

Environmental Hearing Board

Adjudications and Opinions



2012
VOLUME II

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

**JUDGES
OF THE
ENVIRONMENTAL HEARING BOARD**

2012

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskés, Jr.
Judge	Richard P. Mather, Sr.
Judge	Steven C. Beckman (Appointed 10-3-12)
Secretary	Vincent F. Gustitus, Jr.

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2012 EHB 1

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FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2012.

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.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARTIN DOCTORICK

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2011-152-M

Issued: July 2, 2012

**OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS**

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss and dismisses an appeal that was filed late because the Board does not have jurisdiction over an untimely appeal. The Appellant did not file a response to the Department's motion.

DISCUSSION

On August 31, 2011, the Department of Environmental Protection (the "Department") issued an Assessment of Civil Penalty to Martin Doctorick in the amount of \$7,100.00 for violations of the Air Pollution Control Act 35 P.S. §§ 4001-4015 and the Department's regulations promulgated thereunder. The Department filed a motion to dismiss the appeal on the bases that Doctorick failed to timely file the appeal and he also failed to prepay the civil penalty.

Under our rules, a response to a dispositive motion may be filed within thirty days after the dispositive motion has been served. That time having elapsed, Doctorick has not responded to the Department's motion to dismiss, and the Department's motion is now ripe for our consideration.

A motion to dismiss will be granted by the Board where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *McKissick Trucking, Inc. v. DEP*, 2011 EHB 111, 112; *Spencer v. DEP*, 2008 EHB 573, 574; *Eljen Corp. v. DEP*, 2005 EHB 918. Under our rules, the Board only has jurisdiction over timely appeals. 25 Pa. Code § 1021.52(a); *Rostokosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976) (“[T]he untimeliness of the filing deprives the Board of jurisdiction”). Where the Department has directed or issued its decision to a party, that party must file its appeal within thirty days after it receives written notice of the action, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Schwab v. DEP*, 2011 EHB 397, 398; *Spencer v. DEP*, 2008 EHB 573, 574. Therefore, except in the very rare circumstances where an appeal *nunc pro tunc* will be granted, the Board, lacking jurisdiction over untimely appeals, will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set by our rules. *See* 25 Pa. Code § 1021.53a; *see also Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979).

Although Doctorick asserts that he received notice of the Department’s action on September 21, 2011, we find it clear that Doctorick has filed his appeal more than thirty days after receiving the Department’s notice of the action by certified mail.¹ The Department has demonstrated that Roberta C. Adams signed the return receipt accepting the Department’s assessment on September 10, 2011 at Doctorick’s place of business, but the appeal was not filed until October 20, 2011, 40 days later. *See* 1 Pa. Code § 31.12; *see also Spencer* at 574 (The Board computes time according to the regulations governing the practice and procedure before agencies of the Commonwealth). Further, the Air Pollution Control Act does not provide

¹ We note that the Department’s motion to dismiss correctly asserts that Doctorick has also failed to prepay the civil penalty at the time of filing his appeal. Failure to prepay civil penalties is a basis for the dismissal of an appeal. *See* 35 P.S. § 4009.1. Because the Board grants the Department’s motion to dismiss as untimely the Board does not have to reach a decision in the failure to prepay civil penalties argument.

appellants with any additional time to file an appeal of a Department issued according to that act. 35 P.S. §§ 4001 *et. seq.* Even if Doctorick were to argue that he did not personally receive the assessment until September 21, 2011 (the date listed in the notice of appeal), receipt of the Department's action at his place of business on September 10, 2011 was adequate notice as of that date. *See Milford Twp. Bd. Of Supervisors v. DER*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994).

It is important to note that Doctorick has elected not to contest these basic underlying facts by filing a response. Therefore, the uncontested facts asserted in the Department's motion are admitted. 25 Pa. Code § 1021.91(f). We conclude that Doctorick's appeal is untimely, and the Board lacks jurisdiction to hear the appeal. *See Baglier v. DEP*, 2011 EHB 551; *Pedler v. DEP*, 2004 EHB 852, 854; *Burnside Township v. DEP*, 2002 EHB 700, 703 (An appeal filed even one day late will be dismissed).

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARTIN DOCTORICK

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

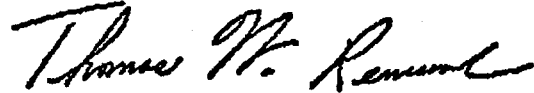
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EHB Docket No. 2011-152-M

ORDER

AND NOW, this 2nd day of July, 2012, it is hereby ordered that the Department's motion to dismiss is **granted**, and the appeal docketed at Docket No. 2011-152-M is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: July 2, 2012

c: Department Litigation:
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Office of Chief Counsel – Southwest Region

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Monongahela, PA 15063



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARY E. COLLIER and RONALD M.
COLLIER

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and MARK M.
STEPHENSON, Permittee

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EHB Docket No. 2010-034-R

Issued: July 3, 2012

**OPINION AND ORDER
ON MOTION FOR PARTIAL ADJUDICATION**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

A third party who was not a party to a Consent Order and Agreement between the Department of Environmental Protection and a gas well operator is not bound by the terms of the Consent Order and Agreement. However, the Environmental Hearing Board finds no basis for striking provisions of the Consent Order and Agreement which have no effect on the third party's legal rights.

OPINION

This matter involves a Consent Order and Agreement entered into between the Pennsylvania Department of Environmental Protection (Department) and Mark M. Stephenson requiring Mr. Stephenson to replace and/or restore the water supply of Mary E. and Ronald M. Collier (the Colliers) in West Mahoning Township, Indiana County, Pennsylvania. The Colliers

have appealed the Consent Order and Agreement to the Pennsylvania Environmental Hearing Board.

Background

Based on the documents filed in this matter, the undisputed facts are as follows: The Colliers own property in West Mahoning Township, Indiana County. Situated on the property in July 2006 was a log cabin mobile home which the Colliers used on a part-time basis. There was also a well on the property that supplied water to the cabin. In July 2006, Mr. Stephenson drilled a gas well on property adjacent to the Colliers'. The gas well was located approximately 292 feet from the Colliers' water supply. Within six months of the gas well's completion, Mrs. Collier complained to the Department that the water supply well on the Collier property had been polluted by the Stephenson gas well.

After conducting an investigation, the Department issued an order on February 12, 2008 finding Mr. Stephenson liable for pollution of the Colliers' water supply pursuant to Section 208 (c) of the 1984 Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. 601.208, which was in effect at the time of the order. That section held as follows:

(c) Unless rebutted by one of the five defenses established in subsection (d), it shall be presumed that a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.

58 P.S. § 601.208.

The 1984 Oil and Gas Act has been repealed and replaced by the current Oil and Gas Act, Act of February 14, 2012, P.L. 87, 58 Pa.C.S. §§3201-3274, which contains a similar provision at Section 3218(c).

The Department's February 12, 2008 order required Mr. Stephenson to provide a written plan and schedule describing in detail his proposal for restoring or replacing the Colliers' water supply. Mr. Stephenson appealed the order to the Environmental Hearing Board on March 19, 2008. *Stephenson v. DEP*, EHB Docket No. 2008-083-R. The Colliers intervened in the Stephenson appeal. Additionally, the Colliers filed a complaint in civil action against Mr. Stephenson in the Court of Common Pleas of Indiana County, seeking damages for pollution to their water supply.

On February 26, 2010, Mr. Stephenson entered into a Consent Order and Agreement (hereinafter sometimes referred to as the "COA") with the Department regarding the restoration or replacement of the Collier water supply. The Colliers were not a party to the Consent Order and Agreement, nor were they part of the negotiations. (Affidavit of Peter Marcoline, Colliers' Motion for Summary Judgment) The Colliers have appealed the Consent Order and Agreement to the Environmental Hearing Board.

On December 17, 2010, both the Colliers and the Department filed motions for partial summary judgment. By order entered on May 19, 2011, the Board denied the motions. Following a settlement conference held on November 2, 2011, the Board entered an order requiring the Colliers to file a Motion for Partial Adjudication and the Department and Stephenson to file responses on the following issue: *Whether the Department had the authority to include paragraph 2.b in the Consent Order and Agreement.*

We treat this motion in the same manner as a motion for partial summary judgment, which we must review in the light most favorable to the non-moving parties. *Goetz v. DEP*, 2003 EHB 16, 18-19. Judgment may be granted only if the record establishes there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter

of law. 25 Pa. Code § 1021.94a(1); *Berks County v. DEP and Exide Technologies*, EHB Docket No. 2010-166-L (March 16, 2012), *slip op.* at 1.

The disputed paragraph of the Consent Order and Agreement - "paragraph 2.b" - reads as follows:

2.b The parties do not authorize any other persons to use the findings in this Consent Order & Agreement in any matter or proceeding including the Common Pleas Action.

The "Common Pleas Action" referred to in paragraph 2.b is described in paragraph M of the Consent Order and Agreement as follows:

M. On or about December 30, 2008, the Colliers filed a Complaint against Stephenson in the Indiana County Court of Common Pleas at Docket No. 11480-CD-2008 ("Common Pleas Action") asserting claims arising out of this matter.

(Exhibit 1 to Colliers' Motion)

The sole issue before the Board is whether the Department had the legal authority to include paragraph 2.b in the Consent Order and Agreement. If we find in the negative, the Colliers' motion asks the Board to vacate paragraphs M and 2.b of the Consent Order and Agreement.

Paragraph M

Although the proposed order attached to the Colliers' motion asks us to vacate both paragraph 2.b and paragraph M, the body of the Colliers' motion for partial adjudication makes no mention of paragraph M. The motion addresses only paragraph 2.b. The memorandum in support of their motion also makes very little mention of paragraph M. In referencing paragraph M in their memorandum, they include the following footnote: "Appellants' claims against Stephenson in the Indiana County Court of Common Pleas arise out of the pollution of

Appellants' Water Supply and not the COA." (Appellants' Memorandum in Support of Motion, p. 6, fn. 2) The Colliers' only dispute with paragraph M seems to be that it relates to paragraph 2.b and states – incorrectly, according to them – that their lawsuit in the Indiana County Court of Common Pleas asserts “claims arising out of this matter.” Later in their memorandum they state as follows:

Appellants' civil action and this provision [paragraph M] was totally irrelevant to compliance by Permittee Stephenson with the Administrative Order entered by the Department on February 12, 2008 to restore Appellants [sic] Water Supply required by the *Oil & Gas Act* and *Pennsylvania Code*.

(Appellants' Memorandum in Support of Motion, p. 9-10) (emphasis in original)

The Colliers have provided us with no legal basis for vacating paragraph M of the COA other than the fact that they disagree with the representation that their civil suit involves claims arising out of their appeal of the COA. This argument is unpersuasive. The Colliers admit that their action in the Indiana County Court of Common Pleas involves the restoration of their water supply, which is the subject matter of the COA. Whether the claims in their civil action *arise out of or are related to* the issues in their appeal of the COA seems to us to be splitting hairs. We, therefore, will not strike the language.

Paragraph 2.b

The heart of the Colliers' motion involves paragraph 2.b which reads as follows:

2.b The parties do not authorize any other persons to use the findings in this Consent Order & Agreement in any matter or proceeding including the Common Pleas Action.

The Colliers argue that the Department had no authority to bind them to an agreement to which they were not a party, citing various cases, including the *City of Chester v. PUC*, 773 A.2d 1280, 1286 (Pa. Cmwlth. 2001) in which the Commonwealth Court held that a consent decree

that had been entered into by the PUC and a transit authority could not bind anyone who was not a party to the agreement. The Colliers also argue that the disputed provisions are designed to preclude them from using the COA in their action against Mr. Stephenson in common pleas court, and they contend this violates their right to due process. Finally, the Colliers contend that paragraph 2.b amounts to a confidentiality clause and is void as a matter of public policy.

In response, both the Department and Mr. Stephenson cite Pennsylvania Rule of Evidence 408 which states in relevant part as follows:

Rule 408. Compromise and Offers to Compromise

(a) **Prohibited uses** – Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations.

Pa.R.E. 408 (a).

Both the Department and Mr. Stephenson argue that Pa.R.E. 408 bars the Colliers from using the COA to establish liability on the part of Mr. Stephenson in their private lawsuit as a matter of law.¹ The Department further argues that the COA does not violate the Colliers' right to due process since they have no right to the findings in the COA, and their right to due process is achieved by their right to an appeal before the Environmental Hearing Board. The Department cites several cases, including the Commonwealth Court's decision in *Morcoal Co. v. DEP*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983), for the proposition that the opportunity to appeal a

¹ Mr. Stephenson also makes a similar argument with regard to 42 Pa.C.S.A § 6141.

Department decision to the Environmental Hearing Board satisfies an appellant's right to due process. The Department asserts that the facts the Colliers seek to use in their civil action are available in documents other than the COA and, therefore, their motion is superfluous. Finally, the Department argues that the question of whether the findings of the COA may be used in the Colliers' civil action, or whether they are barred from use by Pa.R.E. 408, is a question for the Indiana County Court of Common Pleas.

In reply, the Colliers argue that Pa.R.E. 408 has no applicability here because the COA is not a settlement or compromise.²

Consent Orders and Agreements have long been viewed as a hybrid, comprising the elements of both a settlement agreement and an order.³ COA's are subject to review by the Board where they affect the personal or property rights of the person challenging the COA. *Broad Township v. DEP*, 2006 EHB 164; *Lang v. DEP and Maple Creek Mining*, 2004 EHB 584; *Burroughs v. DER*, 1992 EHB 1084. *See, Throop Property Owners Assn. v. DER*, 1988 EHB 38 (A COA is a final action of the Department and is subject to challenge by those affected and to review by the Board.) Here, the Colliers' personal and property rights are impacted by the COA since it addresses the replacement of their water supply. Therefore, the COA is subject to challenge by the Colliers and review by the Board.

² The Colliers similarly respond to Mr. Stephenson's argument regarding 42 Pa.C.S.A. § 6141.

³ For the proposition that a COA may be treated as a settlement agreement, *see American Iron Oxide v. DEP*, 2005 EHB 748, 749 ("The parties entered into settlement negotiations and signed a Consent Order and Agreement. . ."); *Franklin Twp. Municipal Sanitary Authority and Borough of Delmont v. DER*, 1990 EHB 916, 922 ("[The appellant] and DER negotiated a settlement of their differences. . . This took the form of a Consent Order and Agreement. . ."); *Bethlehem Mine Corp. v. DER and United Mine Workers*, 1984 EHB 872 (The Board described an Amended COA as a modified settlement agreement.) In *Carter v. DEP and Cabot Oil and Gas Corp.*, 2011 EHB 845, the subject of the appeal was a document entitled "consent order and settlement agreement." For the proposition that a COA may be treated as an order, *see DER v. Bethlehem Steel Corp.*, 367 A.2d 222 (Pa. 1976), *cert. denied*, 430 U.S. 955 (1977), and *DER v. Landmark International, Ltd.*, 570 A.2d 140 (Pa. Cmwlth. 1990).

In reviewing the COA we apply the basic principles of contract law. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829; *Benjamin Coal Co. v. DER*, 1989 EHB 683. One of those principles is that a non-party to a contract cannot be bound by the terms of the contract unless the non-party agrees to its terms. *City of Chester, supra.*; *Lang, supra.* Here, the Colliers are the third-party beneficiaries of the COA but were not a party to the agreement. Therefore, they cannot be bound by the terms of the COA.

However, the Colliers are not asking the Board to strike the COA but simply paragraph 2.b which they claim bars them from using the COA's findings in their civil suit. The Colliers state that they are not asking the Board to rule on whether they may use the COA findings in their common pleas action but simply whether the Department has the authority to include paragraph 2.b in the COA. The Colliers argue:

This Board has neither the jurisdiction nor authority to determine whether or not Pa.R.E. 408 would bar Appellants from admitting into evidence the COA, for whatever reason they chose, in the Indiana County Court of Common Pleas, that issue solely being within the jurisdiction of the Court. This Board's jurisdiction is limited to the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5, 35 P.S. § 7514(a). The enabling statute does not give this Board authority or jurisdiction to determine the applicability of Pa.R.E. 408 to the admissibility of any evidence, including the COA, in the Indiana County Court of Common Pleas [citations omitted]. This Board has no authority to decide whether the COA is either admissible or inadmissible pursuant to Pa.R.E. 408 in Appellants' civil action.

(Appellants' Reply to Department's Response, p. 3-4)

We agree that we may not rule on whether the COA is admissible in the proceeding before the Indiana County Court of Common Pleas. That is a matter for the common pleas court to decide. Therefore, the sole issue before us is whether there is a basis for striking Paragraph 2.b from the COA unrelated to the common pleas action.

Although we find that the Colliers may not be bound by the terms of paragraph 2.b, we are hesitant to strike the provision entirely from the COA. The language of paragraph 2.b is not limited solely to the Colliers or their action before the Indiana County Court of Common Pleas. Moreover, paragraph 2.b does not state that it prohibits the use of the findings of the COA but simply that any use thereof is not with the authorization of the Department and Mr. Stephenson. We are not persuaded that paragraph 2.b limits the Colliers in any way. Rather, the admissibility or non-admissibility of the COA findings will be governed by Pa.R.E. 408, and not the language of paragraph 2.b.

We think it ill-advised to rewrite the terms of the COA that the Department and Mr. Stephenson have agreed to. They entered into the COA after considerable negotiation, and we do not wish to discourage settlement negotiations in the future by imposing new terms or conditions or deleting agreed-to provisions. *Bethlehem Mines Corp., supra* at 65. Because the language of paragraph 2.b does not impose any obligations on the Colliers nor affect their legal rights, we find no basis for striking it from the COA.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARY E. AND RONALD M. COLLIER

v.

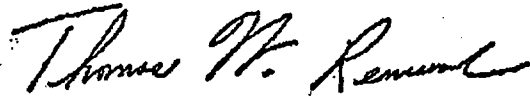
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and MARK M.
STEPHENSON, Permittee

EHB Docket No. 2010-034-R

ORDER

AND NOW, this 3rd day of July, 2012, it is hereby **ORDERED** that the Colliers' Motion for Partial Adjudication is denied.

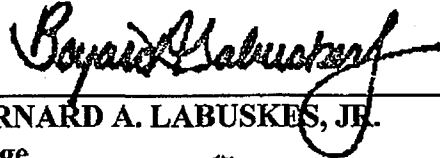
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: July 3, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA’S FUTURE :

v.

EHB Docket No. 2011-168-M

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CHESAPEAKE :
APPALACHIA, LLC, Permittee :

Issued: July 9, 2012

**OPINION AND ORDER ON
MOTION TO DISMISS**

By Richard P. Mather, Sr., Judge

Synopsis

The Appellant, Citizens for Pennsylvania’s Future (“PennFuture” or “Appellant”) filed an appeal of three related actions which it claims the Department took to approve the Chesapeake Appalachia, LLC (“Chesapeake”) Beyond-Brule waterline project (“Project”) in Elkland Township, Sullivan County. Chesapeake filed a motion to dismiss a portion of PennFuture’s appeal asserting that the Environmental Hearing Board (“Board”) has no jurisdiction over two of the three actions that PennFuture has challenged in this appeal.

The Board denies Chesapeake’s motion to dismiss. The challenge to the general permit-like Section 401 Water Quality Certification is not untimely, as Chesapeake asserts, because the current appeal was filed within 30 days of the Department’s action to use or apply the general permit-like Section 401 Certification to the Project. In addition, the limited record currently before the Board prevents the Board from fully determining the role of the Department in processing and granting coverage under the United States Corps of Engineers (“Corps”) Pennsylvania State Programmatic General Permit – 4 (“PASPGP-4”). While PASPGP-4 is

clearly a federal permit issued by a federal agency under federal law, it appears that the Department has a well-defined role under this regulatory scheme, and this active role may result in final Department actions that can be appealed to the Board. At this preliminary state of litigation and based upon the limited record before the Board, the Board is unable to grant Chesapeake's motion to dismiss regarding the Department's actions related to Chesapeake's receipt of coverage under the Corps' PASPGP-4.

OPINION

PennFuture has filed an appeal from the Department's actions to approve the Project. PennFuture, in its Amended Notice of Appeal, states that there are three components of the Department action to approve the Project. According to PennFuture's Notice, the approval includes the issuance of the water obstruction and encroachment Joint Permit Number E-5729-014, the Pennsylvania State Programmatic General Permit 4 Number 752938 and the Water Quality Certification under Section 401 of the Federal Water Pollution Control Act 33 U.S.C. § 1341 ("401 Water Quality Certification" or "Certification") that authorized Chesapeake to construct and maintain two temporary aboveground waterlines to support gas well development and operations on two well sites in Elkland Township, Sullivan County. PennFuture's Notice of Appeal further states that it received notice of the Department's actions by means of a Pennsylvania Bulletin Notice dated October 29, 2011. 41 Pa. B. 5810.

In its motion to dismiss, Chesapeake challenges the second and third component of PennFuture's appeal of the Department's approval of the Project.¹ Chesapeake asserts that PASPGP-4 is a federal permit issued, by a federal agency under federal law, and the Board lacks

¹ It is important to recognize that Chesapeake has not challenged, in its motion to dismiss, the appeal of the state water obstruction and encroachment Joint Permit Number E-5729-014. This portion of the appeal will continue regardless of the Board's resolution of Chesapeake's Motion to Dismiss.

jurisdiction because the Corps, not the Department, issued PASPGP-4. Chesapeake also asserts that PennFuture's challenge to the Department's issuance of the 401 Water Quality Certification is not timely because the Department issued the 401 Water Quality Certification on July 16, 2011 and PennFuture filed its appeal on November 28, 2011, which is more than 30 days beyond the date of issuance for the 401 Water Quality Certification for PASPGP-4.

The Department did not join in Chesapeake's motion to dismiss, but it filed a response in support of Chesapeake's motion.² In its response the Department primarily addresses Chesapeake's first point that the Board lacks jurisdiction over PASPGP-4 because it is a federal permit issued by a federal agency under federal law. The Department agrees with Chesapeake and it supports dismissal of the component of PennFuture's appeal related to PASPGP-4. In addition, the Department very briefly discussed Chesapeake's timeliness argument regarding the Section 401 Water Quality Certification, and it appears that the Department also supports Chesapeake's position on the 401 Water Quality Certification.

PennFuture filed a Response to Chesapeake's motion to dismiss. PennFuture asserts that it is not appealing the Corps' issuance of PASPGP-4, but merely the Department's action to verify that the Project is authorized under PASPGP-4. PennFuture asserts that the Department plays an active and crucial role in determining a person's eligibility for authorization under PASPGP-4. On the issue of the timing of the Appeal of the 401 Water Quality Certification for SPGP-4, PennFuture asserts that its appeal is timely because the Certification was applied to the Project in connection with the verification, and notice of the verification and Certification was

² To ensure that PennFuture had an opportunity to reply to the Department's supporting response to Chesapeake's motion to dismiss, the Board scheduled a conference call with the parties after the Department filed its response to inform the parties that PennFuture was allowed to file a Reply Brief to the Department's Response Brief.

published in the Pennsylvania Bulletin on October 29, 2011. 41 Pa.B. 5810. PennFuture filed its appeal on November 28, 2011 which is within 30 days of that date.³

Chesapeake filed a Reply to PennFuture's Response. On the issue of the timing of the appeal of the Department's 401 Water Quality Certification, Chesapeake asserts that there was no separate certification issued for the Project and the date to appeal the Certification issued for the Project and the date to appeal the certification for PASPGP-4 was within 30 days of the date when the Department issued the Certification on July 16, 2011. 41 Pa. B. 3938. In the alternative, Chesapeake asserts that no case-by-case 401 Water Quality Certification is necessary for projects authorized to PASPGP-4.

PennFuture filed a Reply to the Department's Response supporting Chesapeake's Motion to Dismiss. PennFuture asserts that the Department's verification of the Project under PASPGP-4 is a final appealable action over which the Board had jurisdiction. PennFuture asserts that the Department's verification of the Project is authorized by PASPGP-4, and it includes a determination that the Project satisfies the requirements of the PASPGP-4, which allows Chesapeake to use it for Chesapeake's Project.

The Board will grant a motion to dismiss where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2012-040-M, (Opinion and Order issued May 29, 2012); *Northampton Township v. DEP*, 2008 EHB 563, 570; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. For the reasons set forth in this Opinion, Chesapeake has not met its burden and it is not entitled to judgment on either of its claims.

³ In the alternative, PennFuture also asserts that there are issues of material fact whether the Section 401 Water Quality Certification applies to the Department's verification of the Project under PASPGP-4. According to PennFuture, these outstanding issues of material fact preclude granting of Chesapeake's motion.

Background

PennFuture's appeal is not filed in a regulatory vacuum, but it arises in the context of overlapping state and federal jurisdiction to regulate certain activities that Chesapeake wants to undertake for the Project. The Department regulates the activities that Chesapeake wants to undertake under the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, the Clean Streams Law 35 P.S. §§ 691.1 – 691.1001, and the regulations promulgated under these statutes in Chapter 105 of the Pennsylvania Code title 25, 25 Pa Code Chapter 105.⁴ The Corps regulates certain activities that Chesapeake wants to undertake under the Clean Water Act and the regulations promulgated under this statute. 33 U.S.C. § 1344. The Department and the Corps could independently implement their respective authority without regards to the other's regulatory programs. They have, however, not pursued this approach because they recognized that a coordinated and cooperative approach to implement their overlapping regulatory authority provides superior environmental protection while avoiding duplication of regulatory efforts, reducing overall permit application review times and minimizing costs for applicants by coordinating permit application requirements. 41 Pa. B. 3938 (July 16, 2011) (Notice of Department issuance of 401 Water Quality Certification for PASPGP-4). The current coordinated and cooperative regulatory framework to regulate activities, such as the Project, provides greater regulatory flexibility to permit applicants and streamlines permit applications procedures, requirements and timeframes.

The Board recognizes the obvious benefits of such cooperative and coordinated regulatory approaches that streamline permitting processes and reduce regulatory burdens. There

⁴ The Department has additional authority to regulate such activities, but for the sake of the Board's discussions in this appeal, we will focus on these statutory and regulatory requirements. *See e.g.*, Solid Waste Management Act, 35 P.S. § 6018.101 – 6018.1003; Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605; Hazardous Sites Cleanup Act, 35 P.S. §§ 6020.101 – 6020.1305.

are, however, sometimes legal issues associated with the use of such regulatory mechanisms that provide regulatory flexibility and reduced permitting burdens and timeframes. *See Hendryx v. DEP*, 2011 EHB 127; *Army for a Clean Environment v. DEP*, 2006 EHB 698.

The centerpiece of the Department's and the Corps' efforts to have a coordinated and cooperative joint effort to regulate activities in Pennsylvania, such as those related to the Project, was the development, issuance and implementation of PASPGP-4. The Board recognizes that this general permit is a federal permit issued by a federal agency under federal law. PASPGP-4 was, however, developed in a coordinated and cooperative manner with the Department.⁵ Under PAGSPS-4, the Department has what it appears to be a well-defined role in the implementation of this federal permit. The Department also issued a 401 Water Quality Certification for it, as required by federal law. In addition, the Department's Notice for its Certification for the Corps' PASPGP-4 states that:

PASPGP-4 places the Department of Environmental Protection (Department) regional offices and delegated county conservation districts in the lead for the majority of permit actions.

41 Pa. B. 3938 (July 16, 2011). The limited record before the Board does not explain what the Department means when the Department is "in the lead" for a particular permit action, such as a Project. Two of the three components of PennFuture's appeal relate to PASPGP-4 and its Certification, and these are the two components that are the subject of Chesapeake's dispositive motion. To address Chesapeake's dispositive motion, the Board will therefore have to examine the extent, nature and scope of the Department's and the Corps' joint effort to have a coordinated

⁵ The Department issued the 401 Water Quality Certification for the class or category of activities covered by PASPGP-4, which is a general permit. The Department provided joint notice of its state permit and the Corps' PASPGP-4 for the Project, and, according to the Department, the Department eventually provided the PASPGP-4 authorization to Chesapeake in accordance with the terms of the federal permit.

and cooperative approach to regulate activities in Pennsylvania, such as those related to the Project.

Appeal of 401 Water Quality Certification

One component of PennFuture's appeal is its challenge to the 401 Water Quality Certification that the Department issued in the context of the Corps' issuance of PASPGP-4. The parties agree that the Department's action to issue the required Certification is a final appealable action, and the Board has routinely resolve appeals to the Department's action to issue 401 Water Quality Certifications for a particular project. *See, e.g., Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007) (Third-party appeal of 401 Water Quality Certification issued to Pennsylvania Department of Transportation for a particular highway project). This appeal does not, however, involve the appeal of a 401 Water Quality Certification that the Department issued for a particular project. The 401 Water Quality Certification in question was issued for an entire class or category of projects covered by the Corps' PASPGP-4.

Although the parties agreed that the Department's action to issue the Section 401 Water Quality Certification is a final appealable action, the parties disagree about the timing of an appeal of the certification for the Corps' PASPGP-4. Chesapeake and the Department assert that the challenge is only timely if it is filed within 30 days of Department's action to issue the Certification for the Corps' general permit, which occurs before someone, like Chesapeake, applies to use it for a particular project, such as the Project. PennFuture on the other hand, asserts that its challenge is timely if it is filed within 30 days of the date that the general permit and its Certification are approved for use for a particular project. For the reasons set forth below, the Board rejects the Department's and Chesapeake's position on this issue because it is based on

a fundamental misunderstanding of the type and nature of the actions that the Department took and that PennFuture's appealed.

PASPGP-4 is, as its abbreviated title states, a general permit issued by Corps under Section 404(e) of the Clean Water Act. 33 U.S.C. § 1344(e). A general permit is, by its nature and scope, a permit for a class or category of activities that are capable of regulation or permitting using standard permit terms and conditions. General permits are allowed under state and federal law in numerous environmental permitting programs, and PASPGP-4 is specifically authorized by Section 404 of the Clean Water Act. 33 U.S.C. § 1344. General permits reduce regulatory burdens and streamline permitting timeframes without compromising comprehensive environmental protection. Under a general permitting program, the permitting authority develops a general permit, after public notice and comment, without regard to any particular project. Once the general permit is issued, persons who wish to use it have to comply with applicable requirements to receive coverage under the general permit. This two-step process is typical in most general permitting programs.

PASPGP-4 follows this typical two-step process for issuing and using general permits.⁶ Each step in this two-step process to first issue and then use PASPGP-4 in Pennsylvania is implicated in either the second and third component of PennFuture's appeal. Chesapeake and the Department assert that the appeal of the Department's 401 Water Quality Certification was not timely filed because it was filed well beyond the date that it was issued by the Department on July 16, 2011, in connection with the Corps' issuance of its PASPGP-4. The Board will address this aspect in this portion of the opinion. The Department also asserts that the Department took

⁶ The Corps issued PASPGP-4 as a general permit to allow a class or category of activities to qualify for a permit. After PASPGP-4 was issued, Chesapeake applied for and obtained coverage under it.

no action that was a final appealable action in connection with Chesapeake's obtaining coverage under PASPGP-4. The aspect will be addressed in the following portion of the opinion.

The Department issued its 401 Water Quality Certification for PASPGP-4 which the Corps issued for the class or category of activities covered by it. Chesapeake argues that PennFuture did not file its appeal to the Certification in a timely manner because its appeal was filed on November 28, 2011, well beyond the date that the Department issued the Certification for PASPGP-4 on July 16, 2011. If the Certification were for a specific project, the Board would agree with Chesapeake, but the Certification was issued for a general permit and not for any particular project.

The Department's 401 Water Quality Certification for PASPGP-4 is general permit-like in that it provides the required certification for particular projects in the future that qualify for coverage under PASPGP-4. It is important to understand that the Section 401 Water Quality Certification is needed for particular projects that qualify for PASPGP-4. The Board, rejects Chesapeake's assertion that a Section 401 Water Quality Certification is not required for individual projects or activity authorized by PASPGP-4, and it is only required for the Corps' initial action to issue the general permit without regard to projects or activities that subsequently qualify for coverage under it. Section 401(a)(1) requires "[a]ny *applicant* for a Federal license or permit to *conduct any activity*... shall provide the licensing or permitting agency a certification from the state..." 33 U.S.C. § 1341(a)(1). (emphasis added). Under the clear language of the federal statute, Chesapeake, the applicant, needs a Certification from Pennsylvania for the project or activity that it wants the Corps' permit, PASPGP-4, to authorize. The Department's Certification fulfills this legal requirement in a general permit-like manner by providing the needed Certification when the applicant, Chesapeake, qualified for coverage under the Corps'

general permit at a point in the future. The Certification is available for any project or activity that qualifies for coverage under PASPGP-4 in the future. The Board, therefore, views the Department's Certification as a general permit-like action.⁷

The Board has previously addressed timeliness issues like those presented here in the context of appeals of general permits and the later approval or registration of coverage under it. *See Belitskus v. DEP*, 1997 EHB 939; *Benjamin A. Stevens v. DEP*, 2000 EHB 438; *Army for a Clean Environment v. DEP*, 2006 EHB 698. These decisions help guide the Board in addressing the timeliness of an appeal issued for a general permit-like 401 Water Quality Certification. In *Belitskus*, the Department had issued general permits for certain stormwater discharges in 1992. In 1996, the permittee applied for and received coverage under one of the general permits. The permittee moved to dismiss arguing that the Board lacked jurisdiction over the coverage determination because the general permit was issued in 1992 and the appeal was not timely. The Board rejected this argument and stated:

[Permittee's] suggestion that Appellants' only opportunities to challenge DEP's actions were the filing of timely appeals from the adoptions of the general NPDES permits in October and November 1992 is without merit. At that point, neither Appellants nor anyone else could foresee the instances where DEP would approve coverage in the future. The general NPDES permits at the time of adoption were executory in nature, creating frameworks within which specific applications for coverage would be considered. It was only when those applications were filed by Willamette, seeking coverage for specific discharges to specific streams from specific sites and when those applications were approved by DEP with specific conditions that final, appealable actions occurred. It was only at that point that Appellants or other persons or entities could have been adversely affected.

Stevens 2000 EHB at page 442 (citing *Belitskus*, 1997 EHB at 946). Under *Belitskus*, the Department's decision to approve coverage under a general permit issued by the Department is

⁷ The dissent views the situation somewhat differently, but it reaches the same conclusion that Penn Future's challenge to the 401 Water Quality Certification for Chesapeake's Project is timely.

a final appealable action. In *Stevens*, the Board clarified the scope of the appeal as Judge Labuskes stated:

Although the Board in *Belitskus* was not perfectly clear on this point, the spirit if not the language of the opinion indicates that challenges to the general permits as well as the coverage determination were within the Board's jurisdiction.

Stevens, 2000 EHB at pages 442-43. Thus, under *Belitskus* and *Stevens*, the Board has decided that an appeal of the approval of coverage of a general permit is timely if it is filed within 30 days of the approval of coverage, and that the scope of the appeal includes the approval of coverage and the underlying general permit itself.

More recently, the Board addressed the applicability of the doctrine of administrative finality where a party fails to appeal the issuance of a general permit in *Army for a Clean Environment*. In this appeal, a mining permittee sought to bar a challenge to the approval of coverage under a general permit⁸ based upon the appellant's failure to challenge the earlier issuance of the general permit under the doctrine of administrative finality. The Board rejected the argument and refused to apply the doctrine to bar the appeal before it. *Army for a Clean Environment*, 2006 EHB at page 702-03. Judge Labuskes decided:

We do not see that deferring appeals until general permits are applied to specific situations compromises the vitality of administrative actions or frustrates the orderly operations of administrative law. To the contrary, we see an approach that encourages appeals from coverage approvals as preferable to creating a regimen where essentially meaningless, protective appeals must be filed from generic general permits.

General permits are a valuable regulatory device, but they should not be used as a tool for whittling down constitutional rights. The doctrine of administrative finality is nothing more or less than a tool to insulate agency action from review. When due process rights are implicated, we ought to be sparing in its application.

⁸ Under this general permit program, coverage was approved by means of an amendment to the mining permit.

Id. See also *Hendryx v. DEP*, 2010 EHB 127, 141 (Due process considerations regarding challenge to generic water management plan that covers multiple oil and gas permits).

The legal principles set forth in *Belitskus*, *Stevens* and *Army for a Clean Environment*, governing general permits apply for the same reasons to a general permit-like Department 401 Water Quality Certification issued in connection with the Corps' PASPGP-4. The time to appeal the Certification is not when the Certification is issued before it is applied to any particular project or activity. An appeal of a general permit-like Certification is timely where it is filed within 30 days of the date that the Certification is applied to a particular project that qualifies for coverage under the general permits. Chesapeake's Project received coverage under the Corps' PASPGP-4 and the Department's Certification for the Project on October 29, 2011. PennFuture filed its appeal on November 28, 2011, and therefore its challenge to the Department's Section 401 Water Quality Certification for the Project is timely.⁹

The position that Chesapeake and the Department advance concerning the timeliness of PennFuture's appeal of the Department's Section 401 Water Quality Certification is a Catch-22 that B-25 Bombardier Captain John Yossarian could appreciate.¹⁰ Under the Department's regulations, the Department issued a 401 Water Quality Certification for the classes or general categories of activities permitted under the federal SPGP-4. 41 Pa. B. 3938 (July 16, 2011). The Certification was issued months before the Department issued the approvals under appeal for the Project on October 29, 2011. At this time, it was issued, the Department did not have the

⁹ The scope of this aspect of PennFuture's appeal includes both the approval of coverage and the underlying Certification itself. See *Stevens*, 2000 EHB at page 442.

¹⁰ Captain Yossarian is the major character in Joseph Heller's classic novel *Catch-22*. The premise of the story was, as reflected in the title, no sane person would fly the very dangerous B-25 Michell bombing missions, but the minute you asked to be grounded you demonstrated you were not crazy and would have to fly the missions. If you flew the mission without requesting to be grounded you were crazy, and did not have to fly, although you did, but if you did request to be grounded you were sane and had to fly. If either situation, you flew the missions. Catch-22!

specific Project in mind, but it was issued to provide coverage for the classes or general categories of activities authorized by the federal SPGP-4.

Under Chesapeake's approach, the Catch-22 for PennFuture is that it could only appeal the Department's Certification before it was aware of the Project. This is a hollow appeal. If it waited until Project was approved, then its appeal of the Certification was not timely even though PennFuture objected to the use of the Certification for the Project. This approach is inconsistent with the Board's case law. The Department's Section 401 Water Quality Certification did not apply to any particular project and a later additional action was required to apply it to a particular site. Judge Labuskes addressed this point when he stated: "Potential appellants cannot be expected to use a crystal ball". *Army for a Clean Environment*, 2006 EHB at page 704. PennFuture is entitled to wait until the Department takes the action it wants to challenge, and its appeal is timely if it is filed within 30 days of the later date the Certification was applied to the Project.

The Department and Chesapeake would have the Board decide that PennFuture had to file its appeal of the Department's action to approve the Section 401 Water Quality Certification for the classes or general categories authorized by PASPGP-4 within 30 days of July 16, 2011. This is well before the Department approved the Project on October 29, 2011. Even assuming that such an appeal could overcome standing and ripeness concerns, Appellants would be deprived of their opportunity to challenge the Department approval of the Section 401 Water Quality Certification in the context of the Department's approval of the Project because the Department approved the Project on a different timeline.

Chesapeake also asks the Board to ignore statements in the Department's Chapter 105 Permit No. E5729-014 that states that "issuance of this permit also constitutes approval of a

Water Certification under Section 401 of the Federal Water Pollution Control Act” as “unnecessary and redundant.” Chesapeake’s Brief in support of its Dispositive Motion at p. 6. The Board rejects this argument because this statement in the Department’s Chapter 105 Permit No. E5729-014 supports the Board’s view that the Department provided coverage to Chesapeake under its general permit-like Certification at the time it issued its Chapter 105 Permit No. E5729-014.

Department’s role in providing PASPGP-4 authorization to Chesapeake in accordance with the terms of the federal permit

Chesapeake makes a very broad argument in its motion for summary judgment regarding PASPGP-4. Chesapeake asserts that the Board lacks jurisdiction over this component of PennFuture’s appeal because PASPGP-4 is a federal permit issued by a federal agency under federal law, and the Board only has jurisdiction over final actions of the Department arising under state law. In response, PennFuture asserts that it is not challenging the federal permit, issued by the Corps, but it has appealed the Department’s final action under the terms of PASPGP-4 to “authorize” or “verify” the Project under PASPGP-4. Chesapeake replies that the Department took no final action that can be appealed to the Board under PASPGP-4. At this stage of the litigation and based on the limited record before the Board, the Board is unable to discern the actual role of the Department in administering PASPGP-4 in Pennsylvania, and the Board will deny Chesapeake’s motion. With a more complete record, the Board will be able to decide whether the actions that the Department took under the terms of PASPGP-4 constitute final actions that provide the Board with jurisdiction.¹¹

¹¹ The Board agrees with Chesapeake and the Department that it has no jurisdiction over the terms of a federal permit issued by a federal agency under federal law. If the Board ultimately decides that it has jurisdiction it will be limited to a review of the Department’s role in administering PASPGP-4 and approving coverage or “verifying” a party’s status under it.

The Department had an opportunity to fully describe its role in administering PASPGP-4 in Pennsylvania. Unfortunately, the Department did not, in its response, take full advantage of this opportunity. There are, however, two statements in the Department's Response that indicate that the Department has a meaningful and well-defined role in administering PASPGP-4 in Pennsylvania. First, the Department stated:

Pursuant to the procedures set forth in the Corps' PASPGP-4 as well as 25 Pa. Code § 105.21, the Department published notice of the Water Obstruction Encroachment Permit No. E5729-014 in the *Pennsylvania Bulletin* on July 23, 2011 to provide the Corps, the public, and other agencies with an opportunity to comment. *See* 41 Pa. Bull. 4020 (July 23, 2011), Chesapeake's Ex. F.

Department's Memorandum of Law in Response to Chesapeake Appalachia, LLC's Dispositive Motion at p. 5. Second, the Department concluded:

Therefore, the Department proceeded to provide the PASPGP-4 authorization in accordance with the terms of the federal permit.

Id. The Department provided a combined public notice for its state permit and PASPGP-4, and following the close of the public comment period, "*the Department proceeded to provide the PASPGP-4 authorization...*" *Id.* (emphasis added). Without a more complete record to explain this statement and to describe the Department's role in providing the PASPGP-4 authorization, the Board is not prepared to grant Chesapeake's motion.

In addition, the Department stated that the Department has supported the Corps' establishment of a SPGP program for the Commonwealth, for example, by amending the permit application materials to support the joint permitting process. Department's Response to Chesapeake Appalachia, LLC's Dispositive Motion, ¶ 9. This statement indicates the Department modified its permitting program to better coordinate with the Corps and its SPGP program. The modifications may enhance the Department's role to the extent that the

Department takes final actions regarding eligibility for PASPGP-4 coverage that PennFuture is entitled to appeal to the Board.

The Department also described a litany of horrors that would result from the Board taking jurisdiction over the PASPGP-4 component of PennFuture's appeal. While the more limited focus of such an appeal (*see, supra*, p. 15, note 11) may resolve this litany of horrors, the Department should recognize that there are consequences from its worthwhile goal of having a cooperative and coordinated regulatory program with the Corps to review and issue state and federal permits for a proposed activity in a streamlined manner. The Department and the Corps' laudable efforts to reduce regulatory burdens and increase regulatory flexibility will sometimes create more complicated legal issues for the Board to resolve. This may ultimately be one of those types of situations.¹²

The parties disagree about the meaning of the Board's prior decisions in *Associated v. Wholesalers, Inc. v. DEP*, 1997 EHB 1174 (Opinion and Order on Motion to Dismiss); *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23 (Opinion and Order for Reconsideration). This appeal involved a third-party appeal of a letter which determined that a Dam Safety and Encroachment Act, 32 P.S. § 693.1 – 693.27, permit was not required and an enclosed Section 404 Clean Water Act Pennsylvania State Programmatic General Permit (PASPGP) that was in effect at that time. The permittee and the Department filed motions to dismiss.

The Department filed its motion only on the grounds that the Department's letter and permit were not appealable actions. The Board granted in part and denied in part the Department's motion. *Associated Wholesalers, Inc.*, 1997 EHB at pages 1182-83. The Board

¹² The Board does not yet know whether the Department's role regarding PASPGP-4 amounts to nothing more than component decisions made by the Department as part of the PASPGP-4 process that are not separately appealable final actions. *Lower Salford Township Auth. et.al., v. DEP*, 2011 EHB 333. The Board is unable to address this issue on the limited record before it.

decided that the letter, which merely set forth an interpretation of regulations, was not appealable and granted this portion of the motion. The Board denied that portion of the motion related to the Section 404 permit because the Department issued the permit under Section 404(h) and (g). 33 U.S.C. § 1344 (h) and (g); *Associated Wholesalers*, 1997 EHB at 1183.

The Department filed a motion for reconsideration which the Board granted finding there was a need for a clarification. In its motion, the Department asserted that the Corps, not the Department had issued the PASPGP-4 in question under Section 404(e), and that it did not make any determination whether the permit should have been issued. The appellants argued that the Board was substantially correct in its earlier decision because the Department plays a role in the PASPGP-4 process, and that Department actions taken pursuant to that role are an appealable action. To resolve the issue the Board offered the following clarification:

If the Secretary of the Army issued the PASPGP under Section 404(e) authorization without further action of the Department then the Department's contention is correct. However, Sections (g) and (h) provide for the State to issue the PASPGP. 33 U.S.C. § 1344(g) and (h). It is unclear from the alleged PASPGP used by the Department which section was the basis for the issuance of the PASPGP so we have an issue of fact as to the section under which the permit was issued. In either instance, the Department determined that the applicant qualified for the permit issuance so this is an appealable action.

Associated Wholesalers, 1998 EHB at 30. The dispute between the parties in this appeal centers on this quotation from the *Associated Wholesalers* decision.

Chesapeake and the Department believe that if the Corps issued PASPGP-4 under Section 404(e), and the Department did not under Section 404 (h) and (g), then there is no final Department action to appeal. PennFuture asserts, as did the appellants in *Associated Wholesalers*, that the Department has a well-defined role in administration and the application of PASPGP-4, and that under that role the Department makes determinations that are appealable to

the Board. PennFuture asserts that the Department can make decisions that are appealable in either instance.

The Board agrees with PennFuture and finds that, as a matter of law, the Department can determine if an applicant is qualified “in either instance.” *Associated Wholesalers*, 1998 EHB at page 30. The two instances are if the Corps issue a PASPGP under Section 404(e) and the Department determines eligibility for coverage; and if the Department issues a PASPGP under Section 404(h) and (g) and also determines eligibility.¹³ The first instance is easy to resolve. If the Department assumes responsibility to administer its own permit program under subsections, 404(g) and (h), the Department issues the general permit under the authority, then the Department decision to approve coverage under the general permit it issued is, without any doubt, a final Department action over which the Board has jurisdiction.¹⁴

The second instance is where the Corps retains overall jurisdiction to issue permits and the Corps issues the PASPGP under Section 404(e). If the Corps issues the PASPGP under Section 404(e) *and there is no further action of the Department to extend or grant coverage under it to a particular permittee*, then there is no final Department action to appeal and the Board lacks jurisdiction. *See Associated Wholesalers* at 30. If the Department does take further action to apply it or extend coverage under the Corps’ PASPGP to a particular permit applicant, then the Department has determined that the permit applicant qualifies for coverage under it.

¹³ Subsections (h) and (g) are not separate and independent bases for the Department to issue a PASPGP-4. These subsections must be read together to provide a single instance of state authority to assume responsibility to issue PASPGP-4’s. 33 U.S.C. § 1344(g) and (h).

¹⁴ In *Associated Wholesalers*, the Board did not know what authority was used, Section 404(e) or Section 404(h) and (g), so there was an issue of fact regarding the Authority used to issue the PASPGP-4 in that appeal. In this appeal, the parties agree that the Corps issued PASPGP-4, using it authority under Section 404(e).

Such Department action can constitute a final Department action, and the Board has jurisdiction to hear an appeal of such an action even though the underlying permit was issued by the Corps.¹⁵

The parties disagree whether the Department determined the Chesapeake qualifies for coverage under PASPGP-4. The record before the Board does not include a copy of PASPGP-4, and the Board does not at this preliminary stage of litigation fully understand the scope and nature of the Department's role in administering PASPGP-4 in Pennsylvania. At this point in the appeal, the Board is not able to grant Chesapeake's dispositive motion because there are outstanding issues of material fact regarding the Department's role in administering PASPGP-4.

There is an additional case which supports the Board's cautious approach at this time with only a limited record. In 2007, the Board considered an appeal involving PASPGP-2, which is a SPGP predecessor to the current PASPGP-4.¹⁶ *Township of Robinson*, 2007 EHB 139.¹⁷ In this appeal, the appellants challenged, *inter alia*, the "registration" of two general permits: GP-7 (Minor Road Crossing Permit); and SPGP-2 (State Programmatic General Permit in effect in 2006). The registration under these general permits was when coverage was allowed and not when the underlying general permits were issued.

The movant in *Robinson* asserted that the Board lacked jurisdiction because of the appellants had filed their appeals more than 30 days after registration, which was beyond the 30-day appeal period.¹⁸ The Board dismissed these appeals because they were filed well beyond the

¹⁵ Because the Corps issued PASPGP-4, the scope of the appeal of this component will be narrower than the typical appeal of coverage under a Department issued general permit. *See Stevens*, 2000 EHB at 442. The Board's jurisdiction would only extend to a Department decision to authorize coverage and would not extend to the terms and conditions of PASPGP-4.

¹⁶ PASPGP-3 replaced PASPGP-2 in 2006, which was later replaced by PASPGP-4 in 2011.

¹⁷ *Township of Robinson* is a second appeal in which the Board considered the use of a Corps' PASPGP in Pennsylvania in the context of an appeal of a Department action to "register" or allow its use for a particular project.

¹⁸ Appellants had received actual notice of securing coverage under the two general permits on September 11, 2006, but its appeal was filed on November 16, 2006.

30-day appeal period. The Board also rejected appellant's *nunc pro tunc* arguments. *Robinson*, 2007 EHB at 145. It is interesting, but not dispositive, that the Board's decision relied upon the date that applied or "registered" and not the date the general permits were issued.¹⁹

This approach to rely upon when coverage is allowed is at odds with Chesapeake's and the Department's overall approach in this appeal in which they urged the Board to look to the date that the PASPGP-4 and the Certification were issued by the Corps and not to the later date when it was applied to Chesapeake's Project. In the end, *Robinson*, supports the Board's cautious approach at this state of litigation until it knows more about the Department's role in administering PASPGP-4 in Pennsylvania.

In summary, all three components of Penn Future's appeal remain after the Board's disposition of Chesapeake's Motion to Dismiss. The state water obstruction and encroachment Joint Permit Number E-5729-014 was never at risk since it was not challenged in Chesapeake's Motion. Penn Future's challenge to the Department's 401 Water Quality Certification for the Chesapeake's Project, which received PASPGP-4 authorization, was timely filed, and this component can proceed. At this stage in the litigation and based on only a limited record, the Board is unable to resolve the issues related to Penn Future's third component, which challenges the Department's role in providing coverage to Chesapeake's Project under the Corps PASPGP-4. The Board expects it will be able to resolve these issues when the Department provides it with a more complete record.

Accordingly, the Board issues the following order.

¹⁹ Although SPGP-2 is a predecessor to the current PASPGP-4, the two federal SPGP's may be dissimilar in ways that are relevant to the Board's analysis. In SPGP-2 it appears that the Department's "registered" usage and in PASPGP-4, the Department "verifies" usage. The change in terminology may or may not affect the Board's analysis.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE :

v. :

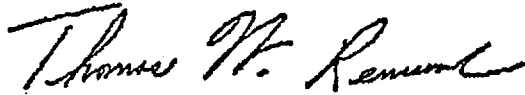
EHB Docket No. 2011-168-M

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CHESAPEAKE :
APPALACHIA, LLC, Permittee :

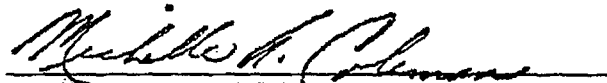
ORDER

AND NOW, this 9th day of July, 2012, it is hereby **ORDERED** that Chesapeake Appalachia, LLC's Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



RICHARD P. MATHER, SR.
Judge

DATED: July 9, 2012

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Attention: Glenda Davidson, Library

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**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
	:	
v.	:	EHB Docket No. 2011-168-M
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COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: July 9, 2012
PROTECTION and CHESAPEAKE	:	
APPALACHIA, LLC, Permittee	:	

**OPINION OF BERNARD LABUSKES DISSENTING
IN PART AND CONCURRING IN THE RESULT IN PART**

I agree with the Department and Chesapeake and would have held as a matter of law that this Board does not have jurisdiction to review a federal permit under any circumstances. The Commonwealth's role in "administering" PASPGP-4 is irrelevant. Regardless of how extensive the Commonwealth's administration, PASPGP-4 at the end of the day is still a federal permit. State administration of a federal permit does not convert a federal permit into a state permit or provide a basis for Board review.

I see no meaningful jurisdictional distinction between reviewing the terms of the permit, which the majority says we cannot do, and reviewing the Commonwealth's "administration" of the permit, which it says we can do. Both inquiries involve questions of federal law. Federal law defines the state's obligations in administering the federal permit. If the Department is not doing its job properly in administering the federal permit, that is a federal problem. Any defect in the federal permit's review processes or the Department's implementation of those processes is a federal problem. This Board should not step into the shoes of the federal government and try

to fix it. Coordination of federal and state functions does not justify an extension of this Board's statutorily defined jurisdiction. This Board's jurisdiction does not turn on policy considerations.

We do not review permit review processes separate and apart from the permit. We do not even review component decisions made short of a final action of the Department. *Lower Salford Township Authority v. DEP*, 2011 EHB 333; *United Refining Co. v. DEP*, 2000 EHB 132. I am not aware of any other instance in the history of this Board where the Board has sought to assert review authority of the Department's administration, as distinct from issuance, of a permit.

This Board can only review "actions." The action at issue here is issuance of the federal permit. Any relief that we can offer must relate to the action being appealed, in this case the permit. Since it is a federal permit, I question what meaningful relief we can offer, and suspect that any relief that we could possibly offer would not be binding in any way on the federal authorities. Indeed, federal authorities generally ignore our proceedings, let alone our rulings. *See Groce v. DEP*, 2006 EHB 856, 950-63. Therefore, the Board's assertion of possible jurisdiction in this case seems rather quixotic, at best.

As a practical matter, reviewing the federal permit will add no marginal value to our review of the environmental aspects of the Project pursuant to our review of the state permit. I agree with the Department's concern that the Board's extension of jurisdiction in this case has other potentially far-reaching implications given the difficult questions of administrative law that the Board's decision raises, the ubiquity of federal general permits, and federal/state coordination on many environmental matters.¹

I would not hold a factual hearing. The majority's decision to hold a hearing only makes sense if there is the possibility that the state's (presumably active) role in administering the

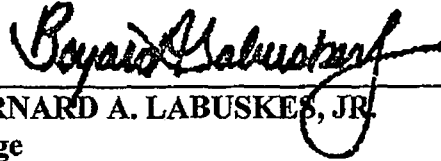
¹ I have no hesitation reviewing *state* general permits at the appropriate time. *See Stevens v. DEP*, 2000 EHB 438.

federal permit can give rise to jurisdiction. In my view, our jurisdiction should not depend on the Department's "actual role" in administering the federal permit in Pennsylvania. In *Lower Salford, supra*, the Board felt that it needed factual testimony to determine whether the state or federal government *issued* the TMDL. Here, the majority is seeking testimony about the *administration* of what is unquestionably a federal permit. Furthermore, our holding in *Lower Salford* eventually consumed an enormous amount of public resources that after years of litigation resulted in a finding that EPA in fact issued the TMDLs that it signed. I am reluctant to go down that path every time the state and federal authorities coordinate their efforts on a TMDL, a permit, or some other action. I am afraid that today's holding represents another step in the wrong direction. We should limit our review to state actions, and the state's administration of a federal permit, no matter how extensive, is not a state action in my view as a matter of law.

In contrast to the federal permit, I agree with the majority that there is no question that it was the Commonwealth that acted when it said that "the issuance of this permit also constitutes approval of [a 401 Water Quality Certification.]"² PennFuture filed a timely appeal from that action, whatever that action turns out to have been. Therefore, we have jurisdiction and I concur in that result. However, I am not in a position in the context of reviewing Chesapeake's motion to dismiss to delve into the merits of the Department's action as the majority has done, notwithstanding Chesapeake's premature contention that the "approval" was "unnecessary and redundant." That contention relates to the merits, not jurisdiction. I actually have no idea what the Department was trying to do by "approving" a certification in connection with its issuance of a project-specific permit to Chesapeake, let alone whether that action was reasonable and lawful.

² The fact that the state must certify the federal action supports my conclusion that we should limit our review to the certification and the state permit, not the state's "administration" of a related but separate federal permit.

It is also not clear to me, at least at this point, that the Department's "approval" relates back to or necessarily incorporates the (separate?) certification that applied to the generic, non-project-specific permit. I express no opinion on what the appropriate scope of review should be in this appeal from the Department's "approval" of a certification.



Handwritten signature of Bernard A. Labuskes, Jr. in cursive script, written over a horizontal line.

BERNARD A. LABUSKES, JR.
Judge



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and MARKWEST LIBERTY
MIDSTREAM & RESOURCES LLC**

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: **EHB Docket No. 2011-072-R**
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: **Issued: July 13, 2012**
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**OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER
AND MOTION TO COMPEL**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Following the filing of Five Motions for Protective Order, a Motion to Compel, Oral Argument, and after reviewing thousands of documents, the Pennsylvania Environmental Hearing Board rules that some documents are confidential business information and need not be produced. The Board further rules that a second larger set of documents should be produced but with restrictions and a third set of documents should be produced with no restrictions.

OPINION

Presently before the Pennsylvania Environmental Hearing Board are five Motions for Protective Order filed by MarkWest Liberty Midstream & Resources,

LLC (MarkWest) in addition to a Motion to Compel filed by Clean Air Council. The underlying case raises important environmental issues of first impression involving Marcellus Shale. On April 13, 2011, the Pennsylvania Department of Environmental Protection (DEP or the Department) issued Plan Approval PA-63-00936D authorizing Permittee MarkWest to build and operate a fractionator tower and process heater at its Houston Gas Plant in Houston, Washington County, Pennsylvania. The Appellant Clean Air Council appealed the Department's Action contending that the Clean Air Act called for the aggregation of multiple emission sources at MarkWest's natural gas production operations instead of considering each source separately when making such air permitting decisions. Three main factors are considered under the applicable law in determining when emissions should be treated as a single source: common control, the sharing of a standard industrial classification grouping, and whether the sources are contiguous or adjacent. It is important to keep this legal framework in mind as we consider the discovery issues before the Board.

The Board earlier denied MarkWest's Motion for a Protective Order which sought to designate nearly all documents requested by Clean Air Council from MarkWest as Confidential Business Information. *See Clean Air Council v. Pennsylvania Department of Environmental Protection & MarkWest Liberty Midstream & Resources, LLC*, 2011 EHB 808. Shortly after the issuance of that

Opinion and Order, Mark West filed a Motion requesting that the Pennsylvania Environmental Hearing Board conduct an *in camera* review of thousands of pages of documents. These documents were categorized into five major groupings with each one explained in a separate Motion for Protective Order filed by Mark West. Clean Air Council has also filed a Motion to Compel addressing Mark West's withholding of these documents.

The Parties, including the Pennsylvania Department of Environmental Protection, have filed comprehensive and voluminous Motions, Responses, and Legal Memoranda addressing the particulars of these Discovery issues. In addition, oral argument was conducted in Pittsburgh before the Honorable Richard P. Mather, Sr. and the Honorable Thomas W. Renwand. The Board acknowledges and thanks Counsel for their excellent work product and their comprehensive development of these discovery issues. In addition, the Board and the Bar owe a note of thanks to Counsel in this case as the raising of these discovery issues has directly led to major enhancements in the Board's electronic filing system.

Counsel in the vast majority of Board cases now must use the Board's electronic filing system rather than file pleadings and documents in "hard copy" i.e., by hand delivery, through the mail, or by facsimile. Although this has substantially benefitted the Board and the Bar by streamlining Board practice and by making nearly everything filed in the case electronically accessible, it has also

greatly improved the ability of anyone with a computer to access and follow Board cases. Not all parties view the latest development as a good thing. Many counsel and their clients are not comfortable with anyone reviewing and monitoring their filings and the developments in their cases. Even though the vast majority of filings have always been public and thus reviewable by anyone making a request, in reality before the advent of the Board's electronic filing system members of the Public including the Press did not review many Board filings. Before the Board's electronic filing system was in effect, a member of the Public or the Press would have to drive to a Board office and make an appointment to review the file. So even though Board filings were "public" it took some effort for the Public to review them. Even Pennsylvania's Right to Know Law still requires a request to be made and may involve some costs to the person making the request, although most of the costs are nominal. Today anyone with access to the internet can easily follow and review everything listed on the Board's electronic docket. In most circumstances, this is a wonderful development. Transparency in all branches of government is hailed as overwhelmingly positive. In addition, if something is readily available online, Board personnel are not diverted from their many tasks to photocopy and mail public documents to those requesting them.

In recent years the Board has seen an increase in requests from Counsel to file documents "under seal." Up until now, documents filed under seal would not

be accessible on the Board's electronic docket. This not only prevented non parties from electronically viewing these documents, it also prevented trial Counsel and the Board from having electronic access to them. This resulted in a host of administrative hardships for the Board. It is important, especially in addressing Opinions and Adjudications which require concurrence and signature by a majority of the Board Judges, that not only the draft Opinions but the underlying legal filings and documents be easily accessible by the Judges and their staff. In most instances this equates to being electronically accessible. When these documents cannot be accessed on the Board's electronic filing system it places a much greater burden on the Board's administrative personnel.

As of July 2, 2012, trial Counsel, if they convince the presiding Judge in their case that filings and documents meet the legal requirements to be filed "under seal", will now be able to do so electronically. Documents filed under seal will only be accessible electronically by the Board and trial Counsel in that case. Once an Order allowing this is in place, trial Counsel will be able to file Motions, Responses, Legal Memorandum, exhibits, and other documents by checking the appropriate box that now appears on the form used to file documents in an Appeal. Our website will allow documents filed under seal to be opened by Counsel for the parties in the Appeal and Pennsylvania Environmental Hearing Board personnel. Public visitors and all other users who attempt to open a document filed under seal

will be unable to see the contents of the document.

We now turn to the merits of the Motions before the Board. The Board conducted two extensive *in camera* reviews of the documents and materials at the Pittsburgh law offices of MarkWest's Counsel. Mark West makes some strong arguments that many of the documents requested by Clean Air Council are confidential and the wide spread dissemination of such information would have a negative financial impact on its business. At the same time, Clean Air Council makes equally strong arguments that most if not all of the information it is requesting is relevant to the key issues in this case. In addition, Clean Air Council argues that the "public interest in accessing this information outweighs MarkWest's private [economic] interests in keeping this information confidential, and a protective order restricting the public's access should therefore be denied to all but the most sensitive information that meets the standards for such protection."

The Parties rely heavily on federal case law in fashioning their arguments. While on the whole we believe Clean Air Council has the superior legal position we emphasize that these federal cases are not binding on us but merely persuasive. In addition, the Parties, for the most part, argue an all or nothing approach. We are not so constrained but have ample tools to fashion fair and just procedures that will, for the most part, protect that information, which consists of far fewer documents than that sought to be designated by MarkWest, from being easily

publicly accessible. At the same time, the vast majority of the documents requested by Clean Air Council will be produced.

After careful and full consideration of MarkWest's Motions, we believe MarkWest's position is not in accordance with Pennsylvania law because it would require the Board to impose draconian restrictions on the Appellant's use and handling of the information. For example, the restrictions would apply to potentially thousands of documents and would severely restrict Appellant's use of the documents in this litigation. Under the procedures outlined by MarkWest many of the documents could not be used to support Motions filed by the Appellant unless agreed to by Counsel for MarkWest. MarkWest's proposed Orders go on for pages and would necessarily hamstring Appellant and the Department in the ordinary course of Discovery and PreHearing Motions Practice and inevitably involve the Pennsylvania Environmental Hearing Board in numerous and unnecessary disputes arising from the restrictions set forth in the Proposed Order. We also find as a matter of both law and fact that MarkWest has not demonstrated good cause for the entry of such an Order.

We reiterate what we have said many times that it is the Pennsylvania Environmental Hearing Board's duty and responsibility to regulate and effectively monitor the discovery process. *Clean Air Council, supra*, at 809. Discovery before the Board is governed by both the Pennsylvania Rules of Civil Procedure

and the Board's own Rules of Practice and Procedure. Discovery is permitted as set forth in Pa.R.C.P. 4003.1 of "any matter not privileged which is relevant to the subject matter in the present action." In addition, MarkWest as the party seeking a protective order barring discovery must show good cause for the relief requested. *See Nothstein v. Pennsylvania Department of Environmental Protection & Mahoning Township*, 1990 EHB 1633, 1634-1635.

We acknowledge and appreciate MarkWest's narrowing of their claims regarding documents which they classify as Confidential Business Information. However, after our exhaustive review of the documents, we disagree that many of the documents they have designated as Confidential Business Information should be so classified in the context of this litigation as either (1) not being trade secrets or otherwise qualified to be marked confidential under Rule 4012 of the Pennsylvania Rules of Civil Procedure and (2) even if so qualified the right of the Appellant to access to these documents to prepare its case outweighs any alleged harm to be suffered by its production. MarkWest's arguments of confidentiality and secrecy seem to be mainly fueled by its fear that if these documents are viewed by its competitors its businesses will be financially impacted. Although we think this view is sincerely held, we fail to see how the production of these documents will result in its business competitors swooping down and stealing MarkWest's customers who are not only tied to MarkWest by contract but who are purportedly

enjoying great commercial success because of the substantial infrastructure and services MarkWest already has in place.¹

We hasten to add that simply because these documents are produced in this case does not mean that they are also being provided to MarkWest's competitors. The documents will be provided to Appellant, not the world in general. Discovery documents are not routinely filed on the Board's website but are usually only attached if needed to decide Motions. In addition, the Board's electronic filing system is now set up to allow documents to be electronically filed under seal if the Board so orders. Such a system can be used to shield truly confidential documents from general view on the Board's electronic docket.

Our Order will grant MarkWest's Motions in several important respects. After our review, we will grant MarkWest's Motion regarding specific enumerated documents mainly relating to contracts and other documents with Range Resources. These documents will not be produced as we do not feel they are necessary for Clean Air Council to develop its case and the production of these documents and the resultant harm to MarkWest outweighs the benefits to Clean Air Council. Our Order has a second category of documents which will be provided to Clean Air Council but will be under some limited restrictions as to

¹ Moreover, we afford MarkWest broad economic protections by crafting a Protective Order covering many of the Range Resource documents and making sure that pricing information is redacted from any documents produced.

their general use. We reject the draconian restrictions advocated by MarkWest as not warranted by the circumstances and outweighed by the substantial harm to Clean Air Council by their non-production or by their production with the requested restrictions. Moreover, prior to hearing, if these documents need to be referred to or attached to Motions or other filings Counsel shall electronically file them "under seal" with general access thus restricted.

We disagree with MarkWest's description of Discovery as a private matter between the Parties. It is not. It is public and the practice is governed by both the Pennsylvania Rules of Civil Procedure and the Board's own Rules of Practice and Procedure. The prohibition against the general filing of discovery was done to prevent vast amounts of paper from filling filing cabinets of the Courts and Board and not because the Discovery process is somehow "private."

As we move closer to a hearing we will consider what documents and testimony, if any, should be shielded from public access. We envision this set of information to be very limited as public access to documents and testimony at a hearing will be restricted only in the rarest of instances.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

CLEAN AIR COUNCIL

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and MARKWEST LIBERTY
MIDSTREAM & RESOURCES LLC**

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: **EHB Docket No. 2011-072-R**
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ORDER

AND NOW, this 13th day of July, 2012, following review of MarkWest's five Motions for Protective Order, Clean Air Council's Motion to Compel, and various Responses, Replies, Legal Memoranda, letters, and following oral Argument in Pittsburgh, it is ordered as follows:

1) After an *in camera* review, the Pennsylvania Environmental Hearing Board grants in part the Motions for Protective Order filed by MarkWest. The following documents are found to constitute Confidential Business Information and MarkWest has shown good cause as to why they should not be produced in Discovery as the harm to MarkWest outweighs any benefits to Clean Air Council. The Board further finds that the production of such documents is not necessary for Clean Air Council to fully develop its case.

A) Excel Spreadsheet of Expenditures for Proposed Pipeline

Installation-MWL 01567-MWL 01596--6/6/2010;

B) Authorization for Expenditure for Hoskins Pipeline Connection Project-MWL 02504-MWL 02506--4/30/2010;

C) Authorization for Expenditure for Lowry Pipeline Connection Project-MWL 02509-02511--4/30/2010;

D) Design Summary Estimate Cost of Future Gathering Operations--MWL 02545;

E) Email re: MarkWest Customer Invoice for Gas Gathering Fees--MWL 01538;

F) Email re: Cut Outs--MWL 02532;

G) Email re: Misunderstanding in SWPA--MWL 02533;

H) Email re: Misunderstanding in SWPA (part of email containing Range Resources communications)--MWL 02534-02535;

I) Email re: Misunderstanding in SWPA--MWL 02536-02537;

J) Email re: Misunderstanding in SWPA--MWL 02538-02540;

K) Email re: Hewitt to Hoskins--MWL 02541-02542;

L) Second Amendment--Gas Gathering & Processing Agreement between MarkWest and Range Resources--MWL 07518-07566--

2/27/2009;

M) Various Letter Agreements & Letters--MWL 07567-07608;

N) Gas Gathering Agreement between MarkWest and Range Resources--MWL 07609-07632;

O) MarkWest Customer Invoice for Gas Gathering Fees--MWL 01539-01555--6/24/2010;

P) Excel spreadsheet of Expenditures for Proposed Pipeline Installation--MWL 01567-01596;

Q) Gathering Operations Gain/Loss Reports--MWL 01665-02033; 02034-02446;

R) Authorization for Expenditure for Hoskins Pipeline Connection Project--MWL 02504-02506;

S) Authorization for Expenditure for Lowry Pipeline Connection Project--MWL 02509-02511; and

T) Design summary Estimated Cost of Future Gathering Operations--MWL 02545.

2) After an *in camera* review, the Pennsylvania Environmental Hearing Board orders the following documents to be produced to the Appellant. **These documents shall be electronically filed under seal if attached to a**

Motion, Response, or other filing.

A) Various Compressor station maps gathering Operation Pipe Status Maps, and other documents—**These documents are listed in Exhibit F to MarkWest’s Third Motion for Protective Order;**

B) Gathering System Build-Out Plan--MWL 02547-02554;

C) Gathering System Build-Out Plan--MWL 02556-02563;

D) Gathering System Build-Out Plan--MWL 02618-02634;

E) Response to Request for Information--MWL 00066-00130;

F) Response to Supplemental Request for Information--MWL 00131-00134;

G) Response to Second Supplemental Request for Information--MWL 00135-00166;

H) Email re: Future Stations--MWL 02543-02544;

I) Email re: Majorsville Operations--MWL 07765-07770.

3) After an *in camera* review, all other documents not listed above should be produced and these documents if attached to a Motion, Response, or other filing can be electronically filed without restriction.

4) The documents in paragraphs 2 and 3 shall be provided to Clean Water Action on or before **July 23, 2012.**

5) Clean Air Council's Motion to Compel is granted in part and denied in part as set forth in paragraphs 1-4.

6) Counsel shall provide the Pennsylvania Environmental Hearing Board with either (A) proposed individual orders regarding Discovery, the filing of Prehearing Motions, and the scheduling of the Hearing or (B) a Joint Proposed Case Management Order on or before **July 31, 2012**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

DATED: July 13, 2012

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCKY RIDGE MOTEL (KYONG H. KIM)	:	
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v.	:	EHB Docket No. 2012-046-M
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COMMONWEALTH OF PENNSYLVANIA,	:	Issued: July 24, 2012
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

OPINION AND ORDER
ON DEPARTMENT’S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis:

The Board denies the Department’s motion to dismiss for lack of jurisdiction where there are unresolved ambiguities in the Notice of Appeal that prevent the Board from finding that the Department is entitled to judgment as a matter of law.

OPINION

Kyong H. Kim, d/b/a Rocky Ridge Motel, filed an appeal, *pro se*, on March 19, 2012 which stated that the Department of Environmental Protection (the “Department”) took an action requiring that the Appellant “[i]ninstall a new water system.” At the top of the handwritten Notice of Appeal, Mr. Kim, or someone who provided him assistance filling out the initiating documents, wrote “request a Korean Interpreter.” To consider this request, the Board scheduled a brief hearing on April 19, 2012 to allow the Board to conduct a brief interrogation of Mr. Kim on the record. We determined that Mr. Kim had a limited ability to speak or understand English, and was therefore entitled to have an interpreter provided by the Board during a hearing on the

merits. See Act 172 of 2006, 42 Pa. C.S. § 4402 and 2 Pa. C.S. § 563; see also Transcript of April 19, 2012 (“T.”) at 6.

The Department now comes before the Board with a motion to dismiss, asserting that Mr. Kim has, in fact, filed an appeal of the Department’s inspection report, which would not constitute an appealable action of the Department, and therefore the Board lacks jurisdiction over the appeal. In support of its motion, the Department points out that Mr. Kim identifies Sheryl L. Martin as the Department official who took the appealed action, and that Mr. Kim attached an inspection report to the Notice of Appeal. The Department argues that:

The Department’s Inspection Report does not include any order or directive with respect to Mr. Kim or with respect to his Rocky Ridge Motel. In the Inspection Report, the Department does not create any obligations nor did it issue any order. In the Department’s Inspection Report, the Department did not alter in any way Mr. Kim’s pre-existing duties or obligations or impose any new obligations or duties upon him.

Department’s Brief in Support of its Motion to Dismiss, pp. 2-3. Therefore, it concludes, the action appealed is not a final action and the Board lacks jurisdiction over the appeal.¹

The Board’s case law sets a high bar for movants to attain in order to succeed on a motion to dismiss. A motion to dismiss will be granted only where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Robinson Coal Co. v. DEP*, 2011 EHB 895, 899; *Spencer v. DEP*, 2008 EHB 573, 74; *Eljen Corp. v. DEP*, 2005 EHB 918. The Board will grant a motion to dismiss for lack of jurisdiction only where the moving party is able to clearly demonstrate that an appeal exceeds the Board’s jurisdiction under the Environmental Hearing Board Act or other statutes. 35 P.S. § 7514; See e.g. *Dobbin v. DEP*, 2010 EHB 852; *Kennedy v. DEP*, 2007 EHB 511, 512; *P.E.A.C.E. v. DEP*,

¹ Mr. Kim has not filed a response to the Department’s Motion to Dismiss. Therefore, by operation of our rules, all properly plead facts, but not necessarily legal conclusions, included in the Department’s motion are deemed admitted. 25 Pa. Code § 1021.91(f).

2000 EHB 1, 2.

The Department correctly points out that the Board's jurisdiction is quite limited. Under section 4 of the Environmental Hearing Board Act, except as otherwise set out specifically by statute, the Board has the power to review "actions" of the Department, where 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.

35 P.S. § 7514(a)&(c); 25 Pa. Code § 1021.2. Correspondence or reports from the Department that does "not result ... affect property rights, privileges, liabilities and other obligations is not an appealable 'decision.'" *HJH, LLC v. DEP*, 949 A.2d 350, 353 (citing *DER v. New Enterprise Stone & Limestone Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976)). Ordinarily, an inspection report, like the one accompanying Kim's Notice of Appeal, would therefore not constitute an appealable action unless the inspection report would "require the recipient to do something; it is prescriptive or imperative, not merely descriptive or advisory." *Perano v. DEP*, 2011 EHB 750, 755; *Kutztown v. DEP*, 2001 EHB 1115.

A brief review of the facts in record and the Notice of Appeal make it clear that the Board will not grant the Department's motion to dismiss because it is far from clear that the Department is entitled to success on its motion as a matter of law. Mr. Kim's Notice of Appeal identifies the *action* of the Department for which review is sought as "Sheryl L. Martin = Install a new water system." Nevertheless, the document that is attached (as required by the Notice of Appeal form) is an inspection report written by Sheryl Martin that documents that the Department "conducted a follow-up inspection of this water supply." The report goes on to report that "water supply has not been changed since the previous inspections of this facility[,]" but "Mr. Kim was issued the

administrative order dated March 2, 2012.” Exhibit A to Department’s Motion to Dismiss. That administrative order, which the Department attached to its motion to dismiss as exhibit B, “ordered Mr. Kim to cease operations of its public water system” until he takes the steps listed by the Department and receives permission from the Department to resume operations.² Memorandum of Law in Support of the Department’s Motion to Dismiss, p. 2; Exhibit B to Department’s Motion to Dismiss.

In addition, the Notice of Appeal lists three objections to the Department’s appealed action. The third objection is “we object to the requirement of a new expensive water system.” This “requirement” is not part of the inspection report that is attached to the Notice, but it is part of the order that the Department issued to the Appellant on the day he received the inspection report. Exhibit B to Department’s Motion to Dismiss, ¶ 2. There is an ambiguity on the face of Appellant’s Notice of Appeal that suggests he intended to appeal the requirement in the order, but he mistakenly attached the wrong document to his Notice of Appeal. The ambiguities on the face of the Appellant’s Notice of Appeal described in this Opinion prevent the Board from granting the Department’s motion to dismiss.

The Department very clearly took an appealable action when it issued Mr. Kim the administrative order. What is less clear is whether Mr. Kim intended to appeal the order or not. At this point in litigation settling that point is unnecessary; the Department simply has not carried its burden to demonstrate that the Board has lack of jurisdiction over the appeal. To the extent that Kim has initiated a legitimate appeal, we note that when an appellant files a Notice of

² We should stress that the only point we are making by noting that the Department issued an administrative order to Kim is that the interaction of the two parties generated an appealable action, and that fact under these circumstances as created enough ambiguity that it is impossible to grant the Department’s motion. We are making no assessments about issues that have or have not been raised by the appeal.

Appeal but does not fill out the form correctly or attach the proper document the Board typically orders the appellant to correct the omission, and may even follow-up by issuing a rule to show cause allowing the appellant to perfect the appeal before the Board would take steps to terminate the appeal. *See e.g. Britt Energies, Inc. v. DEP*, EHB Docket No. 2012-073. We see no reason why Mr. Kim should be denied that courtesy simply because the need to order him to supplement his appeal may have been unclear at the time the appeal was filed.

The Department's recitation of facts makes it clear that a Department representative showed up and handed Kim two documents on March 2, 2012, one was the inspection report – which he was required to sign upon receipt, and the other was the administrative order. We are mindful of Mr. Kim's language difficulties and the challenge that may have posed when initiating this appeal. Any confusion he may have had about which document should have been submitted with his appeal may have been justified. Therefore, although we have written frequently that a *pro se* appellant is not entitled to any special accommodation by virtue of their self-representation, we are also not interested in endorsing the Department's "gotcha" practice of law when the record before the Board contains readily apparent ambiguities that prevent the Board from granting the Department's motion to dismiss.³

Accordingly, we enter the following Order:

³ Rather than issue an order with this opinion requiring Mr. Kim to provide a copy of the Department's order, we note that it is now in record as exhibit B to the Department's Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCKY RIDGE MOTEL (KYONG H. KIM) :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2012-046-M

ORDER

AND NOW, this 24th day of July, 2012, the Department's unopposed motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

DATED: July 24, 2012

c: Department Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Ann Johnston, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant, *Pro Se*:
Kyong H. Kim
798 Seaks Run Road
Glen Rock, PA 17327



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

MR. KIRK E. DANFELT

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EHB Docket No. 2008-051-CP-C

Issued: July 27, 2012

**OPINION AND ORDER ON
ATTORNEY'S FEES PETITION**

By The Board

Synopsis:

The Board finds that Eva Joy Giordano (now Eva Thompson) successfully defended against an unjust claim that was filed under an unproven theory and untimely withdrawn. Therefore the Board awards the full amount of attorney's fees requested, \$11,904.50.

OPINION

Procedural Background

Before the Board is an Application for Attorney's Fees filed by Eva Joy Giordano (now Eva Thompson) who was a defendant to the Department's complaint for civil penalties. This action began with the Department filing a complaint for civil penalties in the amount of \$41,250 on February 27, 2008 alleging violations of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611, (the "Clean Streams Law") against both Kirk E. Danfelt and Eva Joy Giordano. The complaint was not served until July 30, 2008. Neither Defendant filed an answer within the

prescribed 30 days. *See* 25 Pa. Code § 1021.74 (“answers to complaints shall be filed with the Board within 30 days of the date of service of the complaint”). On January 8, 2009, the Department sent a notice to the Defendants that it intended to file a motion for default judgment against the Defendants if a responsive pleading was not provided within 10 days. Neither party filed an answer. The Department subsequently filed its motion for default judgment on April 15, 2009. Counsel for Giordano filed an appearance on May 7, 2009 and filed a response to the Department’s motion for default judgment on May 15, 2009 requesting leave to file an answer to the complaint.

On August 20, 2009, the Board issued an opinion and order granting in part and denying in part the Department’s motion for default judgment. The Board granted default judgment with respect to Danfelt finding him liable for the violations alleged in the complaint. We denied the motion as it related to Giordano and allowed her to file an answer to the complaint within 15 days to dispute her liability. Giordano filed her answer on September 8, 2009.

The complaint states that “Kirk E. Danfelt and Eva Joy Giordano (‘Danfelt’) are husband and wife and maintain two addresses.” Complaint, ¶ 4. The Department includes both Defendants collectively in each allegation throughout the complaint referring to them as “Danfelt”. The complaint alleges that violations of the Clean Streams Law occurred at three sites: East Dutch Corner in Todd Township, Fulton County (“Site 1”), Old Route 30 and the Route 30 Bypass East of McConnellsburg in Ayr Township, Fulton County (“Site 2”) and East Wood Street in Todd Township, Fulton County (“Site 3”). Complaint, ¶ 5. Inspections by the Fulton County Conservation District occurred at Site 1 on January 25, 2007, March 15, 2007 and April 25, 2007; at Site 2 on June 13 and 19, 2007; and, at Site 3 on June 25 and 27, 2007. Complaint, ¶¶ 27-50. The complaint discusses the violations at the three sites stating that “Danfelt” violated the Clean

Streams Law, never making a distinction between Danfelt or Giordano individually. *See DEP v. Danfelt & Giordano*, 2009 EHB 459, 465 (Judge Renwand, concurring) (“here the only allegation alleged against Mrs. Giordano in the complaint is that she is married to Mr. Danfelt.”)

Giordano’s answer to the complaint states throughout that the averments relate to the conduct of Danfelt, and she denies engaging in any of the activity listed in the complaint. The language of her entire answer reflects her position that she was unaware of the violations and that she did not engage in them.

During a conference call with the parties and the Board on May 26, 2010, the Department argued, for the first time, that spouses can be held responsible if they benefit from the actions of the other spouse. The Department also made this contention in a motion to compel filed with the Board on May 28, 2010, stating, “the courts have discussed and assigned responsibility to spouses routinely, particularly when that spouse has benefited from the actions of the other spouse, as in the case at hand.” Motion to Compel filed May 28, 2010, ¶ 22. In support of this new argument, the Department cited tax evasion and bankruptcy cases, which have no applicability to the facts of this case.

On May 18, 2011, Giordano moved for summary judgment on the basis that she had no knowledge of or involvement in the violations in question. In the Department’s response to the motion for summary judgment filed on July 11, 2011, it again raised the argument of spousal liability, stating, “[I]t is clear that the money was used to support the family . . . it should be inferred that any money made by co-defendant Danfelt went towards the expenses associated with . . . shelter, food and clothing.” (Plaintiff Memorandum in Opposition, p. 9) Although the Board denied Giordano’s motion for summary judgment, we questioned the Department’s argument of spousal liability, stating it is “a stretch to accept the Department’s contention that

Giordano is responsible merely for being married to Danfelt and possibly benefiting from his wrongdoing. In fact, this was not raised in its complaint, nor were the Defendants married to each other during the time of the alleged violations at Site 1. See Complaint, ¶¶ 28, 34, 37, 40, 43, 46, 49 (alleged violations occurred on January 25, 2007, March 15, 2007 and April 25, 2007); Motion, ¶ 8 (Defendants were married on April 27, 2007); Giordano's affidavit of May 18, 2011." *DEP v. Danfelt & Giordano*, 2011 EHB 427, 430.¹

On August 10, 2011, the Department deposed Giordano. (Application for Attorneys Fees, Exhibit A) Counsel for the Department began the deposition by advising Giordano that the Department was willing to settle the case for \$1,000. The first 22 pages of the deposition consist of Department counsel attempting to get Giordano to state her position with regard to the settlement offer. This line of questioning ceased only after counsel for Giordano contacted Judge Coleman who instructed counsel to communicate among themselves with regard to any settlement discussions. The Department then questioned Giordano not only on her financial information and assets, but also that of various relatives, none of whom are in any way related to the violations alleged in this case. Finally, near the very end of the deposition the Department asked three questions related to liability, where Giordano again stated, just as she did in her answer to the complaint and in her answers to interrogatories, that she had no involvement in her ex-husband's logging operations or the violations alleged by the Department. Before concluding the deposition, the Department again offered to settle the matter with Giordano, this time stating that it was willing to lower the settlement offer if Giordano could provide more information on Danfelt. Giordano stated that she "stay[s] away from him." Exhibit A, p. 62. The Department found no evidence connecting Giordano to the violations and there was no indication that she

¹ Motion for reconsideration denied, *DEP v. Danfelt & Giordano*, 2011 EHB 519.

knew more.

Following the deposition of Giordano, her counsel filed a motion to compel the Department to answer interrogatories that had been served upon it. Also following the deposition, her counsel filed a second motion for summary judgment. Before the Board ruled on the motion to compel and before the Department's response to the motion for summary judgment was due, the Department on September 22, 2011 filed a motion to withdraw its complaint against Giordano. The Board issued an Order on September 23, 2011 granting the Department's motion to withdraw with prejudice and amending the caption to include only Danfelt as the defendant.

On October 20, 2011, the Department filed a second motion for default judgment against Danfelt under the Board's new rule on default judgment at 25 Pa. Code § 1021.76a which authorizes the Board to assess a civil penalty when default judgment has been entered.² The Board granted the motion and assessed the civil penalty in the amount requested in the complaint of \$41,250 against Danfelt. *DEP v. Danfelt*, 2011 EHB 839.

Giordano filed an Application for Attorney Fees on October 25, 2011. The Department filed its response to the application for fees on December 7, 2011.

Discussion

The Department's theory of the case from the point at which it filed the complaint for civil penalties until it withdrew that complaint was that a wife could be held liable for environmental violations alleged to have been perpetrated by her spouse. Although the complaint is site specific and violation specific, there is no specificity concerning which actions were performed by Danfelt and which by Giordano. There is no explanation of why both spouses are involved since they had separate occupations and business interests. *See DEP v.*

² Rule 1021.76a went into effect after the filing of the Department's first motion for

George and Shirley Stambaugh, 2009 EHB 481 (where farming was the family business.) Kirk Danfelt had a history of violations noted by the Department resulting from his occupation as a logger. Danfelt evidently disappeared after the complaint was served and did not participate in the defense of this case.

Giordano on the other hand, called the Department, protested her lack of involvement, and defended herself in this case. She demanded information from the Department showing that she actually committed the violations. (*See* Motion to Amend Complaint July 19, 2011 denied for technical reasons.) When the Department finally withdrew the complaint against her, Giordano filed a Petition for Attorney's Fees under section 691.307(b) of the Clean Streams Law, which states, "the Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. §691.307(b)

The circumstances in which the provisions of this section may be applied have been set by the Pennsylvania Supreme Court in *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007), and followed by the Environmental Hearing Board in several cases since that time. *See e.g., Crum Creek Neighbors v. DEP*, 2010 EHB 67; *Hatfield Township v. DEP*, 2010 EHB 571; *Solebury Township v. DEP*, 2008 EHB 658 (remand). In *Solebury*, the Supreme Court cites *Lucchino v. DEP*, 809 A.2d 264 (Pa. 2002), to describe incidents where Pennsylvania courts should liberally construe petitions for counsel fees "to justly compensate parties who have been obliged to incur necessary expenses in prosecuting lawful claims or defending against unjust or unlawful ones." *Lucchino*, 809 A.2d at 269, citing *Tunison v. Commonwealth*, 31 A.2d 521, 523 (Pa. 1943).

We find that Giordano successfully defended herself against an unjust claim since the

default judgment.

Department withdrew the complaint after a complex and lengthy litigation during which no wrongdoing on the part of Giordano was found. The Board has entered a final order dismissing the case.

To support her petition for fees, Giordano relies heavily on *Kwalwasser v. DER*, 569 A.2d 422 (Pa. Cmwlth. 1992). She cites the four criteria: “(1) a final order must have been issued, (2) the applicant for fees and expenses must be the prevailing party, (3) the applicant must have achieved some degree of success on the merits, and (4) the applicant must have made a substantial contribution to a full and final determination of the issues.” *Id.* at 424. Giordano then describes how her case meets each of these criteria. She also claims that the Department's actions in her case constitute bad faith or vexatious conduct.³

The Department's counter argument relies on Board cases since *Solebury* citing in particular *Crum Creek Neighbors v. DEP*, 2010 EHB 67, where Judge Labuskes stated:

In order to be eligible for an award of attorneys' fees under Section 307(b) a party must first satisfy three criteria:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;
2. The applicant must show that the appeal stated a genuine claim, i.e. one that was at least colorable, not frivolous, unreasonable, or groundless; and
3. The applicant must show that its appeal was a substantial or significant cause of the Department's action of providing relief.

Id. at 72, citing *Hatfield Township Municipal Authority v. DEP*, 2010 EHB 571; *Lower Salford Township Authority v. DEP*, 2009 EHB 633 and *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718. However, none of those cases involved a set of

³ Because we base our fee award on the criteria enunciated in *Kwalwasser*, we need not

circumstances such as this where the Department filed a complaint against a party without a factual or legal basis and continued to pursue the unjust claim for years.

Giordano defended against an unjust claim ultimately founded on the mere circumstances of her marriage. It appears that the Department is attempting to expand the theory in which spouses who own the same land and/or work at the same enterprise, e.g. farming, may be equally liable for actions related to the land or enterprise. However, even when there is proof that the spouses were joint owners and participated in the business we have held that there must be knowledge or involvement in the actual wrongdoing. See *Barkman v. DER*, 1993 EHB 738 (Board did not find the secretary of a recycling facility liable for violations that occurred at the facility, even though she was joint owner of the land on which the facility was located and the spouse of the facility owner, since she was not involved in management operations); *Blosenski v. DER*, 1992 EHB 1716 (the Board dismissed a penalty assessment against the owner's spouse, co-owner of the real estate and secretary of the business because there was little evidence of her knowledge and participation in the violations.) This case does not involve either joint ownership or spouses working in the same business that committed the violations.

Here, Giordano had no knowledge of or participation in the violations. Giordano's arguments against an unjust claim in this petition for fees are precisely what we feel the *Solebury* Court envisioned as supporting an award of counsel fees. From the time Giordano filed her answer, the Department was on notice that Giordano contested the factual basis for assessing civil penalties against her in the complaint. She claimed she had no involvement in Danfelt's conduct that gave rise to the violations of law listed in the civil penalty complaint. The Department, rather than acknowledging its mistaken position and withdrawing its

reach the question of whether the Department's actions constitute bad faith or vexatious conduct.

complaint against Giordano at that time, continued to vigorously pursue its civil penalty claim against Giordano under new or evolving legal theories that have little or no basis in Pennsylvania law. The claims against Giordano were unjust.

This is not to say that the Department should not litigate violations that they have found and investigated. On the contrary, that is precisely what the Department is to do. However, in their zeal to locate and penalize Danfelt, they unjustly forced Giordano to defend herself and pressured her to pay Danfelt's civil penalty.

After Giordano's deposition, the Department withdrew its complaint. The Department argued, "As soon as [the Department] gained information through discovery that raised questions about Giordano's liability, [the Department] immediately withdrew its complaint." (Department's Response to Giordano's Application for Attorney Fees and Costs, p. 7.) The Board disagrees with the Department's assertion that it acted in a timely manner when it withdrew its complaint. While the Department finally agreed to withdraw its complaint against Giordano, its withdrawal was too late to prevent Giordano from having to spend considerable time and effort to defend against unjust claims based on the specific facts of this case. Her actions brought the desired result, and the Department's action to withdraw was not timely.

The Department challenged the amount of fees requested, implying that a number of frivolous motions were filed which increased the fee amount. We find that the motions filed by Giordano were attempts to determine the specific charges against her and were certainly not frivolous. We have reviewed the fee submission and find the amount to be reasonable for the time and work presented. Therefore, we award the full amount requested, \$11,904.50.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

MR. KIRK E. DANFELT

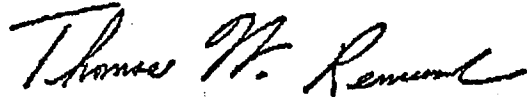
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EHB Docket No. 2008-051-CP-C

ORDER

AND NOW, this 27th day of July 2012, the Application for Attorney's Fees filed by Eva Joy Giordano (now Eva Thompson) against the Department of Environmental Protection is granted in the amount of \$11,904.50.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: July 27, 2012

c: For DEP Litigation:
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Susana Cortina de Cardenas, Esquire
Office of Chief Counsel – Southcentral Region

For Defendant, *Pro Se*:
Kirk E. Danfelt
7422 New Castle Mt. Lane
Mapleton Depot, PA 17052

Petitioner, Giordano:
Gregory A. Jackson, Esquire
594 Penn Street
Huntingdon, PA 16652



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KH REAL ESTATE, LLC

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

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EHB Docket No. 2011-040-R

Issued: July 31, 2012

**OPINION AND ORDER
ON MOTION TO DISMISS**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where a corporate appellant fails to retain legal counsel in accordance with 25 Pa. Code § 1021.21(b), fails to comply with two orders of the Board and fails to respond to the Department's motion to dismiss, we grant the Department's motion and dismiss the appeal.

OPINION

The Appellant, KH Real Estate, LLC (KH Real Estate) is a limited liability corporation that owns a residential facility known as Shadyside Village in West Franklin Township, Armstrong County, Pennsylvania. There is a septic system on the property to treat sewage generated by the occupants of Shadyside Village. On February 24, 2011, the Department of Environmental Protection (Department) issued an Administrative Order to KH Real Estate requiring it to cease the discharge of sewage to the septic system and to develop a plan to bring the system into compliance. On March 24, 2011, Albert C. Krick, the president of KH Real

Estate, appealed the order to the Pennsylvania Environmental Hearing Board (Board). The filing did not indicate that a copy of the notice of appeal had been served on the Department as is required by 25 Pa. Code § 1021.51(g)(1), (g)(2) and (k). Therefore, on March 25, 2011, the Board ordered KH Real Estate to perfect its appeal by serving it on the appropriate personnel at the Department. To date, the appeal has not been perfected.

Based on KH Real Estate's failure to comply with the Board's order to perfect, the Department moved to dismiss the appeal. The Department also moved to dismiss on the basis that KH Real Estate was not represented by legal counsel as required by the Board's rules of practice and procedure at 25 Pa. Code § 1021.21(b). That rule requires that corporations appearing before the Board must be represented by counsel. KH Real Estate filed no response to the motion to dismiss.

Prior to ruling on the motion to dismiss, the Board sought to give KH Real Estate the opportunity to retain counsel. On May 14, 2012, the Board issued an order directing KH Real Estate to secure legal representation on or before May 30, 2012. To date, no entry of appearance has been filed on behalf of KH Real Estate.

A motion to dismiss will be granted where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *Rocky Ridge Motel v. DEP*, EHB Docket No. 2012-046-M (Opinion and Order on Department's Motion to Dismiss issued July 24, 2012), *slip op.* at 2; *Citizens for Pennsylvania's Future v. DEP*, EHB Docket No. 2011-168-M (Opinion and Order on Motion to Dismiss issued July 9, 2012), *slip op.* at 4; *Brandolini v. DEP*, 2000 EHB 1143, 1146.

Here, KH Real Estate has failed to respond to the Department's motion and has ignored the Board's orders requiring it to perfect its appeal and retain counsel. KH Real Estate, and its

president, Mr. Krick, are well aware of the consequences of failing to comply with the Board's orders and rules. Earlier this year, on May 7, 2012, the Board dismissed another appeal filed by Mr. Krick on behalf of KH Real Estate for failure to retain counsel and respond to discovery. *KH Real Estate*, EHB Docket No. 2010-189-R (Opinion and Order on Motion for Sanctions issued May 7, 2010). Similarly, an appeal filed by Mr. Krick on behalf of KH Real Estate three years ago was dismissed for failure to retain counsel. *KH Real Estate v. DEP*, 2010 EHB 151.

In this matter, KH Real Estate has similarly shown a lack of intention to pursue its appeal, beginning with its failure to perfect, its failure to respond to the Board's orders and the Department's motion and its failure to secure counsel in accordance with 25 Pa. Code § 1021.21(b). Dismissal of an appeal is justified where an appellant has failed to comply with Board orders and has shown a lack of intention to pursue its appeal. *KH Real Estate*, EHB Docket No. 2010-189-R, *supra* at 3. Moreover, by failing to file a response to the Department's motion to dismiss, KH Real Estate has elected not to contest the facts set forth in the Department's motion; therefore, we deem them admitted. 25 Pa. Code 1021.91(f); *Doctorick v. DEP*, EHB Docket No. 2011-152-M (Opinion and Order on Motion to Dismiss issued July 2, 2012), *slip op.* at 3. Finding that there are no material facts in dispute and the Department is entitled to judgment as a matter of law, we grant the Department's motion and dismiss the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KH REAL ESTATE, LLC

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

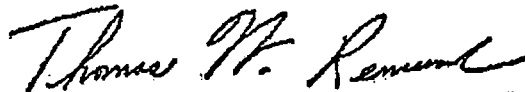
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EHB Docket No. 2011-040-R

ORDER

AND NOW, this 31st day of July, 2012, it is hereby **ORDERED** that the Department's motion to dismiss is granted and the appeal at Docket No. 2011-040-R is dismissed.

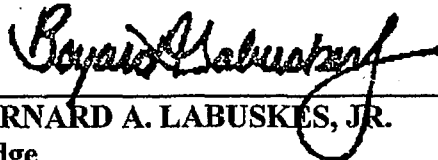
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: July 31, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Mary Martha Truschel, Esquire
Office of Chief Counsel – Southwest Region

For Appellant, *pro se*:
Albert Krick
KH Real Estate, LLC
P.O. Box 100
Worthington, PA 16262



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARGARET HENRY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and SWEPI, LP, Permittee

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EHB Docket No. 2012-030-M
(Consolidated with 2012-133-M)

Issued: August 3, 2012

**OPINION AND ORDER
ON APPELLANT'S MOTION TO AMEND**

By Richard P. Mather, Sr., Judge

Synopsis:

The Board grants a motion to amend a notice of appeal where there will be no undue prejudice to the opposing parties.

OPINION

On February 27, 2012, Margaret Henry filed a *pro se* third-party appeal of a natural gas well permit issued to SWEPI, LP by the Department of Environmental Protection (the "Department"). This appeal is docketed at EHB Docket No. 2012-030-M. That appeal listed a variety of objections to the issuance of that well, nearly all of which centered around her interest as a nearby landowner whose livelihood is operating a "Certified Naturally Grown" farm. After filing her appeal, Henry sought the assistance of counsel, securing representation through the University of Pittsburgh Environmental Law Clinic. Lawyers from the clinic entered their appearance on June 14, 2012 in this appeal. In July, the Department issued six more well permits to SWEPI, and a second appeal was filed as the Appellant quickly moved to file timely

objections to the Department's issuance of several more natural gas permits to SWEPI at the same site. *See* Notice of Appeal filed in EHB Docket No. 2012-133-M. She also moved to amend her earlier notice of appeal and to consolidate both appeals. These appeals center around a common set of natural gas well permits that are located on the same drill pad and the discovery process for both appeals was still open, and so we granted Henry's motion to consolidate. Consolidation of the two appeals will clearly save the Board and the parties the added burden and expense of managing two appeals that are very closely related. We now turn to Henry's motion to amend the appeal docketed at 2012-030-M.

The Appellant's motion to amend her notice of appeal comes more than four months after she filed her initial appeal. Under our rules, after a period of 20 days after the initial notice of appeal is filed, the Board may allow amendment of the notice of appeal where the movant shows that amendment will not result in undue prejudice to other parties in the appeal. 25 Pa. Code § 1021.53(b). This rule, adopted in 2006, was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult. *Groce v. DEP*, 2006 EHB 289, 291. So long as a party is seeking to amend its grounds or objections to a timely appealed action and not seeking to extend the Board's jurisdiction, "[r]egardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379.

The Appellant supports her motion to amend by asserting that no undue prejudice on the Department and SWEPI will occur because the discovery period is still open, no hearing has been scheduled, and the amended notice of appeal will clarify the objections to the Department's action for the benefit of all parties. We agree. Although this varies from case to case, here,

where the Board has already granted the Appellant's motion to consolidate the earlier appeal with a subsequent appeal of additional gas wells at the same well pad, we cannot help but recognize that the additional burden of allowing the Appellant to amend her notice of appeal is light. Allowing the Appellant to amend her initial notice to conform to her second notice will benefit both the Parties and the Board by having one set of objections in the consolidated appeal.

The Department disagrees and informed the Board by letter that it opposes the motion to amend on the basis that the Appellant had not demonstrated that no undue prejudice would burden the other parties in the appeal, the discovery process was nearing completion and the issues raised in the amended appeal are largely new, speculative and unsupported. For one, we will reserve any discussion of the merits of the Appellant's specific objections for a more appropriate time. Second, the Appellant has demonstrated that the other Parties would not be unduly prejudiced by the amended notice of appeal because this appeal is at an early stage of litigation. In this case, no examination of the merits has begun, and though the initial period for discovery was nearing a close, the Board selects six-months as a default and frequently grants a first request for extension of discovery.¹ Finally, the notice of appeal, as amended, raises the same objections as the second appeal and we have extended the discovery period in the first appeal to the dates set out in the second appeal to allow parties to pursue discovery in both matters efficiently and concurrently.

We recognize the difficulty of pursuing an appeal before the Board *pro se*. Because no special accommodation for *pro se* appellants is appropriate, the Board's frequent recommendations that parties that file *pro se* seek the assistance of counsel are meaningful.

¹ Additionally, we note that SWEPI informed the Board by conference call that its activities on the site have so far only been site development activities necessary to pursue the permitted wells appealed by both appeals and initial well development activities of wells permitted by the second appeal. No work has begun on the well appealed by EHB Docket No. 2012-030-M.

Having wisely chosen to meet her jurisdictional obligations to file a timely appeal in the first appeal, Henry appears to have pursued the goal of securing the assistance of counsel.² After obtaining counsel, it is not surprising that the Appellant would be interested in amending her notice of appeal to reflect the receipt of legal assistance. Where, as here, we ultimately believe the parties will not be prejudiced by such amendment, fairness dictates that an appellant be given the opportunity to fully pursue her appeal and amend her initial notice of appeal with the assistance of counsel.

Accordingly, we enter the following Order.

² We note in contrast that the Board has been less willing to accept vague promises that an Appellant will be acquiring counsel as an excuse to delay proceedings. *See e.g. McCobin v. DEP*, EHB Docket No. 2011-159-L (Opinion and Order issued June 11, 2012).

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

MARGARET HENRY :
 :
 vi. : EHB Docket No. 2012-030-M
 : (Consolidated with 2012-133-M)
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and SWEPI, LP, Permittee :

Issued: August 3, 2012

ORDER

AND NOW, this 3rd day of August, 2012, the Appellant's motion to amend notice of appeal is granted.

ENVIRONMENTAL HEARING BOARD


RICHARD P. MATHER, SR.
Judge

DATED: August 3, 2012

c: Department Litigation:
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GROUP AGAINST SMOG POLLUTION	:	
	:	
v.	:	EHB Docket No. 2011-065-R
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and LAUREL MOUNTAIN	:	Issued: August 14, 2012
MIDSTREAM OPERATING, LLC, Permittee	:	

OPINION AND ORDER
ON PERMITTEE’S MOTION FOR SUMMARY JUDGMENT AND
APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

In this appeal of an Air Quality Plan Approval, the parties seek summary judgment and partial summary judgment on the issue of whether emissions from Permittee’s compressor station should be aggregated with 21 connected gas wells that it services. On the question of whether the compressor station and gas wells fall within the same Standard Industrial Classification Major Group, partial summary judgment is granted to the Appellant. On the question of whether the compressor station and the gas wells are under common control and are contiguous or adjacent, we find that there are material and complex questions of both law and fact. Therefore, summary judgment is not appropriate on these issues.

OPINION

This appeal concerns an Air Quality Plan Approval (Plan Approval) issued by the Department of Environmental Protection (Department) to Laurel Mountain Midstream

Operating, LLC (Laurel Mountain Operating) for the operation of its Shamrock Compressor Station located in Fayette County, Pennsylvania. The Plan Approval was appealed by Group Against Smog and Pollution (GASP) who argues that the Department failed to conduct an adequate source determination.

Background

Upon review of the extensive and complex background and supporting documents provided by the parties in support of their motions and responses, we believe the following facts to be undisputed: Laurel Mountain Operating is owned by Laurel Mountain Midstream, LLC (Laurel Mountain Midstream), a limited liability corporation operating in the midstream section of the gas industry. Pursuant to an agreement, Laurel Mountain Midstream collects gas produced at 21 wells permitted and operated by two entities, Chevron AE Resources (Chevron AE or Chevron) and Atlas Resources and places it into interstate lines for transport to market. On August 25, 2010, a Plan Approval application was submitted to the Department for the installation of three gas fired compressor engines and one turbine at the Shamrock Compressor Station which is owned by Laurel Mountain Operating. In granting the Plan Approval on March 21, 2011, the Department concluded that the Shamrock compressor station and the Chevron and Atlas gas wells were not a “single stationary source” and, therefore, their emissions should not be aggregated. GASP appealed, and Laurel Mountain Operating was added to the case as permittee. The question raised by GASP in its appeal of the Plan Approval is whether the Department should have considered the compressor station and the wells as a “single stationary source” for purposes of calculating emissions.

In examining this question, we look to the Federal Clean Air Act and regulations promulgated thereunder since Pennsylvania has adopted the relevant requirements of the Clean

Air Act in this area. 25 Pa. Code §§ 127.81 and 127.83. The Clean Air Act defines “stationary source” as “any building, structure, facility or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(3). All of the parties agree that in order for the Shamrock compressor station and the well sites to be considered a single stationary source, they must meet all three of the following criteria set forth by the Federal Environmental Protection Agency (EPA): 1) they must be under common control; 2) they must be contiguous or adjacent; and 3) they must share the same Standard Industrial Classification Major Group. 40 C.F.R. § 52.21(b)(6).

On April 26, 2012, both GASP and Laurel Mountain Operating filed dispositive motions. GASP’s motion seeks partial summary judgment on the sole issue of whether the Shamrock facility and the well sites meet the third part of the test, i.e., whether they share the same Standard Industrial Classification Major Group. Laurel Mountain Operating’s motion argues that none of the three prongs have been met and, therefore, it is entitled to summary judgment on the question of whether the Shamrock Station and gas wells constitute a single stationary source. The Department responded to both motions, concurring with Laurel Mountain Operating’s motion and concurring with the industrial classification set forth in GASP’s motion, but not concurring with its legal conclusion.

The Pennsylvania Environmental Hearing Board’s (Board) consideration of motions for summary judgment is governed by Section 1021.94a of our Rules of Practice and Procedure, 25 Pa. Code § 1021.94a. Summary judgment may only be granted when there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *Id.* at § 1021.94a(1); *Macyda v. DEP*, 2011 EHB 526. The burden is on the moving party to demonstrate that there are no material facts in dispute and that it is entitled to summary judgment. *Kilgore v.*

City of Philadelphia, 717 A.2d 514, 516 (Pa. 1998) In ruling on the motion, the Board must view the record in the light most favorable to the non-moving party. *Id*; *Harriman Coal Corp. v. DEP*, 2000 EHB 1008. We discuss each motion separately below.

GASP's Motion for Partial Summary Judgment: Do the compressor station and well sites fall within the same Standard Industrial Classification Major Group?

GASP seeks partial summary judgment with regard to the third prong of the test: Do the compressor station and the wells share the same Standard Industrial Classification Major Group. GASP argues that both the compressor station and the well sites fall within Standard Industrial Classification Major Group 13 (Oil and Gas Extraction).

When the Department issued the Plan Approval for the Shamrock compressor station it assigned it a Standard Industrial Classification of 1389 (Oil and Gas Field Services, Not Elsewhere Classified.) (GASP Ex. A) In response to GASP's discovery requests, the Department confirmed that Shamrock's Standard Industrial Classification is 1389. (GASP Ex. B) And, in response to GASP's motion for partial summary judgment, the Department again acknowledges that the Standard Industrial Classification for Shamrock is 1389. The Department also acknowledges that gas wells are covered by Standard Industrial Classification 1311 (Crude Petroleum and Natural Gas) and that the Shamrock compressor station and the gas wells are in the same Standard Industrial Classification Major Group, i.e. Major Group 13. (Department Response)

Laurel Mountain Operating disputes that it has assigned the Shamrock facility a Standard Industrial Classification number, arguing instead that it uses the North American Industry Classification System. Under that system the Shamrock facility is assigned the number 213112 (relating to support activities for oil and gas operations.)

GASP argues that, regardless of whether Laurel Mountain Operating uses the Standard Industrial Classification system, it is the Department who makes the classification assignment and the Department has assigned the Shamrock facility the Standard Industrial Classification number 1389. GASP also asserts that the North American Industry Classification of 213112 corresponds to Standard Industrial Classification number 1389. Laurel Mountain Operating concedes that the two codes correspond. GASP also points out that the Standard Industrial Classification number assigned to the Shamrock facility was not challenged by Laurel Mountain Operating upon issuance of the Plan Approval.

We find that there is no genuine dispute that the Shamrock compressor station and the gas wells fall within the same Standard Industrial Classification Major Group. It is immaterial whether Laurel Mountain Operating recognizes or uses the Standard Industrial Classification system, since this classification system is clearly recognized and used by the Department who issued the Plan Approval and assigned the facility a classification that falls within Major Group 13. Laurel Mountain Operating has not provided us with any facts demonstrating that there is a genuine dispute on this topic. Therefore, we find that GASP is entitled to summary judgment on the question of whether the Shamrock facility and the gas wells it services fall under the same Standard Industrial Classification Major Group.

Laurel Mountain Operating's Motion for Summary Judgment: Are the compressor station and wells under common control and are they contiguous or adjacent?

As noted earlier, the other two prongs of the test that must be met in order for the Shamrock facility and the gas wells to be considered a single stationary source are as follows: 1) they must be under common control and 2) they must be contiguous or adjacent. 40 C.F.R. § 52.21(b)(6). Laurel Mountain Operating argues that these two factors are not present here. The

Department concurs in Laurel Mountain Operating's motion and focuses its response on the first prong of the test.

The first prong of the test is that the sources must be under common control. The parties agree that the definition of "control" is the one applied by the Security and Exchange Commission and recognized by EPA, as follows: "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting shares, by contract, or otherwise." 45 Fed. Reg. 59874. Here, the Shamrock compressor station is owned by Laurel Mountain Operating, whereas the wells are owned by either Chevron AE or Atlas Production. According to Laurel Mountain Operating, 11 of the wells are operated by Chevron AE and 10 by Atlas. (Permittee Statement of Material Facts, para. 17) It is the contention of Laurel Mountain Operating and the Department that because the Shamrock station and the gas wells are not owned or controlled by the same entity, the first prong of the test fails.

In response GASP argues that direct ownership is not the only means of establishing common control. It is GASP's contention that control can be established "through contractual relationships, voting interests, and other acts that indicate a party is able to exercise a degree of operational control." (GASP Response, p. 1) GASP cites various EPA documents in support of its argument. According to GASP, EPA has stated that common control may be established "if there is a contract for service relationship between the two companies." (GASP Response, p. 5, fn. 4, citing various EPA communications) Laurel Mountain Operating and the Department argue that the service contract with the gas well operators is simply "an arm's length commercial relationship between gas well operators and a mid-stream operator" in which "Laurel [Mountain Midstream] agrees to provide a service, namely gathering gas produced by existing wells, in

exchange for payment from the well operators.” (Department Response to Permittee’s Motion, p. 14) They argue that neither Laurel Mountain Operating nor its parent company, Laurel Mountain Midstream, are vested with any authority to control the wells or the well operators.

GASP points out that Chevron AE, the owner of 11 of the gas wells serviced by Laurel Mountain Midstream (Laurel Mountain Operating’s parent company), has an interest and role in Laurel Mountain Midstream’s Management Committee. According to Laurel Mountain Operating’s Statement of Material Facts, filed in conjunction with its motion for summary judgment, “[t]he business and affairs of [Laurel Mountain Midstream] are managed by its members – *Chevron AE* (the successor-in-interest to Atlas Pipeline Partners, L.P.) and Williams Laurel Mountain, LLC. . . as members of a Management Committee.” (Permittee Statement of Material Facts, Ex. D, Article 5, emphasis added)

Laurel Mountain Operating and the Department dispute that this arrangement gives Chevron the ability to exercise control over Laurel Mountain Midstream or Laurel Mountain Operating. They argue that Williams Laurel Mountain (Williams) holds a 51% interest in the Management Committee, whereas Chevron AE holds only a 49% interest, and, therefore, the decisions of the Management Committee are controlled by Williams and not Chevron. Laurel Mountain Operating also points to Laurel Mountain Midstream’s Amended and Restated LLC Agreement (LLC Agreement) which states that “all powers of the Company are vested in and will be exercised by and under the authority of, and the business and affairs of the Company will be managed under the direction of the Operating Member.” (Permittee Statement of Material Facts, Ex. D, § 7.1) According to Laurel Mountain Operating’s Statement of Material Facts, the Operating Member is Williams. (*Id.*)

However, GASP reads further into the LLC Agreement and argues that there are various scenarios where the Management Committee requires an affirmative vote from Chevron before it can act. GASP also references the Gathering Agreement entered into between Laurel Mountain Midstream and the well operators that, in GASP's view, provides both Chevron and Atlas with significant control over Laurel Mountain Midstream.

We cannot ascertain in the limited scope of a summary judgment motion whether the complicated relationship and agreements involving Laurel Mountain Midstream, Laurel Mountain Operating, Williams, Chevron and Atlas amount to the type of control envisioned by the first prong of the single stationary source test. At a minimum it is clear that Laurel Mountain Operating's parent company, Laurel Mountain Midstream, and Chevron have more than merely a commercial relationship. Whether this relationship amounts to "common control" between Laurel Mountain Operating and the gas well owners is a complex issue involving numerous questions of fact and possibly mixed questions of law and fact which are likely to require closer examination of the corporate structure and the agreements among the various corporate entities involved in this matter. Such complex issues are not appropriate for summary judgment. *Borough of Ambler v. DEP*, 2007 EHB 364, 367-68; *Groce v. DEP*, 2006 EHB 268, 269-70. All three parties present compelling evidence in support of their respective positions. However, it is not our role to determine which parties' evidence is more credible in the context of a summary judgment motion; rather, our role is to determine whether there are factual disputes requiring a hearing. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 954. Here, there are clearly factual disputes. Therefore, summary judgment is denied with respect to the first prong the test, that of common control.

The second prong of the test for determining whether emission units should be treated as a single stationary source is that they must be contiguous or adjacent. Laurel Mountain Operating seeks summary judgment on this issue on the basis that the compressor station and the gas wells cannot be considered "contiguous or adjacent" because they are located thousands of feet apart, and in some instances, in separate townships. The terms "contiguous or adjacent" have not been defined in the regulations. Therefore, Laurel Mountain Operating looks to the dictionary definition of "contiguous" as "being in actual contact" and "touching along a boundary or at a point" and to the definition of "adjacent" as "not distant" and "having common endpoint or border." (Permittee's Brief in Support of Motion for Summary Judgment, p. 14, quoting Webster's Ninth New Collegiate Dictionary, 1986). Laurel Mountain Operating asserts that when one applies these definitions, the compressor station and the wells cannot be found to be contiguous or adjacent because the wells are not in contact with, nor do they touch a boundary with Shamrock. According to Laurel Mountain Operating, the wells serviced by the Shamrock compressor station are spread out among four different townships, with the closest well located one quarter mile from the compressor station, and the furthest well over 24,000 feet away. (Ex. B to Palacios Affidavit, Permittee Statement of Material Facts) Laurel Mountain Operating argues that wells located thousands of feet away from the compressor station cannot be considered part of the same source and would require the aggregation of properties that are not adjacent or contiguous.

GASP argues that the question of whether sources are contiguous or adjacent is not determined solely by their proximity to each other, but also requires "a case-by-case consideration of physical connections such as pipelines, dependency, and other aspects of the physical and operational relationship between the facilities." (Appellant's Response in

Opposition, p. 2) It is GASP's argument that because Shamrock and the well sites "are connected via pipeline, are dependent upon each other, and are relatively close in proximity, the contiguous or adjacent requirement is satisfied." (*Id.*) In support of its argument, GASP relies on decisions made by EPA Regional Offices over the last three decades on the question of whether facilities should be considered contiguous or adjacent for purposes of aggregating their emissions. GASP cites EPA decisions that look at not only proximity but also dependency and the existence of a physical connection.

In response to this argument, Laurel Mountain Operating brought to the Board's attention a decision issued by the Sixth Circuit Court of Appeals just days ago, on August 7, 2012, in the case of *Summit Petroleum Corp. v. EPA*, Nos. 09-4348, 10-4572 (6th Cir. Aug. 7, 2012), in which the Court overturned EPA's interpretation of what constitutes "adjacent" for purposes of meeting the second prong of the stationary source test. In that case, the petitioner, Summit Petroleum Corporation (Summit) owned and operated a natural gas sweetening plant, as well as gas production wells located varying distances from the plant, ranging from five hundred feet to eight miles away. The petitioner did not own the property between the individual well sites or the property between the plants and the well sites, and neither the well sites nor the plant shared a common boundary. Nonetheless, EPA had concluded that the plant and wells satisfied the second prong of the stationary source test of being located on adjacent properties because, although the plant and wells were physically independent, they "worked together as a single unit that 'together produced a single product.'" *Id.* at p. 9.

The Sixth Circuit disagreed with EPA's determination that "adjacency" can be established merely through functional relatedness, finding it contrary to the plain meaning of the term "adjacent." The Court looked to the dictionary definition and etymology of the word

“adjacent” as well as to case law to reach its conclusion that “there is a common recognition of the fact that adjacency is a purely physical and geographical, even if case-by-case, determination.” *Id.* at p. 13, citing *United States v. St. Anthony R.R. Co.*, 192 U.S. 524 (1904). The Court concluded that EPA’s interpretation of “adjacent” as including functional relatedness irrespective of physical distance undermined the plain meaning of the text “which demands, by definition, that would-be aggregated facilities have physical proximity.” *Summit Petroleum, supra* at p. 15. The Court remanded the matter to EPA to determine whether the petitioner’s plant and gas production wells were located on “adjacent” properties within the “ordinary understanding” of that term, “i.e., physically proximate” properties. *Id.* at 16.

It is important to note that in the *Summit* case, the Court did not make a determination that the distance between the Summit plant and the gas wells failed to meet the “adjacency” requirement of the single source test. Rather, it disagreed with the manner in which EPA had made its determination, and the Court remanded the matter to the EPA to make a new determination by applying the Court’s interpretation of “adjacency” to the specific facts of the case. The Court in *Summit* recognized that this determination must be made on a case-by-case basis. The Department also recognizes the need to make this determination on a case-by-case basis, as evidenced by its October 12, 2011 “Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries,” cited in GASP’s response to Laurel Mountain Operating’s motion (and attached as an exhibit to the Department’s Response to Laurel Mountain Operating’s Motion). In the Department’s Guidance Document, it states that “properties located a quarter mile or less apart are considered contiguous or adjacent for PSD, Nonattainment NSR and Title V applicability determinations. *Properties located beyond this*

quarter mile range may only be considered contiguous or adjacent on a case-by-case basis.”

(Ex. DEP-3, p. 6) (emphasis added)

Thus, looking at the specific facts of this case, if we were to follow the *Summit* rationale, we would still need to make a determination as to whether there is sufficient physical proximity between the gas wells and the Shamrock facility as to be considered “adjacent.” Neither GASP nor the Department, nor Laurel Mountain Operating for that matter, has had an opportunity to weigh in on the significance of the *Summit* decision. We hasten to add that we are not bound by the Sixth Circuit decision, though we find it persuasive. The parties rely heavily on federal case law in fashioning all of their arguments in this case. As we recently noted, “these federal cases are not binding on us but merely persuasive.” *Clean Air Council v. DEP and MarkWest Liberty Midstream & Resources, LLC*, EHB Docket No. 2011-072-R (Opinion and Order on Motion for Protective Order and Motion to Compel issued July 13, 2012), *slip op.* at p. 6. Moreover, we think that this issue is one in which there exist material questions of fact which would be best developed at a hearing on the merits. As eloquently stated by Judge Labuskes in *Citizen Advocates United to Save the Environment v. DEP*, 2007 EHB 101, 108, “the significance. . . of [this matter] is only one of the myriad of mixed issues of fact and law that permeate every aspect of this appeal.”

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GROUP AGAINST SMOG POLLUTION :
 :
 v. : EHB Docket No. 2011-065-R
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and LAUREL MOUNTAIN :
 MIDSTREAM OPERATING, LLC :

ORDER

AND NOW, this 14th day of August 2012, it is hereby **ORDERED** as follows:

- 1) The Motion for Partial Summary Judgment filed by GASP is **granted**.
- 2) The Motion for Summary Judgment filed by Laurel Mountain Operating is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: August 14, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

BRADLEY COMP AND DORIS J. COMP

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EHB Docket No. 2012-055-CP-L

Issued: August 16, 2012

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

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department’s motion for default judgment because the Defendants failed to answer the Department’s complaint for civil penalties, failed to respond to a notice of intent to seek default judgment or the motion for default judgment, and failed to otherwise demonstrate any interest in defending against the complaint. The Board assesses a civil penalty in the amount requested in the Department’s complaint.

OPINION

On March 20, 2012, the Department of Environmental Protection (the “Department”) filed a complaint for assessment of civil penalties against Bradley and Doris Comp (the “Defendants”) for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Dam Safety and Encroachments Act, 52 P.S. §§ 693.1 *et seq.*, and the regulations promulgated thereunder that are alleged to have occurred on property located in West Goshen Township, Chester County. Each defendant received service of the complaint, together with a notice to defend, on March 24,

2012. The Defendants have never filed an answer or any other form of response to the Department's complaint.

On July 9, 2012, the Department filed a motion for default judgment. That motion informed the Board that the Department provided each of the Defendants with a notice of intent to seek default judgment on June 1, 2012. The Defendants failed to react to the Department's notice of intent, and they have failed to file a response to the motion for default judgment within the 30 days provided by 25 Pa. Code §1021.94.

Our Rules provide that answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint. 25 Pa. Code § 1021.74. Where a defendant fails to file an answer to a complaint, a plaintiff may file a motion for entry of default judgment with the Board pursuant to 25 Pa. Code § 1021.76a. *DEP v. Wolf*, 2010 EHB 611, 613. Since the adoption of 25 Pa. Code § 1021.76a in October 2009, the Board has been explicitly authorized to "assess civil penalties in the amount of the plaintiff's claim" when the Board enters default judgment in a matter involving a complaint for civil penalties. *Wolf*, 2010 EHB at 614-15.

The record shows that, although the Department has filed and served its complaint, provided the Defendants with a notice to defend, provided the Defendants with notice that the Department intended to seek an entry of default judgment, and moved for default judgment, the Defendants have failed to file anything in this case. The Defendants have had numerous opportunities to defend against the complaint and to participate in proceedings before the Board but have chosen not to do so. Therefore, the Board grants the Department's motion and assesses civil penalties in the amount of the Department's claim as set forth in its complaint of \$5,250.

Accordingly, we enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION : EHB Docket No. 2012-055-CP-L
v. :
BRADLEY COMP AND DORIS J. COMP :

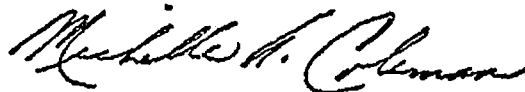
ORDER

AND NOW, this 16th day of August, 2012, it is hereby ordered that the Department's motion for entry of default judgment is **granted**. The Board assesses a civil penalty against the Defendants in the amount of \$5,250.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: August 16, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL AND DEBBIE BARRON

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2011-142-L

Issued: September 4, 2012

**OPINION AND ORDER
ON MOTION IN LIMINE**

By Bernard A. Labuskes, Jr., Judge

Synopsis

An appellant may not use an appeal from an order issued pursuant to Sections 512 and 1102 of the Pennsylvania Hazardous Sites Cleanup Act (“HSCA”), 35 P.S. §§ 6020.512, 6020.1102, as a vehicle for challenging the merits of a response action taken by the Department pursuant to Section 505 of HSCA, 35 P.S. § 6020.505. The exclusive method for challenging a response action is set forth in Section 508 of HSCA, 35 P.S. § 6020.508.

OPINION

On July 12, 2010, the Department of Environmental Protection (the “Department”) issued its Statement of Decision (“SOD”) pursuant to the Pennsylvania Hazardous Sites Cleanup Act (“HSCA”), 35 P.S. § 6020.101 *et seq.*, for the Morris Run TCE site in Hilltown and Bedminster Townships, Bucks County. The SOD explains and justifies the Department’s selection of an interim response to abate the release of trichloroethylene (TCE), a hazardous substance, into the

groundwater beneath a primarily residential area. The site includes an area where as many as 37 properties have been impacted by TCE contamination.

The Department determined that it needed to abate the immediate and ongoing threat posed by the ingestion of TCE in drinking water. In order to achieve that objective, the Department considered four potential alternatives: (1) no action; (2) delivery of bottled water; (3) installation of whole house carbon filtration systems together with execution of environmental covenants setting forth various obligations to be imposed on the impacted property owners; and (4) installation of a public water supply waterline together with execution of environmental covenants. After considering public comments, the Department selected the third alternative. Under Alternative 3, the Department decided to use money in the Hazardous Sites Cleanup Fund to provide carbon filtration systems free of charge to all the properties in the site area that relied on private wells that had TCE levels near or above the statewide health standard. Each property owner that accepted the Department's interim response would be required to execute environmental covenants that would require the property owner to refrain from using groundwater without using a carbon filtration system, operate and maintain the filtration system, sample the water annually after an initial two-year period in which the Department would conduct the sampling, and disclose the interim response when conveying any interest in the property. The environmental covenants would be required to be recorded with the Bucks County Recorder of Deeds.

The Appellants, Michael and Debbie Barron, who are appearing *pro se*, own one of the residential properties subject to the Department's interim response. The Barrons purchased their house on January 10, 2002.¹ The prior owner had already installed a carbon filtration system to remove TCE from the well water. The Barrons knew about the TCE contamination and the

¹ These facts are acknowledged as undisputed in the parties' pre-hearing memoranda.

filtration system when they bought the home. Between 2002 and 2010, the Barrons never changed the filters or rebedded the carbon in their system. A water sample in 2010 revealed TCE levels of 47.1 micrograms per liter ($\mu\text{g/l}$) before the carbon filtration system and 59.8 $\mu\text{g/l}$ after the system. The health standard is 5 $\mu\text{g/l}$. A carbon filtration system that is ill-maintained or not maintained can actually result in a higher load concentration of a hazardous substance in the drinking water than having no system at all. The Barrons did not rebed the carbon filters in their system until October 2011.

After a series of letters and meetings urging the homeowners to accept the filtration systems in exchange for the execution of environmental covenants and the Barrons' refusal to accept that offer, the Department issued an administrative order to the Barrons and the Bucks County Recorder of Deeds on or about September 2, 2011. The order does not require the Barrons to replace their existing carbon filtration system or execute environmental covenants. Rather, the primary purpose and effect of the order according to the Department is to ensure that future prospective purchasers of the property and other interested persons are made aware of the contamination and the institutional controls on the property. The Order achieves this objective by first listing the institutional controls as follows:

1. The then current owner shall not use the groundwater at the Property for any reason without the installation of a Department provided carbon filtration system or an equivalent system.
2. The then current owner shall not use, maintain, or install any groundwater well at the property unless it supplies drinking water through a Department provided and installed carbon filtration system or an equivalent system.
3. After the Department's Initial Monitoring and Maintenance Period, the then current owner shall conduct sampling of the property's drinking water for all of the TCE at least annually at a location before and after the carbon filtration system. The Department recommends that the sampling be performed by a qualified technician and that a laboratory, certified by the Commonwealth, conducts the sampling analysis.

4. If any post-filter sampling of the property's drinking water indicates that any of the TCE exceeds the then current safe drinking standard promulgated by the Department, the then current owner should replace all of the carbon filters on the whole house carbon filtration system. Even if post-filter sampling of drinking water does not indicate an exceedance of a safe drinking standard for any of the TCE, the then current owner should replace the carbon filters on the whole house carbon filtration system, at a minimum, every five years from the date of the last filter installation and/or replacement.

5. The then owner of the Property should maintain the whole house carbon filtration system in accordance with the manufacturer's specifications to assure proper treatment of drinking water. The Department recommends that a qualified technician evaluate the system for any necessary maintenance, at a minimum, every five years.

(Order ¶ E.) The order goes on to require the following:

1. The owner of the Property, his or her agents or assigns, or interest holders in the Property shall not, from the date of this Administrative Order, put the Property, the Morris Run TCE Site, or any portion thereof, to any use that would disturb or be inconsistent with the interim response implemented by the Department, as set forth under Paragraph E and the Statement of Decision, and the owner of the Property, his or her agents or assigns, or interest holders in the Property shall not violate any of the Institutional Controls identified in Paragraph E, herein, or within the Statement of Decision.

2. This Administrative Order shall be binding upon all subsequent purchasers of the Property and interest holders of the Property once it has been recorded.

3. The Recorder of Deeds for the County of Bucks shall within forty (40) days of the date of this Administrative Order record this Administrative Order in a manner that will assure its disclosure in the ordinary course of a title search of the Property.

4. The owner of the Property, its agents or assigns, or any subsequent holder of title to the Property shall provide the Department's Southeast Regional Environmental Cleanup Program Manager with written notice of any conveyance, transfer, or assignment of title to the Property, or any portion thereof, within 20 days of such transfer.

The Barrons filed this appeal from the issuance of the order.² Our review of the Barrons' notice of appeal and pre-hearing memorandum reveals that the Barrons essentially have only one

² The Bucks County Recorder of Deeds did not appeal the order.

objection; namely, that the Department should have selected the fourth alternative in the SOD (installation of a public waterline) instead of the third alternative (installation of carbon filtration systems). They argue that installation of a public waterline would have been a better choice because it would not have resulted in a reduction in the value of their home, would have better reduced the dangers of TCE exposure, and would have eliminated the financial and regulatory burdens associated with installation of carbon filtration systems. The Department has filed a motion in limine, arguing that the Barrons' objection goes to the SOD itself as opposed to the order, and it is inappropriate to debate the merits of the SOD in this proceeding. We agree.

HSCA is the Commonwealth's superfund law. It created an independent, state-run cleanup program designed to promptly and comprehensively address the problem of hazardous substance releases in the Commonwealth, whether or not the sites where those releases occur qualify for cleanup under the federal superfund law (42 U.S.C. § 9601 *et seq.*). See 35 P.S. § 6020.102. The Department is authorized under HSCA to undertake certain "response actions" such as the action that was taken in this case in order to address the release of hazardous substances or contaminants such as TCE into the environment. 35 P.S. § 6020.505. Response actions must be based upon an administrative record. 35 P.S. § 6020.506.

HSCA sets forth unique processes and procedures for not only developing and implementing response actions, but challenging those actions in court or before this Board as well. Of primary importance here, Section 508 reads as follows:

(a) General rule.—*Notwithstanding any other provision of law*, the provisions of this section shall provide the *exclusive* method of challenging either the administrative record developed under section 506 or a decision of the department based upon the administrative record.

(b) Timing of review.—Neither the [EHB] nor a court shall have jurisdiction to review a response action taken by the department or ordered by the department under section 505 until the department files an action to enforce the order or to

collect a penalty for violation of such order or to recover its response costs or in an action for contribution under section 705....

(c) Grounds.—A challenge to the selection and adequacy of a remedial action shall be limited to the administrative record developed under section 506...

(d) Procedural errors.—Procedural errors in the development of the administrative record shall not be a basis for challenging a response action unless the errors were so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made....

(e) Remand.—When a response action is demonstrated to be arbitrary and capricious on the basis of the administrative record developed under section 506, or when a procedural error occurred in the development of the administrative record which (error) would have significantly changed the response action, the following apply:

(1) When additional information could affect the outcome of the case, the matter shall be remanded to the department for reopening the administrative record.

(2) When additional information could not affect the outcome of the case the department's enforcement of its order or its recovery of response action found to be arbitrary and capricious or the result of a procedural error which would have significantly changed the action.

35 P.S. § 6020.508 (emphasis added).

The Department in this case has not taken any of the actions described in Section 508(b) that are mandatory prerequisites to this Board having jurisdiction to review the Department's response action. Specifically, the Department has not filed an action to enforce an order that was issued under Section 505 or to collect a penalty for violation of such an order, or to recover its response costs, or an action for contribution. Instead, the Department has issued the order under appeal to the Barrons and the Bucks County Recorder of Deeds pursuant to its authority under Sections 512(a) and 1102 of HSCA. Section 512(a) reads as follows:

(a) General Rule.—A site at which hazardous substances remain after completion of a response action shall not be put to a use which would disturb or be inconsistent with the response action implemented. The department shall have

the authority to issue an order precluding or requiring cessation of activity at a facility which the department finds would disturb or be inconsistent with the response action implemented. A person adversely affected by the order may file an appeal with the [EHB]. The department shall require the recorder of deeds to record an order under this subsection in a manner which will assure its disclosure in the ordinary course of a title search of the subject property. An order under this subsection, when recorded, shall be binding upon subsequent purchasers,

35 P.S. § 6020.512(a). Section 1102 more generally gives the Department the authority to issue such orders as it deems necessary to aid in the enforcement of the act. 35 P.S. § 6020.1102.

Orders issued pursuant to Sections 512 and 1102 or appeals therefrom are *not* included in the list of prerequisites for a challenge to a response action listed in Section 508. To repeat, Section 508 describes the “exclusive” method for challenging a response action based upon an administrative record “[n]otwithstanding any other provision of law.” 35 P.S. § 6020.508(a). Therefore, although the recipient of an order issued pursuant to Sections 512 and/or 1102 has a right to appeal that order to the Board, a challenge to the merits of a response action that underlies that order is not within the scope of our review of the order. Otherwise, Section 508 would essentially be meaningless anytime the Department issued a Section 512 or 1102 order. This cannot possibly be what the Legislature intended. Sections 512 and 1102 do not trump Section 508; it is the other way around. Therefore, the Barrons may not use this appeal as a vehicle for challenging the Department’s remedy selection in the SOD. The Department’s motion in limine must be granted.

It is not altogether clear what the practical effect of our granting of the Department’s motion will be at the upcoming hearing on the merits. Our reading of the Barrons’ notice of appeal would have suggested that they really only raised one objection and that objection went to the remedy selection set forth in the SOD. We discern nothing in the notice of appeal that is

specific to the order itself as distinct from the underlying response action.³ The Department, however, says that it “is willing to accept some late modifications by the Appellants of the issues they are raising on appeal, provided that such changes do not prejudice the Department’s defense of the appeal and that the Board clarifies that the issues relate only to the Order and not some other action.” We do not know what that means. The Department also says that we “should confine [the Barrons’] arguments as they relate to the Order and only in context of the reasonableness of the Department’s issuance of the Order, since that is the action under appeal.” Again, we do not know what that means as a practical matter. Similarly, the Barrons’ pre-hearing memorandum and response to the Department’s motion are not of much help in this regard. The Barrons have not identified any witnesses in their pre-hearing memorandum. In their response to the motion, they ask us to “admit all evidence submitted. This evidence should include but not be limited to testimony, raw data, and admissions of evidence as outlined in the Departments Exhibits of the Commonwealth of Pennsylvania (volume I and II), all communication between the Barron’s and Appellee, and the interrogatories responses.” It is not clear where all of this leaves us. Therefore, we will proceed to the hearing on the merits.

Accordingly, we issue the order that follows.

³ The Barrons have not asserted, for example, that taking Alternative 3 as a given as we must, the order is inconsistent with that alternative or is otherwise unnecessary, unlawful, or unreasonable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL AND DEBBIE BARRON

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

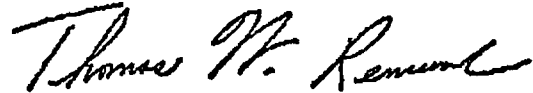
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EHB Docket No. 2011-142-L

ORDER

AND NOW, this 4th day of September, 2012, it is hereby ordered that the Department's motion in limine is **granted**.

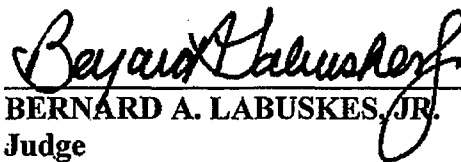
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: September 4, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

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Adam N. Bram, Esquire
Office of Chief Counsel – Southeast Region

For Appellants, *Pro Se*:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEAN W. DIRIAN

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

EHB Docket No. 2011-155-L

Issued: September 10, 2012

**OPINION AND ORDER
ON MOTION FOR SANCTIONS**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part an unopposed motion for discovery sanctions. An appellant is precluded from calling any witnesses other than himself as a sanction for not identifying any witnesses or other persons with knowledge of the matters at issue in response to written discovery and a Board order compelling discovery responses. The appellant is also required to assume the initial burden of proceeding, although the Department retains the ultimate burden of proof.

OPINION

Dean W. Dirian filed this *pro se* appeal from a field order dated September 27, 2011 in which the Department of Environmental Protection (the "Department") alleged noncompliance with the Pennsylvania Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.*, at Dirian's Spring Lake Park in Elizabeth Township, Lancaster Township. The Department has not been satisfied with Dirian's responses to the Department's written discovery and has filed a motion asking us to dismiss this appeal or, in the alternative, impose other appropriate sanctions. Dirian has not responded to the motion.

Discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code § 1021.102(a). Rule 4019 authorizes us to impose sanctions for failure to comply with the discovery rules. Pa. R. Civ. P. 4019. *See also* 25 Pa. Code § 1020.161 (authorizing sanctions for failure to comply with Board's rules and orders). If sanctions are necessary, our goal is to impose a sanction that is appropriate given the magnitude of the violation. We consider (1) the prejudice caused to the opposing party and whether that prejudice can be cured, (2) the defaulting party's willfulness or bad faith, (3) the number of discovery violations, and (4) the potential importance of the precluded evidence. *ERSI v. DEP*, 2001 EHB 824, 829 (citing *Hein v. Hein*, 717 A.2d 1053, 1056 (Pa. Super. 1998)). *See also Perano v. DEP*, 2011 EHB 17, 23-24 (spoliation sanction based on degree of fault of spoliator, degree of prejudice suffered by other party, and use of least restrictive sanction that will prevent substantial unfairness and deter future misconduct) (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3rd Cir. 1994); *Schroeder v. Commonwealth*, 710 A.2d 23 (Pa. 1998)). A separate standard, however, applies to a failure to disclose potential witnesses. The Rules of Civil Procedure expressly provide that, absent extenuating and uncontrollable circumstances, a witness whose identity has not been revealed will not be permitted to testify. Pa. R. Civ. P. 4019(i).

Our review of the record confirms that Dirian's compliance with our rules and orders and his discovery obligations has indeed been spotty. Our greatest concern is that Dirian has failed to disclose any witnesses in response to the Department's discovery requests, which asked Dirian to identify persons with knowledge and other potential witnesses. He has not taken advantage of multiple opportunities to answer the questions. Further, by failing to respond to the Department's motion for sanctions, Dirian has not given us any reason to deny the Department's

request for sanctions. Therefore, in accordance with Pa. R. Civ. P. 4019(i), he will not be permitted to call any witnesses other than himself at the upcoming hearing on the merits. As to any exhibits proffered by Dirian that have not been disclosed, we will decide whether to exclude those exhibits as a discovery sanction on a case-by-case basis at the hearing depending upon a showing of prejudice to the Department. Furthermore, although the Department will retain the ultimate burden of proof, Dirian will be required to assume the initial burden of proceeding. He will be required to file the first pre-hearing memorandum and to present his case in chief first at the hearing on the merits.

We do not feel comfortable imposing the other extreme sanctions requested by the Department against this *pro se* appellant, such as dismissal of the appeal or preventing Dirian from presenting any evidence whatsoever. Although as previously noted Dirian's compliance with applicable requirements has been inadequate, we note that he supplied a rather detailed, seven-page, single-spaced narrative explaining his position and his understanding of the pertinent facts as early as December 23, 2011. (DEP Motion Exhibit 9.) We also note that a few exhibits were attached to that narrative. Other exhibits may have been turned over as well. (See Dirian's "Response," EHB Docket Document No. 18.) There is also mention on our docket of at least one in-person meeting between the Department and Dirian. (Document No. 18.) This case is not overly complex. We assume the Department has a basic understanding of the site at issue or it would not have issued the order in the first place. The Department has not said that it attempted to depose Dirian, which might have been a productive exercise in this sort of appeal and reduced any prejudice otherwise suffered.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEAN W. DIRIAN

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2011-155-L

ORDER

AND NOW, this 10th day of September, 2012, in consideration of the Department's unopposed motion for sanctions, it is hereby ordered that Dirian will not be permitted to call any witnesses other than himself at the hearing on the merits. It is further ordered that the Department may move to exclude any exhibits proffered by Dirian at the hearing that were not previously identified as a discovery sanction based upon showing of prejudice. Dirian shall assume the initial burden of proceeding and shall file his pre-hearing memorandum on or before **October 4, 2012**, with the Department's to follow on **October 25, 2012**, instead of as previously ordered. Dirian shall present his case in chief first at the hearing. The Department's motion is in all other respects denied.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: September 10, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

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

For Appellant, *Pro Se*:
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Newmanstown, PA 17073



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	EHB Docket No. 2008-327-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BULLSKIN STONE &	:	Issued: September 17, 2012
LIME, LLC, Permittee	:	

**OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
PERMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board denies a motion for summary judgment and partial summary judgment on the issue of whether noncoal mining activities were initiated within three years of the permit issuance as required by the noncoal mining regulations. The Board may not make judgments regarding the credibility of witnesses in the context of a summary judgment motion. Rather, we need to take testimony in order to decide the issue.

OPINION

Before the Environmental Hearing Board (Board) is a motion for summary judgment filed by the Appellants, Rural Area Concerned Citizens, seeking summary judgment on their appeal of a Small Noncoal Permit (permit) issued to Bullskin Stone & Lime, LLC (Bullskin) by the Department of Environmental Protection (Department) on October 21, 2008 and appealed by Rural Area Concerned Citizens on November 20, 2008. The permit authorized the mining of

sandstone and shale in Bullskin Township, Fayette County. The case is scheduled for trial in October 2012.

On June 18, 2012, Rural Area Concerned Citizens filed a motion for summary judgment on the basis that the permit had expired by operation of law because Bullskin had not begun any mining activities within three years of the permit's issuance as required by 25 Pa. Code § 77.128(b). The Department filed a response in support of the motion. Bullskin filed a response in opposition to the motion and a cross-motion for partial summary judgment on the question of whether it had, in fact, begun mining activities within three years of the issuance of the permit.¹

Section 77.128(b) of the noncoal mining regulations states as follows:

(b) A permit will terminate if the permittee has not begun the noncoal mining activities covered by the permit within 3 years of the issuance of the permit. The Department may grant reasonable extensions of time for commencement of these activities upon receipt of a written statement showing that the extensions of time are necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee or if there are conditions beyond the control and without the fault or negligence of the permittee. Requests for extensions shall be submitted to the Department prior to expiration of the permit. If a permit has not been activated within 3 years or the permittee has not been granted an extension, the permittee may apply for a permit renewal.

25 Pa. Code § 77.128(b) (emphasis added)

In support of its motion for summary judgment, Rural Area Concerned Citizens provides an affidavit from one of its members, Lee Welker, which states simply that he is familiar with the proposed location of the quarry and that Bullskin has not activated a quarry at the location since the issuance of the permit. (Welker Affidavit, para. 2 and 3)

¹ Bullskin was granted an extension in which to file its response, which was after the filing of the Department's response in support of the motion.

The Department's response in support of Rural Area Concerned Citizen's motion and Bullskin's response in opposition to the motion provide a much more detailed account of the history of Bullskin's permit and activities at the permit site. The Department provided the affidavit of its District Mining Manager, Joseph Leone, and Bullskin provided the affidavit of Dennis Noll, president of Earthtech, Inc., Bullskin's consultant in the preparation and filing of the permit application. These affidavits provide us with the following background:

Background

The permit was issued to Bullskin on October 21, 2008. (Leone Affidavit, para. 2) According to Dennis Noll, sometime "in 2010" the Department requested Bullskin to drill a borehole in the permit area in order to verify certain information in the permit application. (Noll Affidavit, para. 3) The record contains no further information regarding this alleged request by the Department, such as whether it was made in writing or verbally or who at the Department made the request. In response to the Department's request, two boreholes were drilled in the permit area, one on July 26, 2010, the other on September 9, 2010. (Noll Affidavit, para. 5) Overburden analysis was performed on the borehole material on August 11, 2010 and September 22, 2010. (*Id.*) On September 27, 2010, the permit was temporarily suspended because the Department determined that Bullskin had provided incorrect geologic data in its original permit application. (Leone Affidavit, Attachment 2) Following submission of additional geologic data requested by the Department, Bullskin's permit was reinstated on January 25, 2011. (Leone Affidavit, Attachment 3)

On April 30, 2012 the Department again contacted Bullskin regarding the permit. The Department informed Bullskin that because it appeared that the permit had not been activated in

accordance with 25 Pa. Code § 77.128(b) and because no request for extension or renewal had been received, it appeared that the permit had expired. (Leone Affidavit, Attachment 4).

By letter dated May 8, 2012, Bullskin responded to the Department's April 30 letter by stating that it had, in fact, conducted mining activities at the site when it drilled boreholes and conducted overburden analysis. (Leone Affidavit, Attachment 5) The Department disagreed and on June 6, 2012 notified Bullskin that its permit had expired by operation of law. (Leone Affidavit, Attachment 7) Bullskin appealed the permit expiration, and that appeal has been docketed at a separate case number, EHB Docket No. 2012-123-R.

Discussion

Summary judgment may be granted only if the motion record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a.

Before proceeding to the merits of the motion for summary judgment, we note that the moving party in this case, Rural Area Concerned Citizens, provided insufficient information to warrant the granting of summary judgment. Rather, the facts in support of the motion were overwhelmingly provided by the Department in its response. Because Bullskin had the opportunity to respond to the facts and argument set forth in the Department's "response," we feel it is appropriate in this instance to rely on those facts when considering the merits of Rural Area Concerned Citizens' motion. However, the question of whether a party may provide additional material facts when filing a response in support of a motion for summary judgment is an issue that is currently being addressed by the Environmental Hearing Board's Rules Committee. Proposed rulemaking is expected to be published later this year, and the public will have an opportunity to comment on it.

Turning to the merits of the motion, Bullskin asserts that it did perform noncoal mining activities within three years of the permit's issuance in accordance with the requirements of 25 Pa. Code § 77.128(b). It states that the two boreholes it drilled in July and September 2010 served a dual purpose: first, complying with the Department's request to supply additional information and, secondly, "enhancing Bullskin's exploration of the permit area's property characteristics. . . ." (Bullskin Brief in Opposition, statement 7, p. 2) Bullskin argues that these activities constitute mining activities since the definition of "noncoal surface mining activities" includes "exploration" and "borehole drilling." 25 Pa. Code § 77.1 (Definitions) Bullskin also contends that it performed assessments of hydrologic impacts of the proposed mine by measuring water levels in the boreholes. (Noll Affidavit, para. 6)

The Department asserts that the only purpose of drilling the boreholes in 2010 was to obtain overburden information which should have been provided in the original permit application, not in furtherance of any mining activities. The Department points out that Bullskin has not constructed any roads or erosion and sedimentation controls, nor has it commenced overburden or rock removal since the permit was issued. (Leone Affidavit, para. 9) The Department also points to the language of Section 77.128(b) which states not only that a permittee must commence "mining activities" within three years of a permit issuance, but "mining activities *covered by the permit.*" (emphasis added) The Department argues that the activities conducted by Bullskin in July through September 2010 do not constitute "mining activities *covered by the permit*" because they were neither contemplated by nor addressed in the permit. Rather, they were intended solely to provide the Department with information that should have been provided with the permit application. The Department makes the following strong argument:

[T]he regulation requires, at a minimum, that the permittee engage in some activity approved by the permit, not merely some work that could fit within the broad definition of noncoal mining activities. . . .Drilling bore holes to supply geologic information to replace incorrect information in the permit application is not an activity covered by the permit. This information should have been provided before a permit was issued.

(Department Brief, p. 4)

However, whether the activities conducted by Bullskin in July through September of 2010 constitute “mining activities covered by the permit” seems to us to be a mixed question of law and fact. A resolution of these questions necessarily requires us to make judgments concerning the credibility of witnesses which we cannot do in the context of a motion for summary judgment. *Pileggi v. DEP*, 2010 EHB 244, 249; *Defense Logistics Agency v. DEP*, 2001 EHB 1215. Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *Macyda v. DEP*, 2011 EHB 526, 530, quoting *Albright v. Abington Mem’l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997).

We believe that the issue of whether Bullskin’s borehole drilling and overburden analysis constitutes mining covered by the permit is a matter that would be best addressed in the appeal filed by Bullskin at EHB 2012-123-R, which is the appeal of the permit expiration, rather than the current action at EHB Docket No. 2008-327-R, which is Rural Area Concerned Citizens’ appeal of whether the permit should have been issued in the first place. Therefore, for the sake of judicial economy, we conclude that the appeal of Rural Area Concerned Citizens should be stayed until a decision has been issued in Bullskin’s appeal which will likely require a hearing on the merits. Because the issue in that appeal is narrow, we believe that we should be able to proceed to a hearing quickly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS :
:
v. : EHB Docket No. 2008-327-R
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and BULLSKIN STONE :
& LIME, LLC, Permittee :

ORDER

AND NOW, this 17th day of September, 2012, it is hereby **ORDERED** that Rural Area Concerned Citizens' motion for summary judgment and Bullskin Stone & Lime's motion for partial summary judgment are **denied**. This appeal is stayed pending a decision in the appeal of Bullskin Stone & Lime, LLC v. DEP, EHB Docket No. 2012-123-R.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

DATED: September 17, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Office of Chief Counsel – Southwest Region

For Appellant:

Robert P. Ging, Jr., Esquire
2095 Humbert Road
Confluence, PA 15424

For Permittee:

Robert Thomson, Esquire
Mark Dausch, Esquire
Babst Calland Clements & Zomnir, PC
Two Gateway Center
Pittsburgh, PA 15222



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

**FRANK COLOMBO d/b/a GLENBURN
SERVICES**

EHB Docket No. 2011-114-CP-C

Issued: September 27, 2012

**OPINION AND ORDER
ON MOTION FOR SANCTIONS**

By Michelle A. Coleman, Judge

Synopsis:

The Board grants the Department's unopposed motion for sanctions precluding the Defendant from introducing at the hearing any evidence sought by the Department in its unanswered discovery requests.

OPINION

Before the Board is a motion for sanctions ("motion") filed by the Department of Environmental Protection (the "Department") on August 31, 2012 requesting that the Defendant, Frank Colombo d/b/a Glenburn Services ("Colombo" or "Defendant"), be precluded from introducing certain evidence at the hearing. On March 22, 2012 the Department had served interrogatories, expert interrogatories and requests for the production of documents on the Defendant. On July 17, 2012 the Department filed a motion to compel responses to the Department's written discovery and motion to have unanswered admissions deemed admitted. Colombo never filed a response to the Department's motion to compel. On August 13, 2012 the Board issued an Order that Colombo shall respond to the Department's First Set of

Interrogatories, First Request for Production of Documents and Expert Interrogatories within 10 days of the date of the Order and that the statements set forth in the Department's request for admissions were deemed admitted. Colombo never responded to the Department's discovery requests as ordered by the Board.

On August 31, 2012 the Department filed this motion to preclude the Defendant from introducing evidence at the hearing that the Department had sought in discovery, as well precluding expert testimony on the Defendant's behalf. The Department asserts that it is prejudiced in preparing its case without its requested discovery. Colombo never filed a response to the motion.

Section 1021.161 of the Board's Rules authorize the imposition of sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. 25 Pa. Code § 1021.161; *Smith v. DEP*, 2010 EHB 547; *DEP v. Tate*, 2009 EHB 295; *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477. The sanctions may include "dismissing an appeal, entering adjudication against the offending party, precluding the introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed or other appropriate sanctions including those permitted under Pa. Rule of Civil Procedure 4019 (relating to sanctions regarding discovery matters)." 25 Pa. Code § 1021.161.

The Department cited *Kochems v. DEP*, 1997 EHB 422, in its motion for sanctions. In *Kochems* the Permittee filed a motion for discovery sanctions alleging that interrogatories and notices of depositions were served upon the Appellants and they failed to fully complete the requests within the required time. The Appellants did not respond to the Permittee's discovery motion for sanctions. The Board issued an opinion and order granting sanctions against the Appellants precluding them from introducing any evidence at the hearing relating to the matters

sought in discovery. Specifically, the Board stated:

Appellants' failure to respond to the discovery requests warrants precluding them from introducing evidence on matters covered in those requests. Section 1021.111(a) of the Board's Rules, 25 Pa. Code § 1021.1119a), provides that discovery proceedings before the Board shall be governed by the Pennsylvania Rules of Civil Procedure. Under the Rules of Civil Procedure, parties must respond to interrogatories and requests for the production of documents within 30 days. *See* Pa.R.C.P. 4006 (interrogatories) and 4009 (requests for production of documents). Appellants failed, however, to file response or objections to either of Permittee's discovery requests. Ordinarily, the Board is reluctant to impose discovery sanctions unless a party defies an order compelling discovery. *See, e.g., Griffin v. Tedesco*, 513 A.2d 1020, 1024 (Pa. Super 1986); *DER v. Chapin & Chapin*, 1992 EHB 751; *Eastern Consolidation & Distribution Service v. DEP*, 1996 EHB 1093. However, we have also held that discovery sanctions can be appropriate even absent an order to compel; the sanction need only be reasonable given the severity of the violation. *Weist v. Atlantic Richefield Co.*, 543 A.2d 142 (Pa. Super 1988); *DER v. Chapin & Chapin*, 1992 EHB 751.

Kochems v. DEP, 1997 EHB 422, 424; *aff'd* 701 A.2d 281 (Pa. Cmwlth. 1997); *see also DEP v. Klecha*, EHB Docket No. 2011-021-CP-C (Opinion & Order issued April 11, 2012); *DEP v. D.B. Enterprise Developers & Builders, Inc.*, 2009 EHB 278; *Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477; *Potts Contracting v. DEP*, 1999 EHB 958; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697.

Colombo has failed to provide responses to the Department's discovery requests, failed to file a response to the Department's motion to compel, failed to comply with the Board's order to provide the requested information sought in discovery and has failed to respond to the motion for sanctions now before the Board. Colombo's refusal to provide the information the Department requested during discovery prejudices the Department's case, thus pursuant to Section 1021.161 Colombo is precluded from introducing any evidence at hearing regarding the matters the

Department sought in discovery and is precluded from providing any expert testimony at the hearing.

We enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

v.

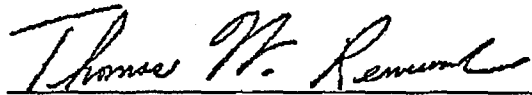
FRANK COLOMBO d/b/a GLENBURN
SERVICES

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: EHB Docket No. 2011-114-CP-C
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ORDER

AND NOW, this 27th day of September, 2012, it is hereby ordered that the Department's unopposed Motion for Sanctions is **granted** and the Defendant is precluded from introducing any evidence at the hearing regarding matters on which the Department sought discovery including the preclusion of any expert testimony on Defendant's behalf.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: September 27, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson

For the Commonwealth of PA, DEP:
Joseph S. Cigan, III, Esquire
Office of Chief Counsel – Northeast Region

For Defendant, *Pro Se*:
Frank Colombo
Glenburn Services
1301 Winola Road
Clarks Summit, PA 18711



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**WILMER HOSTETTER (Individually and for
HOPEWELL RIDGE HOMEOWNERS
ASSOCIATION) and EAST NOTTINGHAM
TOWNSHIP**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

**EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)**

Issued: October 16, 2012

**OPINION AND ORDER
ON PETITION TO INTERVENE**

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants a petition to intervene filed by property developers who contracted for the installation of certain wastewater treatment systems which are the subject of an appeal filed by the current homeowners of those lots.

OPINION

On March 28, 2012, Wilmer Hostetter, individually and for Hopewell Ridge Homeowners Association, appealed the Department of Environmental Protection's (the "Department's") February 28, 2012 letter informing the homeowners' association that it would need to make plans to connect to a conventional backup sewer system because experimental wastewater treatment systems installed at the Wyndham Creek subdivision have failed to meet the operation and maintenance standards laid out in the subdivision's water quality management permit. The Appellants raise numerous objections to the Department's letter, including allegations that any failure to meet the permit's standards are not the responsibility of the

residents of the subdivision, but rather, responsibility rests with the manufacturer of the wastewater treatment systems and the homebuilder who installed them. East Nottingham Township has separately appealed the Department's letter, and the Board has granted the Department's request that the appeals be consolidated.

On August 31, 2012, Keystone Custom Homes and Willow Creek, LLC (collectively, "Petitioners") filed a petition to intervene on the basis that the Petitioners had purchased properties in the subdivision at issue from Wilmer and Joyce Hostetter and had contracted for the purchase and installation of the wastewater treatment systems discussed in the Department's letter. The petitioners contend that they meet the Board's standards to intervene in an appeal on the basis that their interests will be affected in the appeal as the parties that contracted for the installation of the wastewater treatment systems. If permitted to intervene, the Petitioners propose to offer evidence "with respect to economical and feasible sanitary sewage facilities alternatives that can be used to provide sewer service to the Wyndham Creek lots where advance wastewater treatment is required in the event the technical issues with the [wastewater treatment systems] cannot be resolved." Appellant Wilmer Hostetter and Hopewell Ridge Homeowners Association have responded to the petition and indicated that they do not oppose the Petitioners' request. East Nottingham Township and the Department have not filed responses to the petition.

Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "[a]ny interested party may intervene in any matter pending before the board." *See generally* 25 Pa. Code § 1021.81 (general requirements for intervention). Petitioners set forth their basis for intervention under these requirements that no party has contested. An appropriate interested party is one where the petitioner's interest is "substantial, direct and immediate", *CMV Sewage Co. v. DEP*, 2010 EHB 82, 84; *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon v. DEP*,

603 A.2d 226, 233 (Pa. Cmwlth. 1992). Stated another way, the Board will grant a petition to intervene where the “person or entity seeking intervention will either gain or lose by direct operation of the Board’s ultimate determination.” *CMV Sewage, id; Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812 (citing *Browning-Ferris, Inc. v. DER*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991)).

The Petitioners have clearly carried their burden to intervene in this appeal in their petition.¹ Whether the Petitioners or the homeowners are responsible for the maintenance issues associated with the wastewater treatments systems, which were installed, has been placed directly at issue in this appeal. Moreover, both the Appellants and Petitioners each have demonstrated that they may stand to gain or lose as a direct result of a determination whether operation and maintenance issues with the currently installed wastewater treatment systems can be remedied or if, as the Department orders, the properties are required to be connected to municipal sewers.

Accordingly, we issue the order that follows.

¹ The Board also notes that no party opposes Petitioners’ intervention in this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILMER HOSTETTER (Individually and for :
HOPEWELL RIDGE HOMEOWNERS :
ASSOCIATION) and EAST NOTTINGHAM :
TOWNSHIP :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)

ORDER

AND NOW, this 16th day of October, 2012, Keystone Custom Homes' and Willow
Creek, LLC's petition to intervene is **granted**. The caption shall be amended as follows and
should be reflected on all future filings:

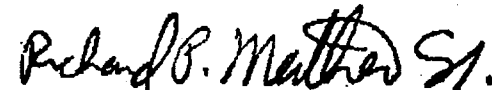
WILMER HOSTETTER (Individually and for :
HOPEWELL RIDGE HOMEOWNERS :
ASSOCIATION) and EAST NOTTINGHAM :
TOWNSHIP, Appellants and KEYSTONE :
CUSTOM HOMES and WILLOW CREEK, :
LLC, Intervenors :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

DATED: October 16, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
Office of Chief Counsel – Southeast Region

For Appellants:
Fronefield Crawford, Jr., Esquire
220 West Gay Street
West Chester, PA 19380

Eugene M. Twardowski, Esquire
CONRAD O'BRIEN PC
200 North High Street, Suite 300
West Chester, PA 19380

For Intervenors:
Marc B. Kaplin, Esquire
Gregg I. Adelman, Esquire
KAPLIN STEWARD MELOFF REITER & STEIN, P.C.
Union Meeting Corporate Center
P.O. Box 3037
Blue Bell, PA 19422



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2011-105-CP-C

v. :

Issued: October 22, 2012

FRANCIS SHULTZ, JR., AND DAVID :
FRIEND, d/b/a SHORTY AND DAVE'S USED :
TRUCK PARTS :

OPINION AND ORDER
ON MOTION *IN LIMINE*

By Michelle A. Coleman, Judge

Synopsis:

The Board denies the Department's motion *in limine* requesting that the facts in the Department's request for admissions to be admitted since they were not signed or verified and that the Defendants be precluded from introducing evidence related to any matters in the request for admission. The Board denies the motion because the Department never asserted that it has been prejudiced in preparing its case for hearing. It has never filed a motion to compel the Defendants to provide more adequate responses. In fact, the Department has filed a lengthy pre-hearing memorandum in preparation for hearing prior to filing this motion *in limine*. The Board does not find that the Department was prejudiced in preparing for the hearing.

OPINION

The Department of Environmental Protection (the "Department") filed a Motion *in Limine* ("Motion") requesting the Board to issue an order stating that the facts in the Department's request for admissions served on the Defendants in April, 2012 are admitted.

Further, the Department requests the Board to preclude the Defendants from introducing evidence related to the matters in the request for admission.

Prior to filing this Motion, the Department filed a motion for summary judgment with the Board on June 29, 2012 asking the Board to establish liability against the Defendants for failing to provide a response to the Department's discovery requests. The Defendants filed a response to the motion for summary judgment on July 19, 2012 and the Department filed a reply brief on August 3, 2012. On August 7, 2012 the Board issued the following Order:

AND NOW, this 7th day of August, 2012, the parties have been in negotiations to settle this matter and have reached an agreement in principle as represented by the Department in letters dated January 25, 2012, March 15, 2012 and May 3, 2012 requesting an extension of the discovery and dispositive motions deadline. The letter dated May 3, 2012 was the first time the Department indicated that it was conducting discovery and had scheduled the depositions of the Defendants. The record before the Board further provides that the Department also sent Request for Admissions and Interrogatories to the Defendants on April 13, 2012. (Department's Motion for Summary Judgment, p. 2.) The Department informed the Defendants, at their deposition, that they did not provide the Department with the responses to the Request for Admissions and Interrogatories. (Defendants' Response, § 13.) The next day the Defendants' counsel hand-delivered the responses to the Department. (Department's Motion for Summary Judgment, p. 3; Defendants' Response, § 14.) The Department then filed this pending Motion for Summary Judgment stating that that Defendants failed to file a timely response to the Department's Request for Admissions and therefore the requested admissions should be deemed admitted which would be sufficient grounds to establish liability for the underlying violations subject to the

assessment of civil penalty. The Defendants' response indicates that there is a misunderstanding between the parties. In consideration of the above, IT IS HEREBY ORDERED that the Department's motion for summary judgment is **denied**. The Defendants were approximately two weeks late in filing responses to discovery during a period of time that the parties were negotiating a settlement and once the Department asked for the responses, the Defendants hand-delivered responses the following day. Under these circumstances it would be unfair for the Board to entertain such a motion as the Department requests.

Order dated August 7, 2012. On the same day, the Board issued an order scheduling a hearing in this matter for October 15, 2012 in Harrisburg. This order was amended on August 16, 2012 setting the hearing for October 29, 2012 in Norristown at the request of the Department.

On September 17, 2012, the Department filed its pre-hearing memorandum and 11 days later, on September 28, 2012, it filed this Motion. This Motion asserts that the Defendants' responses to the requests for admission were inadequate because they were not verified or signed and that the Department has not yet received its first set of interrogatories or first request for production of documents. The Defendants responded to the Motion on October 11, 2012 pointing out that the Department has not filed any motion to compel for any alleged inadequate discovery responses. The Defendants further state that the Department has taken the deposition of each individually named Defendant, arguing that these depositions and the documentation the Department has already received was sufficient enough that the Department did not file a motion to compel.

We must agree with the Defendants that the Department had an opportunity to file a motion to compel with the Board in order to get the request for admissions signed or verified.

However, the Department did not file anything with the Board to obtain what it sought, rather the Department filed a motion for summary judgment and a motion *in limine* to try to get the Board to establish the liability of the Defendants without a fair opportunity to defend. The Department is trying to establish liability by asserting that the request for admissions were not signed or verified and that discovery therefore is inadequate even though the Department never filed a motion to compel or made any indication that it was prejudiced by not having what it sought. In fact, 11 days prior to the filing of this Motion the Department filed a lengthy and in-depth prehearing memorandum which indicates to the Board that it was not prejudiced in its preparation for hearing. Under Pa. R.C.P. 4014, the Department “may move to determine the sufficiency of the answer or objection. . . . [i]f the court determines that an answer does not comply with the requirements of this rule, it may order either the matter is admitted or that an amended answer be served.” Pa. R.C.P. 4014 (c). The Department never requested the Board to determine the sufficiency of the answer or objection, rather it went straight to seeking the Board to establish liability for the underlying violations which were subject to the assessment of civil penalty and to preclude the Defendants from providing certain evidence at hearing. Under these circumstances, we cannot grant the Department’s Motion.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2011-105-CP-C

v. :

FRANCIS SHULTZ, JR., AND DAVID :
FRIEND, d/b/a SHORTY AND DAVE'S USED :
TRUCK PARTS :

ORDER

AND NOW, this 22nd day of October, 2012, it is hereby ordered that the Department's motion *in limine* is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN

Judge

DATED: October 22, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson
9th Floor, RCSOB

For the Commonwealth of PA, DEP:
William H. Blasberg, Esquire
Office of Chief Counsel – Southeast Region

For Defendants:
Arthur L. Jenkins, Jr., Esquire
P.O. Box 710
Norristown, PA 19404



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**WILMER HOSTETTER (Individually and for
HOPEWELL RIDGE HOMEOWNERS
ASSOCIATION) and EAST NOTTINGHAM
TOWNSHIP**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

**EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)**

Issued: October 23, 2012

**AMENDED OPINION AND ORDER
ON PETITION TO INTERVENE**

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants a petition to intervene filed by property developers who contracted for the installation of certain wastewater treatment systems which are the subject of an appeal filed by the current homeowners of those lots.

OPINION

On March 28, 2012, Wilmer Hostetter, individually and for Hopewell Ridge Homeowners Association, appealed the Department of Environmental Protection's (the "Department's") February 28, 2012 letter informing the homeowners' association that it would need to make plans to connect to a conventional backup sewer system because experimental wastewater treatment systems installed at the Wyndham Creek subdivision have failed to meet the operation and maintenance standards laid out in the subdivision's water quality management permit. The Appellants raise numerous objections to the Department's letter, including allegations that any failure to meet the permit's standards are not the responsibility of the

residents of the subdivision, but rather, responsibility rests with the manufacturer of the wastewater treatment systems and the homebuilder who installed them. East Nottingham Township has separately appealed the Department's letter, and the Board has granted the Department's request that the appeals be consolidated.

On August 31, 2012, Keystone Custom Homes and Willow Creek, LLC (collectively, "Petitioners") filed a petition to intervene on the basis that the Petitioners had purchased properties in the subdivision at issue from Wilmer and Joyce Hostetter and had contracted for the purchase and installation of the wastewater treatment systems discussed in the Department's letter. The petitioners contend that they meet the Board's standards to intervene in an appeal on the basis that their interests will be affected in the appeal as the parties that contracted for the installation of the wastewater treatment systems. If permitted to intervene, the Petitioners propose to offer evidence "with respect to economical and feasible sanitary sewage facilities alternatives that can be used to provide sewer service to the Wyndham Creek lots where advance wastewater treatment is required in the event the technical issues with the [wastewater treatment systems] cannot be resolved." Appellant Wilmer Hostetter and Hopewell Ridge Homeowners Association have responded to the petition and indicated that they do not oppose the Petitioners' request. East Nottingham Township and the Department have not filed responses to the petition.

Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "[a]ny interested party may intervene in any matter pending before the board." *See generally* 25 Pa. Code § 1021.81 (general requirements for intervention). Petitioners set forth their basis for intervention under these requirements that no party has contested. An appropriate interested party is one where the petitioner's interest is "substantial, direct and immediate", *CMV Sewage Co. v. DEP*, 2010 EHB 82, 84; *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon v. DEP*,

603 A.2d 226, 233 (Pa. Cmwlth. 1992). Stated another way, the Board will grant a petition to intervene where the “person or entity seeking intervention will either gain or lose by direct operation of the Board’s ultimate determination.” *CMV Sewage, id; Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812 (citing *Browning-Ferris, Inc. v. DER*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991)).

The Petitioners have clearly carried their burden to intervene in this appeal in their petition.¹ Whether the Petitioners or the homeowners are responsible for the maintenance issues associated with the wastewater treatments systems, which were installed, has been placed directly at issue in this appeal. Moreover, both the Appellants and Petitioners each have demonstrated that they may stand to gain or lose as a direct result of a determination whether operation and maintenance issues with the currently installed wastewater treatment systems can be remedied or if the properties are required to be connected to municipal sewers.

Accordingly, we issue the order that follows.

¹ The Board also notes that no party opposes Petitioners’ intervention in this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILMER HOSTETTER (Individually and for
HOPEWELL RIDGE HOMEOWNERS
ASSOCIATION) and EAST NOTTINGHAM
TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)

ORDER

AND NOW, this 23rd day of October, 2012, Keystone Custom Homes' and Willow
Creek, LLC's petition to intervene is **granted**. The caption shall be amended as follows and
should be reflected on all future filings:

WILMER HOSTETTER (Individually and for
HOPEWELL RIDGE HOMEOWNERS
ASSOCIATION) and EAST NOTTINGHAM
TOWNSHIP, Appellants and KEYSTONE
CUSTOM HOMES and WILLOW CREEK,
LLC, Intervenors

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

EHB Docket No. 2012-059-M
(Consolidated with 2012-060-M)

ENVIRONMENTAL HEARING BOARD


RICHARD P. MATHER, SR.
Judge

DATED: October 23, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson, Library

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Gregg I. Adelman, Esquire
KAPLIN STEWARD MELOFF REITER & STEIN, P.C.
Union Meeting Corporate Center
P.O. Box 3037
Blue Bell, PA 19422



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN

v.

**COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION
and RANGE RESOURCES-
APPALACHIA, LLC, Permittee**

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EHB Docket No. 2011-149-R

Issued: November 6, 2012

**OPINION AND ORDER ON MOTION TO
ENFORCE/ENSURE "LITIGATION HOLD" ON THE
YEAGER DRILL SITE AND FOR EXPEDITED CONSIDERATION THEREOF**

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board earlier granted Appellant's Request for Expedited Consideration of its Motion. We now deny Appellant's Motion to Enforce/Ensure "Litigation Hold" on the Yeager Drill Site. Because the Board never issued an Order prohibiting Permittee from conducting operations at the Yeager Drill Site, there is no Board order to "enforce/ensure." A review of voluminous documents filed by the parties indicates that the refilling and reseedling of the drill pit was part of typical activities performed to remediate a drill pit following drilling. Appellant and his experts conducted their own viewing at the site prior to these

remedial activities. In addition, notice was provided to all parties of Range Resources' intent to remediate the site.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is Appellant Loren Kiskadden's (Mr. Kiskadden or Appellant) Motion to Enforce/Ensure "Litigation Hold" on the Yeager Drill Site and for Expedited Consideration Thereof (Motion to Enforce) which was filed on October 5, 2012. By our Order of October 5, 2012, we granted Appellant's Request for Expedited Consideration of his Motion to Enforce and directed that Responses be filed by Permittee and the Pennsylvania Department of Environmental Protection in six days rather than the standard fifteen days as set forth in our Rules of Practice and Procedure. 25 Pa. Code Section 1021.93 (b) ("Responses to discovery motions shall be filed within 15 days of the date of the service of the motion, unless the Board orders otherwise."). Both the Pennsylvania Department of Environmental Protection and the Permittee Range Resources—Appalachia, LLC (Permittee or Range Resources) have filed lengthy Responses with numerous exhibits.

Background

On August 29, 2012 pursuant to 25 Pa. Code Section 1021.105, the Board conducted a Prehearing Conference in Pittsburgh with Counsel. Such Conferences

provide the Board with not only an opportunity to learn more about the case but allow the Board to monitor the progress of discovery, discuss the issues, and often times serve as settlement opportunities for the parties. Most of the time these Conferences are not transcribed. This one was not. One of the issues discussed at the Prehearing Conference involved disputes the parties had over the scope of electronic discovery and the individuals subject to electronic discovery. At the suggestion of Department Counsel, the Board also agreed that it would conduct a site view in October 2012.

The Board routinely conducts site views in cases it believes will go to a hearing on the merits. Such a site view is authorized by 25 Pa. Code Section 1021.115 which provides as follows:

The Board may upon reasonable notice and at reasonable times inspect any real estate including a body of water, industrial plant, building or other premises where the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board.

The site view itself is not an evidentiary hearing. “The purpose of a site view is to help the Board understand the record evidence. Neither the site view nor anything that occurred at the site view constitutes record evidence.” *Perano v. Commonwealth of Pennsylvania Department of Environmental Protection*, 2011 EHB 275, 276 n.1. See also *UMCO v. Commonwealth of Pennsylvania Department of Environmental Protection*, 2004 EHB 797, 801; *Giordano v. DEP*, 2000 EHB 1163, 1166.

Many of the cases heard by the Board involve large tracts of land and scale is sometimes difficult to convey and comprehend merely through testimony and exhibits. Site views, as pointed out in the Department's brief, "can assist the Board...with spatial relationships and overall topography...."

We emphasize that a site view conducted by the Board pursuant to 25 Pa. Code Section 1021.115 is separate and distinct from a party's discovery rights pursuant to the Pennsylvania Rules of Civil Procedure. *See Pennsylvania Rules of Civil Procedure* 4009.31, 4009.32 and 4009.33. Those Rules provide ample opportunity for a party to conduct extensive investigation at a site including inspecting, photographing, and testing.

Many times information requested by the parties and their experts at inspections conducted pursuant to the Pennsylvania Rules of Civil Procedure (as opposed to the Board's site view) becomes evidence introduced at the trial. The documents filed in this case indicate that the parties and their consultants have utilized these discovery procedures. Indeed, Mr. Kiskadden's Counsel and his experts inspected the Yeager drill site, including the drill pit, in June 2012 before the remediation took place.

Discussion

With this background in mind, we now address the arguments of the parties. Mr. Kiskadden contends that Counsel for Range Resources and the Department of

Environmental Protection advised the Board at the August 29, 2012 Prehearing Conference that a “litigation hold” had been put in place. Mr. Kiskadden argues that he interpreted the “litigation hold” to apply to all evidence relative to this matter including that no physical changes would be made to the Yeager Drilling Site itself. Range and the Department of Environmental Protection assert that the “litigation hold” only applied to documents such as emails and other electronically stored information plus hard copies of certain documents relevant to the subject matter. In their view, it did not apply to physical sites such as the Yeager Drill Site.

Moreover, Counsel in this case worked diligently to craft a Report Concerning the Discovery of Electronically Stored Information. They filed a comprehensive Draft Report with the Board on July 12, 2012 which set forth many areas in which they agreed but also detailed specific areas of disagreement left to the Board to decide. This was one of the areas discussed with counsel during the Prehearing Conference. Following the Prehearing Conference on August 29, 2012, the Board issued an Order deciding these questions on that same date. On August 30, 2012, we issued an Order extending the discovery and dispositive motion deadlines.

When the Board raised the issue of a “litigation hold” during the Prehearing Conference we were not contemplating physical sites such as the Yeager Drill Site or the Kiskadden property. Further, we were addressing electronically stored information

held by specific individuals in this case. Our Order of August 29, 2012 sets forth the individuals who are subject to the discovery of electronically stored information for this case. We entered no Order to “enforce or ensure” regarding the Yeager Drill Site nor were we requested to do so.¹

Our review of the Motion to Enforce and the Responses leads us to conclude that there were some misunderstandings or misconceptions regarding the site view and the Yeager Drilling Site. Counsel for Range Resources provided ample documents setting forth that it had advised Mr. Kiskadden that it was going to reclaim the Yeager Drill Site. However, this reclamation was not done until Mr. Kiskadden, his Counsel, and/or consultants were afforded an opportunity to inspect the site. We assume that photographs and other tangible evidence were secured or developed by Mr. Kiskadden or those acting on his behalf which may be offered as evidence at the hearing in this matter.

In addition, after the filing of the Motion to Enforce, Counsel for Range Resources advised that no further changes would be made to the Yeager Drilling Site until after the Board inspected the site. The Board conducted the site view with Counsel for all parties and various other individuals on October 19, 2012. The Board

¹ Range Resources mistakenly argues that Appellant’s request for expedited consideration of its Motion to Enforce should be denied because it fails to meet the requirements set forth in Rule 1021.96(a). This Rule applies to requests for expedited *hearings* as opposed to *motions*. Parties rarely request expedited hearings and none has been requested here.

also inspected Mr. Kiskadden's property and at his specific request viewed the inside of his residence.

A drilling site is rarely if ever in the same condition as it was when the drilling occurred. These sites by their very nature are working sites and undergo frequent changes caused by active operations on the site. This fact does not prevent the Board or the parties from ascertaining the merits of the claims before the Board even when they relate to drilling procedures which occurred months or years earlier.

Based on the foregoing, we will deny the Appellant's Motion to Enforce. We also deny Range Resources' request for counsel fees in responding to the Motion to Enforce.

Our Rules require parties to try to resolve their discovery disputes before filing Discovery Motions with the Board. *See* 25 Pa. Code Section 1021.93(b). In this case, Mr. Kiskadden did not file the necessary certification with his Motion to Enforce. We trust that this omission will not occur again.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. LOREN KISKADDEN

v.

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION
and RANGE RESOURCES-
APPALACHIA, LLC, Permittee

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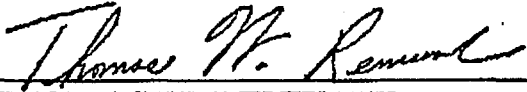
EHB Docket No. 2011-149-R

ORDER

AND NOW, this 6th day of November, 2012, following review of the Appellant's Motion to Enforce/Ensure "Litigation Hold" on the Yeager Drill Site and for Expedited Consideration Thereof and the Responses of the Permittee and the Pennsylvania Department of Environmental Protection, it is ordered as follows:

- 1) By Order of October 5, 2012, we **granted** Appellant's request for Expedited Consideration of its Motion to Enforce.
- 2) Appellant's Motion to Enforce/Ensure "Litigation Hold" on the Yeager Drill Site is **denied**.
- 3) Range Resources' request for counsel fees in responding to the Motion to Enforce is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

DATED: November 6, 2012 .

**c: For the Commonwealth of PA,
DEP Litigation:
Glenda Davidson, Library**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT B. MAYER, MSPE, PRESIDENT :
AMERICAN MANUFACTURING COMPANY, :
INC. :

EHB Docket No. 2012-054-L

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and JNM TECHNOLOGIES, :
INC., Permittee :

Issued: November 21, 2012

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department’s motion to dismiss an appeal for lack of standing and as a consequence of the appellant’s alleged failure to comply with the Business Corporation Law is denied because a motion to dismiss is not an appropriate vehicle for raising such claims.

OPINION

Robert B. Mayer and American Manufacturing Company, Inc. (collectively “American”) filed this appeal from the Department of Environmental Protection’s (the “Department’s”) approvals of alternate on-lot sewage disposal systems manufactured by JNM Technologies, Inc. (“JNM”) (Listing Nos. A2012-0009-0001 and A2012-0010-0001). The Department has filed a motion to dismiss American’s appeal based upon the inconsistent assertions that (1) American does not conduct business in Pennsylvania and, therefore, it lacks standing, and (2) American does conduct business in the Commonwealth and, therefore, it cannot file an appeal because it has failed to register as a foreign business corporation with the Department of State. The

Department alleges that American and JNM are economic competitors, but they are not economic competitors in Pennsylvania.

We need not address the Department's claims at this juncture because the Department has picked the wrong vehicle for making them. A motion to dismiss an EHB appeal is the rough equivalent of a motion for judgment on the pleadings in the sense that the motion is ordinarily decided based solely upon the facts stated or otherwise apparent in the notice of appeal itself. *Hendryx v. DEP*, 2011 EHB 127, 129; *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 421 n.7. Although there is a limited exception to this rule when our jurisdiction is at issue, *Hendryx*, 2011 EHB at 129, the Department's arguments in this case do not pertain to the Board's jurisdiction.

Turning our attention, then, to the notice of appeal, the form that the Board uses requires an appellant to identify itself, the Departmental action being appealed, the appellant's objections to the action, and any related appeals. It does not contain any direction or even any space for describing the basis for the appellant's standing. *See also* 25 Pa. Code § 1021.51 (describing content of notice of appeal). We have specifically held on multiple occasions that an appellant is not required to aver facts sufficient to show that it has standing in a notice of appeal. *Hendryx*, 2011 EHB at 130; *Riddle v. DEP*, 2001 EHB 417, 419; *Ziviello v. State Conservation Commission*, 2000 EHB 999, 1003; *Beaver Falls Municipal Authority v. DEP*, 2000 EHB 1026, 1028; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 941. Because we are limited in the context of the Department's motion to dismiss to reviewing the notice of appeal itself, and because standing need not be averred in a notice of appeal, we are not in a position to address the Department's claim of deficient standing. Similarly, the Department's allegation that JNM cannot pursue an appeal as a consequence of its alleged violation of the Business Corporation

Law goes even further afield of the notice of appeal. We will repeat here what we recently said in *Hendryx*:

The Board's rules allow parties to rely upon facts outside of those stated in the appeal to resolve non-jurisdictional issues in the context of motions for summary judgment. Under the Board's rules governing motions for summary judgment there are additional procedural and substantive requirements that better enable the Board to identify and resolve factual disputes between the parties, and the Board believes that these should be used to address non-jurisdictional issues. *See* 25 Pa. Code § 1021.94a.

Hendryx, 2011 EHB at 130.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT B. MAYER, MSPE, PRESIDENT :
AMERICAN MANUFACTURING COMPANY, :
INC. :

EHB Docket No. 2012-054-L


v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and JNM TECHNOLOGIES, :
INC., Permittee :

ORDER

AND NOW, this 21st day of November, 2012, the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: November 21, 2012

c: DEP, Bureau of Litigation
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee**

EHB Docket No. 2010-166-L

Issued: November 26, 2012

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department erred by failing to properly determine whether the permittee’s fugitive emissions could be permitted notwithstanding the general prohibition against such emissions in 25 Pa. Code § 123.1. The permittee’s Title V permit is remanded to the Department with instructions to perform an independent assessment of whether the fugitive emissions not otherwise allowed under the regulations are insignificant and are not interfering with attainment. The scope and timing of the determination is left to the Department’s discretion in the first instance. The Board notes that the permittee is in process of making major improvements to its facility pursuant to a plan approval recently approved by the Department.

FINDINGS OF FACT

Stipulated Facts

1. Appellant is the County of Berks, Pennsylvania. (Stipulation of Fact Number (“Stip.”) 1.)
2. The Pennsylvania Department of Environmental Protection (the “Department”) is the agency with the duty and authority to administer and enforce the Air Pollution Control Act,

35 P.S. § 4001, *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Stip. 2.)

3. Exide Technologies (“Exide”), the Permittee, is a Delaware corporation authorized to do business in Pennsylvania. (Stip. 6.)

4. The facility that is the subject of this case is a secondary lead smelter located at the confluence of Spring Valley Road and Nolan Street in Laureldale and Muhlenberg Townships, Berks County, Pennsylvania. (Stip. 3.)

5. The Department issued a Title V air permit to General Battery Corporation, the previous owner of the facility, on July 17, 2000, with an expiration date of July 31, 2005. (Stip. 4.)

6. On July 21, 2000, Exide filed an application to change the ownership of the facility from General Battery Corporation to Exide. The Department subsequently re-issued the Title V permit to Exide on November 15, 2000, but the termination date of the permit remained the same, July 31, 2005. (Stip. 5.)

7. On January 27, 2004, Exide submitted a timely application to the Department for renewal of its Title V air permit. (Stip. 7.)

8. On or about September 23, 2010, the Department renewed Exide’s Title V air permit for its facility in Reading, Pennsylvania (Permit No. 06-05066). (Stip. 8.)

9. Berks County filed this appeal from the September 2010 renewal of the Exide permit. (Stip. 9.)

10. The Exide facility is a secondary lead smelter at which lead-acid batteries and other lead-containing materials are received and then shredded or cracked open to separate lead plates, acid, and plastic casings. (Stip. 10.)

11. The plastic casings are recycled into pellets for offsite reuse. (Stip. 11.)

12. The sulfuric acid is collected and contained in aboveground storage tanks and then transferred via pipeline to an onsite wastewater treatment plant for neutralization. (Stip. 12.)

13. The lead plates are combined with other lead materials and melted and refined in the smelter furnaces and refining kettles on site. (Stip. 13.)

14. The lead metal is cast on site and shipped off site for reuse. (Stip. 14.)

Additional Findings of Fact

15. The Title V Operating Permit program is intended to draw together in one vehicle all existing state and federal requirements for a facility and include conditions that come from existing plan approvals in such a manner that the Title V permit becomes a convenient way for the Department, the permittee, and the public to understand what the permittee must do to comply with the law with every requirement in one place rather than have various requirements spread across multiple permits, plan approvals, and other documents (Notes of Transcript page ("T.") 335-36.) Title V permits do not address construction of sources, which is done through the plan approval application process. (T. 337.)

16. Plan approvals are essentially preconstruction permits for new air pollution sources or for significant changes to air pollution sources. For Title V facilities, existing plan approvals are later incorporated into the Title V permit as an administrative amendment or during renewal of the permit. (T. 336.)

17. Title V permits are subject to a five-year renewal cycle, an important part of which is to update and make corrections to the permit, including inclusion of any new federal requirements. (T. 336.)

18. Exide conducts activities at the facility in substantially the following order:

- a. Batteries are transported on site by trucks. The batteries are unloaded at the battery breaker building where spent batteries are shredded apart and divided and/or separated into plastic, acid, and lead/lead-bearing materials.
- b. The lead is subsequently transported to Exide's raw materials storage building where it is stored until it is fed into the furnaces.
- c. The lead-bearing material is first fed into the reverberatory furnaces wherein the lead is melted down to produce a soft lead and a reverb slag.
- d. The reverb slag is then put into the blast furnace. The blast furnace reduces that material into elemental lead and blast furnace slag. The blast furnace slag is taken to a hazardous waste containment building, where it is stored until it is crushed and shipped off site for treatment and disposal. (T. 18-26, 230-31.)

19. Exide utilizes multiple air pollution control devices at the facility. (T. 23-25, 231-33; Berks Exhibit No. ("Berks Ex.") 1, 22; Department Exhibit No. ("DEP Ex." 6.)

20. There are several existing sources of fugitive lead dust emissions at the Exide facility. The majority of the sources are located within a combination of totally enclosed buildings, partially enclosed buildings, or in areas that are under roof with significant portions of the perimeter open to the outside. These existing sources include spent battery receiving, battery shredding, material separation, raw material storage, furnace feeding, lead smelting, lead refining, lead shipping, slag cooling, slag crushing, and equipment storage and maintenance. (T. 26-28, 106-07; Berks Ex. 2A, 22.)¹

21. Although point source emission controls are currently applied to existing sources of fugitive dust emissions, material handling and equipment movement activities in the areas where these sources are located can generate fugitive dust emissions which may escape existing controls and be entrained into the air outside of the building enclosures. (Berks Ex. 22.)

¹ The presiding judge conducted a site view on October 9, 2012.

22. Other potential sources of fugitive lead dust emissions at the facility include air pollution control equipment located outdoors, specifically the related components that manage and convey the dust that they collect. Under normal operating conditions, these mechanical dust conveyance systems are sealed. However, when these systems require maintenance or repair, the dust they contain can be released and entrained into the ambient air. (Berks Ex. 22.)

23. Notwithstanding Exide's extensive air pollution controls and its implementation of approved work practices for controlling and minimizing lead emissions, it nevertheless generates fugitive lead emissions that evade capture. (T. 55-56, 116-17, 122-23, 150, 179, 191, 194-200, 256-57, 265, 286-87; Berks Ex. 4, 4A, 9, 9(2), 22, 23; DEP Ex. 6.)

24. Exide admits that it produces uncontrolled fugitive emissions from multiple sources at the plant. (Berks Ex. 22.)

25. Fred Osman, the County's expert witness, credibly opined that the facility is producing uncontrolled fugitive emissions. (T. 124-25, 141.)

26. Monitoring data from around the Exide facility supports the conclusion that the plant is generating uncaptured fugitive emissions. (T. 150, 179-81; Berks Ex. 5, 9, 9(2), 27, 27A.)

27. Modeling results indicate that the plant is producing fugitive emissions. (T. 66-67, 73-74; 124-26, 179-80, 198; Berks Ex. 4, 23.)

28. The Exide facility is located in the midst of a heavily developed area that includes numerous residential properties, an assisted living facility, a school, and a park. (Berks Ex. 3-5.)

29. Lead is a hazardous air pollutant. 25 Pa. Code § 124.3 (incorporating 40 CFR Part 61.)

30. On December 31, 2010, the Environmental Protection Agency (EPA), following the recommendation of the Department, designated the area around Exide as nonattainment for lead, indicating its determination that the ambient lead concentrations in this area exceed the National Ambient Air Quality Standard (NAAQS) for lead. 76 Fed. Reg. 72097-120.

31. The Department ignored all monitoring data in considering fugitive emissions in the course of its review of Exide's Title V permit renewal application. (T. 351-54, 373.)

32. Significant quantities of lead-containing dust accumulate in and around outside areas of the facility. (T. 243, 257, 259, 265; Berks Ex. 23, 24; Exide Ex. 8.)

33. This dust is likely both a symptom and a cause of fugitive emissions at the facility. (T. 121-23, 190-91, 243, 257; 259, 265; Berks Ex. 23, 24; Exide Ex. 8.)

34. Exide did not demonstrate and the Department failed to meaningfully determine before it renewed Exide's Title V permit that Exide's fugitive emissions are of minor significance with respect to causing air pollution and that they are not preventing or interfering with the attainment of the ambient air quality standard for lead. (T. 56-58, 362-64, 377-78.)

35. The Department admits that it does not know whether Exide's fugitive emissions are significant or are interfering with attainment. (T. 377-78.)

36. The Department assumed without any scientific basis for doing so and without any data or meaningful numeric estimates that Exide's fugitive emissions were "negligible" and "rather small." (T. 346-48, 363-64.)

37. Exide did not request a significance determination, and the Department did not utilize the procedures or criteria set forth in 25 Pa. Code § 123.1 to determine in writing that those fugitive emissions at the facility that are not otherwise subject to a specific exception are of minor significance. (T. 56-58, 285, 362-64, 377-78.)

38. The Department has not required Exide to identify fugitive emissions from any source at the facility other than roadways. (T. 371; Berks Ex. 1.) Instead, the Department accepted Exide's representation that supplying such information would be too complicated. (T. 371.)

39. Exide has received the Department's approval of a plan to totally enclose the existing and potential sources of fugitive lead dust emissions at the facility. This will be accomplished by the addition of new building enclosure structures resulting in a new overall facility enclosure, as well as the addition and reconfiguration of ventilation and emission controls to further control lead emissions from existing process fugitive sources (the "plan-approval project") (Berks Ex. 22; 42 Pa. Bull. 5917.)

40. The fugitive dust emissions controlled by the new overall facility enclosure will be captured and controlled by maintaining the facility enclosure under negative pressure conditions. Negative pressure and in-draft air velocity at access doorways when open will be provided by certain existing point-source ventilation and control systems and the installation of new ventilation and dust collector systems. In order to optimize the performance and efficiency of providing the negative pressure and in-draft conditions, certain other existing ventilation and control systems will be eliminated. (Berks Ex. 22.)

41. The additional control measures described by Exide are intended to be consistent with final amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Secondary Lead Smelting issued by EPA at 77 Fed. Reg. 556 (January 5, 2012). EPA issued these amendments to 40 CFR 63 Subpart X following a risk and technology review of secondary lead smelting sources. In issuing these rule amendments, EPA concluded that full enclosure of operations within buildings with air inflow vented to control devices, along with

implementation of comprehensive work practices, constitutes the current Maximum Achievable Control Technology (MACT) to address risks due to lead emissions from secondary lead smelting sources. (T. 298-306; Berks Ex. 22; 40 CFR Subpart X § 63.544.)

42. The primary objective of the plan-approval project is to dramatically improve fugitive emission control at the facility. (Berks Ex. 23.)

43. The Department approved Exide's plan approval application on August 31, 2012. (42 Pa. Bull. 5917.) The County has filed an appeal from the plan approval. *Berks County v. DEP*, EHB Docket No. 2012-167-L. That appeal is pending.

44. The purpose of the plan approval project is not only to satisfy the NESHAP standard requiring smelters to achieve MACT, but also to contribute to the attainment of the lead NAAQS. (Berks Ex. 22, 23.)

45. Exide is committed to moving forward with the plan approval project in an expeditious manner. (T. 253-54, 305-09, 322-24; Exide Post-Hearing Brief 7.)

46. Permit provision B.10(d) of Exide's Title V permit requires Exide to comply with the revised NESHAP without amendment of the permit or any action by the Department. (Berks Ex.1, § B.10(d), p. 10.)

47. The compliance deadline for completing the work described in the plan approval set forth in the revised NESHAP is January 6, 2014. (T. 306; 40 CFR Subpart X § 63.546.)

DISCUSSION

As a general rule, no person may emit fugitive air contaminants into the outdoor atmosphere from any source. 25 Pa. Code § 123.1. The Exide plant contains multiple sources, and lead is an air contaminant. *See* 25 Pa. Code § 121.1. A fugitive air contaminant is an air

contaminant not emitted through a flue, including emissions resulting from industrial process losses, stockpile losses, and reentrained dust. *Id.*

There are nine exceptions to the rule against fugitive emissions. The first eight exceptions apply to specific sources or activities listed in the regulation such as the construction or demolition of buildings, the grading, paving, maintenance, or use of roads and streets, the clearing of land, and the stockpiling of materials. 25 Pa. Code § 123.1(a)(1)-(8). The ninth exception applies to any other source

for which the operator has obtained a determination from the Department that fugitive emissions from the source, after appropriate control, meet the following requirements:

- (i) The emissions are of minor significance with respect to causing air pollution.
- (ii) The emissions are not preventing or interfering with the attainment or maintenance of an ambient air quality standard.

25 Pa. Code § 123.1(a)(9). Section 123.1 sets forth a specific procedure for the Department to follow in determining whether fugitive emissions are of minor significance or are interfering with attainment:

An application form for requesting a determination under either subsection (a)(9) or § 129.15(c) is available from the Department. In reviewing these applications, the Department may require the applicant to supply information including, but not limited to, a description of proposed control measures, characteristics of emissions, quantity of emissions and ambient air quality data and quality data and analysis showing the impact of the source on ambient air quality. The applicant is required to demonstrate that the requirements of subsections (a)(9) and (c) and § 123.2 (relating to fugitive particulate matter) or of the requirements of § 129.15(c) have been satisfied. Upon such demonstration, the Department will issue a determination, in writing, either as an operating permit condition, for those sources subject to permit requirements under the act, or as an order containing appropriate conditions and limitations.

25 Pa. Code § 123.1(b).^{2,3}

There is no question that Exide is emitting fugitive emissions of lead into the outdoor atmosphere. Exide has acknowledged this fact in the application it submitted to the Department to obtain plan approval to install extensive new control measures in an attempt to reduce those emissions at the site:

The majority of the existing sources of fugitive Pb [lead] dust emissions at the Facility are located within a combination of totally enclosed buildings, partially enclosed buildings, or in areas that are under roof with significant portions of the perimeter open to the outside. These existing sources include spent battery receiving, battery shredding, material separation (M/A system), raw material storage, furnace feeding, Pb smelting, Pb refining, Pb shipping, slag cooling, slag crushing, and equipment storage and maintenance. While point source emission controls are currently applied to most of these existing sources of fugitive dust emissions, material handling and equipment movement activities in the area where these sources are located can generate fugitive dust emissions which may escape existing controls and be entrained into the air outside of the building enclosures.

Other potential sources of fugitive Pb dust emissions at the Facility include air pollution control equipment located outdoors, specifically the related components that manage and convey the dust that they collect. Under normal operating conditions, these mechanical dust conveyance systems are sealed. However, when these systems require maintenance or repair, the dust they contain can be released and entrained into the ambient air.

(Berks Ex. 22. *See also* T. 265-69; Berks Ex. 9(2), 23.) Exide's plan approval application goes on to describe in great detail the various sources of fugitive lead emission at the facility and how Exide proposes to reduce them in the future.

² Where fugitive emissions are allowed, a person may nevertheless not permit fugitive particulate matter to be emitted into the outdoor atmosphere if the emissions are visible at the point the emissions pass outside the person's property. 25 Pa. Code § 123.2. There is no evidence in this case that *visible* emissions of lead have passed outside Exide's property line, so Section 123.2 is not implicated.

³ The language of Section 123.1 has been incorporated into Exide's permit as a permit condition. (Berks Ex. 1 § C.I.)

Even if Exide had not made these extensive admissions in its plan approval application, there would be no serious doubt that the Exide facility is generating uncaptured fugitive emissions of lead. There is also no doubt that at least some, and probably most, of the fugitive emissions coming from the Exide facility are not being emitted from the exempt sources listed in Section 123.1(a)(1)-(8). Therefore, the emissions are prohibited unless the Department makes the significance determination set forth in Section 123.1(a)(9) and (b).⁴

Exide did not request a significance determination. (T. 285.) Exide did not demonstrate that its fugitive emissions are insignificant, and the Department did not engage in what can fairly be characterized as an appropriate significance determination. The Department's key witness conceded on the record the Department simply does not know whether Exide's fugitive emissions are significant. (T. 377-78.) The record confirms that the Department failed to conduct anything in the way of independent, thoughtful analysis on this point. Rather, the Department simply "accepted" Exide's original position (now contradicted by Exide's own plan approval application) that fugitive emissions are "negligible." (T. 348, 371.) The Department has offered various explanations for why it failed to comply with Section 123.1, which we will deal with in turn, but there can be no reasonable dispute that the Department did not make a significance determination that satisfies the letter and spirit of the law.

The Department has not claimed that it was legally entitled to disregard Section 123.1 in the context of Exide's renewal application. When the Department fails to properly apply its own regulations to its review of a permit application and issuing a permit, the Department acts contrary to law. *Zlomsowitch v. DEP*, 2004 EHB 756, 789. "A duly promulgated regulation has the force and effect of law and it is improper for the [agency] to ignore or fail to apply its own

⁴ We will use the shorthand phrase "significance determination" to describe the Department determination pursuant to Section 123.1(a)(9) that fugitive emissions are of minor significance and are not interfering with attainment of a NAAQS.

regulation.” *Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993); *Oley Township v. DEP*, 1996 EHB 1098, 1119. *Blue Mountain Preservation Ass’n v. DEP*, 2006 EHB 589.

The Department’s error cannot be characterized as harmless. It might be that the type of limited scrutiny that the Department brought to bear regarding Exide’s representation regarding its fugitive lead emissions would be appropriate in some cases, but multiple factors compelled a more thorough analysis here. First, the air contaminant in question, lead, is a hazardous air pollutant that is associated with multiple adverse health consequences.⁵ Second, the Exide facility is located in the midst of a densely developed area that includes, among other things, numerous homes, a school, and an assisted living facility for retired nuns. Third, since multiple components of Exide’s operations are not enclosed and not subject to complete control through negative pressure directing airflow to control devices, common sense would suggest a high probability of fugitive emissions. Fourth, extensive monitoring and modeling results may not serve as the basis for “enforcement action” or satisfy EPA requirements for evaluating area-wide attainment, but they certainly would put a reasonable observer on notice that fugitive emissions may be occurring, and therefore, need to be evaluated pursuant to Section 123.1. Fifth, when it promulgated the revised NESHAP for secondary lead smelters such as Exide, EPA found that the risks associated with emissions from the smelters are unacceptable *primarily due to fugitive emissions of lead*. 77 Fed Reg. at 556 (January 5, 2012). It found that NAAQS were being exceeded at the majority of facilities studied “largely due to fugitive dust emissions.” *Id.* at 562. Sixth, enough dust and sediment has historically accumulated in outdoor areas at the plant that the Department has entered into a consent order and agreement with Exide mandating improved

⁵ Quality would seem to have as much to do with deciding whether air contaminant emissions are significant as quantity.

housekeeping. (Exide Ex. 23.) The dust is yet another clue that fugitive emissions might be occurring at more than negligible levels. Seventh, the issue was specifically and credibly raised in public comments. (Berks Ex. 32.) Eighth, the immediate area is in nonattainment for lead. Given this combination of factors, the Department clearly failed to fulfill its regulatory obligation by merely “accepting” Exide’s representation that fugitive emissions are “negligible.”

The Department’s explanations for failing to make the required determination of insignificance are inconsistent and unsatisfying. Its first contention is that it is impossible to reliably evaluate the significance of fugitive emissions. (T. 375-78.) Hopefully, that is not true. We think it is not. Estimating fugitive emissions or emissions of particulate matter as part of the permitting process is not particularly unusual. (T. 149-50, 279.) We note that EPA has published methods for estimating the amount of fugitive emissions. (T. 55-56, 97-98, 118-22, 156-57, 200-01, 266-69; Berks Ex. 23-24.) In fact, Exide has used them. (T. 55, 257; Berks Ex. 24.) In the studies used by the EPA in support of its revised NESHAP for secondary lead smelters, it acknowledged that there are uncertainties associated with estimating fugitive emissions, but it nevertheless concluded that the methodology used in support of its rulemaking provided reasonable estimates of fugitive emissions for smelters. 77 Fed. Reg. at 562 (January 5, 2012). Fred Osman, the County’s expert, credibly opined that there are accepted ways to estimate fugitive emissions. (*See, e.g.*, T. 97-98.) If, however, the Department is correct and it is truly not possible to determine that known fugitive emissions are of minor significance, then it follows that Section 123.1 cannot be met and it follows that the source cannot be permitted.

Exide says there are no additional controls for fugitive emissions other than those that have already been identified in the plan approval, so there is no point in evaluating the significance of fugitive emissions. It says that it has done or at least committed to do everything

that can be done to control fugitives, so it is pointless to measure them. However, just as Section 123.1 includes no exception for impossibility of measurement, it includes no exception for impossibility of control. We disagree that a determination of minor significance is not necessary if there are nonexempt, uncaptured fugitive emissions just because the facility's permit imposes extensive pollution controls on the potential sources. Indeed, the requirement to perform a significance determination only comes into play if those controls have not eliminated fugitives. It is only then that the Department must determine whether those unavoidable, nonexempt fugitives are of minor significance. If the emissions prove to be significant and cannot be adequately controlled, again, we do not see how the permit can be issued in compliance with Section 123.1.⁶

Exide says that the Department is not required to make a "separate determination" where the permit requires controls on the potential sources, citing 25 Pa. Code § 123.1(b). It is true that parts of Subsection 123.1(b) are written in somewhat loose terms: An application form for requesting a significance determination is said to be "available from the Department"; in reviewing those applications, the regulation says the Department "may" require the applicant to submit certain information. Other parts of subsection (b), however, have more of a nondiscretionary tone: the applicant is "required to demonstrate" that the requirements have been met; upon such demonstration, the Department "will" issue a determination "in writing." Subsection 123.1(b) obviously grants the Department some flexibility with regard to *procedures*, but that flexibility does not extend to ignoring the regulation altogether. Had Exide and the

⁶ It has long been established that the Department and the Board are required to deny an application, regardless of economic consequences, where the proposed source cannot comply with applicable air quality regulations. *Rochez Bros, Inc. v. Dept. of Envir. Res.*, 334 A.2d 790 (Pa. Cmwlth. 1975). (Department properly denied application to reactivate beehive coke ovens where data indicated that beehive cake ovens could not comply with applicable regulations.)

Department substantially or in effect complied with the requirements of Section 123.1, we might not have felt compelled to remand the permit. *Cf. Blue Mountain, supra*, at 608 (specific “findings” not necessarily required if proper analysis performed.) However, we simply cannot ignore the Department’s very clear admission borne out by the record that the Department does not know whether Exide’s emissions are significant or not. This stark admission clearly signifies that the Department did not do anything that comes close to making the required determination.

The Department argues that “precise quantification” of fugitive emissions is not always possible. With that scaled down point we do not disagree. However, Section 123.1 does not require “precise quantification”; it requires the Department to determine whether the emissions are of “minor significance” and “are not preventing or interfering with the attainment or maintenance of an ambient air quality standard.”

It is true as Exide says that there is no standard for measuring “minor significance” in the regulation, but that does not mean that the regulation can be ignored altogether. Defining significance is up to the Department in the first instance. Our finding of error in this case is not that the Department improperly defined significance. Rather, the Department’s error is that it did not bring its reasoned discretion to bear at all because to do so would have been “too complicated.” (T. 371.)⁷

To repeat, the Department’s key witness testified very clearly at one point that the Department does not know whether Exide’s fugitive emissions are significant because they cannot in his view be measured or estimated properly. (T. 377.) We are troubled by the fact that, having claimed that fugitive emissions cannot be measured, and admitting that the Department simply does not know whether the emissions are significant at the Exide plant, the

⁷ The regulation prohibits fugitive emissions that are not of minor significance *or* which would interfere with attainment. This suggests that significance as that term is used in Section 123.1(9) is redundant unless fugitive emissions that are not interfering with attainment may nevertheless be significant.

witness at other points testified that Exide's fugitive emissions are in fact small. For example, he testified as follows:

Well, the potential emissions that are being discussed are in rather small quantities, mass-wise, compared to other pollutants, like emissions from power plants, for instance. You could talk about thousands of tons per year of sulfur dioxide and pollutants like that. With lead, we're talking about much smaller quantities. (T. 363.)

If the amounts cannot be quantified, and in fact have not been quantified, how is it that the Department can then say that the emissions occur in "rather small quantities"? Either the Department does not know the extent of fugitive emissions, or it knows that they are small. It cannot be both. To the extent it has simply *assumed* that emissions are small, it has exacerbated its error.

In any event, the record does not support such an assumption. For example, neither Exide nor the Department presented credible expert opinion that compliance with technology-based process control regulatory requirements necessarily equates to elimination of significant fugitive emissions. There is no credible opinion in our view to support the assumption that there are no significant fugitive emissions at the Exide facility because Exide complied with the then existing Maximum Achievable Control Technology (MACT) standards at 40 CFR Part 63 Subpart X (*See* DEP Ex. 2; T. 56-57, 277-80, 284-86, 346-47). Indeed, the fact that EPA has since revised the MACT standards because those standards did *not* result in sufficient capture of fugitives, 77 Fed. Reg. 559-87, suggests that any such assumption would have been incorrect.⁸

Along the same lines, the permit requires Exide to perform robust housekeeping measures and regular visual inspections and walkthroughs, but those measures do not substitute for a proper significance determination. We do not accept the unproven assumption that Exide's

⁸ Whether the new standards will do the job remains to be seen.

housekeeping measures are adequate as far as such measures go, and therefore, it necessarily follows that fugitive emissions must be insignificant. Again, there is no credible testimony to support such an assumption. The County has pointed to monitoring result trends that at least suggest that fugitive emissions are continuing to occur notwithstanding Exide's housekeeping and inspection programs. (T. 137; Berks Ex. 27, 27A.)

The Department's witness noted that *visible* off-site fugitive emissions have not been reported, but he acknowledged that the lack of reported visible sightings does not necessarily mean that the emissions of lead are insignificant. (T. 376.) Section 123.1 is not limited to visible off-site emissions. *Compare* 25 Pa. Code § 123.2.

Section 123.1 excludes from the prohibition against fugitive emissions those emissions that come from "grading, paving and maintenance of roads and streets" and the "use of roads and streets." 25 Pa. Code § 123.1(a)(2) and (3). However, "[e]missions from material in or on trucks, railroad cars and other vehicular equipment are not considered as emissions from use of roads and streets." 25 Pa. Code § 123.1(a)(3). Exide seems to believe that entrainment or reentrainment of lead-containing material that happens to be located on its paved plant roadways falls within this exception. (*See, e.g.*, Post-Hearing Brief at 14.) Even if this is true, neither the Department nor Exide has credibly claimed that reentrainment of lead-containing material from the roadways is the only possible source of significance at the facility such that a proper evaluation of the significance of overall fugitive emissions is not required.

Exide points out that it has taken quite a few positive steps here. It identified some sources of fugitive emissions in its permit and plan approval applications. The permit itself describes some of those sources and emissions. Exide has modeled the emissions from its roadways. It has installed or proposed to install all known controls for all sources. It has

reported emissions in its annual reports to the Department. It has an approved work plan for housekeeping measures with which it complies. No visible emissions have been reported. Accepting that all of these statements are true, however, does not relieve Exide from demonstrating that all of these positive steps have been successful in reducing fugitive emissions to insignificant levels.

Exide argues that the County has failed to prove that there are in fact significant fugitive emissions at Exide's facility. The County was not required to make that showing in order to prevail in this case. The County prevails because it showed that Exide failed to make the required demonstration and the Department failed to make the required determination. *Cf. Crum Creek Neighbors v. DEP*, 2009 EHB 548, 573-74; *Blue Mountain, supra*, at 605-09; *Zlomsowitch v. DEP*, 2004 EHB 756, 787-88. As the County correctly states, "[i]t is not the County's burden to conduct the analysis and complete the application for Exide and the Department." (Reply Brief at 7.)

Remand Issues

By admitting that it does not know whether Exide's fugitive emissions are of minor significance, the Department has in effect admitted that it failed to comply with 25 Pa. Code § 123.1 when it renewed Exide's permit. Although we have the authority to proceed with an appropriate analysis ourselves, the better choice is to remand the permit to the Department for it to make an appropriate finding in the first instance. The Department should determine what combination of estimating, modeling, and/or monitoring is necessary and appropriate to support a determination that fugitive emissions at the facility are of minor significance and not interfering with attainment. If such a determination cannot be made, or if it is determined that

fugitive emissions can be estimated but they cannot be reduced to an insignificant level that is not interfering with attainment, then it would appear that the permit cannot be renewed.

Exide and the Department have both argued that a remand for a significance determination would be useless because of the extensive plant modifications that are in the works pursuant to the plan approval. We disagree. Section 123.1 clearly stands for the proposition that the citizens of this Commonwealth who live and work in the vicinity of the facility are entitled to know whether their Department of Environmental Protection deems the fugitive lead emissions from the facility to be of minor significance. That said, Exide and the Department's point has validity with respect to the *timing* of the significance determination on remand. We see little value in performing the determination before the plant improvements are completed.

The County has pushed us to require a significance determination including a monitoring requirement *before* Exide completes its plan approval work. The purported purpose of this monitoring would be to establish a baseline to measure the effectiveness of the plan approval work. We see nothing in the applicable federal or state regulations, however, that calls for achieving a certain percentage reduction in emissions starting from preexisting levels. Success is based on attainment of the NAAQS and, with respect to Section 123.1, elimination of unauthorized fugitive emissions, not a certain percentage of reduction relative to a baseline.

The County has pressed us to specifically order the Department to base its fugitive emissions determination on remand on more and better air monitoring. The Department ignored monitoring data when it reviewed Exide's renewal application in connection with fugitive emissions. (T. 351-52.) This is difficult to understand. The mere fact that data is derived for one purpose does not necessarily mean that it is completely irrelevant for any other purpose. Exide continues to operate its own monitoring system for some undisclosed reason. The

Commonwealth maintains its own monitoring network in the area for purposes of measuring attainment. We would be surprised if this monitoring data could serve as the sole or even primary basis for any conclusions regarding the contribution of Exide's fugitives to nonattainment, but we would also be surprised if the data proved to be totally useless. The County's expert witness, Fred Osman, credibly opined that the data, particularly when compared to other data and modeling results, should have *some* value in assessing the significance of fugitive emissions. (T. 94-95, 133-41, 178-82; Berks Ex. 4, 5, 9, 9(2), 27, and 27A.) The Department's contrary view that the monitoring data is completely useless is not as credible. At a minimum, the gobs of monitoring data generated with respect to the facility raises enough of a red flag to signal that a careful significance determination was called for.⁹

Section 123.1 does not necessarily require monitoring in connection with a significance determination. However, neither does it prohibit it. The Department's position regarding its legal authority is rather vague. In its brief, it seems to suggest that it has no authority to require monitoring. (*See, e.g.* Brief at 29.) Its witness, however, testified that he believes the Department has such authority. (T. 55.)¹⁰ In our view, the Department should not simply assume on remand that it has no authority to require monitoring data from a Title V permit applicant in order to satisfy Section 123.1. Section 123.1(b) specifically refers to air quality data. *See also* 25 Pa. Code § 127.411(a)(4)(i) and (b) (Department may deny a permit to a

⁹ The existing monitoring data may or may not have continuing relevance after the plan approval project is completed and compliance with the NESHAP is achieved. Again, we leave that determination to the Department in the first instance.

¹⁰ The Department required Exide to establish and maintain five air quality monitoring stations in a 1984 consent order and agreement. (Berks Ex. 4.) The County says that this shows the Department has the necessary legal authority to require source-related monitoring. The Department has two interesting responses. First, it says or at least implies that it can exceed its authority to order that certain things be done so long as it does so in a *consent* order. Secondly, it says that the data generated by Exide's monitoring is useless, which begs the question why the Department would require useless monitoring. The Department also failed to explain how it was able to require fence-line monitoring at another smelter (T. 400) if it is true that it lacks the legal authority to require such monitoring.

source that fails to demonstrate that the “source is equipped with reasonable and adequate facilities to monitor and record emissions of air contaminants and the operating conditions which may affect the emissions of air contaminants.”); § 127.422(2)(permit denial if provision not made for adequate verification of compliance).

The County would have us order the Department to ensure that Exide identifies and quantifies fugitive emissions from each and every possible source at the plant, citing 25 Pa. Code §§ 127.502(b) and 127.503(3)(i) – (iii) as authority for such a requirement. Sections 127.502(b) and 503(3)(i)-(iii) call for detailed information regarding emissions, including fugitive emissions, from all sources in a permit application. These regulatory provisions may shape the Department’s analysis on remand, but an overriding requirement is that significant fugitive emissions are *prohibited* under Section 123.1. The Department will need to decide on remand whether it is necessary to identify and quantify fugitive emissions from every conceivable source at the plant in light of this prohibition.

On remand, the Department must ensure that Exide’s fugitive emissions are not significant or interfering with attainment. As we have said, the Department may decide that it makes sense for that determination to await completion of Exide’s plan approval project. A further complicating factor in this case is that the Department is in the process of developing a State Implementation Plan (SIP) designed to bring the area of the Exide plant into attainment with the lead NAAQS. Section 123.1 does not directly serve as a basis for imposing new limits or controls, but by effectively mandating that sources may not be permitted if they emit fugitives at a level that interferes with attainment or are significant, the regulation can have the effect of possibly requiring new controls designed to ensure that there are no interfering or significant emissions. However, for the reasons that we discussed in an earlier Opinion in this case

(Opinion and Order, March 16, 2012), the imposition of emission limits and controls on Exide designed to contribute toward attainment should be done in the context of the SIP development process. As we said there,

[i]mposing different requirements on Exide now might ultimately prove to be inconsistent with the SIP that the Department will be preparing in the future for submission to EPA for review and approval. Imposing separate requirements now would be disruptive and premature absent exceptional circumstances not shown to be present here. This is true even where one source is likely responsible for nonattainment.

Id., slip op. at 7.

Fortunately, development of the SIP, Exide's plan approval project, the Department's duty to analyze fugitive emissions under Section 123.1, and Exide's duty to comply with the revised NESHAP are not inconsistent objectives or processes. To the contrary, they are complementary. Accordingly, we would encourage the Department on remand to coordinate the scope and timing of its significance determination under Section 123.1 with the SIP development process.

The County is concerned that Exide may not move forward expeditiously with the plant improvements and reduction of its fugitive emissions.¹¹ It tells us, for example, that the NESHAP rule that the plan approval work is in part designed to satisfy is currently under appeal in federal court. It notes, correctly, that a plan approval does not in and of itself actually require its recipient to perform the approved work, and that the plan approval project has not as of yet been incorporated into a SIP for achieving attainment for lead. The County's concern is not unreasonable, but the Department is operating under the expectation that Exide is moving forward with the work (DEP Brief at 32), and so are we. Exide witnesses testified under oath that Exide intends to move forward expeditiously with the project. (T. 305-09; 322-24.) Exide

¹¹ The County also does not concede that the plan approval is adequate, but that issue is not before us in this appeal.

confirms in its post-hearing brief that it intends to comply with the revised NESHAP. (Brief at 7.) Exide's permit specifically requires it to implement the NESHAP required measures. (Berks Ex. 1 § B.10(d).) The work is required not only for NEHSAP compliance, but NAAQS attainment as well, so even if the NESHAP rule is overturned or modified, proceeding toward attainment remains as a driving force. Exide in fact has already started work on the project. (T. 306-07.) Our holding is based on the assumption that these processes will proceed with all deliberate speed.

The County has not asked us to revoke or suspend Exide's permit. Nor would we have been inclined to do so. Therefore, Exide's permit will remain in place and in effect on remand pending the Department's review in accordance with this Opinion and Order, so long as the Department and Exide continue to work in a cooperative and expeditious manner toward NAAQS attainment and MACT compliance.

CONCLUSIONS OF LAW

1. The County bears the burden of proceeding and the burden of proof. 25 Pa. Code § 1021.122(c)(2).

2. The Board's duty is to make a *de novo* determination whether the Department's action can be sustained or supported by the evidence take by the Board. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998) (*quoting Warren Sand and Gravel Co., v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975)).

3. We review the Department action to ensure that it conformed with the law and constituted a reasonable exercise of its discretion based upon the facts. *O'Reilly v. DEP*, 2001 EHB 19, 32.

4. As a matter of law, fugitive emissions cause or contribute to a condition of air pollution. *Department of Environmental Resources v. Locust Point Quarries, Inc.* 483 Pa. 352, 360, (1979).

5. No person may emit fugitive air contaminants into the outdoor atmosphere from any source, unless an exemption under 25 Pa. Code § 123.1(a) applies.

6. Where a fugitive emission does not otherwise qualify for an exemption under 25 Pa. Code § 123.1(a)(1)-(8), for a source to be exempt an operator must obtain:

a determination from the Department that the fugitive emissions from the source, after appropriate control, meet the following requirements:

(i) The emissions are of minor significance with respect to causing air pollution.

(ii) The emissions are not preventing or interfering with the attainment or maintenance of an ambient air quality standard.

(25 Pa. Code § 123.1(a)(9).)

7. When the Department fails to properly apply its own regulations to its review of a permit application and issuing a permit, the Department acts contrary to law. *Zlomsowitch v. DEP*, 2004 EHB 756, 789

8. The Department committed an error of law by failing to determine that the emission of fugitive air contaminants from Exide: (i) are of minor significance with respect to causing air pollution; and (ii) are not preventing or interfering with the attainment or maintenance of an ambient air quality standard. 25 Pa. Code § 123.1(a)(9) and (b).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERKS COUNTY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EXIDE TECHNOLOGIES,
Permittee

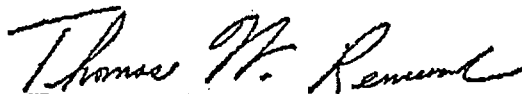
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EHB Docket No. 2010-166-L

ORDER

AND NOW, this 26th day of November, 2012, it is hereby **ORDERED** that Exide's Title V permit is remanded to the Department for further consideration in accordance with our Adjudication.

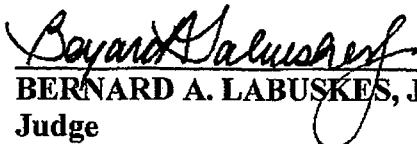
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge


STEVEN C. BECKMAN
Judge

DATED: November 26, 2012

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

**INTERNATIONAL ASBESTOS TESTING
LABORATORIES**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

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EHB Docket No. 2012-111-M

Issued: November 29, 2012

**OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS**

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss and dismisses an appeal where the Appellant corporation has failed to obtain counsel or respond to the Department's motion.

DISCUSSION

In a letter dated May 8, 2012, the Department of Environmental Protection (the "Department") informed International Asbestos Testing Laboratories that the Department had suspended its laboratory accreditation for testing asbestos in water as a result of the laboratory's failure to meet one or more requirements in the Department's proficiency test. Thereafter, International Asbestos Testing Laboratories filed an appeal with the Board protesting the Department's suspension. The appeal was filed in the business' name accompanied by the name and telephone number of John Napolitan, who apparently sought to represent the company's

interests as an employee, but making no representation that he was capable of representing the company as an attorney.

The Department filed a letter on July 3, 2012, explaining that it had determined that the Appellant was a New Jersey corporation, and therefore, the Appellant corporation is required to be represented by counsel in order to comply with 25 Pa. Code § 1021.21. Thereafter, the Board sent a letter to the Appellant requiring it to have an attorney enter an appearance in the proceeding on or before August 3, 2012.

When the Appellant failed to have an attorney enter an appearance, the Department filed a motion to dismiss. Under our rules, a response to a dispositive motion may be filed within thirty days after the dispositive motion has been served. That time having elapsed, the Appellant has not responded to the Department's motion to dismiss, and the Department's motion is now ripe for our consideration. Further, pursuant to 25 Pa. Code § 1021.91(f), because the Appellant has failed to file a response to the Department's motion, the Board deems all properly-pleaded facts in the Department's motion admitted.

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party. *GEC Enterprises v. DEP*, 2010 EHB 305, 308; *Beaver v. DEP*, 2002 EHB 666, 671. A motion to dismiss will only be granted where there are no material issues of fact in dispute and the moving party is clearly entitled to judgment as a matter of law. *Hendryx v. DEP*, 2011 EHB 127, 129; *Spencer v. DEP*, 2008 EHB 573, 574. For the reasons set forth below, the Department is entitled to judgment.

On the issue of representation of a corporation the Board has stated “[w]e have consistently held that appeals filed by any entity other than an individual appealing on his or her own behalf may not proceed without legal representation.” *Falcon Coal & Construction Co. v.*

DEP, 2009 EHB 209, 210; *R.J. Rhodes Transit, Inc. v. DEP*, 2007 EHB 260, 263. Consistent with Pennsylvania law, our rules specifically require that corporations be represented by counsel before the Board. 25 Pa. Code § 2012.21(b); *see also Walacavage v. Excell 2000*, 480 A.2d 281, 283-84 (Pa. Super. 1984).

To date, the Appellant has not had counsel file an entry of appearance before the Board and it has not made any efforts before the Board to seek additional time to obtain counsel to pursue its appeal. The facts, as admitted, clearly indicate that the Appellant is a corporation that is required to obtain representation by counsel to appear before the Board. In addition, the Appellant has ignored our direction to have an attorney enter an appearance on its behalf. We find, therefore, that there are no material facts in dispute and the Department is entitled to judgment as a matter of law. *See KH Real Estate, LLC v. DEP*, EHB Docket No. 2011-040-R (Opinion and Order Issued July 31, 2012). The Appellant is not allowed to pursue its appeal before the Board without counsel.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

INTERNATIONAL ASBESTOS TESTING :
LABORATORIES :

v. :

EHB Docket No. 2012-111-M

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 29th day of November, 2012, it is hereby ordered that the Department's motion to dismiss is **granted**.

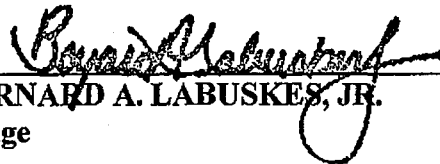
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



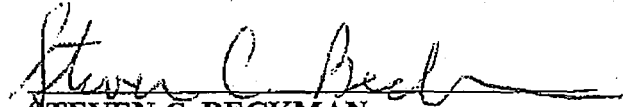
MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge


STEVEN C. BECKMAN
Judge

DATED: November 29, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson
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For the Commonwealth of PA, DEP:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

**FRANCIS SHULTZ, JR., AND DAVID
FRIEND, d/b/a SHORTY AND DAVE'S USED
TRUCK PARTS**

EHB Docket No. 2011-105-CP-C

Issued: December 5, 2012

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

By Michelle A. Coleman, Judge

Synopsis:

The Board denies the Defendants' Motion for Summary Judgment arguing that the Department filed a complaint against the wrong Defendants. Defendants have proven that Shorty and Dave's U-Pull It Used Truck Parts is a fictitious name owned by Shorty and Dave's Inc. The Board finds, however, that a dispute remains as to the Defendant, Shorty and Dave's Used Truck Parts, whose name does not appear in the Department of State's records as incorporated in any fashion.

OPINION

The Defendants, Francis Schultz, Jr. and David Friend, d/b/a Shorty and Dave's Used Truck Parts (the "Defendants") filed a Motion for Summary Judgment ("Motion") on November 5, 2012. The Motion requests the Board to dismiss the complaint filed by the Department of Environmental Protection (the "Department") against the named individual Defendants since the corporation conducted the activities for which the Department sought a civil penalty, not the

individuals. The Department filed its response to the Motion on November 8, 2012.

Prior to the filing of the Motion, the Board had set a date for the hearing. After receiving the parties' prehearing memoranda the Board held a prehearing conference call. During the call, Defendants raised the issue, as reflected in their prehearing memorandum, that the Department filed the complaint against the incorrect Defendant. After a discussion among the parties and the Board, the Board allowed the Defendants and Department to file a motion and response discussing the issue.

This matter began with the filing of the Department's complaint for the assessment of civil penalties on July 25, 2011 against the individual Defendants, d/b/a Shorty and Dave's Used Truck Parts for alleged violations of both the Clean Streams Law, 35 P.S. §691.1, *et seq.*, and the Erosion and Sedimentation Control Regulations, 25 Pa. Code Chapter 102. These alleged violations resulted from earth disturbance activities on the property located at 588 Swedeland Road in Upper Merion Township, Montgomery County, Pennsylvania ("Site") from September 25, 2007 through December 11, 2007. (See Department's Pre-hearing Memorandum Exhibits 4-9). In May of 2006 an Application for Adequacy Review of Erosion and Sediment Control Plan was submitted to the Montgomery County Conservation District. The applicant's information section reflects:

APPLICANT INFORMATION

APPLICANT Francis Schultz and David Friend
(Responsible Official)

Shorty & Dave's Used Truck Parts

ADDRESS: 588 Swedeland Road

CITY: King of Prussia State: PA

(See Department's Pre-hearing Memorandum Exhibit 1). The Montgomery County Conservation District, on behalf of the Department, conducted inspections at the Site and issued earth disturbance inspection reports dated September 25, 2007, October 18, 2007, November 2,

2007, November 15, 2007, November 27, 2007 and December 11, 2007. (Department's Pre-hearing Memorandum Exhibits 4-9). The Department's complaint for assessment of a civil penalty is based on these reports. Each report indicates that the responsible party for the earth disturbance activities at the Site is "Shorty and Dave's Used Truck Parts". (*Id.*).

The Department took the depositions of the individually named Defendants on May 30, 2012. Both Mr. Friend and Mr. Schultz testified that they were misnamed in the complaint. (Defendants' Motion, Exhibit G). On July 18, 2012 the Defendants filed an affidavit of David Friend with the Board stating that Shorty and Dave's, Inc. conducted all activities on the premises. (Defendants' Motion, Exhibit G).

The Defendants' Motion states that Francis Schultz, Jr. and David Friend created Shorty and Dave's, Inc. on November 3, 1997, with its principle place of business at 1936 Lafayette Road, Gladwyne, Pennsylvania, as indicated by the Pennsylvania Department of State's records. (Defendants' Motion, ¶ 3; Defendants' Motion for Summary Judgment, ¶ 4; *see also* Defendants' Motion, Exhibit C). The Motion also states that Shorty and Dave's U-Pull It Used Truck Parts is a fictitious name filed on February 6, 1998. Its principle place of business is at 1936 Lafayette Road and is owned by Shorty and Dave's, Inc., as verified by the Secretary of the Commonwealth of Pennsylvania, Carol Aichele, on October 25, 2012 to be true and correct. (Defendants' Motion for Summary Judgment, ¶¶ 6-7; Defendants' Motion, Exhibits C-D).

The Board may grant a motion for summary judgment "where the pleadings, depositions, answers to interrogatories and admissions, together with supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. (25 Pa. Code § 1021.94a(1); *Angela Cres Trust v. DEP*, 2007 EHB 111, 114; *Snyder Brothers, Inc. v. DEP*, 2006 EHB 978, 980). Accordingly, a review of the record indicates

that Shorty and Dave's U-Pull It Used Truck Parts is the fictitious name owned by the corporation, Shorty and Dave's Inc. with a business address of 1936 Lafayette Road, Gladwyne. However, the Application for Adequacy Review of Erosion and Sediment Control Plan states that the responsible parties are Francis Schultz, David Friend and Shorty and Dave's Used Truck Parts with an address of 588 Swedeland Road, King of Prussia. The inspection reports state that Shorty and Dave's Used Truck Parts is the responsible party with an address of 588 Swedeland Road, King of Prussia. These are the Defendants in the Department's complaint. There is no mention in the application or the inspection reports of the corporation, Shorty and Dave's Inc., or the fictitious name, Shorty and Dave's U-Pull It Used Truck Parts, as the responsible party. The Defendants used both the fictitious name entity and Shorty and Dave's Used Truck Parts interchangeably in its Motion. However, there is nothing provided by the Defendants to indicate that this entity, Shorty and Dave's Used Truck Parts, as a Defendant in this matter and at a different business address, is the same entity as the fictitious name, Shorty and Dave's U-Pull It Used Truck Parts. In fact, a search of the Department of State's records of the name Shorty and Dave's Used Truck Parts does not return any entity under that name. Therefore, it is does not appear that such entity is incorporated, nor is it a fictitious name owned by a corporation. Since this is clearly a dispute of the material fact in this matter, we must deny the Defendants' Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2011-105-CP-C

v. :

FRANCIS SHULTZ, JR., AND DAVID :
FRIEND, d/b/a SHORTY AND DAVE'S USED :
TRUCK PARTS :

ORDER

AND NOW, this 5th day of December, 2012, it is hereby ordered that the Defendants' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN

Judge

DATED: December 5, 2012

c: DEP, Bureau of Litigation:
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9th Floor, RCSOB

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

For Defendants:
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P.O. Box 710
Norristown, PA 19404

jurisdiction is not waivable and may be raised at any time in the course of proceedings before the Board by any party or by the Board itself. See, *Commonwealth of Pennsylvania, Office of Attorney General v. Locust Township, et al.*, 968 A.2d 1263, 1269 (Pa. 2009); *Mazur v. Trinity Area School District*, 961 A.2d 96, 101 (Pa. 2008); *Blount v. Philadelphia Parking Authority*, 965 A.2d 226, 229 (Pa. 2008); *Heath v. Workers Compensation Appeal Board*, 860 A.2d 25, 28 (Pa. 2004); *Jackson v. Pennsylvania Board of Probation and Parole*, 885 A.2d 598, 599, 600 (Pa. Cmwlth. 2005); *Bentley v. DEP*, 1999 EHB 447, 455; *Costanza v. DER*, 1991 EHB 1132. The Appellants have not opposed the motion.

We are receptive to 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. *Doctorick v. DEP*, EHB Docket No. 2011-152-M (Opinion & Order, July 2, 2012); *Blue Marsh Labs. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Palmer v. DEP*, EHB Docket No. 2012-091-L (Opinion and Order May 31, 2012); *Cooley v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531. Where, as here, the Appellants fail to respond to the Department's motion to dismiss, the Board deems all properly pleaded and supported facts in the Department's motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 332.

Any person other than the recipient of the Department action that is aggrieved by a Department action that is noticed in the *Pennsylvania Bulletin* must file an appeal within 30 days

of publication of that notice. 25 Pa. Code § 1021.52(a)(2)(i). The 30-day appeal period starts to run from the date the notice is published in the *Pennsylvania Bulletin*. *Fontaine v. DER*, 1996 EHB 1333. If an appeal is filed beyond the 30-day deadline, the Board is deprived of jurisdiction to hear the appeal. *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus*, 2005 EHB at 357; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546.

As we explained in *GEC Enterprises v. DEP*, 2010 EHB 305, 311:

Pennsylvania courts have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect that mandates the quashing of the appeal. See *Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth 1992); *Cadogan Township Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania Game Comm'n v. DER*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Weaver*, 2002 EHB at 276; *Dellinger v. DEP*, 2000 EHB 976, 980. Untimely appeals are granted very little leniency by the court. See *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979) (“[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence.”); *Rostosky*, 364 A.2d at 763 (“Where a statute has a fixed time within which an appeal may be taken, we cannot extend such time as a matter of indulgence.”) Moreover, the Board is not permitted to disregard such a defect and grant an extension of time “in the interests of justice.” See *West Caln Township v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991); *Weaver*, 2002 EHB at 277. Accordingly, the untimeliness of the appeal, although only slightly overdue, deprives the Board of jurisdiction over the appeal and operates as a waiver of all legal rights to contest the violation or the penalty amount. See, e.g., *Spencer v. DEP*, 2008 EHB 573, 575 (appeal dismissed because it was filed one day too late); *Pedler v. DEP*, 2004 EHB 852, 854 (same); *Tanner*, 2006 EHB at 469 (dismissing an appeal of a compliance order where the appeal was filed 32 days after receipt of the order); *Martz*, 2005 EHB at 349-50 (dismissing an appeal of an enforcement order where the appeal was filed 41 days after the issuance of the order); *Weaver*, 2002 EHB at 279 (dismissing appeal where Notice of Appeal was filed 41 days after the delivery of a civil penalty assessment to the appellant's residence.

The Department issued a renewal of Grande Land's NPDES Permit on November 18, 2010. The December 11, 2010 edition of the *Pennsylvania Bulletin* contained notice of the issuance of the permit renewal. 40 *Pa. Bull.* 7111. This appeal was not filed until May 18, 2011, far more than 30 days from publication of notice of the permit renewal in the *Pennsylvania Bulletin*. Because the appeal was not initiated within 30 days of publication of the notice of permit issuance in the *Pennsylvania Bulletin*, the Board lacks jurisdiction to hear the appeal and it must be dismissed.

Accordingly, we issue the Order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES BARTON, KAREN BARTON,
FILIPPO VALENTI, VITA VALENTI,
ROBERT HEPLER AND KATHLEEN
HEPLER and CRESSONA BOROUGH
AUTHORITY, Intervenor

v.

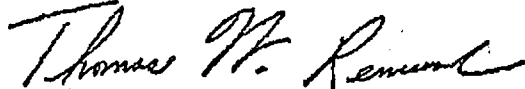
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and GRANDE LAND, L.P.,
Permittee

EHB Docket No. 2011-074-L

ORDER

AND NOW, this 7th day of December, 2012, it is hereby ordered that this appeal is dismissed for lack of jurisdiction. The hearing previously scheduled to begin on December 17, 2012 is cancelled.

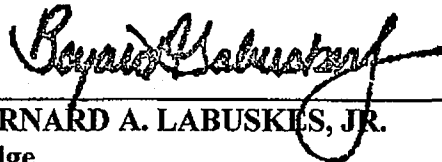
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKIS, JR.
Judge



RICHARD P. MATHER, SR.
Judge


STEVEN C. BECKMAN
Judge

DATED: December 7, 2012

c: DEP, Bureau of Litigation:
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Court Reporter:
Commonwealth Reporting, Inc.
700 Lisburn Road
Camp Hill, PA 17011



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RON TESKA AND GIULIA MANNARINO	:	
	:	
v.	:	EHB Docket No. 2012-156-M
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: December 12, 2012
PROTECTION and EQT PRODUCTION	:	
COMPANY, Permittee	:	

**OPINION AND ORDER ON MOTION
TO DISMISS OF EQT PRODUCTION COMPANY**

By Richard P. Mather, Sr., Judge

Synopsis

The Appellants, Ron Teska and Giulia Mannarino, filed an appeal from a letter dated July 27, 2012 that the Department sent to them in response to a letter the Appellants had sent to the Department. In their letter, the Appellants had requested that the Department transfer a gas well registered to the EQT Production Company (EQT) to them or suspend or revoke EQT’s well registration for the gas well in question. The Board grants EQT’s motion to dismiss because the Board lacks jurisdiction over the appeal of the Department’s letter. The Department’s letter merely advised Appellants of the Department’s interpretation of the law regarding transfers of well registration and explained why the Department declined to pursue Appellants’ alternative request to suspend or revoke EQT’s well registration at that time.

OPINION

Background

This appeal arises from a dispute between the Appellants and EQT over the continued operation of a gas well on property that the Appellants own. The facts summarizing the dispute

are set forth in the Appellants' Notice of Appeal.¹ The Appellants are husband and wife and are the owners of property on which there is a shallow gas well that was drilled under a lease dated 1913. The well is registered to EQT (#059-1341) which acquired the gas lease in 1999. Under the lease, Appellants' household is entitled to free gas from the well on the property. Appellants assert that in 2007 EQT abandoned the well, based upon production reports, and that EQT has no further right to gas from Appellants' property. In addition, Appellants assert that EQT is in violation of state requirements by failing to plug the abandoned well in timely manner.

The Appellants, however, do not want to have EQT plug the gas well. The Appellants are interested in operating the well in question for the energy needs of their household because the gas is not fully depleted even though it may no longer be viable for commercial production. The Appellants and EQT have had discussions regarding the transfer of the well from EQT to the Appellants. The negotiations broke down over objections that Appellants had to terms of transfer that EQT wanted.²

Following the breakdown in negotiations between the parties, Appellants have pursued other means to achieve their overall goal of securing the right and approval to operate the gas well in question located on their property. The Appellants have filed an Action for Declaratory Judgment in the Court of Common Pleas of Greene County seeking, *inter alia*, to force EQT to transfer the gas well to the Appellants. Exhibits A and B in support of EQT Production Company's Motion to Dismiss. In connection with this action Appellants have also sought injunctive relief to prevent EQT from plugging the gas well in question. Exhibits C and D in

¹ See Appellants' Notice of Appeal and EQT's Motion to Dismiss, which provided four additional exhibits.

² The nature of the dispute is not important for the Board's purposes in resolving EQT's motion to dismiss.

support of EQT Production Company's Motion to Dismiss. The Board is not aware of the current status of this action in the Greene County Court of Common Pleas although knowledge of the status of this action is not needed to address the issue before the Board in this appeal.

The Appellants have also requested that the Department take action to assist the Appellants in their efforts to secure the right and approval to operate the gas well in question for the energy needs of their household. In April of 2012, Appellants submitted an Application for Transfer of Well Registration to the Department. Appellants recognize that "no action was ever taken on this application as it was deemed incomplete."³ Appellant's Response to Department's Answer to EQT's Motion to Dismiss, p. 2.

The Appellants contacted the Department regarding its application for transfer of the well registration, but the Department staff reiterated that the only action available to them would be to order EQT to plug the well. In light of the Department's inaction on the pending but incomplete application for transfer of the well registration, Appellants modified their approach and sent the Department a letter dated June 25, 2012 requesting that the Department take enforcement action to suspend or revoke EQT's well registration for the well in question.

The Department responded to Appellants' June 25, 2012, letter in a response dated July 27, 2012, and the Appellants filed the appeal currently before the Board from this July 27, 2012 Department letter.⁴ To evaluate whether the letter under appeal constitutes an appealable Department action it is useful to describe the six-paragraph letter in some detail.

³ According to Appellants, the form was incomplete because EQT's signature on the required one page well registration transfer form was missing. The Appellants assert that EQT refused to sign the form unless the Appellant agreed to sign the documents that EQT wanted appellants to sign.

⁴ The Appellants also later contacted the Department by letter dated August 1, 2012 to request a conference of all interested parties. The requested conference was held on August 16, 2012 at the Department's Pittsburgh Offices. EQT did not participate. Appellants filed their Appeal of the Department's July 27, 2012 letter on August 24, 2012.

In the first paragraph, the Department indicates that it was responding to the Appellants' earlier letter, and relates that the Department had spoken to Mr. Teska about this matter several months ago.

In the second paragraph, the Department described the Department's understanding of the underlying facts: gas well had not been operated for years; lease between EQT and Appellants had been broken; Appellants wanted to own and operate the well; but EQT possibly intended to plug it; and Appellants wanted the Department to transfer the well to them.

In the third paragraph, the Department stated it has no authority to resolve ownership issues. The Department further stated that the Appellants could become the well operator if an appropriate transfer were submitted and signed by *both* EQT and the Appellants. (emphasis in Department's letter).

In the fourth paragraph, the Department recognized and responded to Appellants' suggestion that the Department suspend or revoke EQT's well registration. The Department stated that suspension/revocation of a well registration does not somehow make it available for someone else to operate. The Department explained that its regulatory actions such as well permit issuance, well registration transfer or suspension/revocation do not convey, remove or otherwise effect property ownership.

In the fifth paragraph, the Department indicated that it planned to contact EQT about the well and its plans to address its abandoned status. In addition, the Department stated it had no authority to require that EQT transfer the well to the Appellants.

In the final paragraph, the Department expressed its hope that the letter expressed its position, and it provided contact information if the Appellants had an additional questions.

The Appellants filed their appeal of this Department's letter on August 27, 2012. Their Notice of Appeal described their objections to the letter in a twenty-six paragraph attachment to the Notice. The twenty-six paragraphs provide the basis for Appellants' appeal which seeks to compel the Department to take an enforcement action against EQT to revoke EQT's well registration. The Appellant believe that if the well registration were revoked, it would then be available for operation by another interested party, namely the Appellants. The Appellants assert that the Department's decision to not take an enforcement action directly affects Appellants' rights and they are challenging that decision.

EQT filed a motion to dismiss the Appellants' appeal on September 13, 2012. In its motion, EQT asserts that the Board has no jurisdiction over the appeal of the Department's letter because the letter is not an appealable action. EQT asserts that the Department's decision to not take the enforcement action, requested by the Appellants, to revoke EQT's well registration for the gas well in question involves enforcement discretion which is not appealable to the EHB. EQT also asserts that the Appellants are pursuing the same remedy in an action pending before the Court of Common Pleas of Greene County.⁵ Finally, EQT asserts that the Department's letter is not appealable because it merely explains the DEP's interpretation of the law related to transfer of gas well ownership and regulation and explains that it has no authority to decide or resolve ownership issues. Paragraph 24 of EQT's Motion to Dismiss.

The Appellants filed a response to EQT's motion to dismiss. The Appellants disagreed with EQT and asserted that the Department's decision not to take enforcement to revoke EQT's well registration is an appealable action. The Appellants also disagreed that they are seeking the

⁵ EQT attached documents related to this pending action in the Greene County Court of Common Pleas as exhibits to its Motion to Dismiss.

same remedies. This appeal, according to the Appellants, is about the Department's refusal to take enforcement action against EQT and the appeal is not purely about property ownership.

The Department also filed a Response to EQT's motion to dismiss. Because the Department's response supported EQT's motion, the Board issued an order allowing the Appellants additional time to respond to the Department's response that supports EQT. The Department disagreed with Appellants and asserted that its letter is not appealable because it does not direct the Appellants to do anything. The Department also asserted that the letter merely sets forth the Department's legal interpretations.

The Appellants filed a response to the Department's response. In their response, the Appellants stated that they believe that the Department's letter is appealable because it refuses to take the enforcement action requested by the Appellants. The Appellants also asserted that the Department should not have unreviewable discretion on whether to take an enforcement action. According to the Appellants, such a refusal to take the requested enforcement action affected Appellants property rights in a manner that renders the refusal to act an appealable action.

Standard of Review

The Board evaluated a motion to dismiss in the light most favorable to the non-moving party. *Donny Beaver v. DEP*, 2002 EHB 666, 671. A motion to dismiss will only be granted where there are no material issues of fact in dispute and the moving party is clearly entitled to judgment as a matter of law. *Hendryx v. DEP*, 2011 EHB 127, 129; *Spencer v. DEP*, 2008 EHB 573, 574. EQT has satisfied its burden and is entitled to have its motion to dismiss granted for the reasons set forth below.

Discussion

In this appeal, the Board faces one of the more difficult and often reoccurring issues that comes before the Board. When does a Department letter or other similar communication cross a line to become an appealable action over which the Board has jurisdiction? The Board has the power and duty to hold hearings and issues adjudications on orders, permits, licenses or decisions of the Department, 35 P.S. § 7514(a). The EHB Act states that “no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board. . . .” 35 P.S. § 7514(c). The Board’s rules define “action” 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). The Board only has jurisdiction to review final actions of the Department. *Kennedy v. DEP*, 2007 EHB 511, 512.

Under the Board’s established caselaw, some Department letters or communications are appealable and some are not. *See, e.g., Perano v. DEP*, 2011 EHB 750, 754-55. (letter that merely acknowledges receipt of supplement to remediation plan and reminds person of existing obligations is not appealable); *Pickford v. DEP*, 2008 EHB 168, *aff’d* 967 A.2d 414 (Pa. Cmwlth. 2008); (letter that refuses request to rescind previously issued permits is not appealable); *Kutztown v. DEP*, 2001 EHB 1115 (letter that is equivalent of compliance order is appealable). The Board must therefore evaluate each letter at issue to determine if it is appealable.

One way an informal Department communication such as a letter can become appealable and subject to Board jurisdiction is if the letter or communication is the equivalent of a compliance order. *Kutztown*, 2001 EHB 1115; *see also Perano v. DEP*, 2011 EHB 750. A letter

is the equivalent of a compliance order if it directs or requires the recipient to do something; it is prescriptive or imperative, not merely descriptive or advisory. *See, e.g., Beaver v. DEP*, 2000 EHB 666 (opinion contains extensive list of examples). An informal communication such as a letter that communicates a party's obligation to obtain a permit or similar authorization can also be appealable. *See, e.g., Gordon-Watson v. DEP*, 2005 EHB 812.

In order to determine whether a particular Department letter is appealable, the Board considers such factors as the specific wording of the communication, its purpose and intent, its practical impact, its apparent finality, its regulatory context and the relief, if any, the board can provide. *David Dobbin v. DEP*, 2010 EHB 852; *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 376, *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24. Under these factors and the Board's caselaw set forth above, it is quite clear that the Department's July 27, 2012 letter is not a final Department action over which the Board has jurisdiction.

An evaluation of the purpose and intent of the Department's July 27th letter strongly supports the conclusion that the letter is not appealable. The Appellants were aware of the established regulatory mechanism to transfer the well registration, but their efforts to accomplish a transfer using the Department's well transfer application were blocked by EQT, which refused to sign the transfer application if Appellants refused to agree to EQT's terms. Because this established regulatory avenue was blocked, Appellants sent the Department a letter in which they asked the Department to use its discretionary enforcement authority to revoke EQT's well registration so that the Appellants could eventually register and operate the gas well in question. The Department's July 27th letter responded to this request to take discretionary enforcement action to revoke EQT's as well registration.

On the issue of taking an enforcement action the Department effectively deferred answering the request by stating that it planned to “contact EQT about the well and obtain a plan for addressing the abandoned well status” of the gas well in question. There is nothing in the record before the Board that describes what the Department did next. The letter under appeal is, however, clear that the Department was not ready to pursue any enforcement action until after it contacted EQT about its plans.⁶ This aspect of the letter under appeal also addresses the factor of the apparent finality of the Department’s letter when the Department stated that it wanted to contact EQT about its plans. There is no apparent finality to Appellants’ request to revoke EQT’s gas well registration in the letter under appeal because the letter merely indicated that the Department wanted to contact EQT about its plans before taking any action.

In addition to deferring any decision on enforcement until after it contacted EQT, the Department’s July 27th letter also contains two paragraphs that contain statements regarding the Department’s interpretation of its authority. In the first such paragraph, the Department explains that it lacks the authority to decide or resolve property ownership issues. While this statement merely provides the Department’s interpretation of the limits of its authority, it is nevertheless an accurate statement.⁷ In the second such paragraph, the Department explains certain legal effects of suspension or revocation of a gas well registration. Contrary to Appellants’ desires, the letter explained that the Department does not believe that suspension or revocation of a well

⁶ Even if the Department had flatly declined Appellants’ request to pursue the requested enforcement action, the Board has serious reservations whether a refusal to take a requested enforcement action constitute an appealable action, over which the Board has jurisdiction. As a general rule, the Board has no jurisdiction over the exercise of the Department’s prosecutorial discretion. *See e.g., Dept. of Env’tl. Prot. v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005). While there are exceptions to the general rule, the Board need not consider either the general rule or the exception here because the Department’s letter under appeal deferred any action on enforcement until after it contact EQT about its plans to address the abandoned status of the gas well involved in the appeal.

⁷ *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 710-11.

registration somehow makes it available for someone else to operate. The Board does not need to either agree or disagree with the substance of the Department's interpretation of the legal consequences of the revocation of a gas well registration, but the Board needs only to conclude that such a statement is a legal interpretation of the Department. It is well established that such Department legal interpretations are not final actions of the Department over which the Board has jurisdiction. *See, e.g., Sandy Creek Forest, Inc. v. Dep't of Envtl. Res.*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986). Neither Department statement regarding the lack of legal authority to resolve property disputes or certain legal effects of a well registration revocation provide a jurisdictional basis for this appeal.

An equally important factor to consider is the regulatory context of Appellants' appeal of the Department's July 27th letter. The Appellants have already filed an application with the Department to transfer the well registration from EQT to the Appellants.⁸ The Appellants assert that the transfer of well registration is a simple process, where the application for the transfer is signed by both parties. Because EQT has refused to sign the well registration transfer application, the Department deemed the application incomplete and no action was ever taken on this application. Appellants recognize that "DEP cannot compel the transfer of the well to Appellants by EQT," which is why the Appellants now seek to compel the Department to revoke EQT's well registration using its discretionary authority. *See* paragraph 22 of Appellants Notice of Appeal.

An established regulatory mechanism exists to transfer the well registration from EQT to the Appellants. The Appellants have attempted to use this established mechanism, however,

⁸ The Oil and Gas Act and the regulations promulgated thereunder clearly allow the transfers of a gas well permit or registration. 58 Pa. C.S.A § 3211(k); 25 Pa. Code § 78.13(a).

EQT has refused to sign the well transfer application, and the Department lacks the authority to compel EQT to transfer the gas well registration. This appeal from the Department's letter responding to the request that the Department revoke the gas well registration is not a regulatory surrogate for Appellants' effort to transfer the well registration when their attempts to transfer the well registration using the appropriate regulatory mechanisms are blocked. *See Perano v. DEP*, 2011 EHB 587, 593-94.

The practical impact of the Department's July 27th letter also supports the Board's conclusion that it is not appealable. Appellants ask the Department to take a discretionary enforcement action. The Department did not address this request directly. It deferred any possible future action until after it contacted EQT regarding its plans. The Department's letter has no practical impact on Appellants' pending application to transfer the gas well registration or on EQT's existing well registration. The letter merely explained that the Department planned to contact EQT about the well and to obtain a plan for addressing its abandoned status.

The Board is aware that the Appellants have not been successful to date in reaching a negotiated solution with EQT to achieve its goal of continued operation of the gas well in question to supply gas for its household needs. The Board has no jurisdiction over the Department's letter under appeal, and therefore the Board has no role in addressing Appellants' efforts to achieve its stated goal in the context of this appeal.

In conclusion, the Department's July 27th letter is not appealable as either the equivalent of an enforcement action or the equivalent of a permit or other similar authorization decision. The wording of the letter does not direct any party to take a required action within a specified time. It is not prescriptive in any sense, and it is merely advisory. The letter also does not grant, deny or otherwise modify any Department approval or authorization.

For the reasons set forth above, the Board issues the Order that follows to grant EQT's motion to dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RON TESKA AND GIULIA MANNARINO

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and EQT PRODUCTION
COMPANY, Permittee

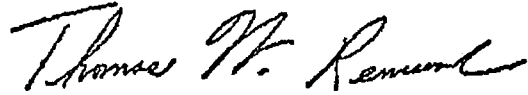
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EHB Docket No. 2012-156-M

ORDER

AND NOW, this 12th day of December, 2012, it is hereby ordered that the Permittee's motion to dismiss is granted.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman




MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge


STEVEN C. BECKMAN
Judge

DATED: December 12, 2012

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

KEVIN CASEY

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION; PENNSY SUPPLY, INC.,
Permittee; DORRANCE TOWNSHIP, Intervenor:**

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: **EHB Docket No. 2012-070-C**
:
: **Issued: December 19, 2012**
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**OPINION AND ORDER
ON MOTION IN LIMINE**

By Michelle A. Coleman, Judge

Synopsis:

The Board grants the Permittee's *Motion in Limine* to preclude the testimony and report of Robert M. Hershey, P.G., who has been retained by the Township and is unwilling to testify as an expert for the Appellant in this matter. The Board cannot compel Hershey to testify as an expert for the Appellant and the use of his report or testimony at the hearing held before the Township Supervisors is inadmissible hearsay since the Department was not a party to that matter. Additionally, Appellant shall be precluded from introducing any and all expert testimony at the hearing in this appeal for failure to designate any expert witnesses in his responses to discovery.

OPINION

The Permittee, Pennsy Supply, Inc. (Pennsy or Permittee), filed a *Motion in Limine* with the Board on October 15, 2012 requesting that the Appellant, Kevin Casey (Casey or Appellant), be precluded from introducing the expert testimony of Robert M. Hershey, P.G. at the hearing in

this appeal. No responses to the motion were filed.¹

Casey filed an appeal on April 2, 2012 of the Department of Environmental Protection's (the "Department") issuance of the Noncoal Surface Mining Permit and NPDES Permit and Authorization to Mine at Pennsy's Small Mountain Quarry III Operation in Dorrance Township, Luzerne County, Pennsylvania. The Permittee served the Appellant its First Set of Interrogatories and First Set of Requests for the Production of Documents on July 19, 2012. The Appellant did not respond within thirty days when responses were due on August 20, 2012. On September 11, 2012 Pennsy filed a Motion to Compel with the Board. On September 27, 2012, the Board issued an Order granting Pennsy's Motion to Compel and requiring the Appellant to respond within 10 days. Casey filed his response on October 1, 2012.

Interrogatory No. 43 requested the Appellant to identify each expert witness expected to be called or relied upon in the hearing. In the Appellant's response he stated, "[m]y attorney has not yet determined what witnesses if any will be necessary at the hearing, if any." (Permittee's Exhibit A). Document Request No. 5 requested the Appellant to provide a copy of the resume of each expert intended to be called as a witness at the hearing. Appellant responded, "[w]e are not having any expert testimony testify [sic], although we may change our minds. If an expert does testify it will be Robert Hershey whose curriculum vitae George Asimos, Esq. of your office already has. Attached to Interrogatories." (Permittee's Exhibit B).

On October 9, 2012 Appellant filed a motion with the Board to extend discovery and to allow into evidence an expert report and testimony of Robert M. Hershey, P.G. The Appellant states that Dorrance Township Supervisors retained Robert Hershey to review Pennsy's application and he in turn submitted a report on September 13, 2012 to the Supervisors on his

¹ There have been various motions filed by the parties in this matter. Each motion will be resolved by separate Board Orders issued on this day.

review of the proposed quarry. (Appellant's Motion, ¶ 5). The Appellant seeks to have Hershey's report and his testimony at a conditional use hearing before the Dorrance Township Supervisors held on September 13, 2012 submitted as evidence before the Board. Appellant asserts that he is unable to hire Hershey to testify on his behalf because the Township Supervisors do not want him to work for any other parties involved since the Township has hired Hershey. In fact, the Township has submitted a sworn affidavit of Robert Hershey as an exhibit to the Township's motion for protective order filed on September 28, 2012 that Hershey has not reviewed Pennsy's Noncoal Surface Mining Permit and that if he was subpoenaed he "would not be able to testify on the PADEP application." (Township's Motion for Protective Order, September 28, 2012).

Pennsy argues that its *Motion in Limine* must be granted since Hershey is unwilling to testify on behalf of the Appellant and unable to be compelled to testify before the Board. Secondly, Pennsy argues the *Motion in Limine* should be granted because the Department would be prejudiced since it was not a party to the Township's conditional use hearing and therefore the testimony from that hearing would be inadmissible hearsay. We agree.

As discussed above, Hershey has been retained by Dorrance Township to do work for them and he has stated that he is unable to testify as Casey's expert. The Board cannot compel Hershey to testify as an expert for Casey. In *Weiss v. DEP*, 1997 EHB 39, a group of citizens appealed the Department's issuance of a noncoal mining permit. The appellants subpoenaed two employees of Washington Township who prepared reports on hydrologic characteristics of the proposed quarry. The witnesses refused to provide their reports or testify on behalf of the appellants. The Board stated that, "expert witnesses cannot be compelled to testify without their consent and that it would be unlikely that the Board will issue subpoenas for the purpose of summoning witnesses to provide expert testimony." *Weiss*, 1997 EHB 42. In *Weiss*, the Board

cited *Columbia Gas Transmission Corp. v. Piper* stating, “It is equally clear under Pennsylvania law that a court has no power to compel expert testimony because a private litigant has no right to compel a citizen to give up the product of his brain anymore than he has a right to compel the giving up material things.” 615 A.2d 979 (Pa. Cmwlth. 1992). Since Hershey has declined to testify for Casey, we cannot compel him to do so. Furthermore, the Appellant’s request to admit into evidence both Hershey’s testimony from the conditional use hearing and his report prepared for the Township is inappropriate. This attempt to use Hershey’s testimony and report is inadmissible hearsay. See Pa.R.E. 801(c). Since the Department, a party in this matter, was not a party in the conditional use hearing and was unavailable to cross-examine Hershey, under such circumstances, the report and testimony are inadmissible. See *Columbia Gas*, 615 A.2d at 983. The Board cannot compel Hershey to testify, nor can we admit the report and testimony in this proceeding.

Pennsy also asks the Board to preclude the Appellant from introducing any expert testimony at this hearing. In Pennsy’s discovery requests, the Appellant did not designate any expert, except Hershey. As discussed above, Hershey cannot be Appellant’s expert. Pennsy’s counsel contacted Appellant’s counsel after receiving the discovery responses and stated, “your client has a continuing obligation . . . to identify witnesses, including experts, that he intends to call during the trial in this matter The fact that you or your client ‘may change your mind’ regarding the use of an expert witness does not eliminate the need to provide this information.” (Permittee’s Exhibit C). The Board has held in the past that “expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries.” *CMV Sewage Co., Inc. v. DEP*, 2010 EHB 725, 729 (disclosing witnesses is arguably the most important obligation that arises during discovery.); see also *Cecil Township Municipal*

Authority v. DEP, 2010 EHB 551. Since no experts have been provided in the Appellant's discovery responses, the Appellant is precluded from introducing any expert testimony at the hearing in this matter.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN CASEY

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION; PENNSY SUPPLY, INC.,
Permittee; DORRANCE TOWNSHIP, Intervenor:

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: EHB Docket No. 2012-070-C
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ORDER

AND NOW, this 19th day of December, 2012, in consideration of the unopposed *Motion in Limine* of Permittee, Pennsy Supply, Inc., to preclude expert testimony of Robert M. Hershey, P.G., and the responses thereto, it is hereby ordered that the motion is **granted**. Appellant Kevin Casey shall be precluded from introducing any and all expert testimony at the hearing in this appeal.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN

Judge

DATED: December 19, 2012

c: DEP, Bureau of Litigation:
Attention: Glenda Davidson
9th Floor, RCSOB

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Hazleton, PA 18201



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

**THE DELAWARE RIVERKEEPER
NETWORK AND MAYA VAN ROSSUM,
THE DELAWARE RIVERKEEPER**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and VIRGINIA HUMMEL,
Permittee**

EHB Docket No. 2012-031-L

Issued: December 19, 2012

**OPINION AND ORDER ON MOTION TO
DISMISS APPLICATION FOR ATTORNEYS' FEES**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss an application for attorneys' fees because it is not clear as a matter of law based upon undisputed facts that the appellants are precluded from recovering any of their fees.

OPINION

The Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper (collectively, the "Riverkeeper"), have filed an application to recover a portion of their costs and attorneys' fees from the Department of Environmental Protection (the "Department") pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), which provides that this Board "may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to the act." The Riverkeeper has applied for \$6,112.60 in fees and costs.

This case began when the Department, in response to a private request filed by Virginia Hummel pursuant to Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), issued an order to Union Township, Berks County directing the Township to amend its Official Act 537 Sewage Plan to allow Hummel to dispose of sewage at her property using a small flow treatment facility. The treatment facility would have discharged to an unnamed tributary of Mill Creek, which at the time was designated as a warm water fishery. The Riverkeeper appealed the order to this Board, as did Union Township. We consolidated the appeals.

Several months before the appeals were filed, the Riverkeeper had filed a completely separate petition asking that Mill Creek and its tributaries be elevated to Exceptional Value status. Soon after the appeals were filed, the Department decided to recommend to the Environmental Quality Board that it upgrade all of Mill Creek (except the unnamed tributary to which Hummel's plant would have discharged) to Exceptional Value. The EQB accepted the Department's recommendation. The Department thereafter conducted an antidegradation analysis of the proposed discharge from Hummel's small flow treatment facility plant to evaluate whether the discharge would have adversely affected the stream's' exceptional value existing use. The Department concluded that the discharge would not interfere with the exceptional value of the stream.

Meanwhile, after all of this had occurred, Hummel informed the Department that she sold her property, which prompted the Department to rescind its order to the Township. The explicit reason for the rescission stated in the Department's letter was that, in light of the fact that Hummel "no longer owns this property and therefore has no sewage disposal needs with respect to that property, she is no longer authorized to maintain her private request." The Riverkeeper then withdrew her appeal of the order.

Although this appeal did not end in an adjudication or other ruling on the merits, the Riverkeeper is nevertheless seeking a portion of her attorneys' fees and costs on the theory that her appeal was the catalyst that prompted the Department to recommend to the Environmental Quality Board that her separate petition to upgrade Mill Creek to EV status be granted. Most of the stream was upgraded, which in turn caused the Department to review Hummel's proposed discharge to ensure that it would not degrade the stream. The Riverkeeper does not assert that her appeal was the basis for a favorable action on the upgrade petition; it merely prompted the Department (and the EQB) to act. Similarly, the upgrade to EV status was not the basis for rescission of the order to the Township; the order was rescinded because Hummel, the person who made the private request, sold the property. Thus, the victory that the Riverkeeper claims is that the Department eventually applied antidegradation requirements in its review of the sewage planning order.

The Department has filed a motion to dismiss the Riverkeeper's application for fees. In this procedural context we are limited to determining whether it is apparent from a review the Riverkeeper's application on its face that she is not entitled to fees as a matter of law. *See Mayer v. DEP*, EHB Docket No. 2012-054-L (Opinion and Order, November 21, 2012) (standard for deciding a motion to dismiss); *Palmer v. DEP*, EHB Docket No. 2012-091-L (Opinion and Order, May 31, 2012) (same).¹ The Department's primary argument is that the Riverkeeper's appeal was not a substantial or significant cause of the Department's action providing relief.

The Department is referring to one of the three threshold criteria for a possible award of fees under the catalyst test for awarding fees under the Clean Streams Law, assuming that there

¹ We might not have been so constrained had the Department filed a response to the application supported by appropriate affidavits in accordance with 25 PA. Code § 1021.183 (response to application).

was no bad faith or vexatious conduct, which is not alleged here. The three criteria are as follows:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;
2. The applicant must show that the appeal stated a genuine claim, i.e. one that was at least colorable, not frivolous, unreasonable, or groundless; and
3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

Crum Creek Neighbors v. DEP, 2010 EHB 67, 72.

Although the Department has framed the argument in terms of causation, and the issue of causation undoubtedly looms large in this matter, the current disagreement between the parties relates more to the definition of “the benefit sought in the appeal” and “the Department’s action providing relief.” The Department’s position is that the only pertinent benefit/relief is rescission of the order. Anything less is not sufficient to justify an award of fees in its view. The Riverkeeper defines the pertinent benefit/relief to include the Department’s application of the antidegradation requirements to the proposed discharge to ensure it would not harm the stream. Causation is not really at issue here because there is no dispute that the Riverkeeper’s appeal did not cause rescission of the order, and we must assume for purposes of the motion to dismiss that the appeal caused the Department to act on the upgrade petition, which in turn resulted in the antidegradation analysis.²

It is the relief sought by the appellant *in the appeal* that is to be considered when assessing whether the appellant was a prevailing party. *Solebury Township v. DEP*, 928 A.2d

² There is no claim here that the Department’s actions caused Hummel to sell her property.

990, 1004 (Pa. 2007). When we speak of the “practical relief” that can justify a fee award using the catalyst test, we are referring to relief that closely resembles the relief that would have been available had the matter proceeded to an adjudication or other final ruling. Whether the relief is embodied in a formal ruling is not important; whether the relief is what was being sought through litigation is important.

It does not appear that the relief that the Riverkeeper sought in this appeal was necessarily limited to rescission of the order to the Township. Our notice of appeal form does not require an appellant to specify a particular prayer for relief, which complicates the task of defining “the relief sought in the appeal.” The Riverkeeper alleged in her original and amended notices of appeal that the Department *failed to adequately show* compliance with antidegradation requirements. She did not allege that the discharge would in fact be inconsistent with antidegradation requirements. She did not assert that the discharge needed to be prohibited. Her approach makes sense. It arguably would have been overreaching and premature for her to contend that the discharge would fail a proper antidegradation analysis since such an analysis was never performed.³

The Riverkeeper sought to have the Department consider the upgrade petition before issuing the planning order. Shortly after the appeal was filed, the Department considered the upgrade petition and made a positive recommendation to the EQB. She sought to have the Department perform an antidegradation analysis. After the appeal was filed, the Department performed an antidegradation analysis. Whether there was in fact a causal link between the

³ The fact that the Riverkeeper continued to pursue her appeal after the Department completed its analysis arguably suggests that she *also* sought a rescission of the order. However, the Riverkeeper concedes that she only obtained a partial benefit and she is only seeking fees incurred up until the point the Department completed its analysis.

appeal and these events remains to be seen, but we are unable to conclude that the Riverkeeper did not receive some of the benefits she sought.

The Department says that an order requiring the Department to act on the upgrade petition and/or perform an antidegradation analysis would have been beyond the authority of the Board, so such relief cannot possibly constitute receipt of the “benefit sought in the appeal.” This is simply not true. Although the relief we can order obviously must relate to the action under appeal, the Board quite frequently remands permits or other actions with instructions to perform a proper analysis. In fact, we often favor that approach when we find that the Department did not apply the correct analysis precedent to taking action. *See, e.g., Berks County v. DEP*, EHB Docket No. 2010-166-L (Adjudication issued November 26, 2012); *Crum Creek Neighbors v. DEP*, 2009 EHB 548.

The Department argues that the Riverkeeper’s appeal failed to state a genuine claim, i.e. one that is at least colorable, not frivolous, unreasonable, or groundless. It is true that appellants are not entitled to fees under the catalyst test for bringing frivolous appeals, *Crum Creek Neighbors*, 2010 EHB at 72, but it is not our impression at this point in the proceeding that the Riverkeeper’s appeal was frivolous.⁴ The Riverkeeper appeared to raise some legitimate concerns regarding the Department’s obligation to comply with antidegradation requirements in connection with its decision to order Union Township to revise its sewage plan. We are not prepared to characterize as entirely frivolous the Riverkeeper’s claim that the Department should review a legitimate, pending upgrade petition before ordering a municipality to allow a discharge to the subject stream. The Riverkeeper is not required to prove that she would have ultimately prevailed on her claims on the merits in the context of a fee application.

⁴ The requirement that an appeal state a genuine claim is arguably rather redundant because it is difficult to imagine how a frivolous appeal could bring about a favorable practical result.

The Department argues in its reply brief that the Board should exercise its discretion and not award any fees, even assuming that the Riverkeeper garnered some benefits as a result of this appeal. The Department raises a number of points in support of this position, such as the limited and ephemeral nature of the benefit received, the lack of any greater value associated with the result beyond the unusual facts of this case, the claim that the result has not advanced the goals of the Clean Streams Law, and the fact that the Department did not have an opportunity to contest the merits.⁵ It adds that the antidegradation analysis did not result in a reversal of its decision to issue the order and had nothing whatsoever to do with its ultimate decision to rescind the order when Hummel sold the property. The problem with the Department's arguments is that they are out of place given its decision to file a motion to dismiss the application. We will address them if necessary at a more appropriate juncture in the proceedings.

Accordingly we issue the Order that follows:

⁵ If we are applying the catalyst test, it would seem to almost always follow that the Department did not have an opportunity to contest the merits. This is an understandable source of frustration, and it makes it all the more important that there be a clear causal link between the appeal and the benefit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER :
NETWORK AND MAYA VAN ROSSUM, :
THE DELAWARE RIVERKEEPER :

v. :

EHB Docket No. 2012-031-L

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and VIRGINIA HUMMEL, :
Permittee :

ORDER

AND NOW, this 19th day of December, 2012, it is hereby ordered as follows:

1. The Department's motion to dismiss the fee application is **denied**.
2. In accordance with the parties' approved joint case management order the Department shall file a response to the Appellants' application on or before **January 7, 2013** and discovery shall be completed on or before **March 19, 2013**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: December 19, 2012

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

STANLEY R. JAKE

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and KMP ASSOCIATES, INC.

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EHB Docket No. 2011-126-M

Issued: December 20, 2012

**OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS**

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a motion to dismiss where the Department has failed to demonstrate that a procedural defect in the *pro se* Appellant's notice of appeal has prejudiced any party, or that the Department is otherwise entitled to a dismissal of the appeal as a matter of law.

OPINION

On August 29, 2011, Stanley R. Jake filed an appeal of Surface Mining Permit 32100103 issued to KMP Associates, Inc. issued on July 22, 2011. Jake's notice of appeal, filed *pro se*, includes, as attachments, a letter from Tim Kania, an employee of the Department informing Jake that the permit he had contacted the Department about had been subsequently issued, a letter dated August 24, 2011 from Jake addressed to the Environmental Hearing Board setting out issues that he had with the issuance of the permit, and exhibits documenting his objection letter previously sent to the Department, a copy of a public notice which appears to have been published in a newspaper, a copy of a photograph of "Red Dog", and a copy of 53 P.S. § 67307 (2010).

On October 5, 2011, the Department filed a motion to dismiss of Jake's notice of appeal on the basis that the "Appellant's appeal does not set forth in separate numbered paragraphs the specific objections to the action of the Department" and therefore failed to file specific grounds for appeal within the 30 day period for appeal. These defects, it argues, deprive the Board of jurisdiction to hear the appeal.

Under our rules, a response to a dispositive motion may be filed within thirty days after the dispositive motion has been served. That time having elapsed, no party has responded to the Department's motion to dismiss, and the Department's motion is now ripe for our consideration.¹ The Board evaluates a motion to dismiss in the light most favorable to the non-moving party. *GEC Enterprises v. DEP*, 2010 EHB 305, 308; *Donny Beaver v. DEP*, 2002 EHB 666, 671. A motion to dismiss will only be granted where there are no material issues of fact in dispute and the moving party is clearly entitled to judgment as a matter of law. *Hendryx v. DEP*, 2011 EHB 127, 129; *Spencer v. DEP*, 2008 EHB 573, 574. Here, the Department has not carried that burden.

The instant case is one, in which the Department has attempted to elevate form over substance. It points to our finding in *Bishop v. DEP*, 2009 EHB 259, 260, that the Department is entitled to know "what the specific objections to the action of the Department" are in an Appeal. The Department further contends that Jake's notice of appeal has not presented with any such specific objections as the notice of appeal states the following in the section entitled "Objections to the Department's action in separate, numbered paragraphs[:]"

Include in my Appeal the November 10, 2010 objection Letter for the permit application (4) Pages. (1) Copy of The "Public Notice" Copy of 53 P.S. § 67307 (2) Pages Photo of 'Red Dog' Boney (sp)

¹ Pursuant to 25 Pa. Code § 1021.91(f), because the Appellant has failed to file a response to the Department's motion, the Board deems all properly-pleaded facts in the Department's motion admitted.

Department's Memorandum of Law in Support of its Motion to Dismiss, p. 2. Lastly, the Department argues that "[n]owhere in the Notice of Appeal or attachments to the Notice of Appeal did Appellant state in numbered paragraphs specific objections, based on facts or legal authority to the Department's action." *Id.* This is simply inaccurate.

A brief look through the attachments to the notice of appeal reveals that Jake attached a letter to the Board dated August 24, 2011 to his notice of appeal containing objections to the Department's public notice process, the permit's conditions, ownership of covered coal refuse material and other contentions of fact and law. These are specific objections to the Department's action under appeal. We cannot conclude, therefore, that any demonstrated failure, by the Appellant, to follow 25 Pa. Code § 1021.51(e) to the exacting letter has produced a notice of appeal that fails to comply with the *substantive* requirements of a notice of appeal. We note that our rules encourage us to interpret the rule's requirements to obtain just and efficient resolution of our proceedings and guide that "[t]he Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." 25 Pa. Code § 1021.4. Here, the Department has not demonstrated how it has been prejudiced by the Appellant's procedural error. Moreover, the Department has not cited, nor are we independently aware, of any instance where the Board has dismissed an appeal for such a minor procedural defect.

Finally, discovery is available in appeals before the Board, and the use of it allows parties to learn more about the other parties' positions, claims and objections. The Department has in fact used discovery in this appeal, as evidenced by its earlier filed motion to compel which was later resolved after Appellant complied with the Department's request for answers to interrogatories. The availability of discovery allows the Department to inquire about objections

when the notice of appeal includes the necessary specific objections but they are not in the correct procedural form.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY R. JAKE

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and KMP ASSOCIATES, INC.

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EHB Docket No. 2011-126-M

ORDER

AND NOW, this 20th day of December, 2012, it is hereby ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

DATED: December 20, 2012

c: **DEP, Bureau of Litigation:**
Attention: Glenda Davidson
9th Floor, RCSOB

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