer a complaint in a Board proceeding is administrative finality, which is governed by *Kent Coal*. Property One and Ms. Schlafke also take specific issue with the Board's reliance on the appellate decision in *Fox v. Gabler*, 626 A.2d 1141 (Pa. 1993) ("*Fox*"). *Fox* involved the entry of a default judgment against one of the parties as a sanction for discovery violations. We have reviewed these appellate decisions and the Board's discussion of them in *Kresge* and again find ourselves agreeing with the Department that these two decisions remain good law and support the argument that the dismissal of an appeal as a sanction acts as a final adjudication on the merits. In summarizing its decision, the Board in *Kresge* stated that, based in part on the appellate court decisions in *Zimmer* and *Fox* that "the dismissal operates as and constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial …." *Kresge*, 2000 EHB at 48. The arguments set out by Property One and Ms. Schlafke do not convince us to abandon the approach followed by the Board in *Kresge*. We see no reason to change the Board's established position that a dismissal of a NOA as a sanction for failing to comply with prior Board Orders constitutes a final judgment of the Board.

We also disagree with Property One and Ms. Schlafke's position that *Kent Coal* applies to the facts of this case. In *Kent Coal*, the Commonwealth Court held that the failure to appeal an earlier compliance order did not prevent the coal company from challenging the violations identified in that compliance order in a later penalty action. The Commonwealth Court's ruling was based on its finding that the specific language of the relevant statute and regulation modified the doctrine of administrative finality. Property One and Ms. Schlafke point out that the penalty provision at issue in this case is similar to the one in *Kent Coal*. On that point, they are correct. However, the Department does not assert that it is entitled to a ruling in its favor in this case on the basis of administrative finality instead relying on the doctrines of *res judicata* and collateral

estoppel. Administrative finality is generally applied to prevent a party from later challenging a Department action where the party does not appeal a Department action in the first instance. Administrative finality does not apply to Property One and Ms. Schlafke in this case because they both appealed the 2012 Order. Property One's and Ms. Schlafke's situation more directly resembles a fact situation discussed by the Commonwealth Court in *Kent Coal* where it stated that the cited statutory and regulatory language:

> does not affect other preclusion doctrines that might apply. Thus, for example if the coal company immediately appealed from a compliance order challenging the fact of the violation, and lost, the company would be precluded … from challenging the fact of the violation in a later civil penalty proceeding. Section 18.4 of SMCRA is not designed to give a person charged with a violation of the Act two bites at the apple, but rather to assure, when that person takes his one bite, that the fruit is ripe.

550 A.2d at 283. As is evident from this discussion, the Commonwealth Court's *Kent Coal* decision does not support the position argued by Property One and Ms. Schlafke. The statutory language that they are relying on does not affect whether the other preclusion doctrines at play in this case, *res judicata* and collateral estoppel, may apply under the specific facts of this matter.

Now having determined that the dismissals of Property One's and Ms. Schlafke's earlier appeals constitute final judgments and after rejecting their arguments that this matter is governed by *Kent Coal* rather than *Kresg*e, we turn our attention to whether the requirements for *res judicata* and collateral estoppel are satisfied. Regarding *res judicata*, the only one of the four necessary elements in dispute is whether the requirement that there is an identity of the cause of action is met. Property One and Ms. Schlafke do not directly contest the other three elements and we agree that these elements are satisfied in this case. The Department concedes that the identity of the cause of action is not as clearly present in this case as the other elements but argues that under the Board's holding in *Dunkard Creek*, there is an identity of the cause of

action between the 2012 NOAs and the current appeal of the 2016 Assessment. Property One and Ms. Schlafke contend that the 2012 NOAs were in the nature of an equity action challenging the requirement to conduct certain corrective actions. They argue that this is in contrast to the current action under appeal which is in the nature of a penalty action or an action at law. In addition, they point out other differences including alleged differences in some of the violations cited in the 2012 Order and the 2016 Assessment along with the claims related to economic benefits and Department costs in 2016 Assessment.

The cause of action terminology in the elements for *res judicata* fits in neatly with civil actions but not as easily with Board proceedings. As recognized by the Board in *Dunkard Creek*, proceedings in front of the Board are different than those in civil court and we do not have causes of action in the same sense as the civil courts. The Board stated that "in evaluating identity of the causes of action, the question is whether the things sued upon or for (or the subject matters, the things in dispute, or the matters presented for consideration) are the same … and whether the ultimate issues are the same." *Dunkard Creek* at 544-45. Under that guidance, we think that on the issues on which the Department is seeking partial summary judgment, the identity of the causes of action element is satisfied. The two issues for which the Department is seeking a favorable ruling from the Board are a determination that certain violations identified in the 2012 Order in fact occurred and that Property One and Ms. Schlafke are both liable for those violations. We find that there is no real question that these two issues in this case were presented for consideration and were the things in dispute in the 2012 NOAs. Specifically, the 2016 Assessment that Property One and Ms. Schlafke contest states that, "the violations identified in Paragraphs L, P, R, S, U, V, Y, AC, AF, and AG, above, and Exhibit A" subject them to a claim for civil penalties. (2016 Assessment, Para. AH, pg. 9.) The language of the violations listed in

Paragraphs L, P, R, S, U and V of the 2016 Assessment is essentially verbatim from the language of the 2012 Order demonstrating that the identity of cause of action element is satisfied for these violations as they were presented for consideration and were the things in dispute in the 2012 NOAs. Therefore, under the doctrine of *res judicata*, the violations in the 2016 Assessment at Paragraphs L, P, R, S, U and V are established as having occurred for the purposes of the civil penalty and may not be contested in this action by Property One and Ms. Schlafke. They are entitled to challenge whether the amount of the civil penalty associated with those violations is lawful and a reasonable and appropriate exercise of the Department's discretion but not the fact that these violations took place.

The next issue is Ms. Schlafke's personal liability for these violations. The NOA filed by Property One and Ms. Schlafke to the 2016 Assessment directly contests the issue of her personal liability and their Cross-Motion for Partial Summary Judgment and the Schlafke SJ Motion seek a ruling from the Board that Ms. Schlafke has no personal liability for the civil penalties assessed by the Department. The Department of course argues that this issue was already decided and under the doctrines of *res judicata* and collateral estoppel, it cannot be re-litigated in this case. The 2012 Order and the 2016 Assessment both list Ms. Schlafke, individually, as a recipient of the Department's actions and state that she has "personally participated in the matters set forth herein". (2012 Order, Para D, pg. 2 and 2016 Assessment, Para. 2, pg. 2.) The 2012 Order further states repeatedly that, "Property One and/or Ms. Schlafke" are required to comply with the specific tasks identified in the document. Paragraph 18 of the 2012 Order states that "Property One and Ms. Schlafke are jointly and severally responsible for all of the obligations under this Order." Ms. Schlafke filed a separate appeal from Property One to the 2012 Order. As part of her appeal, she filed an Answer of Respondents

Property One, LLC; Maria Schlafke to the Complaint of the Department of Environmental Protection, in which she denied that she "has personally participated in the matters set forth herein." After the appeal of Property One was dismissed by the Board, Ms. Schlafke continued her individual appeal until it too was dismissed by the Board. These facts make clear that the issue of Ms. Schlafke's personal liability for the violations in the 2012 Order was contested at the time of her 2012 appeal and therefore, the identity of the cause of action is the same for the 2012 Order and the 2016 Assessment. Having satisfied all of the elements required for the doctrine of *res judicata* to apply on this issue, the Department is entitled to a partial summary judgment on the issue of Ms. Schlafke's liability for the violations in the 2016 Assessment at Paragraphs L, P, R, S, U and V.[1] She may contest whether the amount of the civil penalty associated with those violations is lawful and a reasonable and appropriate exercise of the Department's discretion but may not challenge her personal liability for the civil penalties for those violations.

Violations of the 2012 Order

The Department is also seeking partial summary judgment on the issue of Property One and Ms. Schlafke's liability for violations of the 2012 Order. In Paragraph 13 of the Department's Statement of Undisputed Facts and in its Brief in Support of its Motion for Partial Summary Judgment, the Department alleges seven specific violations of the requirements of the

[1] Having decided that the Department is entitled to partial summary judgment on these two issues under the doctrine of *res judicata*, we do not address the application of the doctrine of collateral estoppel. If we were to address it, it is clear that collateral estoppel would also apply because the same issues (violations and liability) are presented in both actions, Property One and Ms. Schlafke are parties in both actions and had a full and fair opportunity to litigate the fact of the violations and their liability for those violations in their appeals of the 2012 Order.

2012 Order by Property One and Ms. Schlafke. [2] The Department relies on admissions made in deposition testimony from Ms. Schlafke in support of its argument that it is entitled to a partial summary judgment on their liability for these violations. In addition, the Department argues that it is entitled to summary judgment on these violations under the doctrine of collateral estoppel based on an enforcement action filed by the Department in the Crawford County Court of Common Pleas. Property One and Ms. Schlafke state in their response to the Department's Motion that they "do not contest that the Department may be entitled to summary judgment as to Property One's liability for Order Violations admitted by Schlafke during her deposition." (Memorandum of Law in Opposition to the Department's Motion, Pg.19.) Despite that statement seeking to limit the admission to Property One, Property One and Ms. Schlafke specifically admit to six of the seven 2012 Order violations for which the Department is seeking summary judgment. (Appellants' Response to the Department's Statement of Undisputed Facts, Para. 13, Pg. 3-4). Property One and Ms. Schlafke contest the Department's claim that they failed to provide in writing the number of service connections of the Water Supply. *Id*. They also dispute that the Common Pleas action has a collateral estoppel effect because they argue that there was no final judgment on the merits in that action.

[2] The seven specific violations of the 2012 Order (along with the specific paragraphs in the 2012 Order where the requirements are listed) are as follows: 1) Property One and Ms. Schlafke did not repair the chemical feed pump and/or correct any other deficiencies with the chlorination within five days of receipt of the 2012 Order (Para. 2); 2) Property One and Ms. Schlafke did not begin monitoring the entry point disinfectant residual concentration within five days of receipt of the 2012 Order (Para. 3); 3) Property One and Ms. Schlafke did not contact a Pennsylvania accredited laboratory after receiving the 2012 Order (Para. 4); 4) Property One and Ms. Schlafke did not submit to the Department in writing their chosen option to bring the Water Supply into compliance (Para. 7); 5) Property One and Ms. Schlafke did not provide the Department in writing the number of service connections to the Water Supply (Para. 9); 6) Property One and Ms. Schlafke did not employ the services of a certified operator within 30 days of receipt of the 2012 order (Para. 12); and 7) Property One and Ms. Schlafke did not submit the 2011 Consumer Confidence Report to the residents of Doral Estates Mobile Home Park and to the Department within 30 days of receipt of the 2012 Order (Para. 13).

The 2012 Order was issued to Property One and Ms. Schlafke, individually. The Safe Drinking Water Act at 35 P.S. § 721.13 states that it "shall be the duty of any person to proceed diligently to comply with any order issued pursuant to section 5." The 2012 Order was issued pursuant to section 5(c) of the Safe Water Drinking Act (35 P.S. §721.5(c)) along with other statutory authority. While they appealed the 2012 Order to the Board, Property One and Ms. Schlafke did not seek a supersedeas from the Board to stay the requirements of the 2012 Order. As a result, Property One and Ms. Schlafke both had a duty to comply with the requirements of the 2102 Order and between the deposition answers and the admissions in Appellants' Response to the Department's Statement of Undisputed Facts, they acknowledge that they did not comply with a number of the requirements in the 2012 Order. Specifically, we find that Property One and Ms. Schlafke did not comply with the requirements in the following Paragraphs of the 2012 Order: 2, 3, 4, 7, 9, 12, and 13.[3] As discussed, the only requirement that Property One and Ms. Schlafke failed to admit violating was the requirement in Paragraph 7 of the 2012 Order that they provide in writing the number of service connections to the Water Supply within five days of receipt of the 2012 Order. However, in her deposition, Ms. Schlafke was asked specifically if she or Property One had met this requirement and her answer was "No, because we didn't own the property, so we didn't know how many people were there." (Deposition of Maria Schlafke, Department's Motion for Partial Summary Judgment, Ex. B, Pg. 137). On the basis of this statement, we find that the Department is entitled to a ruling in its favor on this violation as well the other six violations that were admitted to by Property One and Ms. Schlafke. Therefore,

[3] In the 2016 Assessment, the Department states in Paragraph Y that neither Property One nor Ms. Schlafke complied with any requirements of the 2012 Order and later, in Paragraph AH, states that the violations described in Paragraph Y subject Property One and Ms. Schlafke to civil penalties. To the extent a portion of the civil penalty for violations described in Paragraph Y are for something other than the failure to comply with these specific paragraphs of the 2012 Order (2, 3, 4, 7, 9, 12 and 13), Property One and Ms. Schlafke may contest whether those violations in fact occurred.

because there is no issue of material fact regarding their non-compliance with these requirements, and as a matter of law, both Property One and Ms. Schlafke had a duty to comply with the 2012 Order, the Department is entitled to partial summary judgment on the issue of whether these specific violations of the 2012 Order took place and Property One and Ms. Schlafke's liability for these violations.[4]

Based on our rulings to this point in this matter, we reject the arguments set forth by Property One and Ms. Schlafke in Appellants' Amended Motion for Summary Judgment as to Appellant Maria Schlafke as well as Appellants' Cross-Motion for Partial Summary Judgment and specifically deny Appellants' Amended Motion and Cross-Motion. Many of the alleged factual disputes and arguments set forth by Property One and Ms. Schlafke in those filings are better directed to the remaining issues in this case such as the length of time for which the Department can collect penalties for certain violations, whether the imposed penalty is lawful under the applicable law and whether the penalty is a reasonable and appropriate exercise of the Department's discretion. We will further consider them if raised at the appropriate time in the future proceedings in this matter.

We issue the following Order.

[4] Because we find that the Department is entitled to the partial summary judgment it requested under its first theory, we are not fully addressing the issue of whether Property One and Ms. Schlafke are collaterally estopped from challenging their liability for failing to comply with the 2012 Order because of the Crawford County Court of Common Pleas ruling on the Department's Petition to Enforce. If we were to consider it, we would likely deny the Department's request for a partial summary judgment on this basis because viewing the record in the light most favorable to Property One and Ms. Schlafke, as we are required to do, we cannot say that there are no issues of material fact and that the Department is entitled to judgment as a matter of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 15th day of November, 2017, it is hereby ordered that the Department's Motion for Partial Summary Judgment is granted as follows: Property One and Ms. Schlafke are liable for the violations identified in the 2016 Assessment at Paragraphs L, P, R, S, U, and V. Furthermore, Property One and Ms. Schlafke are liable for failing to comply with the requirements in the following Paragraphs in the 2012 Order: 2, 3, 4, 7, 9, 12 and 13. Property One and Ms. Schlafke's Cross-Motion for Partial Summary Judgment and Amended Motion for Summary Judgment As To Appellant Maria Schlafke are denied.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 15, 2017

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

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Kayla A. Despenes, Esquire
(via electronic filing system)

For Appellants:
Matthew L. Wolford, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE	:	**Issued: November 30, 2017**

OPINION AND ORDER ON
APPELLANT'S MOTION IN LIMINE

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies Appellant's Motion in Limine because the motion is premature at this time. Disputes exist between the parties concerning the scope and content of their respective expert reports, and the Board is not able to evaluate whether a particular question is within the fair scope of pre-hearing disclosure without the particular question itself and a better understanding of the pre-hearing disclosure. Further, the Board lacks context or testimony from which to draw a conclusion regarding prejudice to Appellant's case.

O P I N I O N

Background

On April 1, 2016, Benner Township Water Authority ("Appellant") filed an appeal of the Department's March 2016 issuance of a permit to the Borough of Bellefonte that would allow Bellefonte to apply biosolids to land in Benner Township. Appellant's concern is that the biosolids and contaminants from the biosolids will migrate into Appellant's well recharge area

and its supplying aquifer. This concern is primarily based on the alleged presence of fractured bedrock, the lack of overlying soil, and the land gradient.

In 2015, the Department contracted with SSM Group to prepare source water protection plans for small water systems whose annual budgets were below a specific amount. Two of the water systems, which were included in the proposal, belonged to Appellant. In 2016, a Draft Plan for Appellant's systems was created and funded through the Department's Small System Water Protection Program. Its costs were covered jointly by the United States Environmental Protection Agency and the Commonwealth of Pennsylvania. The Draft Plan has not yet been submitted by Appellant to the Department for review and approval. During this time period, the Department approved the Borough of Bellefonte's permit application to apply biosolids to land in Benner Township. The Appellant filed an appeal with the Board to challenge the Department's decision as being inconsistent with the Draft Plan.

On December 23, 2016, Appellant filed a Motion to Compel Discovery over allegations that the Department was preventing contact between Appellant and a Department employee. On January 10, 2017, the Board issued an Opinion and Order denying Appellant's request because informal meetings are not governed by discovery rules. The Board further denied Appellant's request that the Department employee in question be represented by separate counsel because this type of relief is unavailable under the Board's rules and was not appropriate here.

On March 22, 2017, the Parties also submitted a Joint Request to Extend the Litigation Schedule and proposed order. The Board granted the Parties' Request and subsequently issued an order on March 22, 2017 that modified the Board's January 18, 2017 order as follows:

1. All Discovery except responsive expert reports to be completed by May 1, 2017.

2. Experts for Appellees may submit an expert report responsive to Appellant's expert report by May 22, 2017.
3. Appellant may submit a rebuttal expert report by June 12, 2017.
4. Dispositive motions to be filed by July 17, 2017.

Under the March 22, 2017 order, the Board allowed the Department and the Permittee to submit expert reports responsive to Appellant's expert report by May 22, 2017. The Appellant was allowed to submit a rebuttal report by June 22, 2017.

On July 11, 2017, Appellant filed a Motion for Summary Judgment. On August 10, 2017 the Department filed its Response to Benner Township Water Authority's Motion for Summary Judgment, and later that same day, the Permittee filed its Response. Appellant filed its Reply Brief on August 24, 2017. The Board issued an Opinion and Order denying Appellant's Motion for Summary Judgment on September 19, 2017. Then, on October 31, 2017, the Appellant filed a Motion in Limine to limit the testimony of the Department's Experts. The Department and the Permittee filed their Responses on November 15, 2017. The Board is now in a position to address the Parties' arguments below.

The Appellant states that the Permittee submitted neither expert nor rebuttal reports, and the Department submitted only "rebuttal" expert reports from its experts in response to Appellant's expert report.[1] Further, the Appellant argues that the two expert reports submitted by the Department do not adequately address issues raised by the Appellant in its expert reports. Specifically, the Appellant alleges that the Department and Permittee failed to address three issues raised by its own expert: (1) does the groundwater beneath the site travel towards the

[1] The Appellant describes the Department's expert reports as "rebuttal expert reports." Appellant's Motion in Limine, ¶¶ 11-12. The Board's March 22, 2017 order simply describes the expert reports as "responsive to Appellant's expert reports."

Grove Park well; (2) are soils less than 20 inches in depth adequate to remove pollutants in the percolating water; and (3) do shallow soils of only a few inches provide sufficient root depth to meet the regulatory requirement to evaluate whether the proposed application will "minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop . . . to the groundwater." The Appellant contends that because the Department and Permittee had at least three opportunities to offer expert opinions contrary to those offered by the Appellant's expert, the scope of their expert opinions should be restricted accordingly.

The Department argues that Appellant's Motion in Limine should be denied because the Appellant relies on factual errors, mischaracterizations, and misrepresentations in both its motion and its brief. The Department asserts that the Appellant misrepresents Pa R.C.P. No. 4003.5(c), which allows experts to testify "as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings." Pa R.C.P. No.4003.5(c). According to the Department, the Appellant mistakenly (and contrary to the Rule) attempts to limit the Department and Permittee experts to "the facts and opinions expressed in their expert reports, fact testimony of which they have personal knowledge and the opinions expressed in their responsive expert reports, and those opinions expressed in their reply reports."

The Department further asserts that the Board has *de novo* review and "is not bound by technical rules of evidence and relevant and material evidence of reasonable probative value is admissible. However, [t]he Board generally applies the Pennsylvania Rules of Evidence." 25 Pa. Code § 1021.123(a). Ultimately, it is the Department's position that the Appellant's attempt to limit the testimony of the Department's experts "goes beyond Rule 4003.5(c) of the Pennsylvania Rules of Civil Procedure . . . goes beyond Rules 702-704 of the Pennsylvania

Rules of Evidence . . . and intrudes upon the Board's exercise of *de novo* review. Therefore, the Department argues that the Board should deny the Appellant's Motion.

The Permittee made arguments similar to the Department's, but also drew the Board's attention to what it views as the improper timing of the Appellant's Motion. Like the Department, the Permittee highlighted the language of Rule 4003.5(c) and the nature of the caselaw surrounding it. The Permittee points out that Pennsylvania's appellate courts have concluded that there is "[n]o hard and fast rule . . . for determining when a particular expert's testimony exceeds the fair scope of his or her pre-trial report." Such an inquiry is performed on a case-by-case basis in order to analyze whether a "discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary form making a meaningful response, or which would mislead the adversary as to the nature of the appropriate response." In other words, the Permittee argues, if the testimony at trial could reasonably have been anticipated from the content of the expert's pre-trial report, it should not be excluded. Thus, it is the Permittee's position that the Appellant's Motion is premature and the Board should deny it, allowing the Appellant to make appropriate objections at the hearing, should opportunity arise.

Further, the Permittee contends that the trial testimony given by the Department's experts would be within the fair scope of their expert reports. The Permittee asserts that the particular topics of testimony the Appellant seeks to exclude "are not well defined on the face of its Motion or in its Proposed Order." It is the Permittee's view that the request to limit testimony is premature in light of the operation of Rule 4003.5(c). Additionally, the Permittee argues that the Appellant has unfairly and too narrowly characterized the scope and content of the Department's experts' reports. The Permittee believes that the fair scope of the Department's expert reports is

much broader than alleged by the Appellant. The Permittee therefore requests that the Board deny the Appellant's Motion.

Standard of Review

A motion in limine gives the Board an opportunity to consider potentially prejudicial and harmful evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Kiskadden v. DEP*, 2014 EHB 634, 635; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *RESCUE Wyoming v. DER*, 1994 EHB 1324, 1325-26. Generally, a motion in limine should only be used to challenge whether certain evidence relevant or related to a given point is admissible, not whether the point itself is a valid one. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. When considering whether to impose sanctions precluding evidence or testimony on the basis of discovery violations, we assess the respective prejudices to the parties. *Wetzel v. DEP*, 2016 EHB 230, 232.

Discussion

The Board agrees with the Department and Permittee that the Appellant's Motion in Limine to limit the testimony of the Department's experts should be denied. The motion is premature. The Board will not yet look at what is beyond the fair scope of the pre-hearing disclosure – including the particular questions and expert reports – because no testimony has been given and there are disputes between the Parties with respect to both fair scope and content of the pre-hearing disclosures, including the expert reports. The Appellant asserts that Mr. Thetford and Mr. Sweeney were identified by the Department as expert witnesses and that both were deposed during discovery. The Department and the Permittee admit that Mr. Thetford was deposed, but deny that Mr. Sweeney was deposed. A motion in limine is not the proper vehicle to

resolve these disputes. We think it is better to wait until the hearing to resolve issues of fair scope when we may place them within the context of particular questions.

There is an additional reason to consider the Appellant's request as premature. Generally speaking, the Board has the discretion to determine what evidence may or may not be admitted to the record. Under the Board's Rules, while the Board is not bound by the technical rules of evidence at hearings, the Pennsylvania Rules of Evidence are generally adhered to. 25 Pa. Code § 1021.123. However, the Board has broad discretion to admit or reject evidence, and may receive all relevant, reasonably probative evidence. 2 Pa. C.S. § 505. The Board expects that any party that wishes to proffer expert testimony "will . . . fully follow both the Pennsylvania Rules of Civil Procedure and the Board's Rules [on expert testimony]. If any party . . . does not follow these requirements, it may be precluded from offering such witnesses at trial in accord with applicable law." *DEP v. Angino*, 2006 EHB 278, 281, quoting *Borough of Edinboro v. DEP*, 2003 EHB 725.

As a general matter, Appellant is correct that expert testimony during a hearing is limited to within the fair scope of the disclosure provided during discovery. However, Appellant's view of Rule 4003.5(c) is at odds with the Board's view of the Rule. Appellant presents the Rule very narrowly and devoid the flexibility the Board has identified in prior caselaw. While Appellant accurately cites the Rule and to the discussion in *Township of Paradise v. DEP*, 2002 EHB 68, Appellant's conclusion is overly simplified:

> [T]he testimony of the Department's expert witnesses must be limited to the facts and opinions as stated in their deposition testimony, answers to interrogatories, and expert reports. Hence, any proffered opinion testimony of the Department's experts on the issues of groundwater flow direction, the remedial abilities of soil of varying depth, and the need for consideration of shallow soils in the computation of the agronomic rate is not admissible.

Appellant's Motion in Limine, 4-5. Appellant has sidestepped any further analysis by the Board of Rule 4003.5(c). We think that this is an oversight because it fails to capture the Board's complete view of the Rule. For example, in *DEP v. Angino*, supra, the Board stated that a violation of pre-hearing disclosure requirements is not an immediate bar to certain content of an expert's testimony.

The Board's inquiry does not end when it concludes that a person is an expert witness and that there has not been compliance with the rules regarding pre-hearing disclosure. *DEP v. Angino*, 2006 EHB at 284. "[P]reclusion of an expert's testimony does not automatically follow from a violation of the pre-hearing disclosure requirements." *Id*. In such a situation, the Board undertakes a balancing test between the facts and circumstances of each case to determine the prejudice to each party. *Id*., citing *Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.1d 1270, 1273 (Pa. 1986).

Specifically, the balancing test consists of four factors: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) bad faith or willfulness in failing to comply with the court's order. *Id*., citing *Borough of Edinboro v. DEP*, 2003 EHB 725, 770. The Board "will not tolerate trials by ambush. . . . [But it] is reluctant to preclude testimony in its entirety unless it would be truly prejudicial not to do so, or there has been contumacious conduct." *Id*. Here, we do not yet have enough information to determine whether prejudice exists.

Limiting the testimony of the Department experts at this preliminary stage is further complicated by the allowance of rebuttal testimony during the hearing. Rebuttal testimony given

by an expert in response to another expert is allowed. *See Daddona v. Thind*, 891 A.2d 786, 813-14 (Pa. Cmwlth. 2006). "'Rebuttal evidence' is defined in Black's Law Dictionary (5th ed. 1979) as 'evidence given to explain, repel, counteract, or disprove facts [as opposed to opinions] given in evidence by the adverse party.'" *Id.*, citing *Feingold v. Southeast Pennsylvania Transportation Co.*, 488 A.2d 284, 290 (Pa. Super. 1985). However, "a party cannot, as a matter of right, offer in rebuttal evidence which is properly part of his case in chief, but will be confined to matters requiring explanation and to answering new matter introduced by his opponent." *Higgins v. DEP*, 2007 EHB 230, 233. The Board has sound discretion over admissible rebuttal testimony. *Westinghouse Electric Corporation v. DEP*, 1996 EHB 1144. "Rebuttal testimony which could have been presented in the offering party's case in chief may properly be excluded. But it may also be admitted: the Board has the discretion to admit such evidence so long as it does not act arbitrarily or capriciously." *Id.*, citing *Pittsburgh-Des Moines Steel Co., Inc. v. McLaughlin*, 466 A.2d 1092 (Pa. Cmwlth. 1983) and *Potochnik v. Pittsburgh Railways Co.*, 108 A.2d 733 (Pa. 1954). Therefore, we think that if Appellant's experts raise evidence not addressed in either the Department's expert reports, the Department's experts may nonetheless have an opportunity to respond, and the Board will have the discretion to determine whether the response is sound rebuttal testimony.

Conclusion

In sum, we find that the Appellant's Motion in Limine is premature and deny it accordingly. Given the dispute between the Parties over what has or has not been addressed in pre-hearing disclosures, including their respective expert reports, we lack context from which we may draw conclusions regarding whether the Department's experts have stepped outside the fair scope of their reports. We are also unable to resolve any issues regarding prejudice without

knowing a particular question, any objections, and the claim of prejudice. Further, even if we were to accept Appellant's arguments and grant its Motion, we might still be confronted by at the hearing with questions concerning allowable rebuttal testimony. Therefore, we believe that Appellant's objections to specific testimony from the Department's expert witnesses would be best raised during the hearing and the motion in limine is denied.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE	:	

O R D E R

AND NOW, this 30th of November, 2017, in consideration of Appellant's Motion in Limine, it is hereby ordered that the Motion is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: November 30, 2017

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

For the Commonwealth of PA, DEP:
Dawn M. Herb, Esquire
(*via electronic filing system*)

For Appellant:
Randall G. Hurst, Esquire
(*via electronic filing system*)

For Permittee:
Jeffrey W. Stover, Esquire
Scott Wyland, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RES COAL, LLC	:	
	:	
	:	
v.	:	**EHB Docket No. 2017-063-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 30, 2017**
	:	

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS APPEAL

By: Judge Richard P. Mather, Sr.

Synopsis

The Board grants the Department's Motion to Dismiss Appeal because the record reflects that Appellant's Notice of Appeal ("NOA") was filed 22 days outside of the 30-day appeal period mandated by 25 Pa. Code § 1021.52(a)(1). The fact that the Appellant had earlier served its NOA with the Department does not affect the requirement that an appellant must file its NOA with the Board within the 30-day appeal period. The Appellant's filing of the appeal was untimely and the Board lacks jurisdiction over the appeal. Additionally, the Appellant did not file any response to the Department's Motion to Dismiss, and the Board may grant a motion to dismiss under 25 Pa. Code § 1021.94(f) if the adverse party fails to adequately respond to the motion.

O P I N I O N

Background

RES Coal, LLC ("Appellant") filed an appeal of Department Compliance Order Docket No. 174021 ("Compliance Order") that determined that Appellant failed to properly design,

construct, and maintain sediment ponds. Department officials inspected the site on May 31, 2017 and sent a copy of the Compliance Order to the Appellant by certified mail on June 9, 2017. According to the Appellant's NOA, it received an emailed copy of the Compliance Order on June 12, 2017, and a copy by certified mail shortly thereafter.

On July 7, 2017, the Appellant mailed its NOA to Ms. April Hain in the Department's Office of Chief Counsel, but it was not filed with the Board.[1] The NOA eventually found its way to the Board on August 3, 2017, whereupon it was docketed as this appeal. On September 12, 2017, the Department filed a Motion to Dismiss Notice of Appeal for Lack of Jurisdiction, alleging that Appellant filed its appeal with the Board outside of the 30-day appeal period. The Appellant did not respond to the Motion. For the reasons that follow, we grant the Department's Motion to Dismiss.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal because of lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id*.; see also *Bernardi v. DEP*, 2016 EHB 580; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs, Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. For the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as

[1] The letter was addressed to Ms. April Hain, Office of Chief Counsel, 16th Floor Rachel Carson State Office Building, 400 Market Street, P.O. Box 8464, Harrisburg, PA 17105-8464. This is not the Board's address, but it is the address on the Board's NOA form for mandatory service to the Department.

true rather than combing through the parties' filings for factual disputes.[2] *Id*.; *Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

Under its rules, the Board has jurisdiction over timely appeals. *West Pike Run Township Municipal Authority v. DEP*, 2014 EHB 1071, 1071-72. With few exceptions, an appeal must be filed within 30 days of the appellant receiving notice of the Department action at issue. *Simons v. DEP*, 1998 EHB 1131, 1134; 25 Pa. Code § 1021.52. The initiation of the appeal period depends on how and to whom the Departmental action is noticed. *Id*. The person to whom the action is directed or issued has 30 days from the date on which he receives written notice of the action. Any other person who is aggrieved by an action must file his appeal within 30 days of one of the following: (1) the date on which notice of the action is published in the *Pennsylvania Bulletin*, or (2) the date on which he received actual notice of a Departmental action which was *not* noticed in the *Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i)-(ii). In this case, the Appellant had 30 days from June 12, 2017 – the date on which the Department's Compliance Order was received by the Appellant – to file an NOA.

The Board has no jurisdiction over appeals that are filed outside of the 30-day appeal period and has routinely dismissed such cases. *Lucey v. DEP*, 2016 EHB 882, 883, citing *Mark Stash v. DEP*, 2016 EHB 509, 510; *Melvin J. Steward v. DEP*, 2016 EHB 209, 210; *Boinovych v. DEP*, 2015 EHB 566; *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756; *Spencer v. DEP*, 2008 EHB 573; *Weaver v. DEP*, 2002 EHB 273. The 30-day rule is firm. A single day past the last date of the appeals period is enough to trigger the Board's loss of jurisdiction over an

[2] The Appellant did not file a response to the Department's Motion to Dismiss contesting any of the facts the Department alleged in its Motion. Under the Board Rules, the Board may deem admitted any facts in a motion that are not denied. See 25 Pa. Code § 1021.91(e). Because the Appellant did not deny any of the facts in the Department's Motion, the Board deems these facts admitted for the purpose of deciding the Motion.

appeal. *See Burnside Twp. v. DEP*, 2002 EHB 700; *Milford Twp Bd. of Supervisors*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994) (affirming Board's dismissal of appeal filed by township thirty-one days after delivery of order to township's correct address); *Taylor v. DER*, 1992 EHB 257. To that end, it is well-established that the "limited right of appeal is jurisdictional in nature and cannot be extended as a matter of grace." *Ametek v. DEP*, 2014 EHB 65, 68. Because the rules governing the Board are regulations that have been promulgated pursuant to statute, they have the force of binding law. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth, 1976). Thus, except in the rare event that the Board grants an appeal *nunc pro tunc*, the Board will grant a motion to dismiss where an appeal has been filed after the deadline set by its rules. *Doctorick v. DEP*, 2012 EHB 244, 245.

A motion for *nunc pro tunc* is granted infrequently and will only be granted where there is fraud, a breakdown in the Board's operation, or some other non-negligent grounds for failing to file the appeal within the mandated appeal period. *Ametek*, 2014 EHB at 68-69. The rule is laid out in §1021.53(a):

> The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in the Commonwealth."

Id., citing 25 Pa. Code § 1021.53(a). Good cause is generally held to mean either "fraud or some breakdown in the court's operation" or "unique and compelling circumstances establish[ing] a non-negligent failure to appeal." *Id. Nunc pro tunc* is "intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain *extraordinary circumstances*." *Id*. at 71 (quoting *Union Electric Corp v. Board of Property Assessments Appeals and Review*, 746 A.2d 581, 584 (Pa. 2000) (internal quotations omitted) (emphasis in original).

Further, Pennsylvania Commonwealth Court has found that *nunc pro tunc* is inappropriate where an appellant misdirected its NOA. *Falcon Oil Co., Inc. v. DER*, 609 A.2d 876 (Pa. Cmwlth. 1992). In *Falcon*, the appellant's attorney's secretary sent the NOA to the Department's regional counsel and its Office of Chief Counsel, but failed to send the NOA to the Board. This error was not discovered until a month later, after the end of the appeals period, whereupon the appellant filed a petition with the Board to appeal *nunc pro tunc*. The Board denied the petition and the appellant appealed to Commonwealth Court. Commonwealth Court affirmed the Board's denial of the petition, having determined that the secretary's error was not non-negligent. *Id*. at 878. Therefore, the appeal was not timely and was a jurisdictional defect. *Id*.

Here, according to its NOA, Appellant received notice of the Department action being appealed on June 12, 2017, starting the clock on the 30-day appeal period. Based on this date, the Board should have received Appellant's NOA by no later than July 12, 2017. On July 7, 2017, the Appellant mailed its NOA to Ms. April Hain in the Department's Office of Chief Counsel, but did not send a copy to the Board. The Board ultimately received and docketed the NOA on August 3, 2017, 22 days after the appeal period ended. Because the "limited right of appeal is jurisdictional in nature," the Board cannot extend it or carve out an exception for individual appellants who missed the deadline. *Ametek v. DEP*, 2014 EHB 65, 68.

Additionally, *nunc pro tunc* does not apply here because there is no allegation of fraud or breakdown in the Board's operation with respect to this matter. In addition, the Appellant has not asserted any unique, compelling, or extraordinary circumstances. Because the Appellant filed no response to the Department's Motion to Dismiss, the Board has no basis in the record on which to consider allowing the appeal *nunc pro tunc*. Finally, even if the Appellant had

responded and argued for an appeal *nunc pro tunc*, the facts in this appeal closely mirror those in *Falcon*, and we do not think the Appellant's error in misdirecting its NOA rises to the level of a "unique and compelling circumstances establish[ing] a non-negligent failure to appeal." If the Appellant failed to note the Board's address in the "Appeal Notice" on page one of the Department's Compliance Order or on the first page of the Board's own Notice of Appeal form, it is not the Department's fault and this delay on the Appellant's part does not extend its appeal period. Thus, the Board does not have jurisdiction under its rules.

Finally, we also think it is worth noting that there is an alternative basis on which to grant the Department's Motion to Dismiss under the Board's Rules. Given the Appellant's failure to file a response to the Department's Motion, the Board may grant the motion under 25 Pa. Code § 1021.94(f). Section 1021.94(f) provides:

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

25 Pa. Code § 1021.94(f). The Department's Motion was made and supported under Rule 1021.94, and the Appellant did not file a response. No response is clearly not an adequate response, and the Board may grant the motion "if the adverse party fails to adequately respond." *Id*.

Conclusion

For these reasons, the Board grants the Department's Motion to Dismiss Appeal. The Board has jurisdiction over timely appeals. Timeliness is defined by 25 Pa. Code § 1021.52 and provides generally that an appellant has 30 days from that date on which he has received notice of an action to appeal that action. Where a Notice of Appeal is filed outside of that 30-day

window, the Board no longer has jurisdiction over the appeal and must dismiss the matter. Here, Appellant filed its NOA 22 days late. Therefore, the Board lacks jurisdiction.

Accordingly, we grant the Department's Motion to Dismiss and issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RES COAL, LLC	:	
	:	
	:	
v.	:	**EHB Docket No. 2017-063-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 30th day of November, 2017, in consideration of the Department's Motion to Dismiss Appeal, it is hereby ordered that the appeal in the above-captioned matter is dismissed. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 30, 2017

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

For the Commonwealth of PA, DEP:
Stevan Kip Portman, Esquire
(*via electronic filing system*)

For Appellant:
Branden P. Moore, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
v.	:	**EHB Docket No. 2016-099-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	**Issued: December 21, 2017**

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

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies the Department's Motion to Dismiss/Motion for Summary Judgment where the record shows material facts are in dispute and that the Department is not entitled to judgment as a matter of law. We do not find a grant of a motion to dismiss/motion for summary judgment to be appropriate under the facts of this appeal and deny it accordingly.

O P I N I O N

On June 29, 2016, Robert W. Diehl, Jr., and Melanie L. Diehl ("Appellants") filed an appeal from a Department letter dated June 6, 2016 in which the Department informed the Appellants that it had completed its investigation of the Appellants' spring on their property. In the letter, the Department stated that it had determined that the spring was only temporarily affected by pipeline construction activities occurring on their property and that the spring was returning to expected conditions. The Department conducted its investigation as a result of a complaint made by the Appellants that pipeline construction activities undertaken by Angelina Gathering Company, LLC ("AGC") had disrupted the flow of water to the spring on their

property. As a result of its investigation and determination, the Department stated in its letter that it "does not plan to require further action regarding this matter."

AGC filed a Petition to Intervene in the appeal that the Board granted on August 30, 2016. On September 16, 2016, AGC filed a Motion to Dismiss alleging that the Board lacks jurisdiction because the Department's June 6, 2016 letter is not an appealable action. In support of its Motion, AGC argued that the Department's letter constitutes an exercise of its prosecutorial discretion, which is not appealable as a general rule. *See, e.g., DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005). The Appellants filed a Response on October 17, 2016 and, after prompting by the Board, the Department also filed a Response on October 25, 2016. On December 1, 2016, the Board issued an Opinion and Order denying the Intervenor's Motion, finding that the limited record before the Board did not allow the Board to address the concerns raised by the Parties at that preliminary stage of the appeal.

On October 19, 2017, the Department filed a Motion to Dismiss/Motion for Summary Judgment ("Department's Motion"), in which it makes two primary arguments. First, the Department argues that the Appellants' interest in seeking a determination from the Board is improper. The Department alleges that this is because the Appellants' wish to use a Board determination for the sole purpose of placing themselves in a more favorable position in their civil action filed in Commonwealth Court. Second, the Department argues that its conclusion in its June 6, 2016 letter does not affect the Appellants' property rights, privileges, liabilities, or other obligations and therefore, the appeal should be dismissed.

In its first argument, the Department asserts that the Appellants may not appeal a Department determination for the sole purpose of supporting or improving their position in a related civil action in another court. The Department points to *Cromwell Township v. DEP*, 2007

EHB 8, for support of its argument. Specifically, the Department highlights that the Board granted a motion to dismiss despite the appellant's objection to the motion on the grounds that a dismissal would hurt the appellant's position in a separate but related civil action. The Department contends that *Cromwell* is analogous to the appeal here.

In its second argument, the Department asserts that its conclusion in the letter it sent to the Appellants is not properly before the Board because the conclusion "does not affect the Diehls' property rights, privileges, liabilities, and other obligations." Department's Motion at 6. The Department holds that its conclusion does not negatively impact any other means of redress or remedy available to the Appellants with respect to the flow of their spring. Finally, the Department suggests that that even if the Board were to determine that the Department had erred in its conclusion, such a finding would not alter or affect the Appellants' property rights. Therefore, the Department contends, other than a "speculative effect" of the decision on an outcome in the Court of Common Pleas, the Department's determination has no effect on the Appellants such that it is properly before the Board.

After being granted an unopposed extension of time, the Appellants filed their Response on December 4, 2017. In it, Appellants assert that the civil action pending before the Court of Common Pleas has no bearing on their appeal before the Board. Further, Appellants dispute the Department's interpretation of *Cromwell Township* and argue that the facts of that case are easily distinguishable from those here. Appellants argue that *Cromwell* specifically dealt with a Department letter that the Department later withdrew. This led the Board to declare the associated appeal moot and dismiss the appeal on a motion from the Department. The Appellants point out that there is no such mootness in play here. The Department has not withdrawn its letter to the Appellants or its determination that the impacts to their spring are merely temporary.

The Appellants also argue that the Department's determination regarding the impacts of the Intervenor's pipeline construction activities is "clearly an appealable action." Appellants' Brief in Opposition to Department of Environmental Protection's Motion to Dismiss/Motion for Summary Judgment at 7 ("Appellants' Brief"). Appellants draw our attention to previous Board decisions – chief among them our decision in an earlier motion to dismiss in this appeal – that a Department determination under Chapter 32 of Title 58 of the Pennsylvania Consolidated Statutes, Act of February 14, 2012 (P.L. 87, No. 13) *as amended*, 58 Pa. C.S. §§ 3201-3274 ("Act 13") is appealable by a property owner who believes that the Department erred in its subsequent investigation and determination. The Department performed an investigation in this matter in response to a complaint about a water loss related to alleged impacts from pipeline construction and concluded that the impacts were temporary. Appellants argue that the Department's finding regarding the effect of AGC's pipeline on construction activities on Appellants' spring "is a determination and final action that is appealable to the th[e] Board." Appellants' Brief at 8.

The Department filed its Reply brief on December 15, 2017. In it, the Department reiterated its arguments regarding the Appellants improperly seeking a ruling from the Board. The Department contends that, contrary to the Appellants' argument that the Board's decision in *Cromwell* hinged on mootness, the Board's determination in *Cromwell* was in fact "dictated by the fact that the only relief that the Board could offer was a declaration of facts which would assist appellants in their parallel civil litigation." Department's Reply Brief at 2. It is the Department's position that here, as in *Cromwell*, the Appellants seek only a declaration of facts to be used in a related matter.

We agree with the Appellants in this matter and for the reasons that follow, we deny the Department's Motion to Dismiss/Motion for Summary Judgment.

Standard of Review

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *West Buffalo Twp. v. DEP*, 2015 EHB 780, 781; *Brockley v. DEP*, 2015 EHB 198, 198-99; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 122-23, *aff'd*, *Consol Pa. Coal Co. LLC v. Dep't of Envtl Prot*., 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390.

A Motion for Summary Judgment may be granted when (1) the pleadings, depositions, answers to interrogatories and admissions, and, if available, affidavits, show that there is no genuine issue of material fact, and (2) that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(a), (b)(iv), (d), (i); Pa.R.C.P. 1035.1; *Robinson Coal Company v. DEP*, 2011 EHB 895, 905; *Energy Resources, Inc. v. DER*, 1990 EHB 901, 904; *Miller v. DER*, 1988 EHB 538, 541. In coming to its decision, the Board should review the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubts as to the presence of a genuine issue of material fact

against the moving party. *Paul Lynch Investments, Inc. v. DEP*, 2016 EHB 845, 847 (quoting *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81).

Discussion

We do not think that the Department has met its burden to be entitled to summary judgment in this appeal. The Department has not challenged the Appellants' standing. It has admitted that the construction of the pipeline triggers the regulations under Act 13. And ultimately, Appellants' motivation for their appeal of a final Department action is irrelevant where the Appellants challenge a final appealable action of the Department.

The Department's first argument – that the appeal should be dismissed because the Appellants are seeking a determination from the Board in order to give themselves a more favorable position before the Court of Common Pleas – is misplaced. The Department relies on *Cromwell Township*, supra, for its argument. In *Cromwell*, the Department initially approved the township's Act 537 Plan and the township appealed. At a later point, the Department withdrew its approval of the Plan and filed a motion to dismiss the appeal with the Board based on the appeal being rendered moot. The township argued that that it needed a ruling from the Board to avoid adversely affecting its position in a separate but related civil action. Ultimately, the township wanted a Board decision so that it might put itself in a more favorable position in its separate but related civil action. The Board granted the Department's motion under these facts.

In its Motion in this appeal, the Department highlights and correctly characterizes dicta from the *Cromwell* decision. Specifically, dicta that discusses the speculative nature of any aid that might be given by a Board ruling, and the idea that another court might "attribute some superior level of credibility to the Department's letter [without a Board decision] is ephemeral." *Cromwell*, 2007 EHB at 11. However, we think the Department has misapplied the Board's

decision to this appeal. While the Board addressed the concerns surrounding hypothetical adverse effects in pending and related litigation, the Board's decision hinged on the Department's appealed action having become moot. The letter, which prompted the township's appeal, had been withdrawn by the Department and the Board could offer no further relief, rendering the appeal moot. *Id*. at 12. The Board did not grant the Department's motion to dismiss because the township sought a Board determination for the purpose of situating itself in a better position. The Board granted the Department's motion because the appeal was moot. This is a critical distinction.

As Appellants point out in their Response, the Department's letter to the Appellants has not been rescinded. Appellants' appeal is not moot – and the Department did not file a motion to dismiss on the basis of mootness. The Mootness Doctrine and its exceptions are not relevant here. Neither is the Appellants' motivation for their appeal or what they may intend to do with the Board's review of a final Department action including the Department's determination. Our role is to evaluate Department final actions that have been appealed.

The Department seems to argue that the outcome of *Cromwell* rested not on mootness, but on the Board's apparent inability to offer meaningful relief. We disagree with this interpretation – though mootness and inability to offer meaningful relief are certainly related. In *Cromwell*, the Board's first point addressing the appeal is that the Township "achieved the result sought by its notice of appeal, [and] any further ruling by this Board would be in the nature of an advisory opinion." *Cromwell*, 2007 EHB at 11. The Department argues that "the only relief the Board could offer was a declaration of facts" that would aid the appellants in their parallel litigation. In the context of *Cromwell*, this is true. The Department action appealed had been withdrawn, thereby becoming moot. The Board was no longer in a position to analyze the

Department's action. Therefore, *because the appeal was moot*, the Board could do no more than offer a declaration of facts. The Board specifically stated,

> In short, because the Department's letter which aggrieved that the [sic] Township has been withdrawn, there is no further relief that the Board can offer and the Township's appeal is moot.

Cromwell, 2007 EHB at 12. We agree with the Appellants in this appeal that *Cromwell* is not analogous with this appeal. Here, there is still a final Department action and we may still evaluate that action.

The Department's second related argument – that its conclusion in the letter that it sent to the Appellants' does not affect their property rights, privileges, liabilities, or other obligations – falls short as well. The Department cites as the basis for its argument the well-established rule that Department communications that do not impact a party's personal or property rights, remedies, or avenues of redress are not final appealable actions. The Department suggests that its letter is without impact and the Appellants may pursue grievances elsewhere, in other judicial forums. While the Department does not explicitly say that the challenged action is not a final appealable action, we cannot help but imagine that this is what the Department means, especially within the context of Section 3218 of Act 13.

The Board previously indicated that it was "not [yet] aware of how or whether Section 3218 of Act 13 is implicated in this appeal involving pipeline construction activities and a water loss complaint." *Robert W. Diehl and Melanie L. Diehl v. DEP and Angelina Gathering Company, LLC*, 2016 EHB 853, 856. The Department has provided the explanation and the Board is now informed on this point.

According to the Department, the Appellants made a complaint to the Department alleging that a spring on their property was adversely affected by the Intervenor's construction of a pipeline on Appellants' property to transport natural gas. Department's Statement of

Undisputed Material Facts at ¶ 7. Section 3218 of Act 13 provides a landowner with the right to notify the Department and request an investigation of a water supply complaint as a result of the drilling, alteration or operation of an oil or gas well, and imposes a duty upon the Department to make a determination within 45 days of the notification. 58 Pa. C.S.§ 3218(b).[1] As per the Department, its Oil and Gas regulations provide, in part:

1. A landowner suffering from diminution of a water supply as a result of oil or gas operation may notify the Department and request an investigation. 25 Pa. Code § 78a.51; Department's Statement of Undisputed Material Facts at ¶ 9.
2. A water supply is defined as a supply of water for various uses including "other legitimate beneficial uses." 25 Pa. Code § 78a.1; Department's Statement of Undisputed Material Facts at ¶ 10.
3. Oil or gas operations include "construction, installation, use, maintenance, and repair of . . . gather and transmission pipelines." 25 Pa. Code § 78a.1; Department's Statement of Undisputed Material Facts at ¶ 11.

The Department asserts that it received a complaint from the Appellants, conducted an investigation, and determined that the water supply loss was merely temporary. Department's Statement of Undisputed Material Facts at ¶¶ 12-13. The Appellants challenge the Department's determination that the impacts to their spring are merely temporary. *Id*. at ¶ 17.

Notwithstanding the Department's sleight of hand attempt to cite Section 5 of the Clean Streams Law rather than Section 3218 of Act 13, this appeal implicates Section 3218 as a result

[1] For reasons not explained, the Department cited Section 5 of the Clean Streams Law, 35 P.S. § 691.5(b)(6) rather than Section 3218. While Section 5 of the Clean Streams Law does provide a very general grant of authority to "Receive and act upon complaints", Section 3218 provides more detailed authority to investigate water supply complaints related to the operation of an oil or gas well. Section 3218 is implicated in this appeal involving Appellants' complaint and the Department's determination, for the reasons set forth in this Opinion.

of the Department's actions under the Section and the regulations promulgated by the Environmental Quality Board to implement Act 13. Under Section 3218 and the regulations promulgated thereunder, as already alluded to, the Department has a duty to investigate complaints from landowners regarding alleged water supply loss and to make a determination following its investigation. Under Section 3218, a landowner may file an appeal with the Board challenging the Department's determination. *Kiskadden v. DEP and Range Resources-Appalachia, LLC*, 2012 EHB 171, 177-78. Here, the Appellants wish to challenge the Department's determination that the water supply loss they suffered is merely temporary.

Noticeably absent from the Department's argument is any discussion of Act 13 and the *Kiskadden* decision. As we stated above and in our November 30, 2017 Opinion in this appeal, Act 13 contains express provisions concerning the protection of water supplies in Section 3218. 58 P.C.S. § 3218. The Board has concluded that a Department determination under this provision is appealable by a property owner who believes the Department erred when it investigated its water supply complaint and determined that the oil and gas activity did not adversely affect the property owner's water supply. *Kiskadden*, 2012 EHB at 177-78. Both the particular language of Act 13 and the affirmative duty imposed on the Department to make a determination in response to a complaint about a water supply loss allowed the Board to distinguish *Kiskadden* from the earlier *Schneiderwind* case and find that a Department determination under Section 3218 is an appealable action.

In its Motion, the Department acknowledges that it conducted an investigation of the Appellants' spring pursuant to the regulations promulgated under Act 13. Department's Motion at 2-3, ¶ 9-11. The cited regulations were promulgated to implement Act 13. *See* 46 Pa. B. 6431 (October 8, 2016) (Statutory authority portion of preamble specifically references Section

3218(a)).[2] It also acknowledges that the Appellant's spring is a "water supply" as defined by the regulations. *Id*. Finally, it confirms that the construction of pipelines sits within the amended definition of "oil and gas operations."[3] *Id*. With this information, we have no trouble concluding that the letter the Appellants received from the Department is an appealable action under Act 13 and 25 Pa. Code § 78.51a. A hearing is the proper place to address whether this appealable Department determination was lawful and reasonable.

Conclusion

We deny the Department's Motion to Dismiss/Motion for Summary Judgment. The Board does not concern itself with an appellant's motivation for bringing an appeal. The case upon which the Department relied addresses related civil actions in the context of a mootness claim. It does not apply here. Further, the Department has acknowledged that it acted pursuant to its authority under the regulations promulgated to implement Act 13 when it inspected Appellants' spring. It is clear to us that the letter containing the determination that the water loss was temporary that the Department sent to the Appellants is an appealable action. As such, it

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[2] Section 3218(a) provides in part that the Environmental Quality Board shall promulgate regulations to implement protection of the water supply requirements. 58 P.S. § 3218(a).

[3] However, the Board finds that this particular point raises some questions, due to 1 Pa. C.S. § 1953 regarding statutory construction, which reads:

> Whenever a section or part of a statute is amended, the amendment shall be construed as merging into the original statute, become a part thereof, and replace the part amended, and the remainder of the original statute and the amendment shall be read together and viewed as one statute passed at one time; but the portions of the statute which were not altered by the amendment shall be construed as effective from the time of their original enactment, and *the new provisions shall be construed as effective only from the date when the amendment became effective*.

1 Pa. C.S. § 1953 (emphasis added). As the Department points out in its footnote, it applies a definition that became effective after the Appellants filed their appeal. While, the new definition was possibly not yet in effect when the Department conducted its inspection and sent the Appellants its determination regarding their spring, Section 3218 was in effect and the regulations promulgated in 2016 implemented the statutory duty enacted in 2012..

affects their property rights, privileges, liabilities, or other obligations. Therefore, we deny the Department's Motion and issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
	:	
v.	:	**EHB Docket No. 2016-099-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	

O R D E R

AND NOW, this 21st day of December, 2017, the Department's Motion to Dismiss/Motion for Summary Judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: December 21, 2017

c: **For DEP, General Law Division:**
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