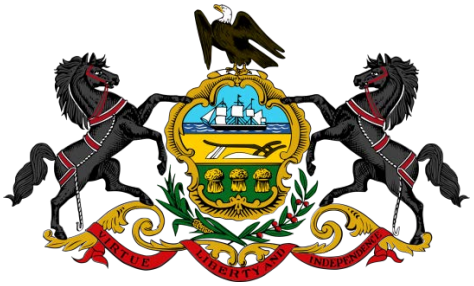
Environmental Hearing Board

Adjudications and Opinions



2016
VOLUME I

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

2016

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

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

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2016 EHB 1

ISBN NO. 0-8182-0379-X

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2016.

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

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2016 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER KARNICK	:	
	:	
v.	:	**EHB Docket No. 2015-128-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WAYCO SAND AND GRAVEL, Permittee	:	**Issued: January 22, 2016**

OPINION AND ORDER ON
MOTION TO DISMISS

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's Motion to Dismiss where the record before the Board demonstrates that the Inspection Report which the Appellant appealed is not a final appealable action of the Department. The appeal of the Inspection Report exceeds the Board's jurisdiction, and the Appellant must await final action on the pending request for a bond release.

O P I N I O N

Appellant Mr. Peter Karnick ("Appellant") initiated this matter on September 2, 2015 when he filed a Notice of Appeal with this Board challenging a Noncoal Inspection Report ("Inspection Report") dated July 28, 2015 issued by the Department to Wayco Sand and Gravel ("Wayco"). The Inspection Report documents conditions on a particular noncoal mining site. Wayco has a noncoal surface mining permit that was issued on July 7, 1994, and under this permit Wayco operated a sand and gravel processing facility known as the Wayco Quarry on land owned by Appellant, which Appellant had leased to Wayco. As part of Wayco's permit, the

Department approved Wayco's reclamation plan, which provides for post-reclamation land use as forestland.

In October of 2014, Wayco applied to the Department for Stage I and Stage II bond release of reclamation bonds on Appellant's property under the Department's regulations at 25 Pa. Code §§ 77.241-243. On October 24, 2014, the Appellant was provided notice that Wayco applied for bond release. In response to the bond release application, the Department inspected the site for potential bond release on July 23, 2015 and July 28, 2015. After the inspections, the Department issued an Inspection Report in which the Department's inspector indicated that Wayco had completed reclamation on the property in accordance with the approved reclamation plan and that the site was ready for Stage I and Stage II bond release. Appellant received a copy of the Inspection Report by mail on August 7, 2015 and filed the instant appeal of the Inspection Report on September 2, 2015. The appeal challenges the inspector's conclusions in the Inspection Report that the site is eligible for bond release.

The Department now comes before the Board with a Motion to Dismiss, asserting that the Board lacks jurisdiction to consider the Appellant's appeal of the Inspection Report because the Department's issuance of the Inspection Report does not constitute a final appealable action. The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Boinovych v. DEP*, EHB Docket No. 2015-090-L, slip op. at 1 (Opinion, Aug. 6, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB

913, 915. 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. *Rocky Ridge Motel v. DEP*, 2012 EHB 303 (citing 35 P.S. § 7514) ; *Dobbin v. DEP*, 2010 EHB 852; *Kennedy v. DEP*, 2007 EHB 511, 512; *P.E.A.C.E. v. DEP*, 2000 EHB 1, 2. Applying this standard to the facts of the appeal, the Board agrees with the Department that the Inspection Report is not a final appealable Department action and finds that the Department is entitled to judgment as a matter of law for the reasons set forth below.

First, we address the Department's argument that the Board lacks jurisdiction over the present appeal because the Department's issuance of the Inspection Report is not a final appealable action. An inspection report is a type of Department communication, and in determining whether such a communication can constitute an appealable action, the Board examines the substantive effect of the communication and whether there are any consequences that may affect the rights of persons. *Goetz v. DEP*, 2000 EHB 840, 855-56. In *Goetz*, the Board stated:

> While the Board has previously held that inspection reports were not appealable actions in those specific instances where it addressed the issue, the Board has never held that inspection reports cannot be appealable actions. Indeed, in a recent appeal challenging inspection reports, the Board held that whether inspection reports were appealable turns on their substance and language – not merely their classifications as "inspection reports" – and that the inspection reports involved in that appeal were not appealable actions because their language was "advisory, not imperative."

Goetz, supra at 855 (citing *Malak v. DEP*, 1999 EHB 769, 770).

The Board has the same evaluation to perform in this appeal to determine if the Inspection Report constitutes an appealable action. 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); *see Elephant Septic Tank Service v. DER*, 1993 EHB 590, 593. The appealability of a Departmental communication turns on the substance of the communication, and not merely its title. *202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10, 12. An inspection report can therefore constitute an appealable action if it "require[s] 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 review of the Inspection Report in this appeal reveals that there is no prescriptive language in the Inspection Report that directs or requires the Appellant or Wayco to undertake any specific action. The Inspection Report merely records the inspector's observations on the progress of reclamation activities being undertaken at that site. The Inspection Report also includes the inspector's opinion as to whether the site is ready for bond release in order for the Department to initiate the bond release application process[1]. Despite the inspector's opinion on bond release, the Inspection Report does not in itself authorize release of the bonds. To release Wayco's reclamation bond, the Department has to follow the "Procedures for seeking release of bond" at 25 Pa. Code § 77.242 and take a subsequent action.

An additional consideration regarding the appealability of the Inspection Report should be mentioned briefly. Mr. Karnick, a pro se Appellant, likely assumed that the Department's standard appeal language included in the Inspection Report meant that the Inspection Report was

[1] In its Motion to Dismiss, the Department asserts that when review of the bond release application is completed, the Department will make a final determination that the site is ready for Stage I and Stage II bond release. According to the Department, this will be the time when the Appellant will have an opportunity to appeal. The Board agrees.

in fact a final appealable action[2]. However, inclusion of an appeal paragraph in an inspection report does not in itself make the Department communication appealable. *Jackson v. DEP*, 2010 EHB 288; *Onyx Greentree Landfill, LLC, v. DEP*, 2006 EHB 404; *Elgen Corp. v. DEP*, 2005 EHB 919. To the contrary, the Board applies numerous factors to determine the question of appealability including the specific wording of the Department communication, its purpose and intent, the practical impact of the communication, its finality, the regulatory context, and the relief which the Board can provide. *Beaver v. DEP*, 2002 EHB 666, 673; *Borough of Kutztown v. DEP*, 2001 EHB 1121-124.

Here, inclusion of the Department's standard appeal language in the Inspection Report does not make an otherwise unappealable Department action appealable. The Inspection Report in this appeal is informative in nature, providing all parties with information on the status of reclamation on the site, as well as the inspector's opinion that the site is ready for bond release. Because the substance of the Inspection Report does not constitute a final appealable action of the Department, the Board lacks jurisdiction over the Appellant's appeal of the Inspection Report. Therefore, we issue the following Order.

[2] Appellant filed a response objecting to the Department's Motion to Dismiss. Appellant's response fails to address the Department's contention that the Inspection Report is an unappealable action and also fails to assert other arguments as to why the Board has jurisdiction over this appeal. Instead, Appellant's response consists of requests that the land be reclaimed to its original use as farm land.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER KARNICK	:	
	:	
v.	:	**EHB Docket No. 2015-128-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WAYCO SAND AND GRAVEL, Permittee	:	

O R D E R

AND NOW, this 22nd day of January, 2016, it is hereby ordered that the Department's Motion to Dismiss is **granted**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 22, 2016

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

For the Commonwealth of PA, DEP:
Steven Kip Portman, Esquire
Elizabeth Spangenberg, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Peter Karnick
398 St. Tikhons Road
Waymart, PA 18472

For Permittee:
Marc T. Valentine, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID AND LINDA MIRKOVICH	:	
	:	
v.	:	**EHB Docket No. 2015-153-M**
	:	**(Consolidated with 2015-156-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2015-181-M)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EMERALD COAL	:	**Issued: January 28, 2016**
RESOURCES, LP, Permittee	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Permittee's motion to dismiss the initial appeal of the third-party appellants filed in this consolidated matter. The initial appeal was an appeal from a Department administrative order directing the Permittee to take several steps to correct an identified water loss on property owned by the Mirkovichs, who are the third-party appellants.

O P I N I O N

The Department of Environmental Protection ("Department") issued an administrative order to Emerald Coal Resources ("ECR") dated September 14, 2015 in which the Department directed ECR to take certain steps to address the loss or diminution of an agricultural water supply on property owned by Linda and David Mirkovich ("Appellants"). The Department's order asserts that ECR's mining activities at its Emerald Mine in Greene County, Pennsylvania, permitted under Coal Mine Activity Permit No. 30841307 adversely affected the Appellants' water supply. Under the Bituminous Land Subsidence and Land Conservation Act, Act of April

27, 1966, as amended, 52 P.S. §§ 1406.1 – 1606.21, ECR has obligations to address such water losses, and the Department's order directed ECR to take several steps to comply with its outstanding obligations. See 52 P.S. §§ 1406.5b and 1406.5c and 25 Pa. Code § 89.145a(f).

On October 13, 2015 the Appellants filed their Notice of Appeal ("NOA") with the Board in which the Appellants raised a number of objections to the Department's action. The Board docketed their appeal at 2015-153-M.[1]

ECR filed its own appeal from the Department's September 14, 2015 administrative order in which ECR raised a number of objections to the Department's action. The Board docketed ECR's appeal at 2015-156-M.

Subsequent to the Department's issuance of its September 14, 2015 administrative order, ECR submitted a Water Supply Replacement Plan to the Department for review on October 14, 2015. On October 28, 2015 the Department sent ECR an email in which the Department stated that it had reviewed the plan ECR submitted and decided that: "The plan, as proposed, provides for an adequate permanent replacement supply." The Department's earlier September 14, 2015 administrative order required, among other things, that ECR provide an adequate permanent replacement for the water supply that it had adversely affected.

On November 23, 2015, Linda and David Mirkovich filed an appeal with the Board challenging the Department's approval of ECR's permanent water supply replacement plan in which it raised a number of objectives. The Board docketed the Appellants' latest appeal at 2015-181-M.

On November 19, 2015, the Board consolidated Linda and David Mirkovichs' appeal docketed at 2015-153-M and ECR's appeal docketed at 2015-156-M following a conference call

[1] The Appellants are appearing before the Board on their own behalf without an attorney as allowed by 25 Pa. Code § 1021.21(a).

with the Parties. After Linda and David Mirkovich filed their appeal of the Department's approval of ECR's permanent water supply replacement plan on December 3, 2015, the Board consolidated this related appeal docketed at 2015-181-M with the two earlier consolidated appeals.

After the Department approved ECR's permanent water supply replacement plan for the Mirkovichs' water supply, but before the Appellants filed their appeal of this approval, ECR filed a Motion to Dismiss the Appellants' initial appeal on November 17, 2015. In support of its Motion, ECR raises two arguments. First, ECR asserts that the Board should dismiss the initial appeal, based on lack of jurisdiction, because the Mirkovichs' objections regarding the alleged inadequacies of an alleged proposed water replacement plan challenge an action not encompassed within the scope of the administrative order or the appeal of it. Second, ECR asserts that the Board should dismiss the objection which challenges the Department's motivation to issue the administrative order. The Appellants challenged the Department's order and stated:

> The referenced order issued by the Department was made with the sole intent to delay compliance with the State program, change the venue for enforcement of the law and to avoid a federal inspection of the mining permit.

Notice of Violation, Objection at 3. ECR asserts that the motivation of the Department in issuing the order is irrelevant in a challenge to the order.

The Appellants responded to ECR's Motion to Dismiss and filed both a Response to Permittee's Motion to Dismiss and A Brief in Support of Denial of Motion to Dismiss. The Appellants' Response and Brief set forth Appellants' arguments on both substantive issues raised by ECR: 1) Appellants' objections to a proposed water replacement plan are not encompassed within scope of the Department's order; 2) and the Department's motivation or intent in issuing

the order is not relevant to this appeal. The Appellants assert that their challenge to the use of a "manifold system," referred to as the Bankson Plan by ECR, is the challenge of an action directly encompassed within the scope of the order under appeal. The Appellants assert that ECR's use of a manifold system has been under consideration since 2014 in several similar versions of proposed plans, and that a plan with a manifold system remained a concern when the Department issued the September 14, 2015 administrative order which directed ECR to comply with its water supply replacement obligations under the law.

On the issue of the Department's motivation in issuing the order, the Appellants assert that it is directly relevant to their appeal of the order. The Appellants describe a three-year period in which they tried repeatedly to get the Department to address their concerns. The Appellants also describe their efforts to involve the Federal Office of Surface Mining Reclamation and Enforcement ("OSM") by filing citizen complaints with OSM and how these efforts, in their opinion, are tied directly to the Department's decision to issue the order under appeal.

The Department also filed a Response to Permittee's Motion to Dismiss and a Memorandum in Support of its Response to Permittee's Motion to Dismiss on December 16, 2015. The Department's Response and Memorandum were filed after the Department approved ECR's Permanent Water Supply Replacement Plan for the Mirkovichs' water supply, after the Appellants appealed this later approval, and after the Board consolidated all three pending appeals related to its September 14, 2015 order to ECR.[2] With the benefit of these later actions and decisions, the Department asserts that the Board has jurisdiction to hear the Appellants'

[2] 2015-153-M, Linda and David Mirkovichs' appeal of the Department's September 14, 2015 order; 2015-156-M, ECR's appeal of Department's September 14, 2015 order and 2015-181-M, Linda and David Mirkovichs' appeal of Department's approval of ECR Permanent Water Supply Replacement Plan.

objections to both Department actions related to its issuance of the order and its approval of ECR's Plan.

On the issue of the Department's motives in issuing the order, the Department agrees with ECR that the Department's motive is not relevant. The Department disagrees with ECR that this argument should be addressed in the context of a motion to dismiss at this preliminary stage of litigation. Given the limited record before the Board, the Department argues that the Appellants' objection to the Department's motives for issuing the order should be addressed through a Motion in Limine at a later time.

Standard of Review

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Edwardson v. DEP*, EHB Docket No. 2014-029-M, slip opinion at 4 (Opinion, December 7, 2015); *West Buffalo Twp. v. DEP*, EHB Docket No. 2014-078-L, slip op. at 2 (Opinion, Sep. 28, 2015); *Brockley v. DEP*, EHB Docket No. 2014-092-L, slip op. at 1 (Opinion, Apr. 3, 2015); *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, EHB Docket No. 2014-027-B, slip op. at 7 (Opinion, Feb. 12, 2015), *recon. denied*, (Opinion, Mar. 13, 2015), *aff'd*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015); *Ehmann v. DEP*, 2008 EHB 386, 390.

Applying this standard to the facts of this appeal, the Board finds that ECR is not entitled to judgments as a matter of law for the reasons set forth below. ECR raised two distinct arguments in support of its Motion to Dismiss, and the Board will address each in turn.

ECR's claim that the Board lacks jurisdiction.

ECR, in a roundabout manner, asserts that the Board lacks jurisdiction over the Appellant's appeal.[3] In its motion ECR states:

> 10. The Board should dismiss, based on lack of jurisdiction, the Mirkovichs' objection regarding the alleged inadequacies of an alleged proposed water replacement plan because it challenges an action not encompassed within the scope of the Order on appeal.

Paragraph 10 of Motion to Dismiss. ECR asserts that the Appellants raise objections to a plan, and the Department's order does not encompass or require the adoption of any specific plan. According to ECR, the Board lacks jurisdiction over the appeal of the order because the Appellants object to a proposed plan that was not part of the order.

The Department and the Appellants disagree that the order did reference a plan or require that ECR submit a plan. In its Memorandum, the Department states that: "The Order directed Emerald to submit a water supply replacement plan ("Plan") to the Department…" Department Memorandum of Law in Support of Its Response to Permittee's Motion to Dismiss at 1. In their Response, the Appellants describe a lengthy process to address their water loss, which beginning in 2014, involved the preparation of a plan to replace their water supply. The Appellants assert that the plan that the Department approved was very similar to the plan that ECR proposed in 2014 and that a plan, including a manifold system, was always a part of the Department's order. The Department agrees and, at a minimum, there is a material fact dispute between ECR on one

[3] ECR does not question the Board's jurisdiction over an appeal of the Department's administrative order. ECR has, in fact, filed its own appeal of this action. ECR only questions the Board's jurisdiction to consider certain Appellants' objections to an underlying Department action over which the Board clearly has jurisdiction.

side and the Department and the Appellants on the other on the question of whether the Department's order included a requirement to submit a plan. This dispute supports denial of ECR's motion to dismiss. In addition, ECR did submit a plan after the Department issued the order and this is strong support for the Department and the Appellants that the Department's order did in fact include a requirement that ECR submit a plan.

More importantly, whether required or not, ECR did submit its permanent water supply replacement plan to the Department for review and approval. The Appellants eventually received notice of these facts and filed an appeal from this second related action.[4] The Board then consolidated these two related appeals for the convenience of the Parties and the Board. The Appellants' concerns about the adequacy of the approved plan are therefore clearly part of the consolidated appeal. ECR still wants the Board to dismiss the Appellants' initial appeal. The Board disagrees and supports the Department's position that the Appellants are entitled to pursue both of their appeals in this consolidated appeal.

ECR's claim that the Department's intentions in issuing the order are irrelevant.

In their NOA, the Appellants challenged the intent of the Department in issuing the administrative order to ECR at the time that it did. The Appellants assert that the order was "made with the sole intent to delay compliance with the State program, change the venue for enforcement of the law and avoid federal inspection of the mining permit." Notice of Appeal, Objections at 3. ECR claims that the Department's intent or motivations in issuing the order are irrelevant in a challenge to the order.

The Appellants disagree that the Department's intentions are irrelevant in this appeal of the order. According to the Appellants, the Department refused to take action for three years and

[4] The Appellants assert that they were not initially notified of these later developments and only learned about them through their own persistence.

only did so to prevent OSM's more direct involvement in the enforcement of ECR's legal obligation to address the undisputed adverse impacts to the Mirkovichs' water supply.

The Department agrees with ECR that its intentions or motivation are irrelevant in Appellants' challenge to the order. The Department disagrees that the issue that ECR has raised, regarding the Appellants' challenge to the Department's intentions or motivation, should be addressed in the context of a motion to dismiss at this preliminary stage of litigation. The Department asserts that concerns related to the Department's motives for issuing the order "should be addressed through Motions in Limine at a later time in this proceeding after a more complete record is developed."

The Appellants have the burden of proof in their third-party appeal of an order issued to ECR to address the alleged adverse effects to the Appellants' water supply under the Board's Rules at 25 Pa. Code § 1021.122 (c)(2). To prevail, the Appellants have the burden to establish that the Department's issuance of the order to ECR constituted an unlawful or unreasonable exercise of its discretion.[5] ECR claims that the Department's motivation or intentions in issuing the order are irrelevant to the Appellants' challenge to the order. At this preliminary stage of the appeal, the Board is not so certain.

While ECR is correct that the Department's motivation in taking an action will rarely play a significant part in the Board's review of the Department's Action, this appeal may be one of those rare cases in which the Department's motivation has a role in the Board's review. In the Board's earlier cases where it declined to consider the Department's motivation, there were

[5] When the Department issues an order and the recipient of the order files an appeal, the Department has the burden of proof under the Board's Rules at 25 Pa. Code § 1021.122 (b)(4). When the Department has the burden in such an appeal it must prove by a preponderance of the evidence that its issuance of its order constituted a lawful and reasonable exercise of its discretion supported by the evidence presented. *See, e.g., Wean v. DEP*, 2014 EHB 219, 251; citing *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Company v. DEP* , 2010 EHB 456, 475.

allegations that the challenged Department action was politically motivated. The Board rejected objections about political motives and stated:

> Furthermore, so long as the Department's final decision was lawful and reasonable, whether the change in position was politically motivated is irrelevant. A lawful andreasonable action that stands on its merits does not become any less so because it was politically motivated. The Department's motivation, political or otherwise, will rarely if ever play a significant part in our review. See *Primrose Creek Watershed Assoc. v. DEP*, EHB Docket No. 2011-135-L (consolidated with 2011-136-L), slip op. at 6 (Opinion and Order, March 20, 2013): *Perano v. DEP*, 2011 EHB 298, 316; *Starr v. DEP*, 2002 EHB 799, 810; *Milco v. DEP*, 2002 EHB 723, 726; *Westtown Sewer Co. v. DER*, 1992 EHB 979, 996.

Borough of St. Clair v DEP, 2014 EHB 76, 90. In this appeal, the Appellants have not alleged that the Department was politically motivated when it issued the order. They assert that the Department's sole intention was to prevent the OSM from becoming more directly involved in OSM's ongoing oversight over the Department's implementation of its State coal mining regulatory program. According to the Appellants, they were in the process of involving OSM in their efforts to address their loss of water supply claims when the Department issued the order to prevent or limit OSM's involvement. These claims, if established, are quite different than the claims in prior decisions that focused on political motivations that the Board viewed as irrelevant. The Appellants' claims, if established, may be relevant and support the Appellants' position that the Department acted unlawfully and unreasonably and abused its discretion when it issued the order to ECR under the appeal.

At this preliminary stage of the appeal, the Board agrees with the Department that it is premature to evaluate ECR's challenge to the Department's motivation in the context of a motion to dismiss. The Board, however, parts company with the Department's position that its motivation, in this appeal in the context of an OSM-approved State program with ongoing OSM

oversight, is never relevant in evaluating the Department's action to issue the order under appeal. The issue of the Department's motivation and its relevance in this appeal remains an outstanding question at this preliminary stage of the appeal.

The Board denies ECR's Motion to Dismiss for the reasons set forth above and issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID AND LINDA MIRKOVICH	:	
	:	
v.	:	**EHB Docket No. 2015-153-M**
	:	**(Consolidated with 2015-156-M**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2015-181-M)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EMERALD COAL	:	
RESOURCES, LP, Permittee	:	

O R D E R

AND NOW, this 28th day of January**,** 2016, it is hereby ordered that ECR's Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 28, 2016

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

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

For Appellants, *Pro Se*:
David and Linda Mirkovich
(via electronic filing system)

For Permittee:
Kevin Douglass, Esquire
Joseph Reinhart, Esquire
Angela Kilbert, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CABOT OIL & GAS CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-131-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 3, 2016**

OPINION AND ORDER ON
MOTION TO QUASH SUBPOENA

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a non-party's motion to quash a subpoena and motion for a protective order. The non-party must make a reasonable effort to provide documents that relate to the water supply at issue in this appeal involving alleged pollution of that water supply. The non-party has not established that the protections afforded by the Pennsylvania Shield Law or the reporters' qualified privilege cover any of the materials listed in the subpoena.

O P I N I O N

On August 6, 2015, the Department of Environmental Protection (the "Department") issued an order to Cabot Oil and Gas Corporation ("Cabot") requiring Cabot to provide temporary water to the Shanti Temple in Montrose, Pennsylvania, and to then develop a plan to restore and/or replace the water supply located on the property. According to the Department's order, Cabot is presumed responsible under Section 3218(c)(2) of the Oil and Gas Act, 58 Pa.C.S. §§ 3201 – 3274, for what the Department determined was pollution to a water supply

located approximately 990 feet from unconventional gas wells operated by Cabot known as the Fontana Wells. Cabot has appealed that order to the Board. Cabot generally contests the Department's finding of pollution and argues that any issues concerning the water quality at the Shanti Temple water well existed before Cabot began developing the Fontana Wells.

On September 21, 2015, Cabot filed a petition for supersedeas and an application for a temporary supersedeas. The Board denied the application for a temporary supersedeas and held a hearing on the supersedeas petition spanning two days beginning on October 1, 2015. On October 2, 2015, Cabot and the Department submitted an agreed upon supersedeas to us for our approval, pursuant to which Cabot agreed to comply in certain defined ways with the Department's order until the Board issues its Adjudication in this matter. We approved the supersedeas and it remains in effect.

According to the documents filed with the Board thus far, the Shanti Temple property was purchased by Shanti Temple, Inc. in 1998 from Vera Scroggins. Shantanand Saraswati is the swami at the Shanti Temple and he lives on the property during the warmer months. Although Scroggins has sold the property, she still plays a major role in managing the property for Swami Saraswati. She also has acted as Swami Saraswati's representative in this litigation and in his dealings with Cabot and the Department. Scroggins has also identified herself as a congregant of the Shanti Temple. She apparently has lived on the property for extended periods of time, and her family members apparently are currently staying at the property. In short, Scroggins is very closely and personally associated with the property, its owner, the swami, and the circumstances related to the Department's order and this appeal.

Ms. Scroggins appears to be directly involved in the management not only of the property as a whole, but particularly with respect to the water source at issue in this appeal as well. Based

upon her response to the motion, she appears to be very knowledgeable regarding the water supply. Among other things, Scroggins may have installed the water filtration system at the property. She may or may not have dumped bleach into the well. She may be the person responsible on occasion for winterizing the water supply when Swami Saraswati returns to India during the colder months. She apparently was present when Cabot's consultant collected a pre-drill water sample. She also was apparently present for a subsequent pre-drill sampling event on August 11, 2014. She made the initial complaint on behalf of the Temple to the Department regarding the alleged change in water quality, and she has since engaged in correspondence with the Department regarding the water supply.

Cabot has now served a subpoena on Scroggins directing her to produce several documents. While somewhat lengthy, we believe it is helpful to quote the subpoena's fifteen requests in their entirety:

> (1) All Documents and/or [electronically stored information (ESI)] concerning or relating to Your previous ownership interest in the Property, including, but not limited to, Your initial acquisition of the Property, deeds, tax Documents, mortgage and/or other lien Documents related to the Property, and Documents related to the sale and/or transfer of the Property to Shanti Temple, Inc.;
>
> (2) All Documents and/or ESI concerning or relating to the current use of the Property, including, but not limited to, Documents and/or ESI that identify any person or persons visiting or residing at the Property since January 1, 2000;
>
> (3) All Documents and/or ESI concerning or relating to Communications between You and the Department concerning or relating to Cabot, including, but not limited to, the letter purportedly authored by Shantanand Saraswati to the Department, on which You were copied as a recipient, on July 23, 2015;
>
> (4) All Documents and/or ESI concerning or relating to Communications between You and the Department concerning or relating to the Water Supply at the Property;
>
> (5) All Documents and/or ESI concerning or relating to Communications between You and the Department concerning or relating to the suitability for consumption of the Water Supply at the Property;
>
> (6) All Documents and/or ESI concerning or relating to Communications between You and the Department and/or any other person concerning or relating to any

water quality issues or concerns with the Water Supply at the Property, including the electronic mail sent from the following accounts: swamishantanand@yahoo.com, veraduerga@gmail.com, and/or scroggins@epix.net, or any other e-mail address;

(7) All Documents and/or ESI concerning or relating to Communications sent from or received by the e-mail address "swamishantanand@yahoo.com" concerning or relating to the Department, the Property, or any water quality issues or concerns with the Water Supply at the Property, and including, but not limited to, any and all Communications with the Department;

(8) All Documents and/or ESI concerning or relating to Communications between and amongst You and (i) Frank Finan, (ii) Craig Stevens, (iii) Ray Kemble, (iv) Dalu Bhai Mistry, (v) Ilona Scroggins, and/or (vi) Rebecca Roter concerning or relating to the Department, the Property, or any water quality issues or concerns with the Water Supply at the Property, including the electronic mail sent from the following accounts: swamishantanand@yahoo.com, veraduerga@gmail.com, and/or scroggins@epix.net, or any other e-mail address;

(9) All Documents, ESI, and/or Videos concerning or relating to water sampling by any person or entity at the Property, including, but not limited to, sampling conducted by the Department at which Michael O'Donnell was present, and the complete and unedited version of the Video titled "Cabot Pre-testing Water for Private Residence – 6-12-13" that You uploaded to Your YouTube channel on August 15, 2013;

(10) All Documents and/or ESI concerning or relating to the construction and maintenance of the Water Well, including any treatments administered to the Water Well by You or any other person or entity, and including, but not limited to, the addition of bleach and/or antifreeze to the Water Well;

(11) All Documents and/or ESI concerning or relating to the sediment filter that is installed in the basement of the structure at the Property, including any documentation of when the filter was first installed and any maintenance performed on the filter;

(12) All photographs and/or Videos of the Water Supply from the Water Well located at the Property;

(13) All photographs or Videos of any glassware, plumbing, or fixtures that You claim show the impact of contact with the Water Supply from the Water Well located at the Property;

(14) All Documents and/or ESI that You claim demonstrate the impact that the quality of the Water Supply has had on the Property and the people who have resided or visited the Property; and

(15) All Documents, ESI, and/or Videos concerning, relating to, or depicting the Fontana Wells.

(Resp. to Mot., Ex. C.)

Scroggins has filed a motion *pro se* asking us to quash the subpoena served upon her by Cabot and issue a protective order "barring further harassment." Scroggins asserts that Cabot's subpoena is unreasonable, oppressive, and burdensome, seeks information not relevant to Cabot's appeal, seeks information that would have a chilling effect on the right of assembly, and seeks to have her, as a citizen journalist, disclose information that is protected by the reporters' qualified privilege and the Pennsylvania Shield Law, 42 Pa.C.S.A. § 5942. Cabot disputes all of these points.[1]

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Since it can be difficult to tell early on in a case whether a matter is relevant, we interpret the relevancy requirement broadly and generally allow discovery into an area so long as there is a reasonable potential that it will lead to relevant information. *Parks v. DEP*, 2007 EHB 57. We do not need to get into whether the material will ultimately be determined to be admissible at this point, Pa.R.C.P. No. 4003.1(b), but we do need to make an assessment of relevancy, Pa.R.C.P. No. 4003.1(a). No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

[1] The Department has not weighed in on the matter.

The Board authorizes parties to serve subpoenas in accordance with the applicable Pennsylvania Rules. 25 Pa. Code § 1021.103. Under the Rules, a party may obtain through subpoena on a non-party any documents that are normally within the scope of discovery under Rules 4003.1 – 4003.6. Pa.R.C.P. No. 4009.1(a). A person who is the subject of a subpoena may move for a protective order under Rule 4012. Pa.R.C.P. No. 4009.21(d)(2). Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney v. DEP*, 2014 EHB 293, 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811. The term "good cause" has not been well defined in Pennsylvania law.[2] However, "a party seeking a protective order must, at the very least, present some evidence of substance that supports a finding that protection is necessary. Such evidence must address the harm risked…" *Dougherty v. Heller*, 97 A.3d 1257, 1267 (Pa. Super. 2014). Nevertheless, whether to issue a protective order is within the sound discretion of the trial court, or here, the Board. *See Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984); *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."). *See also Cooper v. Schoffstall*, 905 A.2d 482, 492-93 (Pa. 2006) (trial courts should determine the appropriate scope of discovery in individualized circumstances).

[2] *See Dougherty v. Heller*, 97 A.3d 1257, 1267 (Pa. Super. 2014) ("No Pennsylvania appellate court has addressed what constitutes 'good cause' in this context."); *Id.* at 1268 ("As oft used as the term 'good cause' is when discussing protective orders, the phrase is not well defined under Pennsylvania law." (Mundy, J., concurring and dissenting)). The Pennsylvania Supreme Court granted a petition for allowance of appeal in *Dougherty* to address, among other things, "good cause," 109 A.3d 675 (Pa. 2015), but later dismissed the appeal as having been improvidently granted, 2015 Pa. LEXIS 2509 (Pa. Oct. 29, 2015). *See also Allegheny West Civic Council v. City Council of Pittsburgh*, 484 A.2d 863, 866 (Pa. Cmwlth. 1984) ("There are no hard-and-fast rules as to how a motion for a protective order is to be determined by the court.")

Importantly, we must also keep in mind that any discovery, whether sought from a party or a non-party, is governed by a proportionality standard. *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Opinion, Oct. 29, 2015); *Tri-Realty Co. v. DEP*, EHB Docket No. 2014-107-L, slip op. at 4 (Opinion, Mar. 20, 2015). Discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. The proportionality standard requires us to consider the following factors:

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

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

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

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

(5) Any other factors relevant under the circumstances.

2012 Explanatory Comment Prec. Rule 4009.1, Part B.

To summarize, in evaluating whether discovery regarding a matter should be permitted, we must first determine whether it will lead to information that is relevant to the subject matter involved in this appeal. If the matter being inquired into is not likely to lead to the discovery of relevant evidence, that is the end of our inquiry. The discovery is not permitted. If it is likely to lead to relevant evidence, we still must decide whether allowing the discovery is consistent with the proportionality standard, which is to say that, given the nature and scope of the case, the

importance of the information, etc., the discovery should be permitted. The proportionality standard means that even material that is likely to lead to relevant evidence may not be available in discovery if the burdens associated with producing it outweigh its value.

Thus, our first task in addressing Scroggins's motion is to assess whether there is a reasonable potential that the documents and electronically stored information (ESI) that Cabot is requesting from Scroggins will lead to relevant evidence. At the risk of oversimplification, the ultimate issue in this appeal is whether the Department acted lawfully, reasonably, and consistent with its constitutional responsibilities in ordering Cabot to restore or replace the Shanti Temple's water supply. The Department acted appropriately if Cabot affected the water supply by pollution or diminution. 58 Pa.C.S. § 3218. Cabot is presumed liable under the circumstances presented here, but it may rebut that presumption if, *inter alia*, the pollution of the Temple's well existed prior to Cabot's activity "as determined by a predrilling or prealteration survey." 58 Pa.C.S. § 3218(c) and (d)(2)(i). The predrilling survey must have been performed by an independent certified laboratory. 58 Pa.C.S. § 3218(e). The presumption of liability can also be rebutted if the well operator "affirmatively proves" that "the pollution occurred as the result of a cause other than the drilling or alteration activity." 58 Pa.C.S. § 3218(d)(2)(v).

Ms. Scroggins argues that all of the information sought by Cabot is irrelevant. Cabot, of course, disagrees. The question of relevancy first arises in connection with the ongoing disputes between Scroggins and Cabot that are unrelated to the current appeal. These disputes apparently relate to Scroggins's alleged trespasses on Cabot's leaseholds to take photographs and conduct "citizen tours." Scroggins claims that Cabot's subpoena in this appeal is just another example of Cabot's vexatious, vindictive campaign against her because of her anti-fracking activism. Cabot for its part accuses Scroggins of having a bias against Cabot and ascribes a nefarious motive to

her role in the water loss complaint. Cabot goes so far as to say that it "intends to prove that Ms. Scroggins initiated this false complaint about a change in water quality to further her anti-drilling agenda." Ironically, by casting such aspersions, each party has essentially confirmed their mutual animosity. However, neither party explains how their mutual disdain relates to the basic issue in this case. Presumably, Cabot is saying Scroggins is pursuing a water loss complaint solely to get back at Cabot, and Scroggins is saying Cabot is defending against the water loss complaint solely to get back at Scroggins, not because Cabot really believes the water was unaffected by its operations.

We utterly fail to comprehend the materiality of any of this. If there is a tiny kernel of relevance in the nature of impeachment, it is too small to see with the naked eye. Even if Scroggins's water loss complaint was "false," it prompted the Department to investigate the matter. No one has accused the Department of being motivated by any bias or ill will. The Department determined that the criteria for repair or replacement set forth in 58 Pa.C.S. § 3212 were met, and it is *that determination* that we review. We do not really review Scroggins's complaint. Her complaint could be dead wrong, "false," or improperly motivated but if the Department's findings are sustainable, its order must be upheld.

This case, as with most cases before the Board, will almost certainly turn in part on statutory and regulatory interpretation but will most likely be based on scientific evidence as explained by experts. We already know from the supersedeas hearing that water quality testing results will play a key role. Indeed, the statute demands it. We anticipate expert testimony regarding water chemistry, hydrogeology, and drilling activity. Evidence regarding Scroggins's and Cabot's feud has no meaningful part to play. Accordingly, to the extent the subpoena gets into that sort of background, we grant Scroggins's motion to quash.

The second aspect of relevance arises as a result of the statutory language that says preexisting pollution, when the rebuttable presumption applies, must be affirmatively proven based on a predrilling survey conducted by an independent certified laboratory. If this is the exclusive method for proving preexisting pollution, we are left to ask how Cabot's requests going to Scroggins's historical knowledge regarding, e.g., stains on china can possibly lead to relevant information. Because this issue is unresolved, a certain amount of discovery in that area will be permitted at this time.

There are a few other more garden variety examples of Cabot's requests that exceed the bounds of potential relevance, which we will note below. For example, Cabot makes several requests regarding "the property" as distinct from the water supply itself. Information regarding the water supply itself is the key. Generally speaking, we will limit Scroggins's duty to respond to the documents related to the water supply itself.

Scroggins has also raised some legitimate concerns regarding proportionality on Scroggins's part. It is important to point out at the outset that neither Scroggins nor the Shanti Temple are parties in this appeal.[3] This case is between the Commonwealth and Cabot. If the Department turns out to be correct, the Shanti Temple is a victim that did nothing more than pursue its statutorily protected right to have a clean water supply. *See* 58 Pa.C.S. § 3218(b). When the Department finds that a driller has polluted a water supply, we must be wary of any attempt on the part of that driller to unduly burden, harass, or intimidate the water supply owner through discovery or otherwise. We are not suggesting that Cabot has done that in this case, but the respective roles and resources of the persons involved in a case of this nature are important criteria that we will keep in mind in our application of the proportionality standard.

[3] On September 22, 2015, the Board ordered Cabot to serve a copy of its notice of appeal on the landowner pursuant to 25 Pa. Code § 1021.51(h)(4). To date, no one has intervened in this matter on behalf of the landowner.

We also believe that the Board has a responsibility to make sure that appeals regarding water loss complaints do not get out of hand. Discovery obligations must be consistent with the just, speedy, and inexpensive determination and resolution of disputes. Litigating the validity of the Department's determination regarding an individual water loss should not result in hundreds of thousands of dollars in fees and costs and countless man hours expended on the part of all concerned. Pursuing an appeal before this Board should not become prohibitively expensive and time consuming for all but the most driven or well-heeled of litigants. The easiest way for a case to get out of hand quickly is for there to be excessive discovery. Indeed, discovery is unavailable or severely restricted before many administrative tribunals we suspect for precisely that reason. We mention this as another factor to keep in mind when we evaluate "the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake" as required under the proportionality standard. Explanatory Comment, *supra*.

Finally with respect to proportionality, Scroggins is concerned that compliance with the subpoena will result in excessive efforts and expense and produce only unnecessarily duplicative information. For example, she seems to think she needs to perform a title search. That is incorrect. Scroggins is only required to produce documents that are available to her and can be produced with reasonable effort. Although Cabot's list of requests at first blush appears rather long, in reality many of the requests are actually quite redundant and will not result in much in the way of additional effort. We also hold that Scroggins has the right to be reimbursed for the reasonable costs of preparing copies or producing the things sought. *See* Pa.R.C.P. No. 4012; Pa.R.C.P. No. 4009.26.[4]

[4] Cabot acknowledges that, from its perspective, these expenses should be "de minimus." (Memorandum at 13.)

Applying these general concepts to Cabot's specific requests, we will highlight those parts of the requests that Scroggins is **not** required to comply with. Those portions that we do not mention require a reasonable effort on Scroggins's part to produce the requested documents and ESI.

Cabot's requests at several locations reference the property as distinct from the water supply itself. (See, e.g., Requests 1, 2, 7, 8.) Cabot's requests regarding the property are potentially too broad because the operative question under the applicable statute and regulations relates to *the water supply*, not the property. *See* 58 Pa.C.S. § 3218 (duty to replace water supply adequate in quality and quantity for purposes served by the supply). For example, it is not clear from a reading of the statutory language why circumstances regarding the ownership of the property where the water supply is located are relevant. It also is not clear why the use of the property as opposed to the water supply is relevant. We will limit Scroggins's duty with respect to Cabot's requests to turning over documents in her possession that contain information about, or in reference to, the water supply.

Cabot's second request directs Scroggins to identify every individual who has ever visited or resided at the property since 2000. This request is far too broad on its face. Additionally, the relevance and importance of the information seems rather limited given that this case is likely to turn on hard data and expert interpretation. Still further, we have no reason to doubt Scroggins's statement that the Shanti Temple is a religious retreat center that has accommodated dozens of visitors and residents over the years. The First and Fourteenth Amendments protect church members' freedom to engage in association for the advancement of beliefs and ideas, and disclosure of identities of the group's members or contributors may have the practical effect of discouraging the exercise of these constitutionally protected rights.

NAACP v. Alabama ex rel. Patterson, 78 S. Ct. 1163 (1958); *Pennsylvanians for Union Reform v. Pa. Office of Admin.*, No. 1019 C.D. 2014, 2015 Pa. Commw. LEXIS 551 (Pa. Cmwlth. Dec. 18, 2015).[5] For these reasons, Scroggins is not required to identify every person visiting or residing at the property since January 1, 2000.[6]

Along the same lines, Cabot's requests regarding documents that refer to Cabot generally without having anything to do with the water supply need not be produced. For example, the third request in Cabot's subpoena asks for all documents relating to communications between Scroggins and the Department regarding Cabot. That request is overly broad and not narrowly tailored to the issue of Cabot's potential pollution of the water supply at the Shanti Temple. In contrast, the subsequent fourth and fifth requests focus in on communications with the Department specifically relating to the water well and its water quality, and these are proper inquiries. Requests 6 through 8 also generally concern communications made by Scroggins regarding the well and its quality. The requests identify various email accounts that Cabot apparently believes Scroggins administers. To the extent that she operates those accounts, requesting emails from the accounts is generally proper to the extent the information is readily available. However, if she does not, for instance, operate the account associated with the email address swamishantanand@yahoo.com, she is under no obligation to seek out or provide emails from that account that are responsive to the requests. Requests 7 and 8 seek any communications relating to the Department or the Shanti Temple property. To the extent that those communications are not related to the issues surrounding the water well, they are beyond the

[5] The protections of the free exercise clause generally do not turn on a judicial perception of the particular belief or practice in question. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 101 S. Ct. 1425 (1981). Courts may inquire into the sincerity, but not the truth or falsity of religious tenets. *United States v. Ballard*, 64 S. Ct. 882 (1944).

[6] Scroggins may similarly limit her response to Request 14, which asks for documents related to the "impact" of the water loss on residents and visitors.

proper scope of discoverable information. In short, Scroggins does not need to produce every communication she has ever had about the Shanti Temple, the property, or Cabot. However, to the extent she has communications with "the Department and/or any other person" relating to the water supply, they should be produced.

Journalist Privileges

Having determined that Cabot's subpoena to the extent that it is tailored to the water supply at issue is generally appropriate and consistent with the proportionality standard, we now need to address Scroggins's assertion that there is nevertheless "good cause" for issuing a protective order because she is a journalist and the materials in question are entitled to protection from disclosure as the fruits of her journalistic labors. She cites two bases for this claim: the Pennsylvania Shield Law and the reporters' qualified privilege under the United States Constitution. We think she has fallen short on both counts.

The Pennsylvania Shield Law reads as follows:

> **Confidential communications to news reporters.**
>
> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

42 Pa.C.S.A. § 5942(a). Thus, in order to be afforded the protections of the Shield Law, a person must be (1) "engaged on, connected with, or employed by" (2) "any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation," (3) "for the purpose of gathering, procuring, compiling, editing or publishing news."

The Pennsylvania Supreme Court has held that Pennsylvania's Shield Law protects only confidential communications from sources. *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 954 (Pa. 2008); *Cmwlth. v. Bowden*, 838 A.2d 740, 748 n.6 (Pa. 2003). The law generally does not protect documents unless the "production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media." *Castellani*, 956 A.2d at 954; *Bowden*, 838 A.2d at 752. *See also Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987) (holding that the Shield Law does not protect the discovery of all unpublished information so long as that information does not reveal the identity of a confidential source); *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997) (same); *Cmwlth. v. Linderman*, 17 Pa. D. & C.4th 102 (1992) (denying motion to quash and motion for protective order for unpublished photographs taken by a photographer employed by a newspaper of general circulation because the photographs did not constitute sources); *Cmwlth. v. Ruch*, 28 Pa. D. & C.3d 488 (1984) (same).

In the typical case where the Shield Law has been implicated, the journalist has identified (generically) specific communications from specific sources. In other words, a journalist reports that Deep Throat told her XYZ, and the government or a litigant is attempting to find out who Deep Throat is. *See, e.g., In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005) (attempt to discover press reports describing Valerie Plame as a CIA operative). No such situation is presented here. Scroggins has not explained how turning over any of the documents requested in Cabot's subpoena would reveal a confidential source. Accordingly, the Shield Law does not provide good cause for protecting any of the documents from disclosure.[7]

[7] In any event, we have generally limited Ms. Scroggins's duty to respond to documents directly related to the water supply, and it is difficult to imagine that the documents so limited would be likely to reveal confidential sources.

The reporters' qualified privilege grounded in the Constitution provides that reporters have a qualified right to refuse to disclose their sources and materials. *Bowden*, 838 A.2d at 752 (citing *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980)). It appears that a qualified reporters' privilege exists in Pennsylvania and within the Third Circuit. *Bowden*, 838 A.2d at 753 n.10 (discussing lower court cases and reserving ruling on the issue). We will assume for our current purposes that it does. Unlike the "absolute privilege" created by the Shield Law, *see Castellani*, 956 A.2d at 951, the reporters' qualified privilege establishes a sort of heightened balancing test, which, where it applies, requires a party who seeks information from a reporter to demonstrate that the party has made an unsuccessful effort to obtain the information from other sources, there are in fact no alternative sources, and the information is crucial to its claim. *Bowden*, 838 A.2d at 755. In another formulation of the test, people seeking protection under the journalist's privilege must show that they (1) are engaged in investigative reporting (2) are gathering news and (3) possess the intent at the inception of the news-gathering process to disseminate this news to the public. *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998).

It is not clear whether Scroggins qualifies as a "reporter," i.e., a member of "the press," such that the privilege applies. Cabot scoffs at the idea but provides us with no support for its position. Scroggins tells us that she hosts two public access television shows, that she publishes documentary videos on her YouTube channel, and that she belongs to press associations, including Indy Media/Binghamton, Shaleshock Media, and Progressive Media.

Even though self-publication and the ability to widely distribute content online have become commonplace, and indeed have to some extent supplanted the role of the more

traditional news outlets,[8] courts have so far been largely successful in ducking the issue of when self-styled citizen journalists are entitled to benefit from the journalism privileges. What signals have been sent out can be rather contradictory, starting with the Supreme Court in the seminal case of *Branzburg v. Hayes*, 92 S. Ct. 2646, 2668 (1972) famously saying that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods," but at the same time speaking frequently in that case and then subsequently in other cases in terms of a more traditional conception of journalism. *See* Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. Pa. J. Const. L. 375 (2009) (noting that the Supreme Court has not referred to the peripheral media as the press). *See also O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 77 (2006) (reporters' privilege applied to individuals who claimed to operate an "online news magazine" devoted to news and information about Apple computers); *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998) (creator of electronic publication called the Drudge Report qualified for the reporters' privilege). *Cf. Obsidian Finance Group v. Cox*, 2011 U.S. Dist. LEXIS 137548 (D. Or., Nov. 30, 2011) (self-described "investigative blogger" not a journalist entitled to protection of the state's shield law); *Too Much Media v. Hale*, 20 A.3d 364, 367-68 (N.J. 2011) (comments posted by citizen watchdog on an online message board not protected by New Jersey's shield law).[9] We have not uncovered any Pennsylvania case law on point.

[8] "[N]ews stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper." *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011). Thanks to the internet, "freedom of the press is [no longer] limited to those who own one." *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999).

[9] More comprehensive analysis on the issues can be found in various law review articles. *See, e.g.*, Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. Fla. J.L. & Pub. Pol'y 47 (2013); Jared Schroeder, *Focusing on*

We are hesitant to conclude that Scroggins is a "reporter" entitled to withhold any materials on that basis absent firmer direction from our courts, but more importantly, the reporters' privilege should in any event be limited to materials gathered by a person acting as a reporter in her role as a reporter. The privilege relates to materials obtained in the ordinary course of newsgathering activities with the primary purpose and objective being to disseminate news. *See In re Madden*, 151 F.3d at 128. A reporter who slips on a banana peel while investigating a grocery store who then sues the store for negligence is not immune from discovery regarding the slippage incident simply because she is a reporter. It is her personal involvement in the matter at issue that is the subject of inquiry, not her role as a reporter investigating the store. Information gained by a person for personal reasons, which includes helping out a friend, is not covered by the privilege. Thus, even if we assume that Scroggins is a journalist, Scroggins's role here as former owner, current manager, long-time resident, and representative of the water supply owner is far more dominant. She has not directed us to any materials that she is required to produce pursuant to the subpoena as limited by this Opinion that were obtained in her journalistic capacity separate from her role as property manager and representative of the owner of the water supply. We have every indication that she gained the information at least in part in the course of managing the property and helping the swami, not in the course of reporting the news. The fact that she may *also* have disseminated some of the information as news does not change the fact that her primary role vis-à-vis the information was personal. Furthermore, documents that go beyond the water supply have already been excluded on relevance and proportionality grounds. As to documents that relate to the water supply, even if we assume *arguendo* that the privilege applies, the value of documents in Scroggins's

---

How Rather Than on Whom: Constructing a Process-Based Framework for Interpreting the Press Clause in the Network-Society Era, 19 Comm. L. & Pol'y 509 (2014).

possession that reflect material, direct, personal, and sometimes exclusive knowledge *regarding the water supply in this case* outweighs the need to protect her journalistic integrity, freedom, and ability to obtain and disseminate news of significant public import.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CABOT OIL & GAS CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-131-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of February, 2016, it is hereby ordered that Vera Scroggins's motion to quash and for a protective order is granted in part and denied in part in accordance with the foregoing Opinion. Scroggins shall assemble the documents and ESI that needs to be produced in accordance with the foregoing Opinion on or before **February 26, 2016**. She should then advise Cabot of her reasonable costs incurred, and upon payment, deliver the documents to Cabot.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 3, 2016

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

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

For Appellant:
Amy L. Barrette, Esquire
Janet L. McQuaid, Esquire
(*via electronic filing system*)

For Non-party Movant:
Vera Scroggins
71 Gus Park Lane
Brackney, PA 18812

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE DELAWARE RIVERKEEPER NETWORK, CLEAN AIR COUNCIL, DAVID DENK, JENNIFER CHOMICKI ANTHONY LAPINA and JOANN GROMAN	:	
v.	:	**EHB Docket No. 2014-142-B (Consolidated with 2015-157-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and R.E. GAS DEVELOPMENT, LLC	:	**Issued: February 4, 2016**

OPINION IN SUPPORT OF ORDER
DENYING PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Judge

Synopsis

The Board denies a Petition for Supersedeas of the issuance and renewal of six permits for unconventional gas wells where the third party appellants failed to show that they have a strong likelihood of success on the merits.

O P I N I O N

Background

On September 12, 2014, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP") approved permits for six unconventional gas wells ("Geyer Wells") at the Geyer well site in Middlesex Township, Butler County, Pennsylvania ("Geyer Well Site"). The permits were issued to R.E. Gas Development, LLC ("Rex"). Two environmental groups, the Delaware Riverkeeper Network and the Clean Air Council, along with four individuals, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman ("Appellants" or

"Delaware Riverkeeper") filed an appeal of the Department's approval of the six Geyer Wells permits on October 13, 2014 and filed an amended appeal on November 3, 2014. The Geyer Well Site is located west of a residential housing development where three of the four individual Appellants reside according to the Notice of Appeal. The fourth individual Appellant, Ms. Groman, resides approximately a mile and a half from the Geyer Well Site according to the Notice of Appeal. On September 11, 2015, the Department renewed all six of the Geyer Wells permits under appeal and the Appellants, with the exception of Mr. Lapina, filed an appeal of those renewals on October 16, 2015. On October 23, 2015, the Board issued an Order consolidating the two appeals into the above-captioned matter.

In December 2015, Rex began drilling at the Geyer Well Site. Appellants filed an Application for Temporary Supersedeas and a Petition for Supersedeas on December 14, 2015. The Board held a conference call with the parties on December 15, 2015 and after hearing the arguments of the parties for and against a temporary supersedeas, the Board denied Appellants' Application for Temporary Supersedeas. The primary reason for denying the temporary supersedeas request was that Rex's initial stage of drilling was nearing completion and Rex stated that it would not be conducting additional drilling until after the Board could hold a hearing and issue a ruling on the Petition for Supersedeas. The hearing on Appellants' Petition for Supersedeas took place on January 6 and 7, 2016. On January 22, 2016, the parties submitted legal briefs addressing the requested supersedeas. On January 29, 2016, the Board issued an Order denying the Appellants' Petition for Supersedeas and stating that an opinion in support of that Order would follow. This opinion is issued in support of the Board's January 29, 2016 Order denying the Petition for Supersedeas.

Supersedeas Standard

A supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *See Weaver v. DEP*, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829. The petitioner bears the burden to prove that a supersedeas should be issued. *Tinicum Twp. v. DEP*, 2008 EHB 123, 126. The standard for granting or denying a petition for supersedeas is set forth in the Environmental Hearing Board Act, and by the regulations promulgated thereunder. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63. In ruling on a supersedeas request, the Board is guided by relevant judicial precedent and its own precedent, and among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b)[1].

In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Hudson v DEP*, EHB Docket No. 2015-09-L, slip op. at p.8 (Opinion in Support of Order Granting Supersedeas, issued September 1, 2015) (citing *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91; *Neubert v. DEP*, 2005 EHB 598, 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *M.C. Resource Development v. DEP*, EHB Docket No. 2015-023-C, slip op. at p.5 (Opinion and Order on Petition for Supersedeas, issued May 7, 2015) (citing *Dickinson Twp. v.*

[1] All the parties acknowledge and the Board agrees that this prohibition on issuing a supersedeas does not apply to this matter so it will not be addressed in this opinion.

DEP, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369). In order to be successful, the petitioner's chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Global*, 2000 EHB 829, 831-32. It is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver*, 2013 EHB 486, 489; *Tinicum*, 2008 EHB 123, 127. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all the above criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

Likelihood of Success on the Merits

Delaware Riverkeeper must make a strong showing that they are likely to be successful on the merits of their claim. This matter involves a third party appeal of the permits issued by the Department to Rex for the Geyer Wells. In a third party appeal of a permit issued by the Department, the appellant must prove by a preponderance of the evidence that in issuing the permit, the Department "acted unreasonably and in violation of the laws of the Commonwealth." *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780); *see also Brockway Borough Mun. Auth. v. DEP*, No. 789 C.D. 2015, slip op. at 14 (Pa. Cmwlth. January 6, 2016). For the reasons that follow, we find that the Appellants have failed to convince us that they are likely to meet their burden to demonstrate by a preponderance of the evidence that the issuance of the Geyer Wells permits was unreasonable and contrary to the law. Therefore, we deny the Appellants' Petition for Supersedeas.[2]

[2] In their opening statement at the supersedeas hearing, the Appellants stated that they were not going to address a significant part of their case, so the fact that the Board finds at this point they have failed to demonstrate that they are likely to succeed on the merits does not necessarily mean they will not succeed in doing so following a full hearing.

Delaware Riverkeeper raised a number of objections to the Department's issuance of the Geyer Wells permits in their Notices of Appeal. The objections focus on alleged shortcomings in the Department's review of the permit applications and an alleged failure to fully consider the impact and risks posed by the Geyer Wells as required under the Oil and Gas Act, the Administrative Code, Article I, Section 27 of the Pennsylvania Constitution and various other statutes and regulations. The Notices of Appeal specifically assert that the Geyer Wells create a risk of air and water pollution, pose the risk of an explosion that would impact nearby residents, and have the potential to negatively impact public health. In the Notice of Appeal addressing the renewal of the Geyer Wells permits, Delaware Riverkeeper incorporated all of their prior objections and raised the additional concern that abandoned wells in the area of the Geyer Well Site were not considered by the Department and potentially increase the previously identified risks.

In the Petition for Supersedeas and in the evidence presented at the hearing, Delaware Riverkeeper presented two main lines of argument. The first line of argument, largely presented through the expert testimony of Daniel S. Fisher, is that the unique geologic setting of the Geyer Well Site along with the presence of numerous abandoned wells in proximity to the Geyer Well Site creates substantial risk of groundwater contamination and gas migration issues. Mr. Fisher stated that, in his professional opinion, the geologic setting, alone or in conjunction with the abandoned wells, made it likely that there would be "either a catastrophic or a gradual release of fugitive gas or other fluids through the vertical fractures and the abandoned wells" in the area of the Geyer Well Site. (Transcript ("T.") 90-91). Delaware Riverkeeper argues that the groundwater contamination and gas migration that Mr. Fisher stated is likely to occur if Rex is allowed to proceed with drilling the Geyer Wells violate various statutes and regulations and,

therefore, the Department's issuance of the permits is contrary to law. Rex and the Department's hearing evidence largely challenged the credibility and veracity of the testimony and opinions offered by Mr. Fisher. There was no in court testimony directly addressing the Department's review of Rex's applications for the Geyer Wells permits. Instead, Appellants and the Department filed a joint stipulation addressing the Department's permit review.

Delaware Riverkeeper's second line of argument focuses on the issue of noise from the Geyer Well Site. They allege that the potential for noise constituted a nuisance that was not adequately considered by the Department during the permit review process, and that the actual noise, once drilling took place in early December, created a public nuisance in violation of several statutes and regulations. As a result of the noise issue, Delaware Riverkeeper argues that the Geyer Wells permits are unreasonable and contrary to law. Delaware Riverkeeper and Rex offered testimony from neighbors of the Geyer Well Site about the noise arising from the initial drilling activity. Rex also provided testimony from Mr. Derek Smith, Senior Director of Health, Safety, Environment for Rex, who testified about the sources of noise and their necessity in the drilling process along with Rex's current steps and proposed future actions to mitigate noise. All parties filed a joint stipulation addressing noise complaints received by the Middlesex Township Manager related to the drilling activity at the Geyer Well Site in early December and his investigation and response to those complaints.

Unique Geologic Setting/Abandoned Wells

Delaware Riverkeeper's expert, Daniel Fisher, testified that the setting of the Geyer Well Site was geologically unique because of its location approximately 2.6 miles from the Blairsville-Broadtop Lineament ("BB Lineament"). Mr. Fisher identified the BB Lineament as a cross-strike structural discontinuity or "CSD" for short. According to his testimony, a CSD is an

area of faulting and fracturing that reaches from the basement rocks up to the surface. Mr. Fisher mapped fracture traces at the surface in southern Butler County using digital elevation data and identified the presence of his mapped fracture traces as consistent with the presence of the CSD. Mr. Fisher testified about a specific alleged risk to one of the individual appellants, Joann Groman. Based on his mapping of the fracture traces, Mr. Fisher concluded that Ms. Groman's property was located directly along one of the fracture traces and was at risk for contamination from the Geyer Wells. It was Mr. Fisher's opinion that the proximity of the BB Lineament/CSD to the Geyer Well Site created a significant risk of gas and/or fluid migration, particularly as a result of the increased pressure during the hydrofracturing process.

Mr. Fisher also testified about his concerns regarding abandoned wells in the area of the Geyer Well Site. He claimed to have identified seven abandoned wells within 1,000 feet from the vertical and horizontal legs of the Geyer Wells along with several additional abandoned wells beyond the 1,000 foot distance. (*See* Ex. 4-9). While there appeared to be limited specific information about the abandoned wells identified by Mr. Fisher, as a general matter, prior drilling in the area of the Geyer Well Site targeted the "100-foot sand," which is generally located at a depth at or above 1,900 feet. The 1,900 foot depth of the abandoned wells was of particular concern according to Mr. Fisher because of the potential for a section of the Geyer Wells to be open and uncased near that depth. The uncased section would allow the abandoned wells to provide a pathway for the migration of gas and fluids from the well bore of the Geyer Wells.

While we found Mr. Fisher generally competent when he was explaining the geologic theories related to the BB Lineament, CSDs, fracture traces and abandoned wells, the conclusions he drew from these theories and the opinion he offered that the situation created a

"perfect storm" and was likely to cause a catastrophic release or a more chronic release of gas and/or other fluids from the Geyer Wells was not credible. (T. 90-91) His conclusions and opinion were significantly undercut during his cross-examination and by the contrary evidence offered by the witnesses presented by Rex and the Department. Critical to our decision is the fact that Mr. Fisher's opinion significantly relies on his claim that drilling unconventional gas wells in the unique geologic setting of Geyer Well Site creates an extraordinary risk. The claim of uniqueness is simply not consistent with the facts. Mr. Fisher was asked during his cross-examination whether he had determined whether there were any other unconventional gas wells located along the BB Lineament. Mr. Fisher stated that he had not looked to see whether any other unconventional gas wells were located in a similar proximity to the BB Lineament as the Geyer Wells. He testified that it would have been possible to conduct such a study and that doing so would have been a good idea. He stated that he simply did not have the time to do that work in preparation for the supersedeas hearing. Absent that effort, we think that his conclusion that the setting of the Geyer Wells is unique is unsupported by the hearing testimony.

In fact, based on testimony presented by the Department through Craig Lobins, the Northwest District Manager of the Department's Oil and Gas Program, it is clear that the setting of the Geyer Well Site is not geologically unique at all. Mr. Lobins testified regarding an analysis undertaken by the Department during the course of the supersedeas hearing. The Department looked at how many unconventional gas wells in Pennsylvania were located in close proximity to the BB Lineament and other similar lineaments. Mr. Lobins testified that there were four unconventional gas wells in southern Butler County and northern Allegheny County located closer to the BB Lineament than the Geyer Wells. He further testified that there were a total of 80 unconventional gas wells located within 2.5 miles of the BB Lineament along its

entire length and 520 unconventional gas wells located within 2.5 miles of the six major lineaments located in Pennsylvania. In addition, there are hundreds of conventional wells in close proximity to the BB Lineament. While it was not clear that all of the wells cited by Mr. Lobins were in production, he testified that the Department had received spud notifications for all the wells, conventional and unconventional, which he stated meant that the well operator had started to drill the wells. Given the number of wells identified by the Department, we are not persuaded that the Geyer Well Site is located in a unique geologic setting for well drilling and development.

Even if the geologic setting is not unique, drilling in proximity to the BB Lineament or other similar lineaments may still pose a risk under the theory outlined by Mr. Fisher. Mr. Fisher testified that drilling in such a geologic setting created not only the possibility of a catastrophic or a gradual release of fugitive gas and/or other fluids, but that such a release was "likely." (T. 35, 91). Of course, if Mr. Fisher is correct that such a release is likely, then given the number of unconventional gas wells drilled in this type of setting according to the testimony provided by Mr. Lobins, one would expect there to be numerous examples of catastrophic and/or gradual releases of gas or fluids. Delaware Riverkeeper provided no evidence of fugitive gas and/or fluid releases in proximity to the BB Lineament or other lineaments in Pennsylvania. Mr. Lobins testified that among his responsibilities with the Department is the supervision of the Department staff who investigate water supply contamination complaints and gas migration issues. Mr. Lobins was not aware of any situations where the Department staff had investigated gas migration issues in the vicinity of the BB Lineament in southern Butler County nor was he aware of any investigations of gas migration related to unconventional gas well activities in the twelve county area of Pennsylvania for which he is responsible. As was pointed out during the hearing,

the absence of evidence is not the evidence of absence, but given the facts as presented, the Board is not convinced that Mr. Fisher's claim that such a release is likely is credible. At best, it appears to be speculative, particularly in light of the lack of any real world examples where the theory set out by Mr. Fisher created the type of release that he says is likely in this setting.

Mr. Fisher's concern about the abandoned wells in the vicinity of the Geyer Wells also does not stand up upon close examination. First, the evidence for the presence of some of the abandoned wells he identified is open to question. In some cases, Mr. Fisher claimed that abandoned wells were present based on his review of aerial photos where he identified the presence of a dark spot that was stable over time and was still there in the fall when the leaves were gone. He stated that this "could be a structure, an oil well tank or shelter." (T. 79). Mr. Fisher did not field verify the presence of the abandoned wells he claims to have identified. Moody and Associates, a consultant for Rex, conducted an investigation for abandoned wells in the area of the Geyer Well Site that was submitted to the Department as part of the permit renewal process. Mr. Smith, Rex's Senior Director of Health, Safety, Environment, testified that Rex did not identify any abandoned wells during its investigation that were a concern because those that were identified were generally shallow relative to the depth of the Geyer Wells laterals and not located in close proximity to the Geyer Wells well pad.

Even if we accept the existence of the abandoned wells identified by Mr. Fisher, his explanation of how they create additional risk is inconsistent with certain facts brought out at the hearing. The principal issue is that Mr. Fisher relied on an incorrect assumption that a portion of the Geyer Wells would be uncased and, therefore, a portion of the well bore would be open to the surrounding rock. Mr. Fisher testified that this open well bore would increase the potential for fugitive gas or fluids from the Geyer Wells to be released to the shallow groundwater or the

surface through the abandoned wells. However, Mr. Smith testified that Rex's plan is to case and cement the entire well bore of the Geyer Wells such that there would be no open well bore during the hydrofracturing process. Moreover, Mr. Smith testified that Rex takes certain steps designed to ensure a good cement job. It was clear during the hearing that these facts were not known to and/or considered by Mr. Fisher in reaching his conclusion that the abandoned wells greatly increased the risk of fugitive gas and fluid migration leading to contamination of the groundwater or surface.

Mr. Fisher also offered the theory that the abandoned wells could interconnect with the fault/fracture system in the BB Lineament and allow for the release of gas and/or fluids. He presented a chart from a published paper that showed that the vertical height of fractures could reach as high as 1,800 feet above a well lateral. The laterals at the Geyer Wells are around 6,000 feet deep so even assuming that the fractures at the Geyer Wells reach the maximum height of 1,800 feet, they are over 2,000 feet below the total depth of the abandoned wells in the area. Mr. Fisher acknowledged on cross-examination that increasing pressure at depth tends to close up fractures. Mr. Engelder, an expert witness for Rex, confirmed this with testimony stating that shallow fractures tend to be on average 10 times longer than they are deep because of the tendency to close up at depth. Given this, it is difficult to see how gas and/or fluids from depths of 6,000 feet will work their way up to the depth of the abandoned wells through the alleged fracture system. Overall, we are not convinced that abandoned wells in proximity to the Geyer Well Site pose the type and scope of risk claimed by Mr. Fisher.

In the end, Mr. Fisher's testimony pieces together limited factual information with a variety of theories to arrive at his opinion that it is likely that there will be a catastrophic or gradual release of gas and/or fluids from the Geyer Wells. We conclude, based on the evidence

presented at the hearing, that this opinion overstates the case and that, at most, the concerns raised by Mr. Fisher are speculative and do not amount to a greater level of risk than exists with any other unconventional gas drilling project. Furthermore, the risks are mitigated by the statutory and regulatory requirements governing gas well development in Pennsylvania that are incorporated into the requirements of the permits issued in this matter. We think this situation is similar to the situation in *Shuey v. DEP* where we stated that in order to convince the Board to rule against the issuance of a permit, the appellants "cannot simply come forth with a laundry list of potential problem." *Id*. at 712. Instead they "must prove by a preponderance of evidence that these problems have occurred or are likely to occur." *Id*. Because the Appellants have not convinced us that these concerns expressed by Mr. Fisher are likely to occur, we find that the Appellants have not satisfied their burden to show, based on the evidence presented during the supersedeas hearing, that they are likely to be successful on the merits of their claim that the Department acted unreasonably or contrary to the law in issuing the Geyer Wells permits because of the technical and geologic issues raised by Mr. Fisher.

Furthermore, given the speculative nature of these risks, we do not think that the Department can be faulted for allegedly not considering them as part of its permit review process. Unfortunately, we were not provided any direct testimony during the hearing about the Department's permit review activities. What information we have on that topic comes from a joint stipulation entered into by the Department and Delaware Riverkeeper. In that stipulation, the Department acknowledges that no one at the Department made any assessment of the presence of fractures or lineaments in the area of the Geyer Well Site prior to issuing the permits. The Department did ensure that the development of the Geyer Well Site complied with the standards set forth in the statutes and regulations. Mr. Lobins testified that the regulations

addressing oil and gas activities contain performance standards that are intended to address the potential risks posed by drilling and hydrofracturing of wells. The permits issued to Rex for the Geyer Wells require that the activities conducted by Rex must be conducted in compliance with the applicable statute and regulations. In addition, the Department included special conditions in the Geyer Wells permits addressing noise mitigation and green completion according to the stipulation. We also had some testimony from Mr. Smith that the Department was given information on abandoned wells in the area of the Geyer Well Site for consideration during the review for the renewal of Geyer Wells permits. If and/or how that information was considered by the Department is not clear from the hearing testimony.

On the limited record we have at this point, we cannot conclude that Delaware Riverkeeper is likely to be successful in demonstrating that the Department's review of the permit applications and subsequent issuance of the Geyer Wells permits was unreasonable or contrary to law because the Department failed to consider the issues presented by the presence of fractures and/or lineaments raised by Mr. Fisher. This matter is in stark contrast to a number of cases where the Board has granted a supersedeas based on shortcomings in the permit review process. When the Board has granted petitions for supersedeas in the past, it has been in cases of clear regulatory violations. *See Hudson*, EHB Docket No. 2015-096-L (supersedeas granted where Department did not comply with post-construction stormwater planning requirements of 25 Pa. Code § 102.8(b)); *see also Rausch Creek Land, LP v. DEP*, 2011 EHB 708 (supersedeas granted where Department improperly issued a permit which, in violation of multiple regulations, allowed permittee to dispose of ash in pit water and improperly classified the site's approximate original contour); *Tinicum Twp. v. DEP*, 2002 EHB 822 (supersedeas granted where Department improperly renewed a permit where permittee was in violation of 25 Pa. Code §

92.13(b) and Department did not conduct any pre-renewal analysis to satisfy Sections 77.457, 77.521(a) and 77.522(b)). Delaware Riverkeeper has not shown that their arguments in this case fit within this line of cases and this further supports our decision not to grant the requested supersedeas.

Noise

Delaware Riverkeeper's second major argument in support of the Petition for Supersedeas is twofold. First, they argue that the Department failed to adequately consider the impacts of noise from the Geyer Well Site in the permit review and renewal process. Second, Delaware Riverkeeper argues that the noise resulting from activity at the Geyer Well Site, principally the drilling activity in early December, constituted a public nuisance. For these two reasons, they contend that the issuance of the Geyer Wells permits was unreasonable and contrary to law.

As previously discussed, there was no direct testimony at the hearing addressing the Department's consideration of the impact of noise from the Geyer Well Site in the permit review process. The joint stipulation filed regarding the permit review process provides that:

> The Department included special conditions in the permit that addressed noise mitigation and green completion. These special conditions included in the permit represent Department efforts to determine whether the development of the Geyer Wellsite can be done without causing a nuisance, whether the development of the Geyer Wellsite as proposed minimizes environmental impacts, and whether the Geyer Wellsite could be developed in a manner that is protective of human health and the environment.

(First Jt. Stip., No. 12). The only other evidence before the Board regarding the Department's consideration of noise in the permit review process comes from the permits themselves. All six of the original and renewed Geyer Wells permits contain a special permit condition stating that:

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

(Appellants' Ex. 1-2).

Delaware Riverkeeper contends that the Department's inclusion of the above special condition in the Geyer Wells permits "says nothing more than the law requires while not actually ensuring *before* the operation goes forward that the operation will comply with the law." (Appellants' Brief, p. 23). They assert that "[t]he Department cannot merely assume compliance with the law and minimization of harm." *Id.* Based on the evidence presented at the hearing, we think that Delaware Riverkeeper's argument on this issue is without merit and does not convince us that the Department's issuance of the Geyer Wells permits unreasonable or contrary to law. The permits contain a special condition that expressly addresses noise and includes a requirement of noise mitigation measures during the drilling and completion of the Geyer Wells. In light of the special condition, and the stipulation entered into between Delaware Riverkeeper and the Department that this was done specifically to address the potential for nuisance, we do not see how Delaware Riverkeeper can successfully contend that the Department did not consider noise issues as part of its permit review process. Because we do not agree that the Department failed to consider noise issues in the permit review process, there is little, if any, likelihood of success on the merits of a claim that the issuance of the permits was unreasonable or contrary to law on these grounds.

Delaware Riverkeeper's second contention with respect to noise is that the noise emanating from the Geyer Well Site during the December drilling constituted a public nuisance. To support their contention, Delaware Riverkeeper presented the testimony of three individuals

who live near the Geyer Well Site in the Weatherburn Heights subdivision. All three witnesses, one of whom, Ms. Chomicki, is an appellant in this case, testified that the noise from the Geyer Well Site had a negative impact on their lives when Rex started drilling in early December. While the testimony is somewhat inconsistent among the witnesses regarding the length of time that the drilling and resultant noise took place, it appears as if the noise lasted somewhere between ten and fifteen days. During this timeframe, Delaware Riverkeeper's three witnesses testified that difficulty sleeping and interference with listening to their televisions were among the negative impacts resulting from the noise at the Geyer Well Site. They also testified that their overall level of anxiety was increased due to the noise and its effects on their daily lives.

In contrast, Rex presented testimony by way of deposition of two residents, Deisha and Daniel Gengler, who live near the Geyer Well Site along Denny Road. According to their testimony, their home is at approximately the same elevation as the homes in Weatherburn Heights. Mr. and Ms. Gengler both testified that they were able to hear noise at their home from the Geyer Well Site during the December drilling. However, they also testified that the noise did not disrupt their lives in any material way. Furthermore, Mr. and Ms. Gengler also testified that they listened to the Geyer Well Site noise while visiting the Weatherburn Heights neighborhood specifically for the purpose of comparing the noise there to what they were hearing at their home. They did this apparently in response to comments in a local newspaper from residents of Weatherburn Heights about the noise levels. Mr. and Ms. Gengler testified that there was no perceivable difference between the noise level at their house and the noise level in Weatherburn Heights.

When determining whether an activity rises to the level of a public nuisance, the Board applies the Restatement (Second) of Torts § 821B. *Chimel v. DEP*, 2014 EHB 957, 1004 (citing *Plumstead Township v. DER*, 1995 EHB 741). Section 821B provides as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation,
>
> (c) Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Additionally, in order for noise to constitute a nuisance, "the question is whether the noise is unreasonable and unnecessary considering all of the circumstance. [sic]" *Chimel*, 2014 EHB 957, 1005 (quoting *Gray v. Barnhart*, 601 A.2d 924, 927 n.4 (Pa. Cmwlth. 1992) (citing *Hannum v. Gruber*, 31 A.2d 99 (Pa. 1943))).

We find that the noise at issue at this time does not constitute a public nuisance based on the testimony provided at the supersedeas hearing. It is not clear to us that it is unreasonable and unnecessary under the circumstances. First, the testimony does not support a finding that it will be continuous in nature or produce a permanent or long-lasting effect. The testimony evidenced that the noise that impacted the Delaware Riverkeeper witnesses was of a limited duration of approximately two weeks and that the level of noise fluctuated during that time period. We have little doubt that future development at the Geyer Well Site will create noise, but no testimony

was presented concerning the likely length of time of any future activities or resultant noise levels. The only testimony dealing with future noise issues came from Mr. Smith of Rex concerning additional noise mitigation efforts that Rex intends to implement at the Geyer Well Site. We have no way of determining whether those efforts will be adequate to reduce noise levels from the site but it does further limit our ability to find that the noise will be permanent or have a long-lasting effect.

In support of their contention that the drilling activities at the Geyer Well Site constitute a nuisance, Appellants point to an unpublished Superior Court decision finding that a trial court properly found that a nuisance existed where plaintiffs complained of noise from a scrap metal recycling facility that caused loss of sleep, anxiety, and the deprivation of the "quiet use and enjoyment of their property." *Umphred v. VP Auto Sales & Salvage, Inc.,* No. 1372 MDA 2014, slip op. (Pa. Super. June 24, 2015). *Umphred* is readily distinguishable from the case at bar, as the nuisance in *Umphred* resulted from a scrap metal recycling facility, a facility which, if allowed to stay in operation, would be permanent in nature. Although we are left to speculate as to the length of time it will take to fully drill and complete all of the wells at the Geyer Well Site, unlike the facility in *Umphred*, the process provided for in the permits at issue is ultimately temporary and will cease once the Geyer Wells are completed.

We next turn our attention to whether the conduct at the Geyer Well Site is proscribed by a statute, ordinance or administrative regulation. On the state level, Delaware Riverkeeper points out that various state statutes and regulations prohibit public nuisances but that of course begs the question. There was no testimony that any statute, ordinance or administrative regulation directly regulates the noise level at the Geyer Well Site. There is apparently a local zoning ordinance in Middlesex Township addressing noise and nuisance requirements at the Geyer Well

Site. The parties stipulated that Eric Kaunert, Middlesex Township Manager, received 35-40 complaints over a seven day period while Rex was drilling on the Geyer Well Site, all but one of which came from residents of Weatherburn. (Second Jt. Stip., No. 1). Mr. Kaunert responded to these complaints by visiting the Geyer Well Site on three different occasions, and none of these visits resulted in the issuance of a notice of violation to Rex. (Second Jt. Stip., No. 2-3). Based on this evidence, we cannot conclude that Rex's conduct at the Geyer Well Site is proscribed by the local ordinance.

Finally, while there is no doubt that the early December drilling activities at the Geyer Well Site created noise, it is not as clear that this noise was a significant interference with public health, safety, peace, comfort or convenience. As stated above, there is a wide variance in the witnesses' perception of the noise from the Geyer Well Site. While the Delaware Riverkeeper witnesses maintain that the noise substantially interfered with their daily lives, Mr. and Ms. Gengler both testified that the noise had no noticeable impact on their daily lives. In fact, the Genglers testified that the noise from the Geyer Well Site is no more disruptive than the noise resulting from the ongoing construction at the Weatherburn Heights housing development. Part of the difference in the responses to the noise may be the result of the different locations of the various witnesses and individual sensitivity to the noise. However, based on all of the testimony, we cannot hold that the noise from the Geyer Well Site constitutes a significant interference with the public health, public safety, the public peace, the public comfort or the public convenience.

In addition to our not finding that the noise was unreasonable under the circumstances, Delaware Riverkeeper presented no testimony that the noise was unnecessary for the activities at the Geyer Well Site. Rex, on the other hand presented testimony that the noise was generally necessary to its operations. For instance, a noise issue that was raised by Delaware Riverkeeper

involved back-up beepers on the trucks at the Geyer Well Site. Mr. Smith testified that these back-up beepers are a safety requirement and cannot be eliminated although Rex would make an effort to minimize them. Absent a showing by Delaware Riverkeeper that Rex was conducting activities that were creating noise unrelated to and/or unnecessary for the drilling operations, we have difficulty ruling that the noise that was the basis of the claim of nuisance meets the requirement that it be unnecessary under the circumstances.

Delaware Riverkeeper has not made a case that the noise emanating from the Geyer Well Site during early December constituted a public nuisance. Furthermore, we cannot say at this point based on the testimony at the hearing whether noise from future activities will rise to the level of a public nuisance, particularly in light of the testimony from Rex that it intends to take additional noise mitigation steps prior to and during renewed activity at the Geyer Well Site. Finally, we are somewhat persuaded by the Department's argument that the current noise issue is really a permit compliance issue at this point rather than a basis for challenging the Department's issuance of the permits and their renewal, both of which occurred prior to the December drilling. In light of the prior discussion, we find that Delaware Riverkeeper has not persuaded us that they are likely to be successful on the merits of their claim that the Department's issuance of the Geyer Wells permits constitute a nuisance and is therefore unreasonable and contrary to law.

Conclusion

A supersedeas is an extraordinary remedy and in order for a supersedeas to be granted, the petitioner must convince the Board that it is likely to be successful on the merits of its claim. In order to be successful in a third party permit appeal, the third party must show by a preponderance of the evidence that the Department's decision to issue the permit was unreasonable and contrary to law. The petitioner in this case, Delaware Riverkeeper has failed to

demonstrate at this point that they are likely to be able to show that the Department's decision to issue and subsequently renew the Geyer Wells permits was unreasonable or contrary to the law. Delaware Riverkeeper attempted to demonstrate that drilling and developing the Geyer Wells poses an extraordinary risk because of a unique geologic setting and the presence of abandoned wells and, furthermore, that the Department improperly failed to consider that risk when issuing the permits. However, the evidence that was presented at the supersedeas hearing did not support the level of risk asserted by the Delaware Riverkeeper. Given the speculative nature of that risk and the fact that the regulations contain performance standards incorporated in to the Geyer Wells permits that are designed to address those risks, we find no fault at this point with the Department's permit review process.

Furthermore, the permits issued by the Department appear to address the noise issue raised by Delaware Riverkeeper, and therefore, there is no basis to rule that the permit application review conducted by the Department is inadequate on this issue. Nor do we conclude that the actual noise from the Geyer Well Site during approximately two weeks in December constituted a public nuisance, such that the Department's issuance of the permits was contrary to law. Because Delaware Riverkeeeper failed to make a strong showing that they are likely to succeed on the merits, we are not required to and did not consider whether they will suffer irreparable harm nor did we consider the likelihood of injury to the public or other parties. It is for all of the reasons discussed herein that we issued the January 29, 2016 Order denying Appellants' Petition for Supersedeas. A copy of that order is attached hereto.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 4, 2016

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

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

For Appellants, Delaware Riverkeeper Network, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman:
Lauren M. Williams, Esquire
Jordan B. Yeager, Esquire
(via electronic filing system)

For Appellant, Clean Air Council:
Joseph Minott, Esquire
Alexander Bomstein, Esquire
Aaron Jacobs-Smith, Esquire
Augusta Wilson, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 29th day of January, 2016, following a two day hearing on Appellants' Petition for Supersedeas and a careful review of the parties' briefs, it is hereby ordered as follows:

1) Appellants' Petition for Supersedeas is **denied**;

2) An opinion in support of this order shall follow.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 29, 2016

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

For Appellants, Delaware Riverkeeper Network, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman:
Lauren M. Williams, Esquire
Jordan B. Yeager, Esquire
(via electronic filing system)

For Appellant, Clean Air Council:
Joseph Minott, Esquire
Alexander Bomstein, Esquire
Aaron Jacobs-Smith, Esquire
Augusta Wilson, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 19, 2016**
	:	

OPINION IN SUPPORT OF ORDER
DENYING REQUEST FOR CERTIFICATION OF APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board denies an Appellant's request to certify two Orders for interlocutory appeal, which denied Appellant's request to reopen the record prior to adjudication and denied reconsideration thereof. The Appellant has not established that an appeal of the Orders presents a controlling question of law, or that an immediate appeal would materially advance the termination of the matter.

O P I N I O N

This matter involves the 2013 appeal of Heywood Becker, proceeding *pro se*, of an order of the Department of Environmental Protection (the "Department") based on inspection reports beginning in 2011 alleging, among other things, that Becker rerouted a stream channel without a permit, which caused sediment pollution to waters of the Commonwealth in violation of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and various regulations in Chapters 102 and 105 of Pennsylvania Code Title 25. The Board conducted a hearing on this appeal that spanned three nonconsecutive days in 2014—April 14, April 22, and May 8. After receiving all of the

transcripts from the hearing, the Board issued an Order setting a schedule for the filing of post-hearing briefs. Days before the Department's brief was due, the Department filed a motion requesting a 30-day extension of the briefing schedule. The Department represented that it was in discussions with the current owner of the site at issue, Peter Edwardson, who earlier in 2014 had also filed an appeal with the Board. *See Edwardson v. DEP*, EHB Docket No. 2014-029-M. The Department said that these discussions might open a path to settlement of both Becker's appeal and Edwardson's appeal. Becker, who no longer owned the property at the time of the hearing, concurred with the motion for an extension and we granted it.

The Department filed another uncontested motion for a 30-day extension on July 29, 2014, in which it represented that settlement negotiations between Becker, Edwardson, and the Department were ongoing, and we granted that extension. The parties then filed a joint request for a conference call in late August. Judge Coleman and Judge Mather conducted a joint conference call on August 26, 2014 with the Department, Becker, and Edwardson, and we agreed to stay both matters for 90 days, with status reports filed at 45 days and 90 days, while the parties continued to work to resolve the appeals. The Department stated in its 90-day status report that the parties needed more time to resolve the matters. This process continued for a tediously protracted length of time, with the Department continually representing that progress was being made on a settlement that would resolve both of the appeals. This long-promised settlement never materialized.

On December 7, 2015, the Board dismissed Edwardson's appeal due to it having been untimely filed. *See Edwardson v. DEP*, EHB Docket No. 2014-029-M (Opinion, Dec. 7, 2015). Soon after, we lifted the stay in Becker's appeal and we once again set a schedule for the filing of post-hearing briefs. The Department filed its brief on January 13, 2016.

The day prior, Becker filed a motion to reopen the record to introduce what he argued was newly discovered evidence that would moot the allegations in the Department's order under appeal. Becker claimed that Edwardson had told him an unidentified staff person of the Department had been on the site recently, and had stated to Edwardson that the stream channel (or "swale" as Becker refers to it) at issue had stabilized and there appeared to have been no man-made changes to the channel. The only indication Becker provided of the identity of this person was that the individual was a male with an "Indian-sounding name." (Motion for Reconsideration at 1.) The Department responded shortly thereafter and stated that it made an inquiry of all Department staff who had been on the site with Edwardson and none of them made the alleged statements. On January 21, 2016, we issued an Order denying Becker's motion to reopen the record because it did not meet the requirements of our rule on reopening the record prior to adjudication located at 25 Pa. Code § 1021.133.[1]

---

[1] That rule provides in part:

> The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b). Becker's four paragraph motion to reopen the record did not address any of these circumstances.

Reopening the record is a decision within the discretion of the presiding judge. *Al Hamilton Contractor Co. v. Dep't of Envtl. Res.*, 659 A.2d 31, 35 (Pa. Cmwlth. 1995). We succinctly summarized the standard for reopening the record in *Perano v. DEP*, 2011 EHB 270, 272-73, and we believe it bears quoting here:

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

On January 27, 2016, Becker filed a motion for reconsideration of our Order denying his motion to reopen the record. In his request for reconsideration Becker identified the Department employee as Pravin Patel, PE. Becker argued that he had now satisfied the requirements of 25 Pa. Code § 1021.133, that the Board should reopen the record so that Becker could question Mr. Patel, and that Patel's statements would establish new material facts that would exonerate Becker. The Department responded that Patel had never spoken to Edwardson or Becker, that he had never been to the site involved in the appeal, and that he never discussed any aspect of the appeal with anyone in the Department's Waterways and Wetlands section or the Bucks County Conservation District. The Department's response was accompanied by a verification executed by Patel attesting to the accuracy of the statements made in the Department's response. On February 3, 2016, we issued an Order denying the request for reconsideration because Becker did not demonstrate any extraordinary circumstances as required under 25 Pa. Code § 1021.151(a) (relating to reconsideration of interlocutory orders), which would justify reconsideration of our prior Order.[2]

Becker had ample opportunity to present evidence for his case during the three days of hearing. Becker did not present any of his own witnesses during his case-in-chief and instead relied entirely on calling witnesses from the Department, the Fish and Boat Commission, and the Bucks County Conservation District as of cross. Becker declined to present any witness on his own behalf to testify, for instance, that there was no sediment pollution to the waters of the Commonwealth or that any sediment pollution was not due to Becker's activities, or that the site had been adequately remediated. Allowing Becker to examine another Department witness as of cross who could not be identified and who may or may not offer testimony of any probative value does not justify reopening the record.

[2] The standard for reconsideration of interlocutory orders is even higher than that for final orders. *Kiskadden v. DEP*, 2014 EHB 737, 738 (quoting *Rural Area Concerned Citizens (RACC) v. DEP*, 2013 EHB 374, 375). A party seeking reconsideration of an interlocutory order must meet all of the criteria established under 25 Pa. Code § 1021.152 for final orders and also demonstrate extraordinary circumstances on top of that justifying reconsideration. *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23, 26-27. The criteria for reconsideration of final orders include:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
> (2) The crucial facts set forth in the petition:
> (i) Are inconsistent with the findings of the Board.

Becker has now filed a request to certify those two Orders for interlocutory appeal with Commonwealth Court. Becker's arguments in his request are quoted in their entirety:

> 1. The Board's Orders of January 21, 2016 and February 3, 2016 involve a controlling issue of law, and an immediate appeal is required to preserve this issue, and to materially advance the ultimate disposition of the matter.
>
> 2. There are no factual disputes; the issues are purely legal in nature.
>
> 3. The evidence sought to be introduced was not in existence prior to the close of the record, and thus it could not have been discovered prior thereto.
>
> 3. [sic] This meets the legal tests of 25 Pa. Code Section 1021.133 (b)(1-3).
>
> 4. As a consequence the foregoing, appellant also hereby requests a continuance of the filing date of his post-hearing brief of February 16, 2016.

(Request for Certification at 1.) The Department opposes the request, arguing that Becker has not met the requirements for an interlocutory appeal and that Becker's request is merely a delay tactic. We largely agree. On February 16, 2016, we denied Becker's request to certify the Orders for interlocutory appeal. We now issue this Opinion explaining our reasoning.

Interlocutory orders are an intermediate step in the ultimate resolution of a cause of action. Since they are not final, they are not immediately appealable, except in remarkable circumstances. As we have recognized before, "appeals of Interlocutory Orders are not favored by the law." *Clean Air Council v. DEP*, 2013 EHB 437, 440; *BethEnergy Mines, Inc. v. DEP*, 1987 EHB 941, 943. Certain interlocutory orders can be appealed as of right and others may be

---

(ii) Are such as would justify a reversal of the Board's decision.

(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a). Becker did not show in his motion for reconsideration that any of these criteria were present in our denial of his request to reopen the record. In addition, we found no reason to reconsider our decision and reopen the record to compel testimony from a Department program staff member whose connection to the site and the appeal is doubtful at best.

appealed only by permission of the appellate court. Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312. Rule 1311(a) states that an interlocutory appeal may be taken by permission pursuant to 42 Pa.C.S. § 702(b), which provides:

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

42 Pa.C.S. § 702(b) (emphasis added). To be appealable, an interlocutory order must first contain the pertinent language of 42 Pa.C.S. § 702(b) before a party may petition the appellate court for review. Pa.R.A.P. 1311(b). If the order does not contain the requisite language, a party must submit to the lower court or government unit an application to amend the order to include the language of Section 702(b).

When determining whether an immediate interlocutory appeal is appropriate, we assess each of the three criteria: (1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter. *Rausch Creek v. DEP*, 2013 EHB 851, 855; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. A party must satisfy all three criteria in its application. *Clean Air Council*, 2013 EHB at 440. Our decision of whether to amend an interlocutory order is discretionary. *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 550; *Mercy Hosp. of Pittsburgh v. Pa. Human Relations Comm'n*, 451 A.2d 1357 (Pa. 1982).

The first paragraph of Becker's request, of course, appears to be a rephrasing of 42 Pa.C.S. § 702(b).[3] However, Becker does not go much further than that. He never explains how any of the criteria apply. He makes the conclusory statement that there are no factual disputes and that the issues are purely legal in nature, but he does not bother to elaborate on the claim. He does not direct us to any case on point, or any case at all for that matter in his request. Becker does not even identify the controlling question of law for which he seeks review. He appears to be seeking review of the question of whether his motion to reopen the record met the requirements of our rules, and whether his attempt to later satisfy the rules in his motion for reconsideration met the standard under our rules for the reconsideration of an interlocutory order, but we do not believe that either of these issues present controlling questions of law in this case.[4] These Orders are purely procedural and wholly inappropriate for interlocutory appeal.

As we have stated before, interlocutory appeals are "primarily designed to allow the Commonwealth Court to consider pure questions of law." *Borough of Danville v. DEP*, 2008 EHB 399, 401. *See also City of Harrisburg v. DER*, 630 A.2d 974 (Pa. Cmwlth. 1993); *DER v. Rannels*, 610 A.2d 513 (Pa. Cmwlth. 1992); *UMCO Energy, Inc.*, 2004 EHB at 837. Instances where the Commonwealth Court has ultimately granted petitions for permission to appeal

---

[3] Becker does not specify the authority giving rise to his request. We have inferred that the request is being made pursuant to Pa.R.A.P. 1311 and 42 Pa.C.S. § 702(b).

[4] This situation is much different than a recent instance where the Board did certify an issue for interlocutory review following an Opinion and Order denying motions for summary judgment, *Waste Mgmt. v. DEP*, 2014 EHB 300, *aff'd*, 107 A.3d 273 (Pa. Cmwlth. 2015). In that case, Commonwealth Court considered the following issue involving the proper interpretation of the Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101):

> When seeking to raise revenue for its recycling program, does a county violate the funding provisions of the Municipal Waste Planning, Recycling and Waste Reduction Act by (a) requesting money and/or services from disposal facilities, (b) conditioning selection of a disposal facility on the facility's "tangible financial and/or programmatic support", or (c) seeking local financial assistance from disposal facilities.

107 A.3d 273, 278.

interlocutory orders have considered pure questions of law that get to the heart of one or more issues involving the merits of the case. *See, e.g.*, *Schell v. Guth*, 88 A.3d 1053 (Pa. Cmwlth. 2014) (considering trial court order denying summary judgment in case involving whether tort claims are barred by sovereign immunity); *Pa. Bd. of Prob. & Parole v. Pa. Human Rels. Comm'n*, 66 A.3d 390 (Pa. Cmwlth. 2013) (considering whether Pa. Human Relations Commission was collaterally estopped from investigating a discrimination claim already adjudicated by Pa. Civil Service Commission); *Burke v. City of Bethlehem*, 10 A.3d 377 (Pa. Cmwlth. 2010) (considering trial court order denying summary judgment on issue involving applicability of exception to governmental immunity for common law negligence action). Here, our decisions to not reopen the record and to not grant reconsideration do not involve issues that get to a controlling question of law on the merits of the case—mainly, whether Becker conducted unlawful activity without a permit and caused pollution to waters of the Commonwealth in violation of the Clean Streams Law and the applicable regulations.

Having determined that Becker's request for certification does not present a controlling question of law, we need not go any further. However, we also fail to see how certification of these Orders would materially advance the ultimate termination of the matter. Becker, for his part, never explains how this immediate appeal would advance the disposition of the initial appeal. If anything, we believe an interlocutory appeal would only further delay a matter that has languished in an adjudicatory purgatory as the parties slouched toward a settlement exanimate.

For these reasons we issued our Order denying the request for certification, a copy of which is appended to this Opinion.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 19, 2016

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

For the Commonwealth of PA, DEP:
Gina M. Thomas, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Heywood Becker
P.O. Box 180
Carversville, PA 18913

5382 Wismer Road
Pipersville, PA 18947

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of February, 2016, in consideration of the Appellant's request for certification for interlocutory appeal of the Board's Orders dated January 21, 2016 and February 3, 2016, and in consideration of the Department's response to the Appellant's request, it is hereby ordered that the request for certification is **denied**. It is further ordered that the Appellant's request for a continuance of the filing of his post-hearing brief is **denied**. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 16, 2016

c: For the Commonwealth of PA, DEP:
Gina M. Thomas, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Heywood Becker
P.O. Box 180
Carversville, PA 18913

5382 Wismer Road
Pipersville, PA 18947

M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 25, 2016**

OPINION AND ORDER ON
REQUEST FOR EXTENSION OF TIME

By Michelle A. Coleman, Judge

Synopsis

The Board denies a joint request for an extension of the dispositive motion deadline in a matter concerning a public water supply.

O P I N I O N

Appellant, M.C. Resource Development Company, appealed a January 28, 2015 letter from the Department of Environmental Protection revoking Appellant's public water supply permit on February 27, 2015 because, according to the Department, Appellant no longer met the definition of a public water system. On March 10, 2015, Appellant filed a Petition for Supersedeas and an Application for Temporary Supersedeas. The Board ordered the parties to participate in a conference call to discuss the petition on March 12, 2015. On that date the temporary supersedeas was granted and a hearing on the supersedeas was scheduled for March 20, 2015. The temporary supersedeas was to remain in effect until the Board's decision on the supersedeas was issued. Following a review of the supersedeas hearing transcript, we issued our

Opinion and Order on May 5, 2015. *See M.C. Res. Dev. v. DEP*, EHB Docket No. 2015-023-C (Opinion, May 5, 2015). Because at that point there was no record evidence of environmental harm that would result from allowing Appellant to continue to operate under its permit, and because there was a demonstration of economic harm to Appellant and its business partners, we granted the petition for supersedeas.

On June 16, 2015, the Board received a joint request for a 60-day extension of the discovery and dispositive motion deadlines. This request was granted. Later, on September 30, 2015, the Board received another joint request for extension of the deadlines. This request was also granted, and the deadline for completing discovery was extended to January 28, 2016. A joint request of February 24, 2016, submitted after the close of discovery, now asks that the dispositive motion deadline, currently set for February 29, 2016, be extended by 45 days. The letter states, without any further information, that a deposition was taken on February 18, 2016, after the close of discovery, and that an extension "*may* allow for the possibility of further settlement discussions…." (Letter of Feb. 26, 2016 (emphasis added).)

As we have stated before, "[a] supersedeas is an extraordinary remedy that is only appropriate when there is a clear demonstration of requisite need." *M.C. Res. Dev. v. DEP*, slip op. at 4 (citing *Guerin v. DEP*, 2014 EHB 18, 22). In reaching our initial decision to grant the supersedeas, the Board relied upon pertinent language contained in *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649: "The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future." *M.C. Res. Dev.*, slip op. at 12 (quoting *Global Eco-Logical Servs.*, 1999 EHB at 651).

It now has been almost a year since the granting of the temporary supersedeas, which then, after hearing, became a supersedeas of the Department's order. We are hesitant to indefinitely extend our supersedeas absent a more robust showing of diligent prosecution of this matter from the parties. The parties' requests thus far have not provided us with any indication on the progress that has been made on the issues involved in this appeal. We do not know, for instance, if any studies have been conducted by the parties, or if additional witnesses have been identified and deposed, or if settlement is even a real possibility. Without a justifiable reason shown that this matter is not languishing, this Board has no inclination to grant another extension of time.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 25th day of February, 2016, it is hereby ordered that the parties' joint request to extend the deadline for filing dispositive motions is **denied** without prejudice.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: February 25, 2016

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

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
David Stull, Esquire
(*via electronic filing system*)

For Appellant:
Brett A. Datto, Esquire
Lauren Schwimmer, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2015-087-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	**Issued: February 29, 2016**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal filed by a municipality and its municipal authority challenging a revision to a neighboring municipality's Act 537 plan because, among other things, the appellant has failed to prove that the plan revision is not able to be implemented under the Sewage Facilities Act and the corresponding regulations.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1966, as amended, 35 P.S. §§ 750.1 – 750.20a ("Sewage Facilities Act" or "Act 537"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1 – 691.1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stipulation ("Stip.") 1.)

2. The Borough of Kutztown is a borough organized under the laws of the Commonwealth of Pennsylvania, with its principal office at 45 Railroad Street, Kutztown, Berks County, Pennsylvania 19530. (Stip. 2.)

3. Kutztown Municipal Authority is a municipal authority incorporated under the Municipalities Act of 1945, with its principal office at 45 Railroad Street, Kutztown, Berks County, Pennsylvania 19530. (Unless otherwise noted, the Borough of Kutztown and the Kutztown Municipal Authority will be collectively referred to as "Kutztown.") (Stip.3.)

4. Maxatawny Township ("Maxatawny") is a township of the second class organized under the laws of the Commonwealth of Pennsylvania, with its principal office at 127 Quarry Road, Suite I, Kutztown, Berks County, Pennsylvania 19530. (Stip. 4.)

5. Advantage Point, LP ("Advantage Point") is the owner and developer of a parcel of real estate located in Maxatawny Township commonly known as the Advantage Point Apartments. (Stip. 5.)

6. The Advantage Point Apartments would consist of a three-building, 337-unit apartment building development with an additional clubhouse facility. (Stip. 6.)

7. Maxatawny developed its first Act 537 plan in 2001 pursuant to a consent agreement entered into with the Department that was prompted by the failing of certain on-lot systems in a portion of the Township referred to as "Area A." (Notes of Transcript page ("T.") 53-54.)

8. Maxatawny's 2001 Act 537 plan contemplated the sewering of Area A, connecting the properties that were failing, and building a new sewer plant. (T. 53-54.)

9. The sewage infrastructure of Maxatawny and Kutztown is to some extent currently connected. (T. 117-18.)

10. Sewage is currently pumped from Maxatawny's Koffee Lane Pumping Station through Kutztown's 20-inch interceptor main, where it commingles with Kutztown's sewage and then flows through the interceptor main to a point just outside Kutztown's wastewater treatment plant. (T. 9, 58-59.)

11. At that point there is a flow diversion facility, or flow splitter, which apportions roughly the same amount of sewage that is contributed by each municipality and diverts a comparable amount of sewage to Maxatawny's Influent Pump Station ("IPS Pumping Station"), where it is then transported to Maxatawny's wastewater treatment plant. (T. 9-10, 59.)

12. The flow splitter is currently connected to the IPS Pumping Station by an 8-inch gravity sewer line. (T. 60, 62; Maxatawny Exhibit ("M. Ex.") 5 at Plan Sheet PM-1.)

13. Kutztown has not executed a certification of capacity for the interceptor main in connection with Maxatawny's request for a planning exemption for the Advantage Point project, *see Borough of Kutztown v. DEP*, 2014 EHB 1048, *aff'd*, No. 2369 C.D. 2014 (Pa. Cmwlth. Oct. 16, 2015). (T. 55.)

14. Because Kutztown has not authorized the use of its line for the Advantage Point project, absent a new line, there is no way for Maxatawny to get new sewage flow from the Advantage Point project to its wastewater treatment plant. (T. 54-55, 57.)

15. Maxatawny's existing official plan is inadequate to meet the sewage needs of Advantage Point's new development. (T. 55, 57-58.)

16. Accordingly, Maxatawny is now seeking to construct a new force main sewer line that would circumvent the use of Kutztown's interceptor main. (T. 54-55, 57, 97; M. Ex. 2.)

17. On April 8, 2015, Maxatawny submitted to the Department through its engineer, Christopher Falencki, P.E., revisions to its current 537 plan. (Stip. 7; Kutztown Exhibit ("K. Ex.") 2.)

18. Maxatawny's plan revision identified its purpose as the relocation of the Area A force main. (Stip. 8; T. 54; K. Ex. 2.)

19. Maxatawny has proposed to relocate and reroute the existing force main that originates from the Koffee Lane Pumping Station. (Stip. 9.)

20. To achieve this, Maxatawny proposes to construct a dedicated force main in the public right of ways along state highways leading to the IPS Pumping Station located north of Route 222 on the north side of Kutztown. (T. 58-61, 77-78, 97, 120; M. Ex. 2 at Section F, M. Ex. 5 at PM-0, PM-1.)

21. Maxatawny plans to reroute a portion of the existing 8-inch gravity sewer line that runs between the flow splitter and the IPS Pumping Station and connect it to the proposed force main that will enter Kutztown's property from the Krumsville Road right of way. (T. 60, 62-63, 77-78; M. Ex. 5 at PM-1.)

22. The rerouted 8-inch gravity line will allow Maxatawny to pump sewage directly into the IPS Pumping Station rather than using the flow splitter. (T. 60, 62-63, 77-78; M. Ex. 5 at PM-1.)

23. After the proposed force main is connected to the rerouted segment of the 8-inch gravity line, Maxatawny will cap and abandon in place the remainder of the existing 8-inch gravity line at the flow splitter. (T. 76, 79; M. Ex. 4, M. Ex. 5 at PM-0, PM-1.)

24. There is no change to the service area proposed in Maxatawny's plan revision. (T. 58.)

25. Kutztown was first informed of Maxatawny's plan revision by the Department. (T. 101; K. Ex. 5.)

26. Counsel for the Department provided counsel for Kutztown a copy of the proposed plan revision on May 4, 2015. (Stip. 11; T. 101; K. Ex. 5.)

27. The Department indicated to Kutztown that Kutztown could provide comments directly to the Department. (T. 101.)

28. Comments on plan revisions are typically submitted to the municipality undertaking the plan revision and the municipality then addresses those comments. (T. 101-02.)

29. The Department indicated to Kutztown that it intended to take action on the plan revision soon after the Department completed its review. (T. 102.)

30. Following receipt of the proposed plan revision from the Department, Kutztown provided a copy of the plan revision to its engineering consultant, Daryl A. Jenkins, P.E. (Stip. 12.)

31. Mr. Jenkins is the engineer for both Kutztown Borough and the Kutztown Municipal Authority. (Stip. 13; T. 7.)

32. Jenkins provided a letter dated May 13, 2015 to Gabriel Khalife, Manager for both Kutztown Borough and the Kutztown Municipal Authority, commenting on Maxatawny's proposed plan. (Stip. 14; K. Ex. 3.)

33. Jenkins's letter provided four comments on the plan revision. (T. 10-11; K. Ex. 3.)

34. Jenkins's comments are prefaced by the statement that his "review is intended to provide a general summary of the content of the planning module and does not provide commentary regarding the completeness or accuracy of the information contained in the document." (K. Ex. 3.)

35. Jenkins's first comment states:

> Section F (Project Narrative) describes the purpose of the project to be the construction of a new force main that will "relocate and reroute" the existing sanitary sewer discharge from the Koffee Lane sewage pumping station. The new force main would connect directly to the influent pumping station currently operated by the Maxatawny Township Municipal Authority. The planning module does not indicate whether there is intent to permanently abandon use of the Kutztown Interceptor as a means for transporting sewage from the Koffee Lane pumping station.

(K. Ex. 3.)

36. Jenkins's second comment states:

> The proposed route for the force main will almost exclusively be in State Highway rights-of-way, and will therefore require a Highway Occupancy permit issued by the Pennsylvania Department of Transportation. The Borough of Kutztown maintains both water and sewer facilities within SR 1021 and SR 0737. It also appears that gas lines may be located in portions of the project route as well. The Borough should ensure that standard practice for the separation of utilities is maintained for the design of this project to avoid future utility conflicts. The PA One Call System requires that utility designers (and Owners) comply with certain standards of care to minimize these types of potential utility conflicts. The Borough should provide relevant information regarding its utilities within the proposed project route if the project moves forward, and similarly, the designer of the project should provide relevant information regarding the force main design to avoid potential conflicts.

(K. Ex. 3.)

37. Jenkins's third comment states:

> The influent pumping station for the wastewater treatment plant is located within an easement on property owned by the Borough of Kutztown. The solicitor should provide comment on whether any modifications would be needed to the existing easement agreement to accommodate the construction of the proposed force main. We have not reviewed a copy of the easement agreement.

(K. Ex. 3.)

38. Jenkins's fourth comment states:

> The planning module does not make mention of the existing flow splitter that pushes sewage flow from the Kutztown Interceptor to the Maxatawny Pumping influent pumping station. The Borough should address the ultimate fate of this

> structure with Maxatawny Township, as it would not be needed if flow is transported via a new force main.

(K. Ex. 3.)

39. The property referenced in Jenkins's third comment is located in Maxatawny Township, but Kutztown owns the property. (T. 35-38, 73.)

40. Maxatawny has an existing Grant of Right-of-Way and Easement from Kutztown for that property for the flow splitter and the IPS Pumping Station. (T. 13-14; K. Ex. 8.)

41. The Grant of Right-of-Way and Easement grants from Kutztown to Maxatawny:

> [A] force main easement to accommodate the needs and operation of the Treatment Facility, as more fully set forth herein, which force main shall consist of one (1) pipe line not exceeding six inches (6") in diameter through which sanitary sewage will be pumped a distance of approximately 2,900 feet from the flow splitting facility located on the leased premises at the Borough Sewage Treatment Plant along Route 737 in Maxatawny Township to the [Saucony Creek Regional Authority ("SCRA")] Treatment Plant located on the SCRA Site (together with all substitutions and replacements therefor, the "Force Main").

(K. Ex. 8 at ¶ G.)

42. Kutztown's attorneys in a letter submitted to the Department state, "The planning module does not state a basis on which Maxatawny may assert a right to enter and cross over Kutztown's property, for this purpose. This issue creates a clear property dispute, which must be addressed by the Courts prior to any action of the Department regarding the Planning Module." (K. Ex. 4.)

43. There is no record evidence that Kutztown will in fact prevent Maxatawny from crossing its property. (T. 7-44; K. Ex. 1-11.)

44. Typically, the Department requires private property owners to provide agreements evidencing easements and rights of access, but the Department does not require that from

municipalities because it assumes that municipalities can exercise the power of eminent domain to ultimately resolve any disputes. (T. 104, 116-17.)

45. Jenkins testified that he did not provide a technical review concerning the merits of the module; the purpose of his letter was merely to provide a summary of the proposed project to Kutztown's Borough Council. (T. 34.)

46. Jenkins did not make any recommendations as to what action he believed the Department should take with regard to the plan revision. (T. 31, 33-34.)

47. Kutztown submitted Jenkins's letter to the Department in conjunction with another letter drafted by Kutztown's counsel dated May 21, 2015, which summarizes Jenkins's comments and provides some additional commentary; however, this letter was not sent to the Department until the afternoon of May 22, 2015. (Stip. 15; K. Ex. 4.).

48. The Department expected to receive Kutztown's comments by May 20, 2015. (K. Ex. 6.)

49. The Department approved Maxatawny's plan revision earlier in the day on May 22, 2015, through a letter sent to the Maxatawny Township Supervisors, Kutztown Borough, Weiser Engineering Consultants, LLC, and the Berks County Planning Commission. (Stip. 16; T. 102-03; K. Ex. 1.)

50. Even though Kutztown's comments were submitted after the Department had issued its approval for the plan revision, the Department still considered Kutztown's comments post hoc. (T. 103-05; K. Ex. 6.)

51. None of Kutztown's comments prompted the Department to reconsider its approval of the plan revision. (T. 103-05; K. Ex. 6.)

52. Kutztown's comments were not sent directly to Maxatawny, but the Department forwarded the comments to Maxatawny. (T. 78, 88-89.)

53. Maxatawny subsequently completed a second plan revision in July 2015, which addressed minor concerns from PennDOT regarding the proposed route of the sewer lines, and Maxatawny's comments on the fate of the flow splitter. (T. 74-76, 95; M. Ex. 4, M. Ex. 5.)

54. The July 2015 plan revision notes with regard to the flow splitter, and Jenkins's first and fourth comments, that the existing gravity line will be capped and abandoned in place after relocation of the force main. (T. 75-76, 78-79; M. Ex. 5 at PM-0, PM-1.)

55. On August 7, 2015, the Department accepted the minor changes contained within Maxatawny's July 2015 revision. (Department Exhibit ("DEP Ex.") 7.)

56. Nothing that is proposed in Maxatawny's plan revision would require Kutztown to revise its plan. (T. 98-99, 118.)

57. There was nothing in the plan revision that required publication or notice of the plan revision in a local newspaper. (T. 101; M. Ex. 2 at Section P.)

DISCUSSION

Advantage Point, LP wants to build a 337-unit apartment complex in Maxatawny Township. The apartments are projected to generate about 69,000 gallons per day of sewage. The original plan was for this sewage to flow through a sewer interceptor line owned by Kutztown that currently handles sewage from both Kutztown and Maxatawny. Kutztown has refused to allow the use of its line for handling the additional sewage from the Advantage Point project. *See Borough of Kutztown v. DEP*, 2014 EHB 1048, *aff'd*, No. 2369 C.D. 2014 (Pa. Cmwlth. Oct. 16, 2015) ("*Kutztown I*"). Whether Kutztown's refusal is justified or not, use of the line for the foreseeable future is not an option.

As a result, Maxatawny has determined, quite correctly, that its existing sewage facilities official plan is inadequate to meet the sewage needs of the new land development. Under the Sewage Facilities Act, 35 P.S. §§ 750.1 - 750.20a, ("Act 537" or the "Act"), every municipality must develop a plan for handling and treating sewage within its boundaries. 35 P.S. § 750.5. These plans generally "must describe existing sewage disposal methods, take into consideration existing plans for population growth and land development, [and] provide for future needs by specifying plans for sewage treatment facilities that will adequately prevent the discharge of untreated or inadequately treated sewage or other waste into any waters." *Del. Riverkeeper v. Dep't of Envtl. Prot.*, 879 A.2d 351, 352 n.2 (Pa. Cmwlth. 2005) (citing 35 P.S. § 750.5). The Act also requires that each municipality revise its plan as required by the applicable regulations or by order of the Department. 35 P.S. § 750.5. Under the regulations, municipalities are required to revise their plans whenever they determine "that the plan is inadequate to meet the existing or future sewage disposal needs of the municipality or portion thereof." 25 Pa. Code § 71.12(a). *See also* 25 Pa. Code § 71.51(a)(2) (municipality shall revise plan when inadequate to meet needs of new land development). Therefore, Maxatawny is legally obligated to revise its official plan to figure out some way to handle Advantage Point's sewage. 25 Pa. Code §§ 71.12(a) and 71.51(a)(2); *Winner v. DEP*, 2014 EHB 1023, 1030; *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 771; *Walker v. DEP*, 2007 EHB 117, 129; *Carroll Twp. Bd. of Supervisors v. DER*, 1993 EHB 1290, 1295; *South Huntingdon Twp. Bd. of Supervisors v. DER*, 1990 EHB 197, 205.[1]

Kutztown is frustrated by Maxatawny's refusal to abide by an intermunicipal sanitary sewage service and treatment agreement entered into between the two municipalities in 2006.

[1] Indeed, if Maxatawny had not acted, Advantage Point could have pursued a private request with the Department, seeking an order from the Department because of the inadequacy of the existing plan to meet its needs. 35 P.S. § 750.5(b).

The failed agreement is the subject of protracted and unresolved litigation before the Court of Common Pleas that has been going on for years and may go on for years more. Maxatawny wants out of that agreement and Kutztown is trying to prevent that. Among other things, Kutztown is attempting to block Maxatawny from addressing sewage from the Advantage Point project in any way until the differences regarding the intermunicipal agreement are worked out. In other words, it is using sewage concerns to block that development. In *Kutztown I*, Kutztown successfully blocked Maxatawny from using Kutztown's sewer line to handle Advantage Point's sewage. As things currently stand, that line is the only way to get sewage from the Advantage Point project to Maxatawny's sewage treatment plant.

Faced with Kutztown's intransigence regarding the use of its interceptor line, Maxatawny has come up with a solution for meeting Advantage Point's need for sewage disposal: Maxatawny will simply build its own line, thereby eliminating the need to use Kutztown's line. Maxatawny revised its plan to provide for this approach, and the Department approved it. Kutztown filed this appeal from that approval. Advantage Point intervened on the side of Maxatawny and the Department.

In an effort to stop Maxatawny's end run around the use of Kutztown's line, and, presumably, the intermunicipal agreement, Kutztown continues to argue in this appeal that the Department should force Maxatawny to remain connected to Kutztown's line or at least defer any action on the revised plan until the other litigation between the parties in the Court of Common Pleas is resolved. It alternatively argues that Maxatawny's new plan cannot be implemented because the new sewer line needs to cross a piece of property that happens to be owned by Kutztown, and it has not been established that Maxatawny has the right to do that.

Kutztown further argues that the Department failed to ensure that the plan satisfied all of the regulatory criteria that must be met before a plan revision is approved.[2]

Turning first to Kutztown's argument that the Department should have disapproved Maxatawny's new plan revision because of the Court of Common Pleas litigation, Kutztown does not direct our attention to any regulation or other authority that supports its proposition that the Department could have prohibited the disconnection from Kutztown's line or ordered Maxatawny to comply with the intermunicipal agreement, or simply put its review on indefinite hold. Kutztown's argument fails for that reason alone. In any event, the Department argues quite persuasively that Kutztown has utterly failed to explain why that litigation should have compelled the Department to disapprove the plan revision. Kutztown tells us over and over again that it is engaged in litigation with Maxatawny, but there is nothing on the record in this appeal to explain the connection between that litigation and the new plan revision. For example, Kutztown has not said that, if it prevails in that litigation, Maxatawny would be precluded from disconnecting from Kutztown's line. For all we know, Kutztown could completely prevail in that litigation but that would still not somehow prevent Maxatawny from building and using its own line. We have no idea whether compliance with the 2006 intermunicipal agreement and Maxatawny's new plan are mutually incompatible. We have no basis for simply assuming that

[2] In third-party appeals of Department actions the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, No. 789 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Jan. 6, 2016); *Gadinski v. DEP*, 2013 EHB 246, 269. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). In this appeal, Kutztown must show by a preponderance of the evidence that the Department erred in approving the Maxatawny plan revision contemplating a new sewer line.

they are as Kutztown would have us do. Kutztown bears the burden of proof and it quite simply has failed to satisfy that burden.

Kutztown says that the contract litigation was discussed in *Kutztown I*. Of course, we must decide the instant appeal based on the record developed in this appeal, but putting that aside, *Kutztown I* involved a different approach entirely. The details of the contract litigation actually played no role in our decision in that case. Most importantly, even if that litigation was described in that case, it was still incumbent upon Kutztown to explain why it matters here, and it has failed to do so. The mere existence of a contract dispute without any explanation of its relevance certainly does not preclude the Department from acting on the revision. In an analogous situation involving a zoning dispute instead of a contract dispute in *Duckloe v. DEP*, 1997 EHB 97, we said:

> Although the Department must consider municipal zoning requirements in its review of sewage plan revisions, and must respect any judicial resolution regarding zoning and land use rights, *Oley Township v. DER*, EHB Docket No. 96-198-MG (Opinion issued November 6, 1996), there is nothing in the Sewage Facilities Act or its regulations which precludes the Department from acting upon a sewage plan revision simply because litigation involving zoning is *pending* before a court of common pleas. In fact, the Department is required to act upon a plan revision within 120 days of its submission with supporting documentation and may not be free to wait for the outcome of what may be extensive litigation. 25 Pa. Code § 71.32(b).

Duckloe, 1997 EHB 97, 104. Indeed, the Department may not have the authority under the Sewage Facilities Act to indefinitely suspend its review of a plan revision due to unrelated litigation.

If we were to assume for the sake of argument that Maxatawny's new plan is inconsistent with the intermunicipal agreement and an approach more consistent with that agreement would be a "better" plan, it would not matter. The Sewage Facilities Act places no obligation upon the

Department to tell a municipality how to develop an appropriate sewage facilities plan. *Bear Creek Twp. Bd. of Supervisors v. DEP*, 2008 EHB 86, 93. As we said in *Northampton Township v. DEP*, 2008 EHB 563, 567, "Neither the Department nor this Board function as überplanners, and we must be wary of any scheme that would have us make planning choices in lieu of the municipality." As stated by the Commonwealth Court in affirming our Adjudication in *Oley Township v. DEP*, 1996 EHB 1098, although sewage facilities planning touches on a divergent set of issues in the law, it is not the Department's place to insert itself into all of these areas of dispute, which are properly resolved before other tribunals:

> Under the Sewage Facilities Act, the [Department] is entrusted with the responsibility to approve or disapprove official plans for sewage systems submitted by municipalities, but, while those plans must consider all aspects of planning, zoning and other factors of local, regional, and statewide concern, it is not a proper function of the [Department] to second-guess the propriety of decisions properly made by individual local agencies, even though they obviously may be related to the plans approved. Moreover, impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge to the actions of those agencies as the law provides, not for an indirect challenge through the [Department]. As we read the Sewage Facilities Act, the function of the [Department] is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management . . .

Oley Twp. v. Dep't of Envtl. Prot., 710 A.2d 1228, 1230 (Pa. Cmwlth. 1998) (quoting *Cmty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468, 478 (Pa. Cmwlth. 1975)). *See also Gilmore v. DEP*, 2006 EHB 679, 690 (citing *Force v. DEP*, 1998 EHB 179, 189; *Young v. DER*, 1993 EHB 380, 407, *aff'd*, 1032 C.D. 1993 (Pa. Cmwlth. 1994)). Under 25 Pa. Code § 71.21(a)(6), the alternative selected by the municipality for providing sewerage need not be the "best" one but need only be an "acceptable" one from a technical, environmental, and administrative standpoint. The deletion of the word "best" from former 25 Pa. Code § 71.21 was "intended to eliminate

subjective judgments among equally acceptable alternatives." 27 Pa.B. 5880 (Nov. 8, 1997). *See Noll v. DEP*, 2004 EHB 712, 721-22. It was neither the Department's nor our responsibility to determine whether Maxatawny has selected the "best" plan. If the plan revision satisfied the applicable regulations and was otherwise reasonable, the Department acted properly in approving it.

The applicable regulatory criteria for the Department's review are set forth at 25 Pa. Code § 71.32(d), which provides that the Department shall consider the following:

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

Kutztown argues that Maxatawny's new plan revision is not "able to be implemented," as required by 25 Pa. Code § 71.32(d)(4). The basis for this argument is that Kutztown happens to

own a parcel of land that the new sewer line needs to cross. Kutztown says that Maxatawny's legal right to cross that parcel has not been established.

The Department admits that it "assumed" Maxatawny had access to the piece of property. (DEP Brief at 33.) Timothy Wagner, the Environmental Group Manager for the Department's Clean Water Program Planning Section, testified that the Department does not typically require documentation evidencing property access to be submitted for municipal projects because the Department presumes that municipalities will be able to negotiate an easement, or if not, municipalities have the power to condemn the property through eminent domain. (T. 104.) The fact that Kutztown, another municipality, is the property owner in this case made no difference according to Wagner, although he admitted that he did not know whether one municipality could condemn property owned by another municipality. (T. 104, 107.)

At the planning stage there is no need to definitively prove that the chosen method of sewage disposal can be done to a certainty. Rather, the municipality is only required to show that the proposal is capable of being done or it is feasible. We have consistently held as much in the past when analyzing the planning regulations. In *Noll v. DEP*, 2005 EHB 505, we interpreted the regulatory language in Section 71.32(d)(4) requiring the Department to consider whether a plan or plan revision is "able to be implemented" as not requiring the Department to ensure with 100-percent certainty that a plan can be implemented as outlined in the planning proposal. In *Noll*, the township's plan revision proposed in part to expand the area of sewer service. The Appellants challenged the economic analysis that accompanied the plan revision, arguing that the Department did not adequately consider the true costs of the plan revision in terms of costs to homeowners and the financing base for the system. We looked at the various regulatory provisions governing the Department's review, which provide, for instance, that the Department

must evaluate the "feasibility for implementation of the selected alternative," 25 Pa. Code § 71.61(d)(2), and the "technical feasibility" of the selected alternative, 25 Pa. Code § 71.61(d)(1). We read these provisions in parity and similarly construed the "able to be implemented" language to mean that the Department must ensure that a plan is "feasible," meaning "capable of being done." *Noll*, 2005 EHB 505, 520 (quoting *Montgomery Twp. v. DER*, 1995 EHB 483, 522). We held that "[c]ertainty of implementation is not the standard, rather capability of implementation is the standard." *Noll*, 2005 EHB at 520.

In reaching that holding in *Noll*, we relied on *Montgomery Township v. DER*, 1995 EHB 483, which involved a plan revision that sought to replace an aging sewage treatment plant with a spray irrigation facility. In *Montgomery Township*, we looked at the regulations to determine the meaning of the phrases "technical feasibility" and "feasibility of implementation" as used in 25 Pa. Code 71.61(d), concerning the alternatives analysis for a plan or plan revision. We held that the term feasibility did not equate to absolute certainty, finding support among the other sewage facilities planning regulations, including Section 71.32(d)(4), which similarly speak in less than definite terms:

> This position is supported by other provisions within the Department's planning regulations. For example, under 25 Pa. Code § 71.21(a)(5)(vi), a plan revision must, among other things, determine whether each of the discussed alternative methods of sewage treatment and disposal are able to be implemented. Similarly, under 25 Pa. Code § 71.32(d)(4), the Department must consider, in approving or disapproving an official plan revision, whether the revision is able to be implemented.

Montgomery Twp., 1995 EHB 483, 522. Ultimately, we held that although a plan revision must demonstrate technical feasibility, it does not mean that "the Department could not approve the Plan Revision unless it was 100% certain the proposed spray irrigation system could be implemented. Such a construction of the Department's regulations would be absurd, since it

would make the application for a Water Quality Management Permit meaningless." *Montgomery Twp.,* 1995 EHB at 521.

We reached the same conclusion in *Lehigh Township v. DEP,* 1995 EHB 1098:

> [W]hile approval of a plan revision must consider the "feasibility" of implementation of the selected alternative in relation to applicable administrative and institutional requirements under 25 Pa. Code § 71.61(d), this does not mean that plan approval must conclude that the project is 100% certain of implementation as a final matter never to be reconsidered under any circumstances. Instead, at the permit approval stage, the requirements of the permit program must be fully evaluated. What may have appeared at the planning stage to be generally feasible may appear at the permit stage not to be acceptable as a treatment method and location because the discharge from the facility will be so deleterious on the receiving stream that even with additional treatment beyond that considered in the planning stage the discharge would not be permissible.

Lehigh Twp., 1995 EHB 1098, 1112 (internal citation omitted).

What emerges from our prior decisions is that, at the planning stage, potential issues need to be identified and carefully evaluated, but there is no requirement that the methods selected and proposals made for sewage treatment need to be absolutely certain of implementation. The regulations repeatedly employ less than definite language suggesting that plans must contain proposals that have a reasonable chance of succeeding, but the regulations in no way demand perfection at the planning stage. There are no bright line rules for what constitutes "able to be implemented," and it is committed to the Department's discretion on a case-by-case basis. Any indication of a legitimate barrier to implementation is worthy of the Department's close consideration when exercising its judgment on whether to approve a plan or plan revision, but it does not necessarily prevent the Department from approving a plan or revision that presents a reasonable likelihood of succeeding.

Here, we find that the Department reasonably concluded that Maxatawny has done enough to show that its proposed force main is capable of being implemented, even in the face of Kutztown's allegation that Maxatawny's legal right to cross Kutztown's property has not been established. The plan has a reasonable likelihood of succeeding. First, we are not entirely sure there is a "property dispute" here. No witness for Kutztown testified that Kutztown will deny access to the parcel in question when it comes time to lay the line. Kutztown only put on two witnesses during its case-in-chief—Daryl Jenkins, Kutztown's engineer, and Gabriel Khalife, Kutztown's borough manager. Even during a series of highly leading questions from counsel, Jenkins never says that Kutztown will not allow Maxatawny to use the parcel of property in question. (T. 14-15.) In fact, Jenkins at one point summarizes the third comment in his letter regarding an existing easement for the parcel as a "recommendation…that the Borough Solicitor should take a look at that easement to see if anything needed to be done to *accommodate* the proposed force main connection." (T. 10 (emphasis added).) Jenkins on cross examination made it clear he was not recommending any action for the Department to take on the plan revision, instead saying that his comments were meant to simply provide a summary of the revision for the Kutztown Borough Council. (T. 31, 34.) Khalife's testimony, spanning only seven pages of transcript including his cross examination, merely mentions that litigation exists, but never explains whether or not that litigation will impact Maxatawny's access to the property or whether Kutztown will seek to block that access regardless of the litigation. (T. 38-44.) Kutztown's attorneys sent a letter to the Department identifying the use of Kutztown's property, but importantly the letter does not represent that Kutztown will in fact attempt to prevent Maxatawny from crossing the property. (K. Ex. 4.) There is no other evidence that Kutztown has barred Maxatawny from the property. It seems from counsel's letter that there is, at most, the

possibility of a dispute, or the potential or basis for a dispute, but there is no evidence of an actual dispute. Kutztown's proposed findings of fact do not include a proposed finding that Kutztown intends to preclude Maxatawny from accessing its property.

It is true that Kutztown argues in its brief that it objects to Maxatawny's plan for installing a new force main on Kutztown's property. (See, e.g., Kutztown Brief at 11.) However, again, this statement is not supported by a citation to the record. Arguing in a brief that Kutztown objects to Maxatawny's plan, and proving that Kutztown intends to or will actually preclude Maxatawny from access are two different things, and Kutztown has done the former but not the latter. At best, the record is inconclusive on this point, with no witness credibly supporting Kutztown's claim. To be clear, we are not suggesting that there will not eventually be a dispute either. Rather, we are simply pointing out that Kutztown has the burden of proof and it has failed to satisfy it on a key premise underlying its case.

Even if Kutztown decides to block access to the parcel, Maxatawny is not without recourse. Absent agreement, Maxatawny can pursue relief in the courts based on, perhaps, an existing easement agreement between the parties associated with the parcel that may or may not authorize access (FOF 40, 41), or eminent domain. We need not and indeed cannot pass judgment on the likelihood of success of such claims, other than to observe that Maxatawny appears to have colorable options.

Further, in considering whether the Department acted reasonably in concluding that the plan can be implemented, we need to view Kutztown's supposed "property dispute" not in isolation but rather in light of the totality of the circumstances faced by Maxatawny. Maxatawny *must* provide for Advantage Point's sewage. The sewage needs of the Township are not being met. Maxatawny's options for meeting its legal obligations to provide for sewage are severely

constrained at this point. Kutztown's assertions that use of its line and/or full compliance with the intermunicipal agreement is an available alternative strike us as rather disingenuous. In essence, Kutztown has attempted to place Maxatawny into a Catch-22. Kutztown wants to force Maxatawny to continue to use Kutztown's interceptor line while at the same time refusing to allow the additional sewage flow from the Advantage Point project to go through the line—sewage that Maxatawny is obligated to accommodate under the law—unless Maxatawny capitulates with respect to the intermunicipal agreement. Yet, Maxatawny cannot be expected to give up all of its rights in its much broader dispute with Kutztown to accommodate one development. The Advantage Point project is being held hostage for reasons that have nothing whatsoever to do with the merits of the project itself, the lack of available capacity, environmental protection, or anything else specific to the project's sewage flow. The Sewage Facilities Act was not intended to be used as a tool to quell otherwise appropriate development. In the end, we do not have the sense that Maxatawny's plan faces insurmountable difficulties or that it will not eventually be implemented. The Department's determination to the same effect was reasonable and consistent with the regulatory standard.

Kutztown relies heavily on *Rausch Creek v. DEP*, 2013 EHB 587 for what it argues is the precept that the Department does not have the authority to resolve property disputes on their merits. While Kutztown argues that the Department, by approving the plan revision, is effectively adjudicating the property dispute between Kutztown and Maxatawny, that is simply not the case. The Department's planning approval does not authorize Maxatawny to enter Kutztown's property. The Department is not rendering a legal opinion on the purported dispute between Kutztown and Maxatawny, and neither are we. The Department's approval here does not authorize any party to violate any other provision of the law or otherwise condone a party to

fail to fulfill any contractual obligation. The Department's approval of a plan revision simply allows Maxatawny to move forward with all of the other steps that will need to be taken to complete the project, including obtaining property access.

Furthermore, unlike the case of a mining company that must show an unambiguous right to mine the property in question that we addressed in *Rausch Creek*, there is no statute, regulation, or case law that clearly requires a municipality engaged in sewage facilities planning to prove that it has property access at the planning stage.[3] As far as we can tell, no such requirement appears on the Department's plan revision application form either.

It is true that the Department relies on 25 Pa. Code § 71.52(a)(6), which requires a municipality to provide documentation establishing the ability to implement a plan revision, to normally require a planning municipality to supply agreements that show that a developer has a right of property access if a private project is involved, but not if the municipality itself is installing the infrastructure. (T. 106-07, 116.) The Department takes this approach because it assumes that municipalities can exercise eminent domain if they need to. (T. 107.) However, Section 71.52(a)(6) does not expressly require proof of land access. Even if it can be interpreted to authorize the Department to require documentation in some cases, it certainly does not require that proof be provided in every case. It is a rather vague regulation that seems to leave a lot of room for the exercise of discretion. The Department did not exercise that discretion unreasonably in this case. Even where documentation is requested, the regulation does not

[3] *Cf. Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, 244:

> This is not a case like *George M. Lucchino v. DER et al.*, 1994 EHB 380, and *Croner, Inc. and Frank Popovich v. DER*, 1993 EHB 271, where the statute required the permittee to present proof of ownership or other right of entry before a permit could be issued. No such requirement exists in the [Dam Safety and Encroachments Act]. Nor is it a case like *Swanson v. DER*, 1984 EHB 681, and *Cooper v. DER*, 1982 EHB 250, where similar requirements were set forth in the regulations. Some proof of ownership is required by the DSEA regulations at 25 Pa. Code Chapter 105 with respect to certain permit categories but not for the ones involved here.

authorize the Department to evaluate the merits of the documentation. Even assuming for the sake of argument that the regulation requires proof of access, any error on the Department's part was harmless error. A remand to insist on submittal of property documents and further consideration of the issue by the Department, which cannot rule on the merits of the access anyway, would be pointless because, as we said above, based on our *de novo* review, Maxatawny's colorable claim that it will eventually be able to obtain access is sufficient to support approval of the plan revision based upon the totality of circumstances presented in this case.

Although Kutztown's primary concerns relate to its contract litigation and the implementability of the plan revision, it also briefly touches upon two other regulatory criteria defining the Department's review. First, Kutztown raises, but does not seriously pursue in its post-hearing brief, the argument that the Department was obligated to consider whether Kutztown's comments had been considered by Maxatawny.[4] Kutztown has made the point that the Department is authorized under 25 Pa. Code § 71.32(b) to take 120 days to evaluate and take action on an official plan or plan revision, and the Department strives to take action within 60 days, yet here the Department acted in approximately 40 days. (T. 102, 114.) Kutztown complains that it was not provided a copy of Maxatawny's proposed planning revision at the time Maxatawny submitted it to the Department for review. Kutztown does not point us to any statutory or regulatory provision that requires Maxatawny to have provided a copy to Kutztown or to have published notice of this plan revision in a newspaper of general circulation. Nevertheless, Kutztown received a copy of the plan revision from the Department and proceeded

[4] Kutztown only addresses this issue in its proposed conclusions of law. While such cursory treatment of an issue borders on waiver, 25 Pa. Code § 1021.131(c); *Stedge v. DEP*, 2015 EHB 577, 592; *DEP v. Seligman*, 2014 EHB 755, 781 n.13; *Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 411 n.1; *Jake v. DEP*, 2014 EHB 38, 47 n.3; *Gadinski v. DEP*, 2013 EHB 246, 273 n.7, we will nonetheless briefly discuss the issue for the sake of a complete record.

to draft comments. The Department informed Kutztown that it intended to move quickly in evaluating the plan revision. Comments are typically submitted directly to the municipality, but the Department informed Kutztown that Kutztown could submit comments to the Department. (T. 101-02.) The Department expected to receive Kutztown's comments on or before May 20, 2015, but did not receive the comments until the afternoon of May 22, 2015, hours after the Department issued its approval letter for the plan revision. (FOF 47-49.) The Department still considered Kutztown's comments to see if anything about the comments would change the Department's decision, and the Department concluded they would not.

The regulation at 25 Pa. Code § 71.32(d)(2) provides that the Department will consider "[w]hether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public." Kutztown apparently falls into the category of the general public. The regulation simply does not require the Department to consider or address Kutztown's comments. The Department does not typically receive comments on plan revisions. (T. 101.) The Department's responsibility is to ensure that *the municipality* has considered comments, and Kutztown did not submit any comments to Maxatawny. (T. 99.) That said, both Maxatawny and the Department were obviously aware of Kutztown's close connection to and interest in the situation, and good planning, if not specifically required, would have included solicitation of its views.

If there was error here, it was again harmless error. Albeit belatedly, the Department did give Kutztown a copy of the revision, and again belatedly, it did consider its comments. The Department forwarded the comments to Maxatawny, Maxatawny considered them, and likewise came to the same conclusion that none of Kutztown's comments required any substantive

changes to be made at the planning phase. (T. 69-70, 79.) Having reviewed Kutztown's comments ourselves, we do not see anything in the comments that would serve as a basis for overturning the Department's approval of the planning revision.

Kutztown also references, again only in a proposed conclusion of law, 25 Pa. Code § 71.32(d)(7), which provides that the Department will consider "[i]f the official plan or official plan revision includes proposed sewage facilities connected to or otherwise affecting sewage facilities of other municipalities, whether the other municipalities have submitted necessary revisions to their plans for approval by the Department." Tim Wagner of the Department presented uncontroverted testimony that nothing in Maxatawny's plan revision would require revisions to Kutztown's plan. (T. 98-99, 118.) Kutztown, for its part, never presented any evidence that it would need to amend its plan to accommodate the changes made by Maxatawny, or that Kutztown would need to make any changes at all to its sewer system. In fact, Kutztown's own engineer declined to opine that the Department should have taken any different action on the plan revision, testifying that his comments were simply that, comments. (T. 31, 34.) Accordingly, Kutztown has not presented any evidence that the Department erred in its approval of Maxatawny's plan revision under Section 71.32(d)(7).

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 750.16(b); 35 P.S. § 7514.

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

3. The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it

is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, No. 789 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Jan. 6, 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.

4. Municipalities must revise their sewage facilities plans whenever they determine that the plan is inadequate to meet the existing or future needs of the municipality or a new land development. 25 Pa. Code §§ 71.12(a), 71.51(a)(2).

5. Issues related to the siting or placement of sewage facilities may be considered during the sewage facilities planning stage. *See Montgomery Twp. v. DER*, 1995 EHB 483, 519 (citing *Munoz v. DER*, 1995 EHB 284; *Fuller v. DER*, 1990 EHB 1726, *aff'd*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Moyer v. DER*, 1989 EHB 928).

6. At the sewage facilities planning stage there is no need to definitively prove that the chosen method of sewage disposal can be done to a certainty, rather only that it is capable of being done or it is feasible. *Noll v. DEP*, 2005 EHB 505, 520; *Lehigh Twp. v. DEP*, 1995 EHB 1098, 1112; *Montgomery Twp. v. DER*, 1995 EHB 483, 520-22.

7. The Sewage Facilities Act places no obligation upon the Department to tell a municipality how to develop an appropriate sewage facilities plan. *Bear Creek Twp. Bd. of Supervisors v. DEP*, 2008 EHB 86, 93.

8. It is not the proper function of the Department under the Sewage Facilities Act to second-guess the propriety of decisions properly made by individual local agencies or courts of competent jurisdiction, even though they obviously may be related to the plans approved. *Oley Twp. v. Dep't of Envtl. Prot.*, 710 A.2d 1228, 1230 (Pa. Cmwlth. 1998) (quoting *Cmty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468, 478 (Pa. Cmwlth. 1975)). *See also Gilmore v. DEP*, 2006 EHB

679, 690 (citing *Force v. DEP*, 1998 EHB 179, 189; *Young v. DER*, 1993 EHB 380, 407, *aff'd*, 1032 C.D. 1993 (Pa. Cmwlth. 1994)).

9. An official plan or any revisions thereto are first and foremost planning documents effectuating a legislative goal under the Sewage Facilities Act to provide a comprehensive program for water quality management. *Force v. DEP*, 1998 EHB 179, 188 (citing *Young v. DER*, 1993 EHB 380, *aff'd*, No. 1032 C.D. 1993 (Pa. Cmwlth. May 26, 1994)).

10. Maxatawny's plan revision is able to be implemented. 25 Pa. Code § 71.32(a)(4); *Noll v. DEP*, 2005 EHB 505; *Lehigh Twp. v. DEP*, 1995 EHB 1098; *Montgomery Twp. v. DER*, 1995 EHB 483.

11. Remanding a matter back to the Department is not necessary in cases where a deficiency in the Department's review amounts to harmless error. *Berks Cnty. v. Dept't of Envtl. Prot.*, 894 A.2d 183, 193 (Pa. Cmwlth. 2006); *Shippensburg Twp. P.L.A.N. v. DEP*, 2004 EHB 548, 550-51; *Kwalwasser v. DER*, 1986 EHB 24, 55-56

12. The Department fully complied with 25 Pa. Code § 71.52 in its review and approval of Maxatawny's plan revision.

13. The Department acted lawfully and reasonably in approving Maxatawny's revision to its official sewage facilities plan.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2015-087-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	

O R D E R

AND NOW, this 29th day of February, 2016, it is hereby ordered that this appeal is **dismissed**. The Department's approval of Maxatawny's plan revision is affirmed.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 29, 2016

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
Janna E. Williams, Esquire
(*via electronic filing system*)

For Appellants:
Charles B. Haws, Esquire
(*via electronic filing system*)

For Permittee:
Jill E. Nagy, Esquire
(*via electronic filing system*)

For Intervenor:
Edward Kang, Esquire
Daniel D. Haggerty, Esquire
David P. Dean, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WINFIELD SCOTT LEA III	:	
	:	
v.	:	**EHB Docket No. 2015-178-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 10, 2016**
	:	

OPINION AND ORDER ON
DISMISSING APPEAL

By: Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where an appellant fails to perfect his appeal and fails to provide even basic information – including the action of the Department that is being appealed – despite two orders of the Environmental Hearing Board directing him to do so, his appeal is dismissed.

O P I N I O N

This matter involves the filing of an appeal by Winfield Scott Lea III on November 20, 2015 from an action of the Pennsylvania Department of Environmental Protection (Department). It is unclear what action of the Department Mr. Lea is appealing. Although Mr. Lea states that he received a copy of the Department's action by certified mail on October 23, 2015, he did not include a copy of it with his appeal, as required by 25 Pa. Code § 1021.51(d)[1] of the Environmental Hearing Board (Board) Rules of Practice and Procedure; nor did he explain in any detail what action he is appealing. In the section of his notice of appeal form, where it asks Mr. Lea to state the action of the Department for which he is seeking review, he simply states,

[1] 25 Pa. Code § 1021.51(d) states that if an appellant has received written notification of an action of the Department, a copy of the action must be attached to the notice of appeal.

"would like to find out why our well became so contaminated." In the section of the notice of appeal form where it asks Mr. Lea to set forth his objections in separate numbered paragraphs, Mr. Lea simply states, "Disagree with the Department. I believe the mining caused our water quality to deteriorate and the amount per minute to decrease. The amount and number of contaminates [sic] are listed on papers attached to appeal." There are no papers attached to Mr. Lea's appeal.

On November 25, 2015 the Board sent Mr. Lea an Order advising him that information was missing from his notice of appeal and that if he wished to perfect his appeal he needed to supply the missing information on or before December 15, 2015. This Order simply required Mr. Lea to provide the Board with a copy of the action being appealed and proof that Mr. Lea had served the mining company whose mining he claimed had affected his water. Mr. Lea did not comply with the Order. On January 21, 2016 the Board again sent an Order to Mr. Lea advising him that if he did not supply the missing information by February 10, 2016, he risked dismissal of his appeal. Again, there was no response by Mr. Lea.

The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.161 state as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal….

The Board has held on numerous occasions that failure to comply with a Board order requiring an appellant to perfect his appeal can result in dismissal of the appeal. *Tanner v. DEP*, 2006 EHB 468; *Mon View Mining Corp. v. DEP*, 2005 EHB 937, 938; *Maple Creek Mining v. DEP*, 2003 EHB 34. As we held in *Mon View Mining*, *supra* at 938, "A party is only required to follow a few simple steps to perfect its appeal." Those steps are necessary to insure that the process is fair to all parties, including the Department. In this case, Mr. Lea has not even

provided us with the basic information required in an appeal, most notably the action being appealed. When a party fails to comply with an order to perfect his appeal, it demonstrates "an unwillingness to participate in the appeal process." *Tanner, supra* at 469. As we held in *Swistock v. DEP*, 2006 EHB 398, 401, "The integrity of the appeal process before the Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board."

Therefore, based on Mr. Lea's failure to comply with two orders of the Board directing him to perfect his appeal, we have no recourse but to dismiss his appeal.

.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WINFIELD SCOTT LEA III	:	
	:	
v.	:	**EHB Docket No. 2015-178-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of March, 2016, it is ordered that the appeal of Winfield Scott Lea III is dismissed for failure to comply with orders of the Board directing him to perfect his appeal.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 10, 2016

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

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

For Appellant, *Pro Se*:
Winfield Scott Lea, III
929 Edmon Road
Apollo, PA 15613

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2015-093-R**
	:	**(Consolidated with 2015-159-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: March 10, 2016**
PROTECTION and FIRSTENERGY	:	
GENERATION, LLC, Permittee	:	

OPINION AND ORDER ON
MOTION TO STRIKE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

A Notice of Appeal is not a pleading. An Answer and Response to a Notice of Appeal is neither required nor permitted under the Board's Rules of Practice and Procedure.

O P I N I O N

This consolidated third party appeal involves a permitted residual waste disposal facility, the Hatfield Ferry Landfill, located south of the deactivated Hatfield Ferry Power Station on the Monongahela River in Greene County, Pennsylvania. It was originally permitted to Allegheny Energy Supply Company, LLC which is now a "sister company" of First Energy Generation, LLC (First Energy), the current permittee. First Energy is also the owner of the Bruce Mansfield coal-fired electric generating plant located along the Ohio River in Beaver County, Pennsylvania approximately 25 miles northwest of Pittsburgh. Pursuant to the permits under appeal, First Energy will deposit waste materials generated by the Bruce Mansfield plant at the Hatfield Ferry Landfill.

Appellant Sierra Club has filed extensive objections set forth in its Notice of Appeal and Amendments. Following these filings, First Energy filed an Answer and Response to the Notice of Appeal and Amendments.

Presently before the Board is a Motion to Strike the Answer and Response of First Energy (Motion to Strike). First Energy opposes the Motion to Strike.

The Sierra Club contends that the Board's Rules neither require nor authorize an Answer and Response to a Notice of Appeal. Indeed, a Notice of Appeal is not a pleading. Therefore, no Answer is required to a Notice of Appeal. *See Pikitus v. Commonwealth, Department of Environmental Protection,* 2004 EHB 910, 912 n. 4. Moreover, the Sierra Club requests that the Answer and Response be stricken so as not to clutter the record and somehow require the parties and the Board to address the issues raised in First Energy's Answer and Response.

First Energy concedes that although an Answer and Response is not required by the Board's Rules it is not expressly prohibited either. In addition, First Energy requests the Board's permission at this time to file such a pleading in order to frame the issues in the Appeal which it argues will help the Board resolve discovery issues. First Energy in its Answer and Response clearly disagrees with some of the statements and characterizations set forth in the extensive Notice of Appeal and Amendments filed by the Sierra Club. First Energy argues that it should be allowed to set forth its rebuttal to such statements at this time. This is certainly understandable.

Although First Energy raises some excellent policy considerations, these reasons would be better debated and addressed by the Environmental Hearing Board Rules Committee. We are hesitant to allow such an *ad hoc* filing in this matter without the benefit of a specific Rule allowing such filings. Moreover, the actions under Appeal in this matter are actions taken by the

Pennsylvania Department of Environmental Protection. It has not filed any Answer and Response to the Sierra Club's Notice of Appeal and Amendments. If we allow such a filing by First Energy, the Permittee, should we then direct the Department to file an Answer and Response? And if so, on what legal basis? We are well aware that "[t]he rules in this chapter shall be liberally construed to secure the just, speedy, and inexpensive determination of every appeal or proceeding in which they are applicable." 25 Pa. Code § 1021.4.

The Board's Rules of Practice and Procedure have been developed and modified over many years with input from a very active Rules Committee after robust discussion and debate. We are loathe to "wing it" here and allow such a detailed filing with 10 exhibits totaling 1,058 pages. First Energy will have ample opportunity to set forth its view of the facts and law in this matter. Our Rules require the Parties to set forth and detail their positions, both legal and factual, not at this stage of the Appeal but after discovery and prior to hearing when they file their Prehearing Memoranda. *See* 25 Pa. Code § 1021.104.

We, therefore, will issue an Order in accordance with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 10th day of March, 2016, following review of the Sierra Club's Motion to Strike Answer and Response and First Energy's papers in opposition, it is ordered as follows:

1) The Sierra Club's Motion to Strike First Energy's Answer and Response is **granted.**
2) Docket entries 18 and 19 are stricken from the record.
3) The Board's Rules of Practice and Procedure neither require nor permit an Answer and Response to a Notice of Appeal and Amendments.
4) First Energy will have ample opportunity to set forth its legal and factual positions in this matter in accordance with the Board's Rules of Practice and Procedure.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 10, 2016

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

For the Commonwealth of PA, DEP:
Marianne Mulroy, Esquire
John H. Herman, Esquire
Forrest M. Smith, Esquire
(*via electronic filing system)*

For Appellant:
Charles McPhedran, Esquire
Lisa K. Perfetto, Esquire
(via electronic filing system)

For Permittee:
Naeha Dixit, Esquire
Mark D. Shepard, Esquire
James A. Meade, Esquire
Donald C. Bluedorn, II, Esquire
Alana Fortna, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

422 AUTO SALES, INC.	:	
	:	
v.	:	**EHB Docket No. 2015-081-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 15, 2016**
	:	

OPINION AND ORDER
DISMISSING APPEAL

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Where an appellant fails to perfect its appeal and fails to provide even basic information – including the action of the Department that is being appealed – despite two orders of the Environmental Hearing Board directing it to do so, the appeal is dismissed.

O P I N I O N

This matter involves the filing of an appeal by 422 Auto Sales, Inc. on May 11, 2015 from an action of the Pennsylvania Department of Environmental Protection (Department). However, it is unclear what action of the Department is being appealed. The appeal consists of a handwritten letter dated May 4, 2015. Although the letter is directed to the "Environmental Hearing Board" the body of the letter indicates that it is, in fact, directed to the Department. The letter states in relevant part as follows: "I just received your letter in regards to "422 Auto Sales, Inc." that was sent March 19. . .there are some discrepancies in your report. DEP your office was actually out on a complaint back in 2010-2011. . . ." Although the letter appears to be directed to the Department, the Board treated it as a notice of appeal.

The Board's Rules of Practice and Procedure require a notice of appeal to include certain information, including the following: 1) a copy of the action being appealed where the appellant has received written notification; 2) specific objections to the action set forth in separately numbered paragraphs; and 3) proof that the appellant has served a copy of the appeal on the Department's Office of Chief Counsel[1] and program office that took the action that is being appealed and, where applicable, the recipient of the action. 25 Pa. Code § 1021.51(f)(2)(vi). Because 422 Auto Sales had failed to provide any of this information with its appeal, the Board issued an Order to the appellant on June 9, 2015 directing it to provide the missing information on or before June 29, 2015 in order to perfect its appeal. The Board received no response from the appellant.[2] On October 23, 2015, the Board again ordered 422 Auto Sales to provide the information necessary to perfect its appeal or face dismissal of its appeal, and again, the appellant failed to respond. To date, the Board has received no communication from 422 Auto Sales other than the initial appeal.

The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.161 state as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal….

Further, the Board has held on numerous occasions that failure to comply with a Board order requiring an appellant to perfect its appeal can result in dismissal of the appeal. *Scott v.*

[1] It is clear that the appellant never served a copy of the appeal on the Department's Office of Chief Counsel, as required by 25 Pa. Code § 1021.51(f)(2)(vi) since the Department has never entered its appearance in this case.

[2] The appellant also filed a letter requesting *pro bono* representation in its appeal. The Environmental Hearing Board participates in a program developed and administered by the Environmental and Energy Law Section (the Section) of the Pennsylvania Bar Association whereby the Section attempts to secure *pro bono* representation for qualifying individuals in matters before the Board. At the time of the appeal, only individuals qualified for *pro bono* representation. Because 422 Auto Sales is a corporation, it did not qualify.

DEP, EHB Docket No. 2015-178-R (Opinion and Order Dismissing Appeal issued March 10, 2016); *Tanner v. DEP*, 2006 EHB 468; *Mon View Mining Corp. v. DEP*, 2005 EHB 937, 938; *Maple Creek Mining v. DEP*, 2003 EHB 34. We recently held in *Scott*: "'A party is only required to follow a few simple steps to perfect its appeal.' Those steps are necessary to insure that the process is fair to all parties, including the Department." *Slip op.* at 2 (quoting *Mon View Mining, supra* at 938).

In this case, 422 Auto Sales has not even provided us with the basic information required in an appeal, most notably a copy or description of the action being appealed. The appeal makes reference only to a letter of "March 19" but fails to include a copy of the letter or any details about the letter, such as which program office of the Department issued the letter or what action, if any, was ordered by the Department. When ordered to provide the Board with further information regarding the action being appealed, 422 Auto Sales has refused to do so. As we recently held in *Scott*, "When a party fails to comply with an order to perfect his appeal, it demonstrates 'an unwillingness to participate in the appeal process.'" *Slip op*. at 3 (quoting *Tanner, supra* at 469). As we further held in *Swistock v. DEP*, 2006 EHB 398, 401, "The integrity of the appeal process before the Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board." The appellant's unresponsiveness to the Board's orders and unwillingness to provide the most basic information needed by the Board in order to proceed further with this appeal leaves us no recourse but to dismiss the appeal.

.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

422 AUTO SALES, INC.	:	
	:	
v.	:	**EHB Docket No. 2015-081-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 15th day of March, 2016, it is ordered that the appeal of 422 Auto Sales, Inc. is dismissed for failure to comply with orders of the Board directing it to perfect its appeal.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 15, 2016

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

For the Commonwealth of PA, DEP:
Office of Chief Counsel – Southcentral Region
(via electronic mail)

For Appellant, *Pro Se*:
422 Auto Sales
c/o Chris Neal
LG 7628
B2-205
SCI Pine Grove
191 Fyock Road
Indiana, PA 15701

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS J. KAZMIERCZAK, SR.	:	
	:	
v.	:	**EHB Docket No. 2015-062-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIRONMENTAL & RECYCLING SERVICES, INC., Permittee	:	**Issued: March 18, 2016**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board grants in part a motion for summary judgment filed by a Permittee because the Appellant has not come forth with any documentary support or legal argument to sustain his contention that the Department erred in treating a permit modification for a construction and demolition waste landfill and processing facility as a minor modification instead of a major modification. The Board denies in part that motion, and denies in whole a motion for summary judgment from the Department, because it is not clear as a matter of undisputed fact that potential local land use issues have been properly considered and accounted for. The Board also denies an Appellant's motion for summary judgment on the same issues.

O P I N I O N

On May 7, 2015, Thomas J. Kazmierczak, Sr. appealed the Department of Environmental Protection's (the "Department's") approval of a minor modification to the permit for a construction and demolition waste (C&D waste) landfill and processing facility operated by Environmental & Recycling Services, Inc. ("ERSI") at 1100 Union Street in Taylor Borough,

Lackawanna County. ERSI and the Department tell us that a landfill has been operated at this location since the 1970s when it was known as the Amity Landfill and it accepted municipal waste. ERSI later obtained the property, and in 1995 the Department issued a solid waste permit to ERSI for the operation of a C&D waste landfill and recycling facility. (ERSI Resp. Ex. C.) In 1999, ERSI submitted an application to expand the landfill, which, following litigation before this Board, was eventually approved by the Department in 2011 as a major permit modification. (ERSI Resp. Ex. D.) *See Envtl. & Recycling Servs., Inc. v. DEP*, 2007 EHB 568. ERSI's 2011 permit includes a salvaging and recycling plan that details, among other things, ERSI's processing of wood waste and the use of a wood grinder/chipper. (ERSI Resp. Ex. E at Section N.) ERSI later approached the Department to revise its salvaging and recycling plan. Following discussions between the parties, the Department decided that such a revision would need to be done through a permit modification instead of pursuant to the terms of the existing permit. (DEP Brief at 3.) Accordingly, in 2014, ERSI submitted an application for a minor modification to its permit. (ERSI Resp. Ex. G.) This modification, now under appeal, allows ERSI to produce an alternative fuel product and wood chips for use in the production of mulch and animal bedding. ERSI says that the scope of the minor modification involves only the relocation of an existing wood grinder within the permit boundaries of the landfill site, the provision of information regarding markets for recycled materials, and the submission of plans for the storage of certain materials in an existing building. The Department issued its approval of the minor modification on April 8, 2015. (DEP Ex. G.)

Kazmierczak's appeal contains four objections, all of which relate to Taylor Borough's land use and zoning. The four objections are fairly summarized as follows:

1. Certain processing at ERSI's landfill to produce wood chips and an alternative fuel product is not a permitted use at the site under Taylor Borough's zoning ordinances.
2. The location of the site is zoned as S-3, which does not permit C&D waste recycling.
3. ERSI did not make the Department aware of the S-3 zoning prohibition during the application process.
4. Because of the zoning conflict, ERSI's permit modification should have been a major modification instead of a minor modification.

On the day the appeal was filed, the Board issued its standard order establishing the deadlines for conducting discovery and for filing dispositive motions. The deadline for filing dispositive motions was set for December 3, 2015. Absent notices of appearance and a joint statement certifying that the parties conferred about settlement, the Board received no filings from any party between the filing of the appeal and the dispositive motion deadline.[1] On the morning of December 7, 2015, having received no dispositive motions from any party, the Board reached out to the parties to schedule this matter for a hearing on the merits. Later that same day, Kazmierczak filed a belated motion for summary judgment. We held a conference call with the parties on December 9, 2015 to discuss how the matter would move forward. The Department and ERSI did not oppose the untimely filing of Kazmierczak's motion so long as they were permitted to file their own dispositive motions. The parties agreed to confer about a schedule and propose it to the Board. The proposed schedule set a date for responses to Kazmierczak's motion for summary judgment, a date for ERSI and the Department to file dispositive motions, and a date for Kazmierczak to respond to those motions. Any replies were to be due 15 days after responses. We issued an Order consistent with the parties' proposal.

[1] Taylor Borough has not intervened in this appeal and it did not file its own appeal of the permit modification.

On January 25, 2016, ERSI and the Department both filed responses to Kazmierczak's motion for summary judgment. At that time the Department also filed a cross motion for summary judgment. Kazmierczak chose not to file a reply to the responses of ERSI and the Department.[2] On January 29, 2016, ERSI filed its own motion for summary judgment. Kazmierczak's responses to the motions filed by ERSI and the Department were due February 16, 2016, but Kazmierczak filed no response at that time. On March 1, 2016, ERSI filed a somewhat gratuitous letter outlining the timeline of filings and due dates of responses and asking that we deny Kazmierczak's motion for summary judgment and grant ERSI's motion for summary judgment on the basis of Kazmierczak's failure to respond. We presume that it is no coincidence that, on the same day, Kazmierczak filed tardy responses to ERSI's and the Department's motions, two weeks after those responses were due, with no accompanying motion seeking leave to file an out of time response, and no explanation as to why a timely response was not made.[3]

ERSI filed a reply brief on March 16, 2016, arguing that ERSI's motion for summary judgment should be considered uncontested because of Kazmierczak's untimely response, and therefore granted. ERSI then goes on to repeat the same arguments it presented in its prior filings. Although we need not consider a response tardily filed, having read Kazmierczak's response, we cannot help but note that it contains essentially the same arguments that were presented in his notice of appeal and in his own summary judgment motion. Therefore, it is neither a great help to his own case nor a great prejudice to the cases of ERSI and the

[2] Reply briefs are permitted but not mandatory under 25 Pa. Code § 1021.94a(k).

[3] Kazmierczak's pattern of disregard for filing deadlines is frustrating to say the least. As we admonished in *DEP v. Allegheny Enterprises*, 2014 EHB 338, while addressing a tardy response to a discovery motion, "Such cavalier disregard for our Rules wastes our time and resources. We cannot divine whether or not a party will respond to a filing. We cannot continually reach out to counsel to remind them of filing deadlines or to determine whether or not they will file a response at all." 2014 EHB 338, 339 n.1.

Department. In any event, we would be reluctant to grant ERSI's and the Department's motions for summary judgment on the basis of Kazmierczak's failure to respond alone because of the significant overlap in the substance of the parties' filings, with many of the same arguments appearing in the parties' motions as in their respective responses.

All three of the motions for summary judgment address the same issues and cover all of the objections in Kazmierczak's notice of appeal. We believe the issues can be fairly reduced to (1) whether the Department erred in approving the permit modification because of an alleged conflict with Taylor Borough's land use and zoning, and (2) whether ERSI's permit modification was accurately treated as a minor modification instead of a major modification. We will address the motions concurrently in terms of these two issues.

Standard of Review

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Citizens for Pa.'s Future v. DEP*, 2015 EHB 750, 751; *Global Eco-Logical Servs., Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). *See also Cnty. of Adams v. Dep't of Envtl. Prot.*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in the light most favorable to the non-moving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *City of Phila. v. DEP*, 2014 EHB 156, 159; *Holbert v. DEP*, 2000 EHB 796, 808. Summary judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly

undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106.

There appears to have been little if any discovery exchanged in this matter. ERSI tells us that Kazmierczak did not serve any formal discovery requests on ERSI, a point Kazmierczak does not rebut. ERSI does not tell us what discovery it conducted, but we sense that if there was any it was minimal. Given the fact that ERSI and the Department were not prompted to file their own dispositive motions until after Kazmierczak filed his, past the original deadline for doing so, we get the strong impression that this case was not vigorously litigated by any party. We mention this here because it is often difficult to grant summary judgment when presented with an incomplete record due to thin discovery and when outstanding doubts remain about one or more issues in a case. *See Brawand v. DEP*, 2013 EHB 865.

Alleged Zoning Conflict

Kazmierczak argues in his motion that ERSI was required to obtain a variance from Taylor Borough because C&D waste processing is not a permitted use at the location of the facility, 1100 Union Street. He contends that, because ERSI has not obtained any variance, the Department's approval of the permit modification was improper. ERSI and the Department, of course, oppose Kazmierczak's motion. They instead contend that summary judgment should be granted in their favor because any zoning conflict is speculative at best and, in any event, the Department gave appropriate consideration to local zoning and land use during its review of the permit modification. While Kazmierczak's own motion is entirely unconvincing, he has provided us with just enough factually to hesitate granting summary judgment in favor of ERSI and the Department on this issue.[4]

[4] Kazmierczak's motion for summary judgment did not contain a statement of undisputed material facts as required by 25 Pa. Code § 1021.94a(b)(1)(ii). This defect alone provides sufficient basis for the denial

At the outset we must note that the bulk of Kazmierczak's motion is a near verbatim restatement of the four objections in his notice of appeal with little more in the way of substance to supplement what are already sparse allegations. The motion contains only two citations to legal authority—a citation to the Municipalities Planning Code regarding a zoning hearing board's function with respect to variances, 53 P.S. § 10910.2, and a citation to *Lancaster Township v. Zoning Hearing Board of Lancaster*, 6 A.3d 1032, 1034 (Pa. Cmwlth. 2010) for the precept that an appellate court should afford deference to a zoning hearing board's interpretation of its own ordinance. These citations have little if any bearing on the matter before us. We have no idea why the *Lancaster Township* case should have any influence on our proceedings. Kazmierczak never takes the time to explain how that case should have controlling authority on the outcome of this appeal. We are not an appellate body reviewing any decision of a zoning hearing board. We are a quasi-judicial administrative tribunal that hears *de novo* appeals of actions of the Department of Environmental Protection. *See Hilcorp Energy Co. v. DEP*, 2013 EHB 701.

No party cites any statutory provision of the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, or any regulatory provision in the solid waste program that outlines any specific duty of the Department with respect to considering local zoning during the review of a permit modification. ERSI argues that Taylor Borough's zoning ordinance is irrelevant to the propriety of the Department's approval of the permit modification. This is, of course, incorrect. Regardless of any solid waste provision, pursuant to certain provisions of the Municipalities Planning Code, commonly referred to as Acts 67 and 68, the Department *must* consider and may rely upon local zoning in the permitting of infrastructure or facilities. 53 P.S. §§ 10619.2 and

---

of a motion for summary judgment. *Nofsker v. DEP*, 2014 EHB 555, 558 (citing *Plymouth Twp. v. DER*, 1990 EHB 1288, 1291). However, we will nonetheless address the arguments presented in his motion.

11105. ERSI never discusses Acts 67 and 68 in any of its filings. The Department, for its part, argues that it gave proper consideration to local land use under Acts 67 and 68 based on the information it had at the time.[5]

The Department's authority to consider zoning in its review of a permit application is generally limited, but it is not wholly irrelevant to its decision. The Department has no role in enforcing local land use and zoning requirements, *New Hanover Twp. v. DEP*, 2011 EHB 645, 680, and the Department is not required to conduct an independent investigation on whether a project complies with local zoning requirements during its review, *Snyder v. DEP*, 2015 EHB 857, 879 (quoting *Tri-County Landfill v. DEP*, 2015 EHB 324, 330-31); *Heasley v. DER*, 1991 EHB 1758, 1768. However, if the Department becomes aware of a zoning conflict, it must account for that conflict:

> It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue.

Tri-County Landfill v. DEP, 2015 EHB at 331. In such a situation the Department may, in the exercise of its discretion, deny a permit, suspend review of a permit, issue a permit with appropriate conditions, or issue the permit as-is depending on the factors and circumstances of the individual case. *Id.*; *New Hanover Twp. v. DEP*, 2011 EHB 645, 678-80; *Lyons v. DEP*, 2011 EHB 169, 192-94. *See also Cnty. of Berks v. DEP*, 2005 EHB 233, 269-70, *aff'd*, 894 A.2d

[5] The Department argues in its motion that it also fulfilled any obligations it has under Article I, Section 27 of the Pennsylvania Constitution. However, Kazmierczak has not raised any issues in his appeal pertaining to Article I, Section 27, and therefore, we need not address it. *Rhodes v. DEP*, 2009 EHB 325, 327 (allegations not raised in a notice of appeal are waived) (citing *Fuller v. Dep't of Envtl. Res.*, 599 A.2d 248, 252 (Pa. Cmwlth. 1991)).

183 (Pa. Cmwlth. 2006) (Acts 67 and 68 do not require the Department to refuse to permit a facility even if the Department does identify a land use conflict).

Much of Kazmierczak's factual argument in his motion for summary judgment hangs on a letter from Clark D. Robbins, Taylor Borough Code Official, addressed to the Department. The letter is dated May 4, 2015, nearly a month after the Department approved ERSI's permit modification. It reads in pertinent part as follows:

> Please be informed that the location in question is a[n] S-3 Special Purpose zone and not permitted for Recycling, Storage Yards, Junkyards or associated accessory uses as they require typically M-2A General Manufacturing zone. S-3 is for landfill use and associated uses to allow the operation of a landfill.
>
> As we have not receive[d] any information during this application modification submittal process for review or comments and not having given any approvals for same, I am advising you that this permit should not have been issued.

(App. Ex. C.)[6] Kazmierczak also attaches various portions of tables of land use classifications in Taylor Borough, but he provides very little in the way of context or explanation of those tables and classifications. (App. Ex. B.)

The Department responded to Robbins's letter with a letter dated August 10, 2015, memorializing and/or elaborating on a telephone conversation the Department had with Mr. Robbins on May 7, 2015. The Department expressed its position as follows:

> It is the Department's position that the minor permit modification to process C&D waste materials at ERSI was issued in accordance with the Municipal Waste Regulations. Nothing in this minor permit modification shall be construed to supersede, amend or authorize violation of the provisions of any valid and applicable local law, ordinance or regulation, provided that said local law,

[6] The Department disputes the point that Taylor Borough was excluded from the permit application and review process. The Department argues that it issued a technical deficiency letter to ERSI in November 2014, and Taylor Borough and the Lackawanna Planning Commission were both copied on that letter. (DEP Ex. D.) According to an affidavit executed by the Department's lead permit reviewer, Dylan J. Evans, Taylor Borough never contacted the Department to express any concerns with the ERSI application. (DEP Ex. I at ¶ 9.)

> ordinance or regulation is not preempted by the Pennsylvania Solid Waste Management Act. If it is Taylor Borough's position that the proposed C&D waste processing operations at ERSI are a violation of Taylor Borough's zoning ordinance, then Taylor Borough is free to enforce the existing zoning ordinance for this facility.

(DEP Ex. F.)[7]

ERSI argues that we should disregard Robbins's letter because it was not received by the Department until after the Department completed its review. However, this position is inconsistent with our *de novo* review, in which we decide an appeal of a Department action based on the record that is developed before us. *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 12 n.2 (Adjudication, Feb. 29, 2016); *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Young v. Dep't of Envtl. Res.*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). We are in no way constrained to consider only what the Department considered when it made its decision. *Chimel v. DEP*, 2014 EHB 957, 984; *Borough of St. Clair v. DEP*, 2013 EHB 177, 180. We do not step into the shoes of the Department to second-guess its decision based upon the record it had before it. Instead, we make our own decision based on a record created entirely before us that is not limited in either time or scope by what the Department considered.

---

[7] The position expressed in this letter echoes a permit condition contained in the 2011 expansion, a condition which remains in effect through the current modification (see DEP Ex. G):

> Nothing in this permit shall be construed to supersede, amend or authorize violation of the provisions of any valid and applicable local law, ordinance or regulation, provided that said local law, ordinance or regulation is not preempted by the Pennsylvania Solid Waste Management Act, the Act of July 7, 1980, Act 97, 35 P.S. 6018.101, et seq., and Act 101, Municipal Waste Planning, Recycling and Waste Reduction Act, July 28, 1988 (53 P.S. §4000.101 et seq.).

(DEP Ex. E at 6 ¶ 9.) It is also consistent with our holdings. *See Cnty. of Berks v. DEP*, 2005 EHB at 271 ("[I]t is still a long standing principle of law that a permit from the Department only authorizes an activity with respect to the Commonwealth; it does not provide the permittee with authority to override restrictions imposed by other entities to use the property in a certain manner."); *Id.* at 274 ("The permit *only* authorizes the permittee to conduct landfilling activities. It does not allow the permittee to avoid whatever other restrictions there may be on the use based on local ordinances.").

Tri-Realty Co. v. DEP, 2015 EHB 184, 188. *See also Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472. Accordingly, there is nothing preventing us from considering the Robbins letter.[8]

The Department says that it still considered local land use in its review of the permit modification and that its decision to approve the modification was lawful and reasonable. In support of this argument, the Department calls attention to the fact that a landfill has been permitted at this same site for decades. The Department also points out that it considered Taylor Borough's land use during its review of the expansion application that was approved in 2011. The Department and ERSI say Taylor Borough raised a zoning objection during the Department's review of that expansion. The Department and ERSI attach a letter addressed to the Department dated February 13, 2009, also drafted by Clark D. Robbins, here with the title of Zoning Officer, in which Taylor Borough withdrew its previously lodged objection. The letter provides in pertinent part as follows:

> I am writing in regard to your letter of November 19, 2008 in response to our letter of November 3, 2008. From the information you supplied it appears the following have application to the ERSI landfill:
>
> 1. ERSI has a continuous and ongoing application since December, 1999.
>
> 2. While the ERSI permit expired on March 31, 2007 and landfill operations ceased the licensee did not abandon its request for continued operation by way of its application of December 1999.
>
> 3. The licensed premises for the landfill under the original license and as set forth on the present application remain the same.

[8] At the same time, we must be careful to not incentivize a tactic where municipalities, despite being informed that the Department is reviewing a certain application, wait until after the Department makes a decision on the application to raise a potential zoning conflict, and an appellant is able to prolong a project through litigation before this Board by manufacturing an issue of material fact. We are not suggesting that there is any nefarious motive in this case. In any event, given the proximity of the letter to the Department's decision, and Kazmierczak's timely filed appeal, we are hesitant to altogether ignore the letter for the sake of granting summary judgment.

> **In light of the aforesaid it would appear that the landfill is a pre-existing use and is now reclassified as a permitted conditional use.** We do note that this correspondence is premised upon the facts supplied by your office and we do advise that a variation of the facts may result in a different interpretation by the Borough. The Borough reserves the light to enforce all aspects of its Zoning Ordinance, Subdivision and Land Development Ordinance, Stormwater Ordinance and other applicable ordinances and regulations not preempted by the Commonwealth.

(ERSI Resp. Ex. B; DEP Ex. C) (emphasis added). The Department argues that it had no reason to believe that Taylor Borough changed its position on the ERSI facility since 2009.

The Department attaches an affidavit from Dylan Evans, the lead permit reviewer for the modification, in which he says that in considering local land use he relied on the information before him and the fact that the activity had already been previously approved. (DEP Ex. I.) We presume that part of that reliance was on the Department's application form, which asks applicants, "Does the proposed project meet the provisions of the zoning ordinance or does the proposed project have zoning approval? If zoning approval has been received, attach documentation." (DEP Ex. A at Section 2, p. 3.) ERSI checked the box for "yes" because it says it had no reason to believe there was any zoning conflict, and ERSI contends that there is still no real conflict.

We have no indication of whether there has in fact been any change in land use in Taylor Borough in the intervening years since the Department last looked at the issue. Kazmierczak never explains why there has been an apparent change in Clark Robbins's position with regard to the zoning of the landfill, and whether that is an accurate reflection of Taylor Borough's current position. Kazmierczak also has not identified any interpretation of a zoning ordinance by the Taylor Borough zoning hearing board. According to ERSI, to date there has been no action

taken against ERSI before the zoning hearing board. ERSI also tells us that there has been no fundamental change in the use of the property.

On balance we are left with some unanswered questions and doubts that lead us to believe this issue should be investigated further. If there is a land use conflict, the substance of that conflict is a matter that is to be resolved before a zoning hearing board. But knowledge of the nature and extent of any conflict and whether it is legitimate is a fundamental starting point for the Department's responsibilities under Acts 67 and 68.

Finally on this issue, ERSI makes an argument that Kazmierczak's appeal actually relates to whether processing of C&D waste should be permitted at all at the facility and that such a claim is barred by administrative finality. ERSI contends that processing was approved by the Department during the prior expansion and that any challenge to it now is an impermissible collateral attack on that major modification. We are not convinced that administrative finality comes into play. Kazmierczak never asks for the permit itself to be rescinded, only the minor modification. (App. Brief at 2.) We read the current situation as Kazmierczak alleging that there may have been a change in Taylor Borough's land use and zoning since the 2011 expansion and the activities conducted by ERSI may not accord with the current land use scheme. Although ERSI tells us that nothing has really changed in the permit and the recycling plan, the Department clearly thought that ERSI's proposed change was significant enough to require a permit modification, which is likely a prudent and reasonable course of action. (DEP Brief at 3.) Accordingly, it is appropriate for the Department to assess the permit modification in light of updated circumstances, including any changes in local land use.

As noted above, we are left somewhat wanting for a more complete record—a likely byproduct of parties who conducted little if any discovery.[9] For instance, we have not been provided with any transcript excerpts of any deposition taken of Clark Robbins that would probe the assertions in his 2015 letter. Had more documentary support been presented with the respective motions, it may have resolved our outstanding doubts and rendered summary judgment appropriate. As it stands, we cannot conclude as a matter of law that the Department properly considered all relevant aspects of local land use, and therefore, this issue must be resolved at a hearing on the merits. At the same time, we will not allow our proceedings to turn into a zoning hearing board matter. The hearing on the merits will be largely limited to whether the Department acted reasonably in approving the permit modification in light of the current state of Taylor Borough's zoning and land use. In this respect, we caution Kazmierczak that he will likely have an uphill battle convincing us that the Department erred in its approval absent a change in zoning and a real, substantial conflict. Furthermore, we reiterate that even if there is a real land use conflict, it does not mean that the Department's approval of the permit modification is necessarily invalid or unreasonable.

Minor Modification

Kazmierczak argues that the minor designation of ERSI's permit modification is a misnomer because the alleged zoning conflict renders it a major modification. ERSI and the Department respond that the regulation governing whether a modification to a C&D waste landfill permit will be considered a major modification or a minor modification does not establish a basis for this modification to be treated as major. ERSI seeks summary judgment on the issue that the permit modification was properly treated as minor.

[9] We note without comment that we have almost no indication of Kazmierczak's interest with respect to the ERSI facility. ERSI tells us that Kazmierczak owns a neighboring property and operates his own recycling facility there, but we do not know if that is true. (ERSI Resp. Brief at 4.)

The significance of a major modification designation is that it requires an applicant to update its environmental assessment (25 Pa. Code § 271.126) and harms/benefits analysis (25 Pa. Code § 271.127), and there are heightened public notice requirements, (25 Pa. Code §§ 271.141 – 271.143). *See Exeter Citizens' Action Comm. v. DEP*, 2005 EHB 306, 337. The regulation at 25 Pa. Code § 271.144(a) provides 15 triggering events for a permit modification to be considered major, which, for example, include things such as changes in daily volumes of waste, changes in the permitted acreage of a landfill, changes in monitoring plans and treatment methods, and changes in the ownership or operator of a landfill.[10] ERSI and the Department argue that none of those triggering events were present for ERSI's modification. Indeed, none of the 15 triggers for a major modification have anything to do with zoning or land use. In addition, at no point does Kazmierczak argue that the Department should have employed its discretion to require ERSI to conduct an environmental assessment as a result of its determination that the ERSI facility will have a significant effect on the environment. *See* 25 Pa. Code § 271.126(b). Nor does he argue that the Department should have likewise employed its discretion to require

[10] The full list of the 15 triggering events is as follows:

> (1) Change in site volume—waste capacity. (2) Change in the average or maximum daily waste volume. (3) Change in excavation contours or final contours, including final elevations and slopes, if the change results in increased disposal capacity or impacts the groundwater isolation distance or groundwater quality. (4) Change in permitted acreage. (5) Change in the approved groundwater monitoring plan, except for the addition or replacement of wells or parameters. (6) Change in approved leachate collection and treatment method. (7) Change in gas monitoring or management plan, or both, except when installation of additional wells or improvements to the collection systems are proposed. (8) Change in the approved closure plan. (9) Acceptance for disposal of types of waste not approved in the permit. (10) Change in ownership, unless the owner is the permittee, in which case permit reissuance is required under § 271.221 (relating to permit reissuance). (11) Change in approved design under § 271.231 (relating to equivalency review procedure) if the design has not been previously approved through an equivalency review. (12) The submission of an abatement plan. (13) The disposal of waste in areas that have reached final permitted elevations. (14) Change in operator, unless the operator is the permittee, in which case permit reissuance is required under § 271.221. (15) Submission of a radiation protection action plan.

25 Pa. Code § 271.144(a)(1)-(15).

heightened public notice and participation. *See* 25 Pa. Code § 271.144(c). Kazmierczak has not presented a coherent legal argument for why ERSI's permit modification should be a major modification.

In his consolidated response to the Department and ERSI, Kazmierczak asserts that there is still an issue of material fact of whether the modification should have been major or minor. We disagree. Kazmierczak does not identify the scenario he believes should have triggered a major modification beyond the conclusory statement that the alleged zoning conflict apparently automatically renders a modification major. Nor does he explain the significance of ERSI's modification not being considered major. Kazmierczak never references the applicable regulation cited above. One cannot simply state that a permit modification should have been major without any supporting explanation or argument and then rest on that statement. In fact, our rules explicitly prohibit such conduct in summary judgment motions practice:

> [A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

25 Pa. Code § 1021.94a(l). Making a bald allegation does not otherwise create an issue of material fact. *Casey v. DEP*, 2014 EHB 439, 444 (quoting *Golaschevsky v. Dep't of Envtl. Res.*, 683 A.2d 1299, 1302 (Pa. Cmwlth. 1996), *aff'd*, 720 A.2d 757 (Pa. 1998)). Major modification and minor modification are terms of art within the statutory and regulatory scheme that carry legal significance. They are not merely hollow adjectives that can be bent to the subjective whim of a litigant. Accordingly, we grant summary judgment in favor of ERSI on this issue.

Based on the foregoing, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS J. KAZMIERCZAK, SR.	:	
	:	
v.	:	**EHB Docket No. 2015-062-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	

O R D E R

AND NOW, this 18th day of March, 2016, upon consideration of the parties' motions for summary judgment, and the responses thereto, it is hereby ordered as follows:

1. Kazmierczak's motion for summary judgment is **denied**;
2. The Department's motion for summary judgment is **denied**; and
3. ERSI's motion for summary judgment is **granted in part and denied in part** in accordance with the preceding Opinion.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

*** Judge Bernard A. Labuskes, Jr. has not participated in the consideration of this appeal.**

DATED: March 18, 2016

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

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

For Appellant:
Matthew J. Perry, Esquire
(*via electronic filing system*)

For Permittee:
Scott A. Gould, Esquire
Teresa K. Schmittberger, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN W. KLESIC	:	
	:	
v.	:	**EHB Docket No. 2015-150-M**
	:	**(Consolidated with 2015-169-M)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 21, 2016**

OPINION AND ORDER DENYING
MOTION TO DISMISS

By: Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Department's motion to dismiss this appeal as moot because a certain exception to the mootness doctrine applies. Although the Department has revoked the two related enforcement actions that prompted the appeals, the appeals are not moot. The issues at the site remain unresolved, according to the Department, and the conduct complained of is capable of repetition yet likely to evade review.

O P I N I O N

Mr. Stephen W. Klesic filed an appeal on behalf of United Environmental Group, Inc. ("UEG"), objecting to a Department civil penalty assessment issued to UEG for alleged violations of the Storage Tank and Spill Prevention Act on UEG's property. Mr. Klesic is the sole shareholder of UEG. Mr. Klesic, again acting on behalf of UEG, filed a second appeal of a Department order issued to UEG which directed UEG to address certain violations of the Solid Waste Management Act on UEG's property. Mr. Klesic, who is not an attorney, filed timely appeals of both Department actions and attempted to represent UEG *pro se*. The Board

consolidated the appeals at Docket Number 2015-150-M in a Board Order dated November 10, 2015.

The Board issued two letters to Mr. Klesic instructing UEG to obtain counsel in accordance with 25 Pa. Code § 1021.21(b), which requires corporations to be represented by an attorney authorized to practice in Pennsylvania. UEG did not obtain counsel in accordance with the Board's letters and on December 7, 2015, the Board dismissed the consolidated appeals for UEG's failure to obtain counsel. Mr. Klesic then filed a request for reconsideration of the Board's dismissal of the appeal and on December 30, 2015, the Board granted in part and denied in part Mr. Klesic's request for reconsideration. Specifically, the Board denied the request for reconsideration as it applied to the Appellant, UEG, because UEG is a corporation and as such, UEG is required to be represented by counsel. 25 Pa Code § 1021.21(b). However, the Board determined that Mr. Klesic, an individual, also filed an appeal on his own behalf and is proceeding *pro se* as allowed by the Board's rules at 25 Pa Code § 1021.21(a). The Board therefore granted Mr. Klesic's request for reconsideration to allow Mr. Klesic to proceed *pro se* to represent his individual interests, but not UEG's interests, in the appeal of the Department's civil penalty assessment and order.

The Department now comes before the Board with a motion to dismiss the appeal, asserting that this appeal is moot because the Department rescinded and revoked its civil penalty assessment on January 26, 2016, and also rescinded and revoked its order on January 28, 2016. According to the Department, there is now no Department action for the Board to review in this consolidated appeal and therefore the Board can no longer grant effective relief. Before the Department filed its motion to dismiss, Mr. Klesic filed with the Board a motion to compel responses to interrogatories and requests for production of documents.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Boinovych v. DEP*, 2015 EHB 566; *Brockley v. DEP*, 2015 EHB 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa. 2002); *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001); *Blue Marsh Labs.*, 2008 EHB at 307-08; *Solebury Township v. DEP*, 2004 EHB 23, 28-29. There are, however, various exceptions to the mootness doctrine where the Board will not dismiss a case. These exceptions include instances where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pennsylvania Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd* 731 A.2d 133 (Pa. 1999); *Ehmann v. DEP*, 2008 EHB 386, 389; *Solebury Township*, 2004 EHB at 29. Applying these decisions to the appeal before the Board, the Board finds that the Department is not entitled to judgment at this time for the reasons set forth below.

Mr. Klesic does not dispute that the Department rescinded and revoked its civil penalty assessment on January 29, 2016, and rescinded and revoked its order on January 28, 2016. Normally, where the Department has acted to rescind its prior appealable action, the Board has

generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758; *See Lipton, et al. v. DEP*, 2008 EHB 223; *Cromwell Township v. DEP*, 2007 EHB 8; *Borough of Edinboro v. DEP*, 2000 EHB 1167. Here, however, Mr. Klesic argues that the Department is merely attempting to have the Board dismiss the current appeal, and, the Department will ultimately reissue new orders or assessments. This argument has merit based upon the limited record before the Board. Although the Department rescinded the civil penalty assessment and order, the Department admits in its response to the Appellant's reply to the motion to dismiss that Mr. Klesic will still be required to resolve the outstanding issues at the site in question. Administrative orders and civil penalty assessments remain the most likely tools that the Department will use to gain compliance. This situation appears to fall squarely within exceptions to the mootness doctrine because the issues in this appeal are likely to be repeated and evade review, and Mr. Klesic will suffer a detriment without a decision from the Board. The Department's conduct to gain compliance is capable of repetition in the form of new orders and assessments issued to UEG or Mr. Klesic, yet likely to evade review if the Board grants the Department's motion to dismiss.

The procedural history of this appeal also supports the Board's decision to allow the appeal to continue. The Department issued the order to UEG, a corporation. Mr. Klesic filed the appeal on behalf of UEG and also in his individual capacity as the Board recently discovered. The appeal of UEG has been dismissed because UEG failed to retain counsel as required by the Board's Rules at 25 Pa Code § 1021.21(b). Mr. Klesic's appeal remains. Allowing the appeal to continue now may allow the Board and the Parties to avoid similar issues in the future if and when the Department decides to take a new enforcement action.

The Commonwealth Court has recently explained that in order for the first mootness exception to apply, (1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be a reasonable expectation that the complaining party will be subjected to the same action again. *Consol Pennsylvania Coal Co. v. DEP*, No. 351 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Dec. 15, 2015) (*quoting Phila. Pub. Sch. Notebook v. Sch. Dist. Of Phila.*, 49 A.3d 445, 449 (Pa. Cmwlth. 2012); *see also Sludge Free UMBT, et. al. v. DEP and Synagro*, 2015 EHB 888, 890.

With respect to whether the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration, the Board finds that this element is satisfied in this case because the Department withdrew the challenged order and civil penalty assessment prior to Board resolution of the appeals. Regarding the reasonable expectation that Mr. Klesic will be subject to the same, or similar, actions again, there are strong indications that the Department will have to take similar actions in the future. The Department admits in its reply that outstanding issues at the site in question remain, which require resolution, subjecting UEG or Mr. Klesic to the same Department enforcement action. At this preliminary stage of the appeal, the Department's response strongly suggests that the Department will require UEG or Mr. Klesic to resolve the issues with the site, including the issuance of future orders or civil penalty assessments. Because the facts of this appeal fit within an exception to the mootness doctrine, the Board will not decide that Mr. Klesic's appeal is not in fact moot at this time[1].

[1] Mr. Klesic filed with the Board a request for the production of documents on November 23, 2015 and a motion to compel discovery and interrogatories on February 1, 2016. With the Board's determination that this appeal is not moot, the Board turns to the Appellant's motion to compel responses to interrogatories and requests for production of documents. The Department shall file its response to the motion to compel by March 28, 2016. In a normal situation, the Board would simply grant the motion to compel where the Department failed to file a response to the motion. Here, the appeal was initially dismissed and subsequently reinstated in the name of Mr. Klesic. In light of the procedural complications, the Board will give the Department one last chance to file a response before ruling on Mr. Klesic's motion.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN W. KLESIC	:	
	:	
v.	:	**EHB Docket No. 2015-150-M**
	:	**(Consolidated with 2015-169-M)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 21st day of March, 2016, it is hereby ordered as follows:

1. The Department's motion to dismiss is **denied.**

2. The Department shall respond to the Appellant's motion to compel by **Monday, March 28, 2016**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 21, 2016

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

For the Commonwealth of PA, DEP:
Marianne Mulroy, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Stephen W. Klesic
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2016-009-L**
	:	**(Consolidated with 2016-024-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and INSURANCE AUTO	:	**Issued: March 22, 2016**
AUCTIONS, INC., Permittee	:	

OPINION AND ORDER ON
MOTION FOR TEMPORARY INJUNCTION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a *pro se* appellant's motion for a temporary injunction because the Board is not empowered to grant injunctions. To the extent the appellant's motion can be interpreted as a petition for supersedeas, it must be dismissed because the appellant has failed to provide adequate factual and legal support pursuant to 25 Pa. Code § 1021.62(c) for the granting of a supersedeas. The appellant has not explained why the Department's approval of an NPDES permit for stormwater runoff was unlawful or unreasonable.

O P I N I O N

On December 9, 2015, the Adams County Conservation District approved what appears to be after-the-fact coverage under a PAG-02 NPDES General Permit for stormwater discharges associated with construction activities for Insurance Auto Auctions, Inc., which operates an automobile salvage yard in Latimore Township, Adams County. Glenn J. Morrison, M.D.,

acting *pro se*, appealed that approval of coverage at EHB Docket No. 2016-009-L.[1] Subsequent to the Conservation District's approval, Morrison requested that the Department of Environmental Protection (the "Department") conduct an informal hearing on the decision pursuant to 25 Pa. Code § 102.32(c).[2] During the hearing the Department received comments from both Morrison and Insurance Auto Auctions. The Department determined that the Conservation District acted appropriately and affirmed the NPDES approval. Morrison appealed the result of the informal hearing at EHB Docket No. 2016-024-L. We consolidated the two cases into the earlier docket number on February 26, 2016.

Morrison lives at the property adjacent to the salvage yard. He contends in this consolidated appeal that fluids from the vehicles—such as motor oil, transmission fluid, battery acid, and gasoline—leak out of their chassis and stormwater runoff then carries those fluids onto his property and horse pasture. He also makes allegations of potential groundwater pollution, which is of particular concern to him because he uses well water at his property.

Morrison has now filed a motion for a temporary injunction. He seeks to have Insurance Auto Auctions prohibited from moving or storing salvage vehicles on its property and to have all vehicles currently on site moved off of the property. In his motion Morrison makes many of the same general assertions that are contained in his notices of appeal in support of the argument that

---

[1] Parties proceeding *pro se* do so at their own risk and are held to the same standard as any other party in a matter before the Board. *DEP v. Columbo*, 2013 EHB 635, 643 n.1; *McGinnis v. DEP*, 2012 EHB 109, 123; *Matusinski v. DEP*, 2008 EHB 489, 496; *Eagle Res. Corp. v. DEP*, 2003 EHB 597, 599.

[2] That regulation provides:

> A person aggrieved by an action of a conservation district under this chapter shall request an informal hearing with the Department within 30 days following the notice of the action. The Department will schedule the informal hearing and make a final determination within 30 days of the request. Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures.

25 Pa. Code § 102.32(c).

the movement and storage of the salvaged automobiles poses a threat to the area watershed. Consequently, Morrison argues that Insurance Auto Auctions' operation is causing irreparable harm to neighboring landowners such as him. In support of his claims he cites Article I, Section 27 of the Pennsylvania Constitution and the three-prong test articulated in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).[3] Apparently addressing the elements of the test, Morrison summarily concludes that statutes and regulations have been broken, no measures have been taken to prevent environmental harm, and that the only benefit of the salvage yard is corporate profit, a benefit Morrison says should not be considered. Morrison's motion is supported by an affidavit executed by him, which contains a mixture of personal observations and argument against the salvage yard.

Insurance Auto Auctions and the Department argue in response that the Board is not authorized to act as a court in equity to grant injunctions, and that Morrison has failed to provide adequate factual and legal support for his motion. This Board, of course, is not a court acting in equity and we are not empowered to grant injunctions. *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 247 n.20 (citing *Marinari v. Dep't of Envtl. Res.*, 566 A.2d 385, 387 (Pa. Cmwlth. 1989)); *Grove v. DEP*, 2000 EHB 1212, 1214-15 n.1 (quoting *Thomas v. DEP*, 1998 EHB 778, 782-83); *City of Scranton v. DER*, 1995 EHB 104, 123-24. Accordingly, Morrison's motion must be denied on that basis alone.

---

[3] *Payne v. Kassab* sets forth its test in terms of three questions:

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

312 A.2d at 94.

By way of emergency relief, the Board is vested with the power to issue a supersedeas in appropriate cases. 35 P.S. § 7514(d). Even if we were to interpret Morrison's motion as a petition for supersedeas, however, his petition would need to be dismissed. A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Dougherty v. DEP*, 2014 EHB 9, 11; *Mellinger v. DEP*, 2013 EHB 322, 323; *Rausch Creek Land, LP v. DEP*, 2011 EHB 708, 709; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Twp. v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Servs. v. DEP*, 1999 EHB 649, 651; *Oley Twp. v. DEP*, 1996 EHB 1359, 1361-1362. The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, and the Board's rules provide that the grant or denial of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Neubert v. DEP*, 2005 EHB 598, 601. In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three criteria, with a strong showing of likelihood of success on the merits. *Hudson v. DEP*, 2015 EHB 719, 726; *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91 (citing *Pa. Mining Corp. v. DEP*, 1996 EHB 808, 810); *Neubert v. DEP*, 2005 EHB at 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. The issuance of a supersedeas is ultimately committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB at 802; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pa. PUC v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983).

Our rules provide us with the authority to deny a petition for supersedeas without holding a hearing on the petition for one of the following reasons: (1) lack of particularity in the facts pleaded; (2) lack of particularity in the legal authority cited as the basis for the grant of the supersedeas; (3) an inadequately explained failure to support factual allegations by affidavits; or (4) a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(1)-(4). *See also Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 732; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635. Morrison's motion is deficient with respect to three of these reasons—lack of particularity in the facts pleaded, lack of particularity in the legal authority cited, and failure to state grounds sufficient for the granting of a supersedeas.

Given the fact that a supersedeas is an extraordinary measure that is not to be taken lightly, it is critical that a petition for supersedeas plead facts and law with particularity and be supported by affidavits setting forth facts upon which issuance of the supersedeas may depend. 25 Pa. Code § 1021.62(a); *Dougherty v. DEP*, 2014 EHB at 12. The pleadings and affidavits must be such that, if the petitioner were able to prove the allegations set forth in its pleadings and affidavits at a hearing, and the Department and/or permittee did not put on a case, it would be apparent from the filings that the Board would be able, if it so chose, to issue a supersedeas. In other words, the petitioner's papers, on their face, must set forth what is essentially a *prima facie* case for the issuance of a supersedeas. *See Global Eco-Logical Servs. v. DEP*, 2000 EHB 829, 832; *A&M Composting v. DEP*, 1997 EHB 1093, 1098. A petition that together with its supporting documentation does not provide the Board with a basis for granting a supersedeas will be denied. *Mellinger v. DEP, supra*.

The purpose of this consolidated appeal is to determine whether the Conservation District erred in approving coverage under the general permit for stormwater discharges. The fatal flaw

in Morrison's motion is that he fails to explain how the District erred as a matter of either fact or law by approving coverage. He tells us, for example, that salvaged vehicles are being moved around on the site and fluids might leak from the vehicles in the process, but he does not explain why it somehow follows that the stormwater permit coverage was approved in error. He says there are zoning issues at the site but again fails to explain how that equates to a permitting error. Apart from quoting the Environmental Rights Amendment and making a passing reference to the federal Clean Water Act, Morrison does not specify any statutory or regulatory provision that he believes was violated by the issuance of the coverage approval. There are somewhat extensive regulatory requirements and criteria in 25 Pa. Code Chapter 102 that outline what applicants must demonstrate with respect to stormwater management in terms of developing plans and implementing best management practices. Morrison does not direct us to any of these requirements. Morrison does not identify what deficiencies he believes exists in, for instance, the post-construction stormwater measures that Insurance Auto Auctions will implement, or the studies and analyses underlying Insurance Auto Auctions' stormwater management plan. Morrison's attempt to incorporate the information and exhibits contained in his appeals into his motion is not an adequate substitution for the requirements of a supersedeas petition. *See Dougherty*, 2014 EHB at 14-15.

In addition to the lack of particularity in Morrison's motion, he has also failed to state grounds sufficient for the granting of a supersedeas. In order to ultimately prevail in this appeal, Morrison will need to prove by a preponderance of the evidence that the Conservation District and the Department's issuance of an NPDES permit to Insurance Auto Auctions was unlawful, in the sense that the Department or Insurance Auto Auctions violated some statutory, regulatory, or adjudicatory law or Morrison's constitutional rights, or that the Department's action was

otherwise unreasonable or not supported by the facts. *See generally Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, No. 789 C.D. 2015, ___ A.3d ___ (Pa. Cmwlth. Jan. 6, 2016); *Gadinski v. DEP*, 2013 EHB 246, 269. In order to prevail on a supersedeas petition, as previously mentioned, Morrison would need to show that he is clearly likely to succeed in showing that he will prevail on the merits, i.e., showing that the Department erred, as well as that a balancing of harms to the various parties and the public supports the issuance of a supersedeas. *Compare Hudson v. DEP*, 2015 EHB 719 (petitioner demonstrating clear violations of regulatory requirements in the stormwater permitting of a swine farm, rendering supersedeas appropriate).

Aside from failing to show or even allege any likelihood of success on the merits, Morrison provides insufficient support for any need for emergency relief given a balancing of harms. Morrison cites a continued threat of leaks, but we do not see how superseding the construction permit would solve that. The Department tells us that Insurance Auto Auctions cannot currently install permanent controls under the NPDES permit because it is involved in litigation with Latimore Township over the use of the property. Nevertheless, the Department says that while that litigation is pending, Insurance Auto Auctions still has obligations pursuant to a Consent Order and Agreement entered into with the Department, which requires Insurance Auto Auctions to implement and maintain interim erosion and sedimentation controls at the property. The CO&A also contains a condition for Insurance Auto Auctions to implement a restoration plan should it ever vacate the property prior to implementing the NPDES permit. The Department also asserts that the stormwater control measures required by the permit will actually improve the runoff Morrison complains about. It says that suspending the permit would only prolong and exacerbate the conditions giving rise to Morrison's appeal. The Department's contentions are supported by affidavit and exhibits. These points cut against the typical

orientation of a supersedeas where a party stands to suffer irreparable harm before a case can be adjudicated on the merits. Suspending an after-the-fact permit designed to remedy what appear to be inadequate stormwater controls would seem to be counterproductive.

Finally, even if we were to issue a supersedeas in this case, our supersedeas would only relate to the Conservation District's approval of the PAG-02 permit and the Department's subsequent affirmance of that approval. It is unlikely that superseding the NPDES permit coverage would somehow force Insurance Auto Auctions to remove all of the salvaged vehicles from its property, which seems to be what Morrison seeks in his motion based on his proposed order. Suspending the permit also would not affect Insurance Auto Auctions' obligations under the Consent Order and Agreement. As with the rest of his motion, Morrison fails to explain the legal authority for the relief that he is seeking.[4]

Accordingly, we enter the following Order.

[4] Morrison also requests in his motion that we conduct a site view. As this case moves forward, and in the event it approaches a hearing on the merits, we will consider scheduling a site view with the parties.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2016-009-L**
	:	**(Consolidated with 2016-024-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and INSURANCE AUTO	:	
AUCTIONS, INC., Permittee	:	

O R D E R

AND NOW, this 22nd day of March, 2016, it is hereby ordered that the Appellant's motion for a temporary injunction is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 22, 2016

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

For the Commonwealth of PA, DEP:
Elizabeth Spangenberg, Esquire
Curtis C. Sullivan, Esquire
Stevan Kip Portman, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Glenn J. Morrison, M.D.
(*via electronic filing system*)

For Permittee:
Brigid R. Landy, Esquire
David J. Raphael, Esquire
(*via electronic filing system*)

Commonwealth of Pennsylvania
Environmental Hearing Board

THE DELAWARE RIVERKEEPER NETWORK, CLEAN AIR COUNCIL, DAVID DENK, JENNIFER CHOMICKI ANTHONY LAPINA and JOANN GROMAN	:	
v.	:	**EHB Docket No. 2014-142-B**
	:	**(Consolidated with 2015-157-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and R.E. GAS DEVELOPMENT, LLC	:	**Issued: March 22, 2016**

OPINION AND ORDER ON PERMITTEE'S MOTION IN LIMINE TO STRIKE THE EXPERT REPORT AND PRECLUDE THE EXPERT TESTIMONY OF MR. DANIEL FISHER

By Steven C. Beckman, Judge

Synopsis

The Board denies Permittee's Motion in Limine to strike the expert report and preclude associated expert testimony of Appellants' witness. The Board will not preclude the witness' testimony at the hearing on the merits based solely on the Board's findings regarding the credibility of certain aspects of his testimony at the supersedeas hearing.

O P I N I O N

Introduction

Presently before the Board is a motion in limine that was filed by R.E. Gas Development ("Rex") and joined by the Pennsylvania Department of Environmental Protection ("the Department" or "DEP") to strike the expert report and preclude associated expert testimony of Daniel Fisher, a proposed witness for the Appellants. On September 12, 2014, the Department approved permits for Rex's six unconventional gas wells ("Geyer Wells") at the Geyer well site

in Middlesex Township, Butler County, Pennsylvania ("Geyer Well Site"). Two environmental groups, the Delaware Riverkeeper Network and the Clean Air Council, along with four individuals, David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman ("Appellants") filed an appeal of the Department's approval of the six Geyer Wells permits on October 13, 2014 and filed an amended appeal on November 3, 2014. On September 11, 2015, the Department renewed all six of the Geyer Wells permits under appeal and the Appellants, with the exception of Mr. Lapina, filed an appeal of those renewals on October 16, 2015. On October 23, 2015, the Board issued an Order consolidating the two appeals into the above-captioned matter.

In December 2015, Rex began drilling at the Geyer Well Site. Appellants filed an Application for Temporary Supersedeas and a Petition for Supersedeas on December 14, 2015. On December 15, 2015, after hearing the arguments of the parties for and against a temporary supersedeas, the Board denied Appellants' Application for Temporary Supersedeas. A hearing on Appellants' Petition for Supersedeas took place on January 6 and 7, 2016 at which Daniel Fisher provided expert testimony on behalf of the Appellants. On January 15, 2016, in accordance with a previously issued Order of the Board and prior to the ruling on Appellants' Petition for Supersedeas, the Appellants identified their experts, including Daniel Fisher, and provided a summary of their experts' opinions. On January 29, 2016, an Order denying the Appellants' Petition for Supersedeas was issued and an Opinion in support of that Order was issued on February 4, 2016 ("Supersedeas Opinion"). The Supersedeas Opinion pointed to certain aspects of Mr. Fisher's testimony as not credible, namely Mr. Fisher's testimony that the conditions at the Geyer Well Site create a "perfect storm" likely to cause a catastrophic and/or chronic release of gas and/or fluids from the Geyer Wells. *The Delaware Riverkeeper Network v. DEP*, EHB Docket No. 2014-142-B, slip op. at p.8 (Opinion in Support of Order Denying

Petition for Supersedeas, issued February 4, 2016) (citing T. 90-91). Based on the Supersedeas Opinion, Rex filed the current Motion requesting that the Board "strik[e] the expert report of Mr. Daniel Fisher and preclud[e] Mr. Fisher from testifying in the substantive permit appeal hearing as to the opinions articulated in his expert report that this Board has already found to be not credible." The Department joined in this Motion and Appellants filed a response opposing the Motion.

Motion in Limine Standard

A party may obtain a ruling on evidentiary issues by filing a motion in limine pursuant to 25 Pa. Code § 1021.121. A motion in limine is the proper and even encouraged vehicle for addressing evidentiary matters in advance of the hearing. *Kiskadden v. DEP*, 2014 EHB 634, 635 (citations omitted). In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. Whether to accept expert testimony is within the discretion of the Board, and the Board's decision will not be disturbed on appeal unless it is clearly erroneous. *Rhodes v. DEP*, 2009 EHB 237, 238 (citing *Grady v. Frito-Lay*, 839 A.2d 1038, 1046 (Pa. 2003)).

Analysis

Rex asserts in its Motion that the Board should not permit Appellants to "re-introduce non-credible opinion testimony from Mr. Fisher" because allowing that testimony at the substantive hearing will be a waste of time and constitutes the needless presentation of cumulative evidence. (Permittee's Memorandum of Law in Support of Motion, p. 6). In their response, Appellants emphasize the abbreviated nature of a supersedeas hearing and the fact that Mr. Fisher may be able to present additional facts or argument at the full hearing in support of

his conclusions. We first want to address Rex's request to strike Mr. Fisher's expert report. We find that there is no need to strike Mr. Fisher's expert report because it is not, nor will it be, evidence in this matter. While the Board does not have a rule governing this issue, as a general matter, I do not admit a copy of an expert report as evidence in hearings and do not consider expert reports that have been filed to the Board's docket to constitute evidence that may be cited in post-hearing briefs or relied on by the parties. Parties are free, of course, to introduce exhibits from an expert report and provide testimony regarding the opinions contained within an export report, but the expert report itself will not be admitted. Mr. Fisher's expert report was not admitted as evidence in the supersedeas hearing and, consistent with my past practice, it will not be admitted as evidence if we proceed to a full hearing. Therefore, we deny the request to strike Mr. Fisher's expert report.

Turning our attention to Rex's request to preclude Mr. Fisher from presenting expert testimony, we have fully considered the issue and we will permit Mr. Fisher to testify at the hearing. As stated by Judge Renwand in *Kiskadden v. DEP*, 2014 EHB 626, 630, "the Board dislikes precluding testimony, especially expert testimony." While we understand the basis for Rex's request, our primary concern regarding the request to preclude Mr. Fisher from testifying at the full hearing has to do with the nature of a supersedeas hearing and the resulting decision. In particular, we are cognizant of the fact that a supersedeas hearing involves expedited preparation by the parties and a limited record for consideration. In this particular case, the issue is further complicated by the timing of the supersedeas hearing, the timing of various expert filings and the timing of Board's opinion on the supersedeas petition. We also must consider the fact that the Supersedeas Opinion is the opinion of just one Judge. While the Judge hearing the arguments at the supersedeas may have found Mr. Fisher lacked credibility on certain points,

excluding Mr. Fisher from testifying at a full hearing based on credibility issues, in essence, converts that credibility decision in to a final Board decision without allowing all five Judges on the Board the opportunity to evaluate Mr. Fisher's testimony and judge his credibility. We cannot say with certainty how the full Board will view Mr. Fisher's testimony and we think that it would be inappropriate to deny the full Board the opportunity to consider the testimony of Appellants' expert on a crucial part of their case based on a credibility determination in a supersedeas hearing.

In the end, Rex's Motion requires us to balance these concerns against the very real desire to prevent the waste of time and the needless presentation of cumulative evidence. With the benefit of the knowledge gained at the supersedeas hearing, and keeping in mind the Supersedeas Opinion, we trust that the parties will adjust their hearing presentations to minimize any potential waste of time and presentation of cumulative evidence. We find that in balancing these concerns under the facts and circumstances of this case, we will not exclude Mr. Fisher from testifying at the full hearing because such a ruling would in essence extend the findings from a supersedeas hearing in to what amounts to a final ruling on a significant part of Appellants' case. As the Board has said repeatedly, '[i]t is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal." *Weaver v. DEP*, 2013 EHB 486, 489. For these reasons, the Board denies Permittee's Motion in Limine to Strike Expert Report and Preclude the Expert Testimony of Mr. Daniel Fisher.

Commonwealth of Pennsylvania
Environmental Hearing Board

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

O R D E R

AND NOW, this 22nd day of March, 2016, following review of Permittee's Motion in Limine to Strike Expert Report and Preclude the Expert Testimony of Mr. Daniel Fisher, and Appellant's response thereto, it is hereby ordered that the Motion is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 22, 2016

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

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

For Appellants, Delaware Riverkeeper Network, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman:
Lauren M. Williams, Esquire
Jordan B. Yeager, Esquire
(via electronic filing system)

For Appellant, Clean Air Council:
Joseph Minott, Esquire
Alexander Bomstein, Esquire
Aaron Jacobs-Smith, Esquire
Augusta Wilson, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAYNE K. BAKER	:	
	:	
v.	:	**EHB Docket No. 2014-151-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: March 23, 2016**

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board finds that the Department of Environmental Protection did not err in granting Stage 1 bond release. When a landowner challenges the Department's approval of Stage 1 bond release, the burden of proof is on the landowner to demonstrate that the Department erred or violated a statutory provision or regulation in granting the bond release. Although the burden of proceeding may shift to the Department or mining company to dispute the allegations of the landowner, the burden of proof remains with the party who brought the appeal. In evaluating approximate original contour, we rely on measurements taken by the mining company's expert since he followed the methodology for measuring slopes set forth in the mining regulations. Where the evidence shows that oil constituents are present in amounts less than the Act 2 health based standards in an area of the site where equipment maintenance took place, we do not find this to be evidence of widespread contamination of oil at the site. Likewise, the discovery of four filters, three oily rags and a plastic lid in the staging area is not evidence of widespread contamination at the site.

PROCEDURAL BACKGROUND

This matter involves the approval of Stage I bond release by the Pennsylvania Department of Environmental Protection (Department) for surface coal mining conducted by Amerikohl Mining, Inc. (Amerikohl) on property owned by Wayne K. Baker in Fayette County, Pennsylvania. Mr. Baker opposes Stage I bond release based on his allegations that the site has not been returned to approximate original contour and that waste was illegally disposed of on the site.

Mr. Baker filed a petition for supersedeas and temporary supersedeas on November 26, 2014. In lieu of a supersedeas hearing, the parties agreed to an expedited hearing schedule, and the Department agreed not to reduce the bond pending a ruling on the expedited hearing. A site view was held on April 30, 2015, and a hearing in this matter was held before Chief Judge and Chairman Thomas W. Renwand on August 26 through 28, 2015. All post hearing and reply briefs have been submitted, and this matter is now ripe for adjudication.

FINDINGS OF FACT

1. Mr. Wayne K. Baker is an individual who resides at 315 Lake Lynn Road, Lake Lynn, Fayette County, Pennsylvania. (Notice of Appeal; T. 129)

2. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Joint Stipulation, para. 1)

3. Amerikohl Mining, Inc. (Amerikohl) is a Pennsylvania corporation with a business address of 1384 State Route 711, Stahlstown, PA 15687, and is engaged in the business of mining coal by the surface method pursuant to License No. 1475. (Joint Stipulation, para. 2)

4. Amerikohl conducted surface mining activities on property owned by Mr. Baker in Springhill Township, Fayette County (the Baker site) pursuant to Surface Mining Permit No. 26100103 (the Baker permit), which was issued on July 21, 2011. (Joint Stipulation, para. 3)

5. Mr. Baker originally signed a contract with Purco Coal Company for the extraction of coal on his property. The Purco contract was subsequently assigned to Amerikohl in 2010. (T. 140-41, 653-54)

6. Mr. Baker signed a Land Use Change Form for the Baker site on June 24, 2010. The form changes the post-mining land use to "unmanaged natural habitat." (Appellant Ex. 2; T. 168-71, 180-82)

7. Also on June 24, 2010, Mr. Baker signed a Negative Prime Farmland Soils Statement that states that the area covered by permit "has not produced a crop for five (5) or more of the last ten (10) years." It further states that the areas "designated as prime farmland soils by the Soil Survey of Fayette County, Pennsylvania, are covered by mature tree growth." (Appellant Ex. 2) (underlining in original) (T. 168-71, 180-82)

8. Amerikohl's "land man" presented the Negative Prime Farmland Soils Statement and Land Use Change Form to Mr. Baker to sign while they were on his property. Mr. Baker does not recall a notary being present when he signed the form. (T. 169-71)

9. The total bond amount posted for the Baker permit is $141,520.00 (Joint Stipulation, para. 4)

10. On or about July 23, 2014, Amerikohl submitted a request for Stage 1 bond release on 28.1 acres of the Baker permit, for a release of $77,659 or 60% of the total bond. (Joint Stipulation, para. 5)

11. In a letter dated September 19, 2014, the Department concluded that the Baker site met Stage 1 bond release standards. (Notice of Appeal) The Department approved Stage 1 bond release in November 2014. (T. 481)

12. Reduction of the bond for the Baker site has been stayed pursuant to an agreement between the parties resolving Mr. Baker's petition for supersedeas. (Joint Stipulation, para. 6)

13. Section 10.4 of Module 10 of Amerikohl's surface mining permit states in relevant part, "Identify the final grading and drainage pattern . . . . Operations involving steep slopes (greater than 20 degrees) must include a stability analysis." Amerikohl's response to that section states in relevant part, "The maximum slope encountered will be approximately 15 % or 8.5 degrees. A slope stability analysis is not needed since the sloped areas are well below 20 degrees." (T. 23; Appellant Ex. 2)

14. According to Section 10.4 of Module 10 of Amerikohl's permit no pre-mining slopes exceeded 8.5 degrees. (T. 63-64; Appellant Ex. 2)

15. Neither Amerikohl nor its consultant, Earth Tech, conducted a pre-mining survey to ascertain the original contours of the site. (T. 563, 692-93) Amerikohl used USGS contour maps to determine the original contour. (T. 692)

16. William G. Rosner holds a professional surveyor's license within the Commonwealth of Pennsylvania and has approximately 50 years' experience in the mining industry. (T. 13) Mr. Rosner was recognized by the Board as an expert in surface mining operations, surface mine reclamation and land surveying. (T. 17)

17. Mr. Baker retained Mr. Rosner as a consultant in July 2014. (T. 17-18, 19)

18. Shortly after being retained by Mr. Baker in July 2014, Mr. Rosner went to the Baker site and took measurements of what he considered to be the steeper areas of backfill using an Abney level, which is a handheld tool for taking slope measurements. (T. 24, 670-71) He measured the slope as being 22.6 degrees. (T. 25)

19. The slope that Mr. Rosner measured was located upslope from a portion of the collection ditch at the perimeter of the site on the northern portion of the mine site. (T. 25)

20. Other than this area, Mr. Rosner concluded that a majority of the site had been backfilled to approximate original contour. (T. 111) He agreed that the slopes blend in with the adjacent topography. (T. 73)

21. Mr. Rosner conducted a physical survey of the Baker site on March 11, 2015. (T. 37) To conduct the survey, he used conventional surveying equipment. (T. 37)

22. The measurements that Mr. Rosner took on March 11, 2015 supported his earlier conclusion in July 2014. (T. 62)

23. Mr. Rosner published his conclusions in a report dated April 9, 2015. (T. 63; Appellant Ex. 3) Mr. Rosner concluded that the Baker site does not meet approximate original contour because his slope measurements exceeded the gradient stipulated in the Amerikohl permit. (T. 67)

24. Mr. Rosner concluded the backfill was unevenly distributed on the site, creating steep slopes in some areas and a topographic depression near the haul road. (T. 69)

25. Collection Ditch C-3 and Sedimentation Pond SP-2 were removed, re-graded, re-seeded and mulched beginning on or about April 20, 2015. (T. 451, 655-56)[1]

[1] The transcript states that Amerikohl's consultant, Charles Lightfoot was on the site on "August 20 [2015]" and at that time "the beginning of the reclamation of [collection ditch] C-3 was undergoing." (T.

26. Mr. Rosner visited the Baker site again on August 21, 2015. (T. 70) Using an Abney level that he rested on his truck, he measured the slope at the area of the former collection ditch as being 23 degrees. (T. 114)

27. An Abney level is a handheld device and is used for approximating slopes, angles and distances. It is not as accurate as a physical survey. (T. 670-71)

28. William Shuss is a Mine Conservation Inspector Supervisor with the Department. (T. 469) He previously worked as a Surface Mine Inspector Supervisor and as a reclamation specialist for a coal company. (T. 470-71) Mr. Shuss was recognized as an expert in surface mine reclamation. (T. 473, 475)

29. If a site looks like it has been re-graded in a manner that Mr. Shuss feels is consistent with the regulations, he does a visual assessment of the slopes. (T. 479) If his visual assessment raises any concerns, he asks either the Department's mine inspector or the mining company to take measurements. (T. 480)

30. When Mr. Shuss approved Stage 1 bond release for the Baker site, he did not look at the data for the pre-existing contours. He looked at whether the site blended well with the surrounding topography. (T. 536)

31. A visual assessment is the manner in which Mr. Shuss has typically evaluated approximate original contour throughout his career. The only exception is when he sees what he considers to be "extremes." (T. 485-86)

32. Photographs at the Baker site taken by the Department on August 6, 2015 depict gradual slopes and no highwalls, spoil piles or depressions. (Commonwealth Ex. C-7 – C-9)

655-56) Based on his subsequent testimony where he referred to this date as being "April 20," we find that the date of "August 20" is either a typographical error or a misstatement by the witness. Based on his testimony as a whole, we believe the correct date to be April 20, 2015.

33. The Department did not take measurements of the slopes at the Baker site. (T. 493)

34. A slope stability analysis was not done prior to bond release because the Department's information indicated there were no slopes exceeding 20 degrees. (T. 508, 512)

35. Charles Lightfoot is a mining engineer with Earth Tech. (T. 646) He has a degree in mining engineering from Penn State. (T. 647) He was recognized by the Board as a professional engineer and an expert in the preparation of permit applications and completion reports for bond release applications and the development and interpretation of data to determine whether the reclamation of a site meets approximate original contour. (T. 650-51)

36. PASDA contours are part of the LIDAR mapping system that has mapped the Commonwealth of Pennsylvania. (T. 654)

37. PASDA contours are more accurate than USGS contours. (T. 692) PASDA contours are updated, whereas USGS contours are based on photos from the 1950s or 1960s. (T. 654) PASDA contours are available at intervals of two feet, whereas USGS contours are at 20 foot intervals. (T. 654) PASDA contours are based on more modern mapping technology. (T. 692)

38. The pre-mining slope measurements listed in Amerikohl's permit application were based on USGS contours because the application was submitted in 2006 and PASDA contours were not widely available until 2007-2008. (T. 692-93)

39. Earth Tech's report prepared for this case used PASDA contours, instead of USGS contours, to show the pre-mining contour of the site. (T. 695)

40. A post-mining GPS survey was conducted by Earth Tech sometime after April 28, 2015. (T. 657)

41. The Earth Tech survey shows that post-mining slopes on the site are less than the pre-mining slopes. (T. 665)

42. Cross sections in the vicinity of former collection ditch C-3 show that the average post-mining slope does not exceed 8 degrees. (T. 674)

43. There are no highwalls left on the portion of the site that was disturbed by Amerikohl. There are highwalls remaining from a prior mining operation on a portion of the site that was not disturbed by Amerikohl. (T. 675)

44. There is an area of depression at the bottom of the haul road. (T. 702)

45. There is a mounded area on the site in the location between cross sections 11 to 11' and 12 to 12'. (T. 704-05)

46. Mr. Lightfoot performed a stability analysis on the slope that Mr. Rosner measured as being 22.6 degrees and determined the slope was stable. (T. 708-09)

47. In February 2015, Mr. Baker, Mr. Baker's son, Mr. Rosner, and a representative from American Geosciences (AGI) excavated several test pits at an area north of Sediment Pond No. 2 known as the staging area. (T. 31, 155-59, 182) The staging area is where Amerikohl kept its oil and fuel tanks and performed maintenance on equipment. (T. 182)

48. During the excavation, three oil filters, a fuel/water separator filter, three oily rags and a plastic lid were uncovered. (T. 34-35, 36, 159)

49. David Parsonage is a vice-president at American Geosciences. He was recognized by the Board as an expert in the environmental characterization and evaluation of sites and releases and the processes related to those characterizations and evaluations. (T. 340, 341) His experience includes testing for chemicals in the environment. (T. 339-40)

50. Dr. James Pinta, Jr. is Vice President of Environmental Services for Civil and Environmental Consultants (CEC). (T. 568) Over the course of his career, Dr. Pinta has planned, conducted or supervised over 1,000 site investigations or site characterizations. (T. 571)

51. Dr. Pinta was recognized by the Board as a professional geologist and an expert in the field of environmental site investigation and interpretation of related field and laboratory data. (T. 573)

52. On April 22, 2015, the Department took samples from the staging area where Mr. Baker's test pits had been dug. (T. 290-94, 583)

53. The sampling showed the presence of petroleum compounds. (T. 291-92) All of the constituents were lower than the health based residential remediation standards established under Act 2. (T. 388-94)

54. No sampling results were submitted for other areas of the site.

DISCUSSION

Pursuant to the Environmental Hearing Board Rules of Practice and Procedure, where a party who is not a recipient of a Department action files an appeal of that action, he or she has the burden of proof. 25 Pa. Code § 1021.122(c)(2). As we held in *Clancy v. DEP*, 2013 EHB 554, 572, "like all who appeal the Department's approval of a Stage I bond release, [the appellant] has the burden of proof in this matter." (citing *Wayne v. Department of Environmental Protection,* 2000 EHB 888, 902.) Thus, Mr. Baker bears the burden of proving by a preponderance of the evidence that the Department abused its discretion in approving Amerikohl's application for Stage I bond release by failing to follow the criteria set forth in the Pennsylvania Surface Mining Act, the Clean Streams Law and the regulations thereunder. *Id.*

(citing *Lucchino v. DEP*, 2000 EHB 655, 667). *See also*, *Brockway Borough Municipal Authority v. DEP*, EHB Docket No. 2013-080-L (consolidated with 2014-086-L) (Adjudication issued April 24, 2015) (citing *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269), *slip op*. at p. 16, *aff'd*, No. 789 C.D. 2015 (Pa. Cmwlth. January 6, 2016) ("The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution.") "Preponderance of the evidence" means "that the evidence in favor of the proposition must be greater than that opposed to it…" *Clancy, supra*, at 572 (quoting *McGinnis v. DEP*, 2012 EHB 109, 125). Therefore, in order to meet his burden of proof, Mr. Baker must demonstrate that his allegations of waste disposal and failure to meet approximate original contour are supported by a preponderance of the evidence.[2]

The standard for Stage I bond release is set forth in 25 Pa. Code § 86.174(a), which states as follows:

[2] Mr. Baker asserts that he should not carry the burden of proof with regard to his allegation of waste disposal since Amerikohl is in a better position to know where waste was disposed on the site. Amerikohl and the Department counter that Mr. Baker is in the best position to prove this allegation since he is the party alleging that he saw it occur. Although we may shift the burden of proceeding, the ultimate burden of proof remains with the party who asserts it. *See* Section 1021.122(a) of the Environmental Hearing Board Rules of Practice and Procedure. 25 Pa. Code § 1021.122(a) ("In proceedings before the Board, the burden of proceeding and the burden of proof shall be the same as at common law in that the burden shall normally rest with the party asserting the affirmative of an issue. . .In cases where a party has the burden of proof to establish the party's case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of proceeding with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue."). Thus, although the burden of proceeding may shift to Amerikohl depending on the evidence presented by Mr. Baker, the ultimate burden of proving the issue of waste disposal by a preponderance of the evidence remains with Mr. Baker. *See Philadelphia Co. v. SEC*, 175 F.2d 808, 818 (D.C. Cir. 1948), *dismissed as moot*, 337 U.S. 901, 69 S. Ct. 1047, 93 L.Ed. 1715 **(**1949**)** (Generally speaking, "the burden of proof lies upon him who affirms, not him who denies." (*citing* 1 Jones, Evidence in Civil Cases (4th ed. 1938) § 180; Stephen Digest of the Law of Evidence (12th ed. 1946) Article 100).

> (a) When the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan, Stage 1 reclamation standards have been met.

Approximate Original Contour

The term "approximate original contour" is not defined in the mining regulations. However, "contouring" is defined as follows:

> Contouring – reclamation of the land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water and with adequate provision for drainage.

25 Pa. Code § 87.1.

It is Mr. Baker's contention that the site fails to meet the approximate contour that existed prior to mining. He bases this assertion on two sets of data: first, information contained in Amerikohl's permit application regarding pre-mining slope measurements and, second, post-mining slope measurements taken by William Rosner, Mr. Baker's consultant. Mr. Rosner first took measurements in July 2014 by using an Abney level, a hand-held device. He measured an area of the site that raised a concern for him in the vicinity of Collection Ditch C-3, at the northern perimeter of the site. He determined the slope in this area to be 22.6 degrees. Mr. Rosner subsequently conducted a field survey in March 2015 and again found the slope to be the same degree of steepness. Finally, just days before the hearing in this matter, he again measured the slope using an Abney level and determined that the slope was approximately 23 degrees.

Since no pre-mining survey of the site exists, Mr. Rosner compared his measurements to the data set forth in Module 10 of Amerikohl's permit application, which purports to set forth pre-mining conditions at the site. Section 10.4 of Module 10 states that "[t]he maximum slope

encountered [pre-mining] will be approximately 15 percent or 8.5 degrees. A slope stability analysis is not needed since the sloped areas are well below 20 degrees." (F.F. 13) Therefore, by Amerikohl's own admission, pre-mining slopes at the site were no greater than 8.5 degrees and in no case above 20 degrees.

Comparing the pre-mining slope measurements contained in Module 10 (slopes no greater than 8.5 degrees) with Mr. Rosner's measurement of the slope near Collection Ditch C-3 (22.6 degrees), it is Mr. Baker's contention that the post-mining slope in the vicinity of the collection ditch far exceeds its pre-mining condition and, therefore, fails to satisfy the requirement that the site meet approximate original contour.

The Department and Amerikohl challenge Mr. Baker's contention on numerous grounds. First, they point out that Collection Ditch C-3 was removed in late April 2015, after Mr. Rosner undertook his survey, and the slope is no longer as steep as when Mr. Rosner took his measurements. Second, they argue that Mr. Rosner's measurements are not reliable because he did not follow the methodology set forth in the surface mining regulations for measuring slopes. Finally, they rely on the field survey conducted by Amerikohl's consultant, Earth Tech, which shows that the post-mining slopes are consistent with or better than pre-mining slope conditions

William Shuss, the Department's Mine Conservation Inspector Supervisor, admitted to there being a steep slope in the area of Collection Ditch C-3 prior to its reclamation. However, once the collection ditch was removed and regraded in late April 2015, the Department and Amerikohl contend that the slope was significantly reduced. They argue that Mr. Rosner's slope measurements do not reflect the current state of the site. Mr. Baker counters that even if there were a reduction in the slope after the collection ditch was reclaimed in April 2015, the

Department approved the bond release in November 2014, far in advance of the reclamation of the collection ditch and any alleged corresponding reduction in slope.

Amerikohl and the Department assert that Mr. Rosner's measurements cannot be relied upon because he did not follow the methodology called for in the mining regulations. Section 87.54(a)(21) of the surface mining regulations explains how to take a slope measurement as follows:

> (i) Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed, or, when this is impractical, at locations specified by the Department.
> (ii) The measurements shall extend at least 100 feet beyond the limits of mining disturbances, or another distance determined by the Department to be representative of the premining configuration of the land, when the area has been previously mined.
> (iii) Slope measurement shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed.

25 Pa. Code § 87.54(a)(21).

Rather than taking measurements extending 100 feet above and below the area disturbed by mining, as required by Section 87.54(a)(21), the Department and Amerikohl argue that Mr. Rosner focused on small, incremental segments within a section of the site. They assert that if one follows the methodology set forth in the regulations, no slopes exceed the 8.5 degree pre-mining approximate value set forth in Module 10.4 of the mining application. Amerikohl's consultant, Charles Lightfoot, testified that when slopes are measured according to the methodology set forth in the regulations, the steepest post-mining average slope is 8 degrees. (T.664- 74)

Amerikohl's consultant, Earth Tech, performed a field survey of the site in April 2015, after removal of Collection Ditch C-3. (T. 664) From that field survey, Mr. Lightfoot prepared cross sections comparing the pre-mining and post-mining contours at the site to demonstrate that post-mining conditions do not exceed the pre-mining contours and, in some cases, have improved on pre-mining conditions. (T. 665-68) Since no pre-mining survey was performed at the site, Earth Tech relied on pre-mining contours from two sources: the PASDA[3] database and USGS[4] maps.[5] Mr. Lightfoot's cross sections demonstrate that post-mining slopes are consistent with pre-mining conditions. Following the method set forth in Section 87.54(a)(21) of the regulations, he demonstrated that the steepest overall slope was measured at 8 degrees.

Mr. Baker points to Mr. Rosner's measurement taken days before the hearing showing that the slope in the area of the former collection ditch was 23 degrees. However, Mr. Rosner's measurement was taken with an Abney level, a handheld device, resting on his truck, which is not as reliable as a land survey. Additionally, Mr. Rosner provided no testimony that he followed the methodology set forth in Section 87.54(a)(21) when he measured the slope.

Although we were very impressed with Mr. Rosner and his credentials and experience, we assign a higher degree of reliability to Mr. Lightfoot's measurements since he used the

---

[3] Although not defined at the hearing, "PASDA" is the acronym for Pennsylvania Spatial Data Access and, according to its website "is the official public access geospatial information clearinghouse for the **Commonwealth of Pennsylvania.**" **http://www.pasda.psu.edu/** (last checked March 15, 2016). At trial, Mr. Baker's counsel referenced a disclaimer on the PASDA website regarding the use of its data. However, Mr. Lightfoot testified that PASDA data is widely used for engineering purposes (T. 706), and we have no reason to question Mr. Lightfoot's testimony on this matter.

[4] "USGS" is the acronym for "U.S. Geologic Survey." **http://www.usgs.gov/** (last checked March 15, 2016)

[5] PASDA provides a more accurate representation of pre-mining conditions because PASDA contours are updated, whereas USGS contours are based on photos from the 1950s or 1960s; PASDA contours are available at intervals of two feet, whereas USGS contours are at 20 foot intervals; and PASDA contours are based on more modern mapping technology. (F. F. 37) USGS maps were used as the source of pre-mining data set forth in the permit application because PASDA was not available at the time the mining permit application was being prepared. Once PASDA became available, Mr. Lightfoot used both it and USGS as a source of data for pre-mining comparison.

methodology set forth in the mining regulations. For this reason, we also respectfully disagree with Mr. Rosner's contention that the backfilling of the site is imbalanced.

Mr. Baker cites the Board's decision in *Old Home Manor v. DEP*, 1986 EHB 1248, for the proposition that an improperly reclaimed area of even a small size can be a basis for finding that the mining operator has not met approximate original contour. However, the reclamation standards at issue in *Old Home Manor* were those in effect prior to the 1980 amendment of the Surface Mining Conservation and Reclamation Act; therefore, this decision is of limited value to us as we review the reclamation of the Baker site under the standards currently in effect.

Mr. Baker also cites the Board's more recent decision in *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 587, as support for his claim that the Stage 1 bond release was improperly approved for the Baker site. However, that case is both procedurally and factually different from the present matter. *Rausch Creek* involved an appeal of a surface mining permit renewal, not Stage 1 bond release. Additionally, the mining operator in *Rausch Creek* intended to dispose of coal ash on the site, and the Board determined that the site would deviate from its approximate original contour due to the overfilling with ash. The Board described the condition of the site in Rausch Creek as follows:

> [T]he top of the fill at its northern perimeter, and to some extent at the western perimeter of the fill, extends out too far. Instead of a triangle that blends into the hillside, picture a rectangle that protrudes above the natural contour of the hillside. As a result, the northern end of the fill is too high. This in turn creates a very steep drop-off. It is cliff-like in some places. It is unsafe, environmentally unsound, and aesthetically unacceptable. The deviation is substantial and may involve tens of thousands of cubic yards of fill.

2013 EHB at 607-08. This is quite different from the Baker site, which appears in photographs introduced at trial to be a gentle, relatively uniform slope that blends in with the surrounding land.

Mr. Baker provided testimony that he is no longer able to run farm equipment over the property. However, prior to the start of mining by Amerikohl, Mr. Baker signed a Land Use Change Form in which he agreed that the land use would be changed from farmland to unmanaged natural habitat. (F.F. 6) He also signed a statement saying that the area covered by the permit "has not produced a crop for five (5) or more of the last ten (10) years." (F.F. 7) Mr. Baker states that he was told by Amerikohl's representative that he had to sign those documents or Amerikohl would not receive its permit. He also testified that he did not sign the documents in front of a notary, as indicated on the forms. He did not dispute, however, that the signature on the documents was his. Moreover, Mr. Baker has experience in the surface mining industry, having operated a surface mining company from approximately 1974 to 1990, and having worked on approximately 35 to 40 reclamation projects. (T. 138-39) We, therefore, believe that he understood the forms he was signing.

Mr. Lightfoot was asked about an area of depression at the bottom of the haul road as well as a mounded area located between the areas covered by two of the cross sections he had prepared. Mr. Lightfoot admitted that the area of depression and mounded area exist at the site, although he disputed they were as severe as Mr. Rosner claimed. Mr. Rosner produced drawings of this area as part of his testimony, but admitted to issues with the scale of the drawings. (T. 90-92) The Department produced photographs of the area that rebut any claim of imbalance in backfill. The photographs show a gently sloped hillside that blends in with the area around it.

Therefore, without further evidence to demonstrate that these areas do not meet approximate original contour, we cannot find that Mr. Baker has met his burden of proof on this matter.

Waste Disposal

Mr. Baker contends that Stage 1 bond release should not have been granted based on his allegation that Amerikohl employees dumped waste oil and illegally buried solid waste at the site. He points to Section 315(b) of the Clean Streams Law, which states as follows:

> Upon the completion of any mining operation and prior to the release by the department of any portion of the bond liability, the operator shall remove and clean up all temporary materials, property, debris or junk which were used in or resulted from his mining operations.

35 P.S. § 691.315(b).

In February 2015, Mr. Baker excavated a portion of the site in the location known as the staging area, where Amerikohl stored and maintained its equipment. During this excavation, he uncovered three oil filters, a fuel/water separator filter, three oily rags and a lid from a bucket. It is Mr. Baker's contention that the presence of these materials is an indication of widespread disposal of solid waste at the site and a violation of Section 315(b). Mr. Baker removed the materials[6] and presented no further evidence of solid waste disposal on the site. We find that the presence of those materials, though disconcerting, is *de minimus* and does not constitute a basis for overturning the Department's approval of Stage 1 bond release. The presence of a handful of items in an area where equipment maintenance took place is not evidence of widespread disposal throughout the site. Moreover, the items have been removed from the site, albeit by Mr. Baker, and there appears to be no further basis for withholding bond release on these grounds.

Mr. Baker testified that he observed an Amerikohl employee, Mike Richter, dumping waste oil onto the ground in March or April 2014. Mr. Baker did not make a complaint about

[6] In fact, the materials were presented at trial as exhibits.

this incident, either to the Department or to Amerikohl, at the time he alleges it occurred. Rather, in July 2014 he contacted the United States Environmental Protection Agency (EPA) to report the dumping of waste oil at the site. The complaint to EPA occurred following a dispute between Mr. Baker and Amerikohl over the payment of royalties. EPA referred the complaint to the Department.

The Department sent an investigator from its Office of Chief Counsel Bureau of Investigations, Bruce Gearheart, to the site. Mr. Gearheart interviewed several Amerikohl employees and all said they were unaware of any oil spills. Mr. Gearheart also interviewed Mike Richter, at that time retired from Amerikohl, who admitted that he was aware of an episode of vandalism in which a plug was removed from the tank holding waste oil, allowing approximately 20 gallons to escape.

Mr. Baker points to readings taken with a Photoionization Detection (PID) meter as evidence of waste oil contamination. Mr. Baker's expert, William Parsonage, testified that a PID meter is used in the field to screen for the presence of organic substances that ionize. He stated, "It's a general reading instrument. It doesn't tell you conclusively what's in whatever you're reading. It's used for health and safety purposes but also a routine tool to help. . .where you might have evidence of contamination." (T. 353) Two readings with the PID meter were included in Mr. Parsonage's report. One reading was zero, the other 8.5 ppm (parts per million). (T. 378) He concluded that the reading of 8.5 ppm was significant in connection with petroleum odor and visual observations of petroleum impact. (T. 353-54) However, Amerikohl's expert, Dr. James Pinta, testified that a reading of 8.5 "could very well be a background reading." (T. 579) At the hearing, he used a PID meter on the cap of a Sharpie pen and obtained a reading of 58 parts per million. (T. 578-79)

The Department conducted sampling in the area where Mr. Baker dug the test pits and where he testified to have seen the dumping of waste oil. The results of the Department's sampling found constituents associated with waste oil in concentrations lower than the health-based remediation standards established under Pennsylvania's Act 2[7] and the regulations thereunder at 25 Pa. Code Chapter 250. The constituents associated with waste oil were present at less than one milligram per kilogram. (T. 389-94) Mr. Baker did not conduct any testing repudiating the Department's results.

Based on Mr. Baker's testimony and the results of the Department's sampling, we do not dispute Mr. Baker's allegation that some amount of waste oil is present on the site. We have no doubt that waste oil was spilled in the staging area where equipment was kept and maintained. The question is whether the amount of oil spilled is significant and/or widespread. The evidence indicates it is not. As noted earlier, sampling was performed only in one area of the site, in the vicinity of the staging area, and the sampling showed the presence of waste oil in insignificant amounts less than the Act 2 health based standards.

Mr. Baker argues that the Department's sampling is not representative of the entire site and should have been conducted in other areas of the site. However, as we noted earlier in this discussion, Mr. Baker has the burden of proof, and the burden is on him to prove contamination of waste oil at the site, not on Amerikohl or the Department to prove the contrary. Moreover, we agree with the Department and Amerikohl that the most likely area at the site for the disposal of oil or other waste is the staging area where equipment was maintained and materials were stored. This area was sampled and, as noted earlier, the sampling showed the presence of waste oil in amounts less than the Act 2 health based standards. Mr. Baker has provided us with no

[7] "Act 2" is Pennsylvania's Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 - 6026.908

basis for concluding that other areas of the site are likely to contain higher amounts of waste oil or other forms of contamination.

Based on the evidence, we find that the Department did not err in granting Stage 1 bond release to Amerikohl.

CONCLUSIONS OF LAW

1. Mr. Baker bears the burden of proving by a preponderance of the evidence that the Department erred in granting Stage 1 bond release to Amerikohl. 25 Pa. Code § 1021.122(a) and (c)(2); *Clancy v. DEP, supra.*

2. The standard for Stage I bond release is met:

> when the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan.
>
> 25 Pa. Code § 86.174(a).

3. Approximate original contour is met when the land surface:

> closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water and with adequate provision for drainage.
>
> 25 Pa. Code § 87.1.

4. When determining if slopes meet approximate original contour, the following methodology should be followed for measuring the slopes:

> Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed, or, when this is impractical, at locations specified by the Department.
>
> The measurements shall extend at least 100 feet beyond the limits of mining disturbances, or another distance determined by the Department to

> be representative of the premining configuration of the land, when the area has been previously mined.
>
> 25 Pa. Code § 87.54(a)(21).

5. Section 315(b) of the Clean Streams Law requires in relevant part:

> Upon the completion of any mining operation and prior to the release by the department of any portion of the bond liability, the operator shall remove and clean up all temporary materials, property, debris or junk which were used in or resulted from his mining operations.
>
> 35 P.S. § 691.315(b).

6. The discovery of four filters, three rags and a bucket lid in an area of the site where equipment was stored and maintained, without further evidence of widespread disposal at the site, is *de minimus* and does not warrant the overturning of the Department's Stage 1 bond release approval.

7. Mr. Baker has not demonstrated by a preponderance of the evidence that the Department erred in granting Stage 1 bond release to Amerikohl.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 23rd day of March, 2016, it is hereby **ORDERED** that the Appellant's appeal is dismissed and this matter is marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 23, 2016

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Mary Martha Truschel, Esquire
(via electronic filing system)

For Appellant:
Philip L. Hinerman, Esquire
John Gotaskie, Esquire
Adam H. Cutler, Esquire
(via electronic filing system)

For Permittee:
Kevin J. Garber, Esquire
Jean M. Mosites, Esquire
Abigail F. Jones, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-064-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	**Issued: March 29, 2016**

OPINION AND ORDER ON
APPLICATION FOR FEES AND COSTS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's application for fees and costs under Section 307(b) of the Clean Streams Law because the appellant's underlying appeal of the Department's approval of a sewage facilities planning exemption was not a proceeding pursuant to the Clean Streams Law.

O P I N I O N

The Borough of Kutztown and the Kutztown Municipal Authority (hereinafter collectively "Kutztown") filed an appeal of the Department of Environmental Protection's (the "Department's") decision to grant Maxatawny Township's request for an exemption from the regulatory requirement to revise its official sewage facilities plan to accommodate a new land development, the Advantage Point Apartments project, owned and developed by Advantage Point, LP. We issued an Adjudication in this matter finding that the Department erred in accepting a review letter drafted by Kutztown's engineer in lieu of an explicit written

certification of capacity for the sewage system as required by the regulation at 25 Pa. Code § 71.51(b)(2)(iii). *Borough of Kutztown v. DEP*, 2014 EHB 1048.

Following our Adjudication, Kutztown filed an application for fees and costs pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and our rule on such applications at 25 Pa. Code § 1021.182. In the meantime, however, Maxatawny Township appealed our Adjudication to Commonwealth Court, and the Department requested that we stay proceedings related to the fees application pending a decision from Commonwealth Court. We issued an Order consistent with that unopposed request. Commonwealth Court affirmed our Adjudication. *Maxatawny Twp. v. Dep't of Envtl. Prot.*, No. 2369 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 757 (Pa. Cmwlth. Oct. 16, 2015). Thereafter, upon motion from Kutztown reminding us of the pending fees application, we issued a scheduling order for Kutztown to supplement its application to bring it up to date, and for the Department and any other party choosing to participate to file responses. Kutztown supplemented its application, but did not support either its initial application or the supplement to its application with a brief, despite language in our scheduling order requesting briefs. *See also* 25 Pa. Code § 1021.184(a). The Department filed a response and a supporting brief in opposition to Kutztown's application. Maxatawny also filed a response in opposition.

Both the Department and Maxatawny argue that Kutztown is not entitled to recover any fees and costs because its appeal had nothing to do with the Clean Streams Law or any issue involving protecting the waters of the Commonwealth. Instead, they argue, Kutztown's appeal solely involved the Sewage Facilities Act, 35 P.S. §§ 750.1 - 750.20a, which does not contain a provision for the recovery of counsel fees and costs. We agree.

Section 307(b) of the Clean Streams Law provides in part that the 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) (emphasis added). Section 307(b) provides the Board with broad discretion to award fees in appropriate proceedings. *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1003 (Pa. 2007); *Lucchino v. Dep't of Envtl. Prot.*, 809 A.2d 264, 285 (Pa. 2002). We generally employ a three-step analysis in deciding an award of costs and fees under Section 307(b): (1) whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law; (2) whether the applicant has satisfied the threshold criteria for an award;[1] and (3) if the first two steps are satisfied, we then determine the amount of the award. *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764, 774-75, *aff'd*, No. 66 C.D. 2014 (Pa. Cmwlth. Dec. 23, 2014); *Angela Cres Trust v. DEP*, 2013 EHB 130, 134.

In this case, our analysis does not need to go any further than the first step. In *Patricia Wilson v. DEP*, 2010 EHB 911, we relied upon the Commonwealth Court's affirmance of our Opinions in *Pine Creek Valley Watershed Association v. DEP*, 2008 EHB 237 and 2008 EHB 705, to establish a set of factors to look to in determining whether an appeal qualifies as a proceeding pursuant to the Clean Streams Law for the purpose of resolving an application for fees. *See Dep't of Envtl. Prot. v. Pine Creek Valley Watershed Ass'n*, No. 12 C.D. 2009, 2010 Pa. Commw. Unpub. LEXIS 67 (Pa. Cmwlth. Mar. 25, 2010). Those factors include:

- The reason the appeal was filed, i.e., the purpose of the litigation

[1] The threshold criteria for an award will vary depending on whether the applicant obtained a final ruling on the merits. If there is no final ruling on the merits, we look to the criteria established by the catalyst test, but if there is a final ruling we look to the criteria established in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990). *Crum Creek*, 2013 EHB at 837-38. *See also Solebury Twp., supra*, 928 A.2d 990 (Pa. 2007); *Upper Gwynedd Towamencin Mun. Auth. v. Dep't of Envtl. Prot.*, 9 A.3d 255, 263-65 (Pa. Cmwlth. 2010).

- Whether the notice of appeal raised objections related to the Clean Streams Law
- Whether the party pursued the Clean Streams Law objections through the trial and in post-hearing briefing
- Whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law
- Whether the case implicates discharges to waters of the Commonwealth

Angela Cres Trust, 2013 EHB 130, 135-36 (quoting *Wilson*, 2010 EHB 911, 914-15).

None of these factors militate in favor of Kutztown in this case. This case was exclusively about sewage facilities planning. Kutztown's purpose for appealing the Department's approval of a planning exemption was to challenge what the Department considered as a written certification of capacity from Kutztown's engineer—a certification Kutztown never gave. The sole issue in this appeal was whether "Kutztown, a permittee whose line must be used to transport sewage from the proposed new land development, provide[d] the written certification required under Section 71.51(b)(2)(iii)." *Borough of Kutztown*, 2014 EHB 1048, 1067. This case did not touch upon the Clean Streams Law or any issues related to water quality. Instead, the proceedings turned on an analysis of whether a ministerial administrative requirement was fulfilled under the sewage facilities planning regulations—the provision of a written certification of capacity from an affected municipality for its interceptor line.

Kutztown's notice of appeal references the Clean Streams Law only once, and in a largely catch-all, boilerplate way, asserting that the Department's approval of the planning exemption was "in violation of the requirements of the Sewage Facilities Act, the Clean Streams Law and the regulations promulgated thereunder, specifically there has been no certification of available capacity." (Notice of Appeal ¶ ll.) This statement is repeated nearly verbatim in

Kutztown's pre-hearing memorandum and as a proposed conclusion of law in its post-hearing brief. Yet these references are essentially the entire extent of Kutztown's Clean Streams Law argument in this appeal. No Clean Streams Law issues were litigated at the hearing on the merits. Kutztown failed to pursue any water quality objections throughout this appeal. Kutztown says now in its application for fees that an exceedance of capacity in its interceptor line would necessarily implicate the potential discharge of pollutants to the waters of the Commonwealth, but it never articulated that concern at the hearing on the merits. The transcript of the two-day hearing is devoid of any mention of the word pollution. Kutztown never presented any evidence of what impact an exceedance of capacity would have on any waters of the Commonwealth. Presumably, if Kutztown were concerned about water pollution it would have at least taken the basic step of identifying the waters that stand to be impacted.

Given the lack of attention to the Clean Streams Law by the parties, it is no coincidence that the only mention of the Clean Streams Law in our entire Adjudication occurs in a finding of fact quoting 25 Pa. Code § 71.51(b)(2), which lists the requirements for obtaining a planning exemption, one of them being that the Department must determine that existing sewage facilities are in compliance with the Clean Streams Law and the corresponding regulations. *See* 25 Pa. Code § 71.51(b)(2)(i). However, that aspect of the regulation was never contested or litigated by Kutztown. In fact, in a joint stipulation submitted days before the hearing commenced, the parties, in a paraphrase of Section 71.51(b)(2)(i), stipulated that "Kutztown's and Maxatawny's collection, conveyance and treatment facilities are in compliance with the Clean Streams Law and the rules and regulations thereunder." (Docket entry 40, ¶ 13.) Instead, the parties focused almost entirely on Section 71.51(b)(2)(iii).

Kutztown points out that Section 71.51(b)(2)(iii) was promulgated in part pursuant to authority under the Clean Streams Law. While it is true that the Clean Streams Law is listed among the sources of authority for the regulation, the important point is that the regulation does not relate to water quality in any material way. As we described the regulation in our Adjudication:

> Section 71.51(b)(2)(iii) of Title 25 of the Pennsylvania Code states that the sewage facilities planning that would ordinarily be required for a subdivision proposing to connect to existing public sewers is not necessary if the municipality (among other things) provides "written certification from the permittees of the collection, conveyance and treatment facilities…that there is capacity to receive and treat the sewage from the applicant's proposed new land development and that the additional wasteload from the proposed new development will not create a hydraulic or organic overload or 5-year projected overload."

Borough of Kutztown, 2014 EHB at 1060. The substance of the regulation is what is important, and Section 71.51(b)(2)(iii) relates directly to sewage planning, not water quality protection. *See Wilson*, 2010 EHB 911, 916. "It is a long reach to say that an appeal is a proceeding pursuant to the Clean Streams Law simply because it cites a regulation which names the Clean Streams Law as one of a number of promulgating authorities." *Angela Cres Trust*, 2013 EHB at 139.

In many respects, this case is similar to the fees application we denied in *Wilson*, *supra*. In that case we sustained a consolidated appeal of the Department's approval of a township's update to its Act 537 plan because the update did not reflect the township's true intentions with respect to its implementation of the update. We ultimately found that the township was not committed to implementing the plan in contravention of 25 Pa. Code §§ 71.31(f) and 71.32(d)(4). *Wilson v. DEP*, 2010 EHB 827. During the fees application stage we held that the underlying proceedings were not pursuant to the Clean Streams Law—"they were without a doubt proceedings pursuant to the Sewage Facilities Act and nothing else." *Wilson*, 2010 EHB

911, 915. As we said in *Wilson*, which equally holds true here, "Nothing about our Adjudication inures to the benefit of clean streams, except in the remote and indirect sense that informed sewage planning tends generally to result in better water quality, but so does effective air pollution control, safe mining, and proper hazardous waste management." *Wilson*, 2010 EHB at 916. This appeal was not a proceeding pursuant to the Clean Streams Law, and Kutztown is not entitled to recover any fees or costs under Section 307(b).

Accordingly, we enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN AND KUTZTOWN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2014-064-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, MAXATAWNY TOWNSHIP, Permittee, and ADVANTAGE POINT, LP, Intervenor	:	

O R D E R

AND NOW, this 29th day of March, 2016, it is hereby ordered that Kutztown's application for fees and costs is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 29, 2016

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
Janna E. Williams, Esquire
(*via electronic filing system*)

For Appellants:
Charles Haws, Esquire
(*via electronic filing system*)

For Permittee:
Jill E. Nagy, Esquire
(*via electronic filing system*)

For Intervenor:
Mark Stanley, Esquire
Edward Kang, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM BEARDSLEE	:	
	:	
v.	:	**EHB Docket No. 2016-029-R**
	:	**(Consolidated with 2016-033-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 1, 2016**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Petition for Supersedeas following a hearing. Although the Petitioner made a credible demonstration that his economic harm could constitute irreparable harm, the evidence did not demonstrate that he is likely to succeed on the merits of his claim.

O P I N I O N

On March 4, 2016, the Pennsylvania Department of Environmental Protection (Department), suspended the Section Foreman certification of the Appellant, Mr. William Beardslee, for a period of six months pursuant to Section 510(b)(2) of the Bituminous Coal Mine Safety Act (Mine Safety Act), Act of July 7, 2008, P.L. 654, 52 P.S. § 690.510(b)(2). Two Notices of Appeal were filed by the Appellant challenging this action and a related action of the Department which the Board consolidated, *sua sponte*, on March 10, 2016. After a conference call with Counsel on the same date, we directed the parties to brief the issue of which party had the burden of proof for the Supersedeas Hearing.

Burden of Proof

Both parties submitted excellent briefs on the issue of burden of proof. The Mine Safety Act was amended in 2008 to provide that "an appeal to the Environmental Hearing Board shall be treated as a petition for Supersedeas." 52 P.S. § 690.510 (b)(2). Subsection 4 provides that it is subject to the provisions of the Environmental Hearing Board Act. *Id*. at § 690.510(b)(4).

Section 510(b)(2) requires the Board to treat the Appellant's Notice of Appeal as a Petition for Supersedeas. The Department therefore contends that, as is normally the case at a Supersedeas Hearing, the Appellant has the burden of proof to establish by a preponderance of the evidence that a Supersedeas should issue. Since the Board has separate rules for considering Petitions for Supersedeas, *compare* 25 Pa. Code Sections 1021.61-64 (Supersedeas Rules) *with* 25 Pa. Code Sections 1021.101-134 (Rules concerning hearings on the merits), the Department argues that it has to be presumed that the Legislature was aware of the Board's normal practices and merely provided that the Notice of Appeal would be considered a Petition for Supersedeas. Nothing else was changed in the Department's view. In other words, argues the Department, we should not assume that the Legislature intended the hearing on the Petition for Supersedeas to automatically morph into a hearing on the merits. Likewise, the Department contends that the burden of proof resides with Mr. Beardslee since it is a Supersedeas Hearing and not a hearing on the merits. If it were a hearing on the merits of an Appeal from the suspension of a certification the burden of proof would rest with the Department. *See* 25 Pa. Code § 1021.122(b)(3).

Mr. Beardslee strongly disagrees. Counsel points out that under the Board's Rules, the Department bears the burden of proof when it revokes or suspends a license, permit, approval or certification, or when it issues an order. 25 Pa. Code § 1021.122 (b)(3). Specifically, in a

hearing on the merits the Department much prove by a preponderance of the evidence that its order modifying, suspending or revoking a certification constituted a lawful and reasonable exercise of the Department's discretion. *Wean v. DEP***,** 2014 EHB, 219, 251, *citing Perano v. DEP***,** 2011 EHB 623, 633.

Appellant argues that although the Legislature used the term Petition for Supersedeas it really wanted to protect the due process rights of workers and insure a speedy resolution of their cases. Counsel contends that the Legislature wanted to provide the individual, such as Mr. Beardslee in this case, whose certification was revoked or suspended, with an expedited hearing to alleviate a deprivation of due process. The Board's usual practice is to allow the parties to conduct discovery and the opportunity to file dispositive motions which usually results in a hearing that would be scheduled more than six months after the filing of the Notice of Appeal. As Appellant points out, such a normal schedule would result in a hearing after the conclusion of Mr. Beardslee's suspension which would effectively render his Appeal moot.

Appellant instead argues that the General Assembly wanted to insure that Appellants such as Mr. Beardslee would be provided expedited hearings in which the burden of proof would remain with the Department. Such a hearing would constitute a hearing on the merits and would provide a much more inexpensive resolution of the dispute. The Department disagrees and contends that the language of the statute is unambiguous on its face.

We sympathize with the Appellant's position. It is certainly reasonable to conclude that the Legislature wanted to insure that a hearing would be held quickly and expeditiously. Nevertheless, legally we think the Department's position is correct. The Legislature could have directed that an expedited hearing be held to resolve the dispute. It did not. We are hesitant to ignore the clear language of the statute to pursue Appellant's version of the spirit of the

legislation. Moreover, the Board has Rules that were adopted in 2009 specifically allowing a party to file a motion for an expedited hearing. In fact, the "Board may order an expedited hearing on its own motion." 25 Pa. Code § 1021.96a. The Rules regarding expedited hearings set forth the factors that the Board will consider in deciding whether to order an expedited hearing, including prejudice to a party, the realistic needs of the parties to conduct discovery, and whether an expedited hearing would promote judicial economy or would otherwise be in the public interest.

A case such as the suspension or revocation of a miner's certificate seems to be an ideal case to apply these Rules allowing for expedited hearings. On the day of the hearing, in response to our question, the Department indicated that they were not prepared to go forward with the scheduled Supersedeas Hearing as the hearing on the merits. This is certainly understandable. One way around this dilemma in our view would be for Counsel to meet following the filing of the Notice of Appeal (which pursuant to the Mine Safety Act is treated as a Petition for Supersedeas) and attempt to reach an agreement for the scheduling of an expedited hearing which would take into consideration the factors set forth in the Board's Rules covering expedited hearings. In other words, Counsel could agree to quickly conduct any needed discovery and jointly propose dates for the filing of prehearing and posthearing memoranda and briefs. Of course, if they were unable to resolve all procedural and scheduling issues they could request the Board to hold a prehearing conference to help resolve these issues. In this way, we are confident that both a fair process and an expedited hearing could be fashioned protecting the interests of all parties.[1]

[1] Of course, although the Mine Safety Act sets forth that the Notice of Appeal shall be "treated as a Petition for Supersedeas" we do not interpret that language as placing either the parties or the Board in a legal straightjacket requiring the Board to hold a Supersedeas Hearing *and* then a merits hearing on

Although we allocated the burden of proof at the Supersedeas Hearing to Mr. Beardslee, we directed that the Department present its case first. We have found in certain cases that such a procedure protects the interests of both parties, results in witnesses (especially Department witnesses) not having to be called twice, and allows for a more logical and coherent introduction of the evidence. It is also in accordance with our Rules regarding the conduct of Supersedeas Hearings. At the discretion of the Board, if necessary to ensure prompt disposition, Supersedeas Hearings may be limited in time and format, with parties given a fixed amount of time to present their entire case, and with restricted rights of discovery or cross-examination.

Standard for Granting a Supersedeas

Before turning to the main issue in this matter, we will briefly review the standards for granting a Supersedeas. As pointed out by the parties, a Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Mountain Watershed Association, Inc., v. DEP & Amerikohl Mining, Inc.*, 2011 EHB 689, 690; *Kennedy v. DEP*, 2008 EHB 423, 424; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802. As succinctly stated recently by the Board:

> The Environmental Hearing Board Act of 1988, 35 P.S. Sections 7511-7514, and the Board's Rules of Practice and Procedure provide that the grant or denial of a Supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514 (d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514 (d); 25 Pa. Code § 1021.63(a); *Neubert v. DEP*, 2005 EHB 598, 601.

Morrison v. DEP & Insurance Auto Auctions, Inc., EHB Docket No. 2006-009-L (consolidated) (Opinion and Order issued March 22, 2016), p. 4.

---

relatively straightforward disputes. It is common to have Petitions for Supersedeas filed but then resolved quickly by agreement of the parties who then proceed with discovery and an eventual merits hearing.

In addition, the Board will not issue a Supersedeas "in cases where pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the Supersedeas would be in effect." 25 Pa. Code § 1021.63(b); *Mountain Watershed Assn.***,** at 690. The Board has held that in order to prevail a petitioner much credibly demonstrate each of the factors listed above but make a strong showing that he is likely to succeed on the merits of his Appeal. *Morrison***,** *slip op.* at 4; *Hudson v. DEP***,** 2015 EHB 719, 726; *Pennsylvania Mining Corporation v. DEP*, 1996 EHB 808, 810. The issuance of a Supersedeas is up to the Board's discretion based upon a review and balancing of all the statutory and regulatory criteria. *Morrison, supra*; *Svonavec v. DEP***,** 1998 EHB 417, 420.

DISCUSSION

On March 17, 2016, the Pennsylvania Environmental Hearing Board (Board) conducted a Supersedeas Hearing in Pittsburgh. The record of that proceeding has been transcribed and numbers 156 pages. The testimony and evidence presented at the Supersedeas Hearing reveal a rather straightforward case with the main dispute centering on whether the Department's suspension of Mr. Beardslee's Section Foreman certification for six months was proper under the law and circumstances. Mr. Beardslee is employed by Mepco which operates the 4 West Coal Mine in Greene County, Pennsylvania. The mine is a deep mine and is a room and pillar mine. In the seven months preceding the incident with Mr. Beardslee, which did not involve any personal injury or property damage, two miners were killed in the 4 West Mine. In response to those tragic occurrences, both the federal and state mine inspectors increased their presence in the mine and conducted more inspections, some of which were unannounced. Indeed, such an unannounced inspection was conducted by federal Mine Safety and Health Administration Inspector Allan Jack on the night of February 23, 2016.

Mr. Jack, was accompanied by Mepco Section Foreman Ryan Dittman on the night of February 23, 2016. Mr. Dittman testified at the Supersedeas hearing that he arrived at the K1 section of the mine at approximately 9 pm. The mining crew that had worked the shift prior to Mr. Dittman had been supervised by Mr. Beardslee. Upon arriving at this section of the mine, Mr. Dittman observed that the continuous mining machine and the mobile roof supports were unattended and "that the power was on" in those machines. (Tr. 16).[2] Mr. Dittman turned the power off to this equipment. (Tr. 19).

There is not a serious dispute that the power in such equipment should be turned off if unattended. The reason for this is that a fire and explosion could occur as methane is often released at the mine face which needs to be constantly monitored while machines are powered. Turning off the equipment is both easy and easily checked. According to the testimony, although the equipment is turned off by the miners operating such equipment, it is the responsibility of the Section Foreman as a Certified Mining Official to make sure the equipment is off when the shift crew leaves the mine face.

Mr. Beardslee testified that he gained his certification in November 2015 and began work as a Section Foreman in January 2016. He has been employed in the mining industry for approximately 10 years. He exhibited a clear understanding of the mechanics of mining and his responsibilities. We found him to be both knowledgeable and candid. He obviously is someone who likes his job and we have no reason to doubt his dedication and customary attention to detail. Mr. Marvin Gardner, an experienced Department official in the Bureau of Mine Safety who was involved in the Department's investigation and the decision to suspend Mr. Beardslee's

[2] "Tr. __" refers to a page of the transcript of the Supersedeas Hearing.

certification, testified that he was aware of no other work issues with Mr. Beardslee. As to Mr. Beardslee's reputation at the mine, Mr. Gardner testified that "he was a good man." (Tr. 141).

At the Supersedeas Hearing, Mr. Beardslee testified at length as to everything he did at the mine on February 23, 2016. He exited the section of the mine in question at approximately 7:00 pm without checking to see if the power to the trailing cables powering the continuous mining machine and mobile roof supports had been turned off.

The federal Mine Safety and Health Administration notified the Pennsylvania Department of Environmental Protection (Department) of the incident of the night of February 23, 2016. Upon learning that the power had been left on, the Department immediately conducted its own investigation. As part of that investigation, Department representatives spoke to Mr. Beardslee on February 26, 2016. Mr. Beardslee told them "he could not deny what the Section Foreman [Mr. Dittman] and MSHA [inspector] saw." (Tr. 121). Mr. Beardslee testified that he was shocked to learn that the power had been left on, and he freely admitted that he knew "power to the trailing cable to the mobile equipment" should have been turned off before his mining crew left that section of the mine. (Tr. 134). He testified that the suspension will not only cost him approximately $8,000 (the difference between his pay as a Section Foreman and a miner) but that he has been under a tremendous amount of stress as a result of it. (Tr. 125).

It seems clear, based on the overwhelming weight of all of the testimony, that power was left on to the trailing cables connected to the continuous mining machine and the mobile roof supports when Mr. Beardslee's mining crew left their work area on February 23, 2016. This power remained on until it was discovered by the federal mining inspector and witnessed by Section Foreman Ryan Dittman two hours later. The question then becomes whether the Department's suspension of Mr. Beardslee's certification for six months is appropriate under the

circumstances or, in this context of a Supersedeas Petition, likely to be seen as an abuse of discretion.

The Department called Colvin Carson to testify about this aspect of the case.[3] Mr. Carson is the Director of the Department's Bureau of Mine Safety. He has been in that position since June, 2015. He began his employment with the Department in 2006 after working in the private mining industry for 29 years. He has extensive experience in all phases of deep mining including service as a section foreman and a shift foreman. The Department could not have presented a more knowledgeable or articulate spokesman. He explained that leaving the power on mobile equipment at the end of a shift "could be catastrophic." (Tr. 61). There was both a risk of explosion and fire from methane from the mine face or the nearby gob pile. He explained that the administrative penalty of $2,500 that the Department could have imposed in lieu of suspension of Mr. Beardslee's certification was not adequate and that a six month suspension was called for because of the severity of the violation. Mr. Carson made the decision to suspend Mr. Beardslee's certification because he "felt that the nature of the violation was such that the mine infrastructure and the people employed there were put in danger." (Tr. 63) He thought a suspension rather than a fine was called for because he "felt that [Mr. Beardslee's] inexperience in the position, coupled with the fact that this was a serious violation that occurred, warranted removing him [from his Section Foreman position] for a period of time until he received more training and mentoring." (Tr. 64) Mr. Carson stated that "when we found out the nature of the violations written by MSHA, we were very concerned and we focused on the one violation

[3] After *voir dire*, the Board recognized Mr. Carson as an expert in mine safety, the roles and duties of Section Foremen, and the underground mining of bituminous coal. (Tr. 58) Section Foremen are at the entry level managing production crews. The Section Foreman's primary responsibility is to see that the law is complied with and that the miners are operating safely. They report to a Shift Foreman, who reports to the Mine Foreman, who in turn reports to the Mine Superintendent. (Tr. 59)

written by Allan Jack where the power was left on" in the section. (Tr. 60) The power was left on unattended for two hours.

We found Mr. Carson's testimony extremely creditable. The Department's Director of Mine Safety has a very difficult job in safeguarding the lives of thousands of miners across the Commonwealth. In this case, he was intimately involved in a thorough investigation and relied on his many years of experience in the mining industry to reach a decision that appears to be imminently reasonable.

Conclusion

Based on the testimony before us, the Petitioner has not shown that he is likely to win on the merits. We do find that the economic loss he will suffer satisfies the showing of irreparable harm under the facts of this case; however, without a showing of a likelihood of success on the merits, we will not supersede the Department's suspension of his certification.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM BEARDSLEE	:	
	:	
v.	:	**EHB Docket No. 2016-029-R**
	:	**(Consolidated with 2016-033-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of April, 2016, Appellant's Petition for a Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 1, 2016

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

For the Commonwealth of PA, DEP:
Mary Martha Truschel, Esquire
Matthew Kessler, Esquire
(via electronic filing system)

For Appellant:
R. Henry Moore, Esquire
Patrick Wayne Dennison, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN J. STEWARD	:	
	:	
v.	:	**EHB Docket No. 2015-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 5, 2016**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an untimely appeal.

O P I N I O N

On August 6, 2015, the Department of Environmental Protection (the "Department") issued a compliance order to Melvin J. Steward, the Appellant, when the Department's Water Pollution Biologist, Felicia Lamphere, hand-delivered the order to Mr. Steward at his residence. The order directed Steward to address violations of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27. Although Mr. Steward refused to sign for this hand-delivered order, he accepted the order from Ms. Lamphere when she handed it to him on August 6, 2015. On August 7, 2015, the Department issued an amended compliance order to Steward. That day, after Steward refused to sign for the amended order, Department Compliance Specialist Ronald Eberts, Jr. taped the amended order to the front door of Steward's residence. The Board received Steward's notice of appeal from the order on September 11, 2015, which is 36 days after he received notice of the compliance order on August 6, 2015, and 35 days after he received notice

of the amended order on August 7, 2015. The Department has moved to dismiss his appeal as untimely. Mr. Steward has not filed a response to the Department's motion.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Boinovych v. DEP*, 2015 EHB 566, 566; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915.

A notice of appeal from a Department action under the Dam Safety and Encroachments Act must be received by the Board within 30 days after the person receives actual notice of the action. 32 P.S. § 693.24(a). *See also* 25 Pa. Code § 1021.52(a). Failure to file a timely appeal within the thirty-day appeal period deprives the Board of jurisdiction to hear the appeal. *Rostokosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Schwab v. DEP*, 2011 EHB 397; *Spencer v. DEP*, 2008 EHB 573. The thirty-day appeal period deadline is not flexible; the Board is deprived of jurisdiction even if an appeal is filed one day after the expiration of the thirty-day period. *Schwab v. DEP*, 2011 EHB 397; *Spencer v. DEP*, 2008 EHB 573. For actions of the Department that are directed or issued to a prospective appellant, the date when the appellant first received notice of the action is the controlling factor for determining when the thirty-day appeal period starts to run. 25 Pa. Code § 1021.52(a)(1); *Hanover Twp. v. DEP*, 2010 EHB 788; *GEC Enterprises, Inc. v. DEP*, 2010 EHB 305.

Here, Mr. Steward filed his appeal beyond the thirty-day timeframe, thus depriving this Board of jurisdiction. He received notice of the compliance order on August 6, 2015 and the

amended order on August 7, 2015. The Board received his appeal on September 11, 2015, which is 36 days after he received notice of the compliance order and 35 days after he received notice of the amended order. Therefore, his appeal is untimely and must be dismissed.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN J. STEWARD	:	
	:	
v.	:	**EHB Docket No. 2015-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of April, 2016, the Department's motion to dismiss is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 5, 2016

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

For the Commonwealth of PA, DEP:
Curtis C. Sullivan, Esquire
Janna E. Williams, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Melvin J. Steward
7348 Trent Street
Harrisburg, PA 17112

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2015-195-B**
	:	**(Consolidated with 2016-013-B)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and URSINUS COLLEGE,	:	**Issued: April 14, 2016**
Permittee	:	

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

By Steven C. Beckman, Judge

Synopsis

The Board grants in part Ursinus' Motion for Summary Judgment as it pertains to what constitutes the Act 2 site for purposes of this appeal, and denies the remainder of that Motion. Further, the Board denies Tri-Realty's Motion for Partial Summary Judgment.

O P I N I O N

Introduction

On or about November 16, 2015, the Department of Environmental Protection ("the Department" or "DEP") approved a Cleanup Plan ("2015 Cleanup Plan") submitted by Ursinus College ("Ursinus") under the provisions of the Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101-6026.908. Tri-Realty Company ("Tri-Realty") appealed the Department's approval of the 2015 Cleanup Plan along with the Department's Administrative Order that, among other things, required Tri-Realty to either attain compliance with an Act 2 standard on its property, or to grant Ursinus access to Tri-Realty's property to

undertake the activities described in the 2015 Cleanup Plan ("2015 Administrative Order"). On December 24, 2015, the Department issued a Supplemental Administrative Order that was appealed by Tri-Realty on January 22, 2016 and subsequently consolidated with its first appeal. On January 22, 2016, Ursinus filed a Motion for Summary Judgment. Tri-Realty responded to Ursinus' motion on February 22, 2016, and Ursinus filed its reply on March 8, 2016. Tri-Realty also filed a Motion for Partial Summary Judgment on January 27, 2016. Ursinus filed its response to that motion on February 25, 2016, the Department filed its response to that motion on February 26, 2016, and Tri-Realty filed its reply on March 11, 2016. Since the issues in both Ursinus' January 22 Motion for Summary Judgment and Tri-Realty's January 27 Motion for Partial Summary Judgment significantly overlap, we will address both motions in this Opinion.

Background

The ongoing cleanup process that is at the heart of this case resulted from the release of No. 6 heating oil from two underground storage tanks formerly operated by Ursinus on Ursinus' campus in Collegeville, Montgomery County. The release, which was first reported to the Department in 2004, resulted in the contamination of groundwater on both Ursinus' campus and the adjacent property known as the College Arms Apartments ("College Arms") owned by Tri-Realty. The oil has reportedly migrated from Ursinus' campus, on to the College Arms property, and eventually into a ravine on the College Arms property known as "Bum Hollow."

Ursinus has been addressing the heating oil release through Act 2. The Act 2 process involves a series of related steps to identify and address impacted properties, including the submission to the Department of a series of notices, reports and plans that may include a Notice of Intent to Remediate, a Remedial Investigation Report, a Risk Assessment Report, a Cleanup Plan, and a Final Report. On March 4, 2010, Ursinus submitted a Notice of Intent to Remediate to the Department that selected a site-specific standard as the environmental remediation

standard under Act 2. Four years later on March 14, 2014, Ursinus submitted a Remedial Investigation Report ("RIR"). The Department ultimately approved Ursinus' proposed RIR, and Tri-Realty appealed the Department's approval to the Board (EHB Docket No. 2014-107-L). The appeal of the RIR was eventually terminated when Tri-Realty and the Department reached a settlement agreement ("Settlement Agreement"), a copy of which was docketed with the Board. Ursinus was not a party to the Settlement Agreement. Relevant to our current deliberations, the Settlement Agreement stated that:

1. "For purposes of Act 2, the area contaminated by the oil released from Ursinus' USTs, which currently includes portions of both Ursinus' Property and the College Arms Property, is the 'Site.'" (Settlement Agreement, Paragraph U, p.5);
2. "The Parties agree that the Findings in Paragraphs A through SS above are true and correct and, in any matter or proceeding involving Tri-Realty and the Department, shall not challenge the accuracy or validity of these findings." (Settlement Agreement, Paragraph 1, p.10-11); and
3. "Tri-Realty reserves all of its rights to comment on, and oppose approval by the Department of, any pending or future Act 2 submissions by Ursinus or anyone else, including a risk assessment, cleanup plan, or final report related to the Site. … Tri-Realty reserves all of its rights to appeal the Department's approval of any pending or future Act 2 submissions related to the Site." (Settlement Agreement, Paragraph 6, p.12).

After the Settlement Agreement was executed, Ursinus continued to progress through the Act 2 process. Ursinus submitted a Cleanup Plan to the Department on November 24, 2014 ("2014 Cleanup Plan"). After receiving comments from Tri-Realty, the Department disapproved the 2014 Cleanup Plan. Eventually, Ursinus submitted the 2015 Cleanup Plan that was approved

by the Department, resulting in this appeal. It is unclear at this point whether Tri-Realty was afforded an opportunity to comment on the 2015 Cleanup Plan before its eventual submission and/or approval. In addition to approving the 2015 Cleanup Plan, the Department issued the previously discussed 2015 Administrative Order addressing access to Tri-Realty's College Arms property. Ursinus and Tri-Realty had previously executed an access agreement on May 17, 2013 ("2013 Access Agreement") that was renewed through April 6, 2018.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC,* 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

Discussion

The Motions filed by Ursinus and Tri-Realty are unusual in that they were filed very early in this case before discovery has been completed. This is a reflection of the lengthy history that preceded the filing of the current appeal. Ursinus, Tri-Realty and the Department have been

engaged in the Act 2 process since at least 2010 and efforts to address the contamination began several years prior to that date. In light of the past actions involving these parties, and the arguments set forth in the Motions, we think it is important to begin our analysis with a few fundamental statements. Tri-Realty's Notice of Appeal in this case challenges two actions of the Department: 1) the approval of the 2015 Cleanup Plan by the Department and 2) the 2015 Administrative Order issued by the Department to Ursinus and Tri-Realty. These Department actions are clearly appealable to the Board and the Board has clear jurisdiction to hear these appeals pursuant to the Environmental Hearing Board Act. In addition, Act 2 expressly provides that Department decisions involving the reports and evaluations required under Act 2 "shall be considered appealable actions under the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act." 35 P.S. § 6026.308. Therefore, as a general matter, the Department's approval of the 2015 Cleanup Plan is clearly an appealable action. Furthermore, it is axiomatic that Tri-Realty could not have appealed the Department's approval of the 2015 Cleanup Plan until the Department acted to approve it. Any such appeal prior to that would have been premature. While the argument is not clearly set forth, at certain points in their filings with the Board, the parties arguably question Tri-Realty's general right to appeal the Department's actions and appear to rely on Board opinions in the prior litigation among the parties for this position. Any reading of the prior opinions that suggests that Tri-Realty is not entitled, as a general matter, to pursue its current appeal is simply inconsistent with the statutes and is not a proper reading of those opinions.

We also must address Ursinus' characterization of its Motion as a Motion for Summary Judgment. This is obviously a mischaracterization as even if we were to grant the Motion, it would not result in the termination of this appeal. Even Ursinus acknowledges this in its

Memorandum of Law In Support [of] Motion For Summary Judgment when it states that "[t]his motion does not address that portion of Tri-Realty's appeal that challenges the Department's Administrative Order." (Memorandum, p. 3, FN 4). Ursinus also states that it is asking the Board to "enter summary judgment on those portions of the Notice of Appeal that challenge the Department's approval of the Cleanup Plan." (Memorandum, p. 5). Therefore, Ursinus' Motion is properly characterized as a motion for partial summary judgment and this matter will continue no matter how the Board rules on the Motions.

We next turn our attention to the Motions in an attempt to sort out what specific issues the parties assert are appropriate for the Board to decide at this point of the proceeding. This task is complicated by the fact that the parties are seeking summary judgment based on information and objections set forth in Tri-Realty's Notice of Appeal. The Notice of Appeal in this case does not set forth Tri-Realty's objections to the Department's actions in a concise and straightforward manner. To further complicate our task, Ursinus' Motion at times appears to be based on selective, inconsistent or implausible readings of those objections. In its response to Ursinus' Motion, Tri-Realty points out that several of the issues that Ursinus raises are not actually contested in its Notice of Appeal and acknowledges that there is no dispute regarding these issues[1]. Sorting through the morass, we find that the following issues are presented to the Board by the Motions:

[1] Ursinus' Motion seeks summary judgment on the following issues: 1) Act 2 does not require Ursinus to meet a residential or background standard for cleanup of Tri-Realty's property; 2) the Department's approval of a cleanup plan does not require that Ursinus have in place deed notices and restrictive covenants that may be necessary to satisfy a site-specific cleanup standard and 3) Act 2 does not require the Department or Ursinus to discuss its comments, and does not require the Department to wait 90 days before issuing its approval. Our reading of Tri-Realty's response is that it believes that these are not real issues since it states that these are not objections that it raised in its Notice of Appeal or are points that it otherwise does not contest. On the first issue, Tri-Realty states that the "cleanup standard here will have to be site-specific." (Tri-Realty's Response in Opposition, p. 14). On the second issue, Tri-Realty states "it is not a ground on which Tri-Realty objected to DEP's approval of the 2015 Cleanup Plan." (*Id.* at 15).

1. Does the Act 2 site include the contaminated portions of both Ursinus' property and Tri-Realty's property or is it limited to Ursinus' property?
2. Is the Department's approval of the 2015 Cleanup Plan in reliance on the Access Agreement and the 2015 Administrative Order to satisfy the requirement under 25 Pa. Code §250.410(c) that there is documentation of cooperation or agreement lawful, reasonable and supported by the facts?
3. Is Tri-Realty barred, by administrative finality or otherwise, from bringing this Appeal of the Department's approval of the 2015 Cleanup Plan?

We find that these issues are all of the issues that have been properly presented to the Board for its consideration. To the extent the parties believe that their respective Motions raise additional issues beyond those cited here and/or addressed in footnote 1, those portions of their Motions are denied and summary judgment is not granted on any issues not specifically addressed in this Opinion.

Site

Both Ursinus' Motion for Summary Judgment and Tri-Realty's Motion for Partial Summary Judgment seek a decision regarding what constitutes the Act 2 "site" in this case. Ursinus' Motion for Summary Judgment argues that the Act 2 site consists of the contaminated portions of Ursinus' campus and Tri-Realty's College Arms property. Tri-Realty argues in its Partial Summary Judgment Motion that the Act 2 site in this case is limited as a matter of law to the Ursinus campus and does not include Tri-Realty's property. There are no issues of material

---

On the third issue, Tri-Realty "agrees that DEP's refusal to hold a meeting is not in itself a reason to grant Tri-Realty's appeal" but "DEP's refusal to meet with Tri-Realty will be shown to be part of a pattern of arbitrary disregard for Tri-Realty's property". (*Id.* at 17). Finally, we do not see anywhere in the Notice of Appeal where Tri-Realty asserts that the Department's approval of the Cleanup Plan was unlawful because it was done in less than 90 days. We find that given the lack of any apparent dispute on any of these issues, we are not required to rule on them.

fact regarding what constitutes the Act 2 site in this matter and we can decide the issue as a matter of law. We find that the Act 2 site in this appeal consists of the contaminated portions of Ursinus' and Tri- Realty's properties. More specifically, we think that the Act 2 site is "the area contaminated by the oil released from Ursinus' USTs, which currently includes portions of both Ursinus Property and the College Arms Property" as stated in the Settlement Agreement. Tri-Realty agreed in the Settlement Agreement that this description of the Act 2 site was a true and correct finding and that it would not challenge the accuracy or validity of that finding in any matter or proceeding involving Tri-Realty and the Department. Having agreed to this designation of the Act 2 site as part of the resolution of its appeal of the RIR and furthermore, having agreed not to challenge it in any matter involving the Department, there is no basis for Tri-Realty's argument in its Motion for Partial Summary Judgment that the Act 2 site is limited to the Ursinus campus. In fact, we think that this portion of Tri-Realty's Motion for Partial Summary Judgment is a direct breach of the terms of the Settlement Agreement.

We also find that the description of the Act 2 site spelled out in the Settlement Agreement is consistent with the definition of a site found in the Act 2 statute and its implementing regulations. Act 2 defines "site" as "[t]he extent of contamination originating within the property boundaries **and all areas in close proximity to the contamination necessary for the implementation of remediation activities to be conducted under this act.**" 35 P.S. § 6026.103. (emphasis added). Tri-Realty argues that the definition of site supports its position that the site in this matter is limited to Ursinus' property because the site cannot include land that is not within the boundaries of the property containing the source of contamination. This reading asks us to ignore the entire second part of the statutory definition of site, which we refuse to do. Tri-Realty's College Arms property is without dispute an area in close proximity to the

contamination that is necessary for the implementation of remediation activities and therefore fits easily within the definition of site. Furthermore, we think that the description of the Act 2 site contained in the Settlement Agreement is consistent with the proper interpretation of Act 2, its relevant regulations, and the intent behind Act 2 itself. Omitting contaminated property from the definition of the site simply because it is outside of the boundaries of the property containing the source of contamination is not only inconsistent with the language of Act 2, but would appear to discourage the voluntary, quick and effective removal of environmental hazards and the effective reuse of contaminated industrial land. Instead, as is an issue in this case, the regulations address situations where a third party landowner's property is contaminated or affected by a neighboring property's source contamination by requiring "documentation of cooperation or agreement" with the submission of a site-specific cleanup plan. *See* 25 Pa. Code § 250.410(c). For the foregoing reasons, we find that the Settlement Agreement's description of the Act 2 site is the proper description of the Act 2 site as it applies to this appeal and we grant in part Ursinus' Motion for Summary Judgment as it applies to the designation of the Act 2 site. [2]

Documentation of Cooperation or Agreement

The next issue raised by the parties' Motions is the existence of the required documentation of cooperation or agreement in conjunction with Ursinus' submission of the 2015 Cleanup Plan. One of the bases of Tri-Realty's appeal is its claim that the regulatory requirement of documentation of cooperation or agreement found at 25 Pa. Code § 250.410(c) was not satisfied and therefore, the Department's approval of the 2015 Cleanup Plan was unlawful. In its Motion for Summary Judgment, as well as in the Replies to Tri-Realty's Motion for Partial Summary Judgment, Ursinus and the Department argue that the combination of the

[2] We do not address the issue of administrative finality as it applies to the definition of the "site" in this appeal, because we find that we can properly resolve the issue without extending our discussion beyond a statutory and regulatory analysis.

2015 Administrative Order, the Access Agreement, and Tri-Realty's November 17, 2015 letter to the Department ("2015 Letter")[3] provides the required documentation of cooperation or agreement.

Having reviewed all of the documents cited in support of the parties' contentions, as well as the associated arguments, we find that summary judgment is not appropriate on the issue of whether it was lawful and reasonable for the Department to conclude that the documents it relied on satisfied the requirement for documentation of cooperation or agreement. We cannot say that, as a matter of law, the Access Agreement, the 2015 Letter, and the 2015 Administrative Order collectively constitute the documentation of cooperation or agreement required under 25 Pa. Code § 250.410(c). On its face, it seems implausible that an administrative order can constitute evidence of cooperation or agreement. In our experience, the Department's issuance of an administrative order usually signifies the exact opposite and is most often the direct result of a party's failure to agree with and/or cooperate with the Department. The proposition that these documents satisfy the § 250.410(c) requirement relies, at least in part, on the interpretation of the term "Related Activity" that is defined in the Access Agreement, or in the alternative, an interpretation of the meaning of the 2015 Letter. We are not prepared to say that the offered interpretations are the correct interpretations at this point in the case.

Our review of the 2015 Administrative Order, as well as the Supplemental Administrative Order, raises issues of fact and leaves us far from clear and free of doubt that they alone, or in conjunction with the other documents, constitute the required documentation of cooperation or agreement. As the Department acknowledged in the 2015 Administrative Order, the Access Agreement alone does not appear to be sufficient to constitute the required

[3] The 2015 letter stated, among other things, that Tri-Realty "will grant Ursinus access to College Arms, pursuant to the Order and the indemnification provided by Ursinus thereunder, to execute Ursinus' plan **as an interim measure.**" (emphasis added).

documentation of cooperation or agreement. Likewise, the 2015 Letter provides similar ambiguities that cast doubt on the scope of access actually granted, namely the interim nature of that access. Viewing the three independently inconclusive documents in the light most favorable to the nonmoving party, as we are required to do, we cannot rule as a matter of law that we are free and clear of any doubt that these documents collectively constitute the documentation of cooperation or agreement required for the approval of the 2015 Cleanup Plan. For these reasons, we deny in part Ursinus' Motion for Summary Judgment as it pertains to documentation of cooperation or agreement.

Tri-Realty's Appeal of the 2015 Cleanup Plan Approval and Administrative Finality

Ursinus asserts that Tri-Realty's appeal of the Department's approval of the 2015 Cleanup Plan, or at least certain aspects of that appeal, is barred by administrative finality. Ursinus takes this position because it contends that this appeal addresses issues that were or should have been addressed in Tri-Realty's prior appeal of the Department's RIR approval. More specifically, Ursinus states that by appealing the 2015 Cleanup Plan, Tri-Realty improperly "appealed a subsequent step in a multi-step process, and is thereby seeking to challenge the underlying approval that the Department previously provided, which has become administratively final by operation of law." (Ursinus' Memorandum of Law in Support of Motion for Summary Judgment, p.12). Because of this, Ursinus urges that Tri-Realty's appeal of the 2015 Cleanup Plan is barred by administrative finality and it is entitled to summary judgment in its favor. In response, Tri-Realty contends that its appeal of the RIR's approval was a separately appealable action and does not preclude its appeal of the 2015 Cleanup Plan's approval, and that it specifically reserved the right to appeal the 2015 Cleanup Plan in the Settlement Agreement.

The issue we are asked to consider is whether there was something about the RIR appeal and the way it was resolved by the Settlement Agreement that should bar the current appeal based on administrative finality. Viewing the record in a light most favorable to the nonmoving party, it is not clear and free of doubt at this point that Tri-Realty's appeal of the Department's approval of the 2015 Cleanup Plan is improper as a matter of law. As we stated previously, as a general matter, the Department's approval is clearly an appealable action and subject to the Board's jurisdiction. We find that Tri-Realty's appeal is not barred by administrative finality because Tri-Realty could not have challenged the approval of the 2015 Cleanup Plan until it was approved by the Department. While there may be issues and certain findings that were part of the RIR that may be implicated in the appeal of the 2015 Cleanup Plan approval, on the record in front of us at this point in the litigation, it is difficult to sort out what, if any, role those may have had in the Department's approval decision. Ursinus' position that appealing the Department's approval of the RIR essentially foreclosed Tri-Realty's ability to appeal the Department's approval of the 2015 Cleanup Plan undermines the fact that each step in the Act 2 process is a separately appealable action and is inconsistent with the plain language of the law. *See* 35 P.S. § 6026.308 ("[d]ecisions by the department involving the reports and evaluations required under this chapter shall be considered appealable actions under the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act"). The legislature certainly was aware that each of the steps in the Act 2 process built on and related to the prior steps in that process and yet it saw fit to provide that each Department decision associated with certain steps in the process is an appealable action.

Ursinus cites Judge Labuskes' opinion in Tri-Realty's earlier appeal of the RIR approval where he states that "we believe that protracted litigation over the various reports runs counter to

Act 2's goal of encouraging voluntary cleanup of sites while ensuring the protection of public health and the environment." *Tri Realty Co. v. DEP*, 2015 EHB 552, 559. Ursinus implies that Judge Labuskes' expression of concern over continued, protracted litigation over the cleanup of the Ursinus and Tri-Realty properties provides support for its administrative finality argument. While we share Judge Labuskes' concern, we do not think that his opinion should be read in the manner that Ursinus would like us to read it. The statutory language of Act 2 makes clear that it is made up of several independently appealable steps. The RIR is an early step in the Act 2 process. To hold as a matter of law that appealing an early step in the process bars a party from appealing the approval of the subsequent cleanup plan, the step that outlines the overall plan for site restoration, appears to be contrary to law. Furthermore, we think that such a ruling would create a real Catch-22 for parties wishing to challenge the Department's Act 2 decisions. If a party, such as Tri-Realty, attempted to appeal a cleanup plan prior to its approval by the Department, that appeal would most likely be dismissed for lack of jurisdiction because of the lack of a Department action. It seems inappropriate, and inconsistent with the statute, to then turn around and say a party like Tri-Realty is too late to challenge a cleanup plan and they should have raised certain issues by challenging the RIR. We are not prepared to endorse that approach in this case when ruling on a summary judgment request. For these reasons, we deny Ursinus' Motion for Summary Judgment as it applies to Tri-Realty's ability to appeal the 2015 Cleanup Plan's approval.[4] To the extent that Ursinus' administrative finality argument was aimed at what it perceived to be specific challenges to the RIR, we had difficulty discerning the particulars of

[4] While we acknowledge that Tri-Realty expressly preserved its right to appeal the cleanup plan in the Settlement Agreement, we do not find this to be dispositive to our decision. We make no comment on the effect of a settlement agreement from a prior appeal on the administrative finality of certain issues in subsequent, related appeals, particularly in light of the fact that not all parties in the former case and in the present case were party to that Settlement Agreement.

those arguments and at this point conclude that those issues lack sufficient clarity to be decided at the summary judgment stage.

Conclusion

Based on the foregoing, we grant in part Ursinus' Motion for Summary Judgment as it pertains to the designation of what property constitutes the Act 2 site in this matter. Ursinus' Motion for Summary Judgment as it applies to all other issues, and Tri-Realty's Partial Motion for Summary Judgment are both denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-REALTY COMPANY	:	
	:	
v.	:	**EHB Docket No. 2015-195-B**
	:	**(Consolidated with 2016-013-B)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and URSINUS COLLEGE,	:	
Permittee	:	

***AMENDED O R D E R**

AND NOW, this 14th day of April, 2016, upon review of Ursinus' Motion for Summary Judgment, Tri-Realty's Response thereto, and Ursinus' Reply, together with Tri-Realty's Motion for Partial Summary Judgment, Ursinus' and the Department's Responses thereto, and Tri-Realty's Reply, it is hereby ordered that Ursinus' Motion for Summary Judgment is **granted in part** as it pertains to the designation of the Act 2 site in this matter. Ursinus' Motion for Summary Judgment as it applies to all other issues, and Tri-Realty's Partial Motion for Summary Judgment are both **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

***This Amended Opinion and Order is issued to add the signatures of all five Judges to the Order, which were inadvertently omitted in the original Opinion and Order.**

DATED: April 14, 2016

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

For the Commonwealth of PA, DEP:
Brian G. Glass, Esquire
(via electronic filing system)

For Appellant:
Jennifer A. Smokelin, Esquire
Michael C. Falk, Esquire
Robert P. Frank, Esquire
David G. Mandelbaum, Esquire
Hayley Easton, Esquire
(via electronic filing system)

For Permittee:
Neil S. Witkes, Esquire
Lynn R. Rauch, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, KENNETH W. RICHTER, KENNETH GRAHAM AND HARRY MAUSSER	:	
v.	:	**EHB Docket No. 2015-071-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees	:	**Issued: April 15, 2016**

OPINION AND ORDER ON
OMNIBUS MOTION IN LIMINE

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Appellants' motion in limine which was filed on the eve of trial and seeks to exclude from evidence a Permittee's expert witnesses, documents, and things not disclosed in response to the Appellants' unanswered discovery requests. The Appellants failed to file a motion to compel a response to their discovery requests and never asserted that they have been prejudiced in preparing their case for hearing.

O P I N I O N

Before the Board is an appeal of the Department of Environmental Protection's ("Department") approval of a Joint Act 537 Sewage Facilities Plan Update for the Townships of Hegins and Hubley, both of which are located in Schuylkill County. According to Hegins Township's ("Hegins") prehearing memorandum, Hegins is largely in agreement with the position of the Appellants and does not oppose the present appeal. Hubley Township

("Hubley"), on the other hand, opposes the present appeal. [1] On or about November 18, 2015, the Appellants served discovery requests in the form of interrogatories and requests for the production of documents upon Hubley and the Department. The Department responded to the Appellants' discovery requests, but Hubley did not. The Appellants did not file a motion to compel Hubley's response to the Appellants' discovery requests, nor has the Board issued any Orders compelling Hubley's response to the discovery requests. [2]

The Appellants now come before the Board with a motion in limine, asserting that Hubley should not be permitted to introduce evidence, documents, and things not disclosed in response to the Appellants' unanswered discovery requests because, according to the Appellants, such non-disclosure constitutes a failure to complete discovery. Specifically, the Appellants' motion requests the Board to preclude Hubley from offering or introducing the following:

> (a) Any reference to, or any testimony by, expert witnesses on behalf of Hubley Township, except those expert witnesses who have been properly identified pursuant to the Pennsylvania Rules of Civil Procedure;
> (b) Any reference to, or any testimony by, any non-expert witness on behalf of Hubley Township who has not been properly identified in response to the Appellants' discovery requests;
> (c) Any reference to, or use of by Hubley Township, documents not produced pursuant to Appellants' Requests for Production of Documents; and
> (d) Any testimony by anyone offered as an expert witness on behalf of Hubley Township which is beyond the fair scope of that witness's opinions and grounds identified in discovery.

Hubley filed a response in opposition to the Appellants' motion in limine. Hubley asserts that the motion should be denied because the Appellants did not explain in its motion how they have been prejudiced or to what extent they have been unfairly surprised.

---

[1] When the appeal was filed in 2015 both Townships opposed the appeal. Hegins changed its position late in 2015.

[2] Hegins and Hubley filed a motion to compel discovery against the Appellants at about this time and the Appellants sought a protective order concerning the scheduling of depositions. At no point during these developments, including a conference call with the Board, did the Appellants mention its outstanding discovery requests.

Discovery before the Board is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code § 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. Discovery allows all sides to accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. Ordinarily, discovery sanctions, especially the sanction of the preclusion of evidence, are not imposed unless a party defies an order compelling discovery. *Twp. of Paradise and Lake Swiftwater, Inc. v. DEP*, 2001 EHB 1005, 1007; *DEP v. Land Tech Eng'g, Inc., 2000 EHB 1133, 1140*; *Caernarvon Twp. Supervisors v. DEP and Chester County Solid Waste Auth.*, 1997 EHB 601, 605. However, the Board has held that discovery sanctions may be appropriate absent a motion to compel as long as a sanction is reasonable given the severity of the violation. *DEP v. Colombo*, 2012 EHB 370, 371-72 (citing *Kochems v. DEP*, 1997 EHB 422, 424, aff'd 701 A.2d 281 (Pa. Cmwlth. 1997)); *DER v. Chapin & Chapin, Inc.*, 1992 EHB 751, 755. The Board considers the prejudice caused to each party by allowing or excluding the testimony and the extent to which the prejudice can be cured. *Rhodes and Valley Run Water Co. v. DEP*, 2009 EHB 237; *DEP v. Angino*, 2006 EHB 278. Applying these standards to the facts of the appeal, the Board denies the Appellants' motion in limine for the reasons set forth below. The Board does not condone Hubley's failure to respond to discovery, but the remedy requested by the Appellants is too harsh under the facts of this appeal.

First, the Appellants assert that the witness testimony and related documents listed in Hubley's prehearing memorandum should be excluded because this information was not previously disclosed in response to the Appellants' November 18, 2015 discovery requests.

Hubley admits that it did not formally respond to the Appellants' November 18, 2015 discovery requests. In the Appellants' view, the unanswered discovery requests are reason enough to exclude the introduction of the witness testimony and related documents listed in Hubley's prehearing memorandum. The Board disagrees. The Board must approach with caution the exclusion of integral evidence as a sanction for discovery violations, particularly where no motion to compel was filed and no Board Orders have been violated. *Bucks County Water & Sewer Auth. V. DEP*, 2014 EHB 142, 151 (citing *Environmental & Recycling Serv., Inc. v. DEP*, 2001 EHB 824, 830). In this case, the Appellants did not file a motion to compel compliance with its discovery requests, nor did Hubley violate any Board Orders relating to the Appellants' discovery requests. The Appellants' failure to file a motion to compel compliance with its discovery requests is one important factor in denying the motion in limine.

Next, the Appellants have not explained how they would be prejudiced if the Board permitted Hubley to introduce the evidence listed in Hubley's prehearing memorandum. While it is true that Hubley did not disclose this evidence in response to the Appellants' discovery requests, a violation of prehearing disclosure requirements does not automatically provide for preclusion of an expert's testimony, rather the degree of prejudice suffered by the parties is the controlling factor. *CMV Sewage Co., Inc. v. DEP*, 2010 EHB 725; *McGinnis v. DEP*, 2010 EHB 489. The Board is not convinced that any apparent prejudice to the Appellants exists. While the Board takes seriously a party's right to rely on discovery responses in preparing for trial, *McGinnis v. DEP*, 2010 EHB 489, 493 (citing *American Iron Oxide Company v. DEP*, 2005 EHB 779, 784), and the Appellants were indeed deprived of this right, it should come as no surprise to the Appellants that Hubley intends to call as witnesses the two engineers who crafted and revised the Act 537 plan to testify as experts for Hubley in defense of the plan. The

Appellants have been aware for several months that these witnesses would be testifying as experts for Hubley in defense of the plan. Without an allegation of specific prejudice or surprise from the Appellants or prejudice that is apparent to the Board, the Board is not in a position to exclude any evidence, documents, or things not disclosed in response to the Appellants' unanswered discovery requests.[3] Accordingly, we issue the following Order.

[3] During a conference call with the Parties in advance of the scheduled hearing on April 19, 2016, the Board asked whether the Appellants counsel could better identify any specific prejudice to the Appellants and also provide any means to remedy such prejudice. No specific prejudice was identified and the Board did not have to consider any less harsh remedies to resolve possible prejudice because none was specifically identified.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROGER WETZEL, WILLIAM WOLFGANG, RANDY SHADLE, KENNETH W. RICHTER, KENNETH GRAHAM AND HARRY MAUSSER	:	
v.	:	**EHB Docket No. 2015-071-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HEGINS TOWNSHIP and HUBLEY TOWNSHIP, Permittees	:	

O R D E R

AND NOW, this 15th day of April, 2016, it is hereby ordered that the Appellants' omnibus motion in limine is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: April 15, 2016

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

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

For Appellants:
Kevin M. Walsh, Jr., Esquire
Donald G. Karpowich, Esquire
(*via electronic filing system*)

For Permittee Hegins Township:
John G. Dean, Esquire
Matthew G. Boyd, Esquire
(*via electronic filing system*)

For Permittee Hubley Township:
Paul J. Bruder, Jr., Esquire
Timothy J. Nieman, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WAYNE K. BAKER	:	
	:	
v.	:	**EHB Docket No. 2014-151-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: April 20, 2016**

OPINION AND ORDER ON APPELLANT'S PETITION FOR RECONSIDERATION OF THE BOARD'S ADJUDICATION OF MARCH 23, 2016

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where the Appellant has not met the criteria set forth in 25 Pa. Code § 1021.152 for granting reconsideration of the Board's Adjudication, his petition is denied.

O P I N I O N

On March 23, 2016, the Environmental Hearing Board (Board) issued an Adjudication in this matter finding that the Appellant, Wayne K. Baker, had not met his burden of proof in his appeal of the Department of Environmental Protection's (Department) decision to grant Stage I bond release to Amerikohl Mining, Inc. (Amerikohl) with regard to mining conducted on Mr. Baker's property in Fayette County, Pennsylvania. Mr. Baker seeks reconsideration of the Board's Adjudication pursuant to 25 Pa. Code § 1021.152 which states in relevant part as follows:

> (a) . . . Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition:
>
> (i) Are inconsistent with the findings of the Board.
>
> (ii) Are such as would justify a reversal of the Board's decision.
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

The Department and Amerikohl have filed responses opposing Mr. Baker's petition.

Waste Issues

At the hearing, Mr. Baker argued that Stage 1 bond release should not have been granted based on his allegation that Amerikohl employees had dumped waste oil and buried solid waste at the site in violation of Section 315(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001. Under Section 315(b), before any portion of a bond may be released:

> . . .the operator shall remove and clean up all temporary materials, property, debris or junk which were used in or resulted from his mining operations.

The Board found that Mr. Baker had discovered a handful of items on the property – four filters, some oily rags and a bucket lid – and had discovered a small amount of waste oil in the area where Amerikohl had conducted maintenance of its equipment. As to the filters, rags and bucket lid, the Board noted as follows:

> Mr. Baker removed the materials[1] and presented no further evidence of solid waste disposal on the site. We find that the presence of those materials, though disconcerting, is *de minimus* and does not constitute a basis for overturning the Department's approval of Stage 1 bond release. The presence of a handful of items in an area where equipment maintenance took place is not

[1] In fact, the materials were presented at trial as exhibits.

> evidence of widespread disposal throughout the site. Moreover, the items have been removed from the site, albeit by Mr. Baker, and there appears to be no further basis for withholding bond release on these grounds.

Baker v. DEP and Amerikohl Mining, Inc., EHB Docket No. 2014-151-R (Adjudication issued March 23, 2016), *slip op*. at 18.

As to the waste oil, the Board held:

> Based on Mr. Baker's testimony and the results of the Department's sampling, we do not dispute Mr. Baker's allegation that some amount of waste oil is present on the site. We have no doubt that waste oil was spilled in the staging area where equipment was kept and maintained. The question is whether the amount of oil spilled is significant and/or widespread. The evidence indicates it is not. As noted earlier, sampling was performed only in one area of the site, in the vicinity of the staging area, and the sampling showed the presence of waste oil in insignificant amounts less than the Act 2 health based standards.

Id. at 19-20.

Mr. Baker argues that the Board has created a new standard requiring Mr. Baker to prove "widespread contamination" in an amount that is more than "*de minimus*." On the contrary, the Board simply applied our rules on burden of proof which require that a party challenging Stage 1 bond release has the burden of proving by a preponderance of the evidence that the Department abused its discretion in approving the release. 25 Pa. Code § 1021.122(c)(2). *See Baker, supra* (citing *Clancy v. DEP*, 2013 EHB 554, 572; *Lucchino v. DEP*, 2000 EHB 655, 667). Mr. Baker raises no new information that the Board did not consider in rendering our Adjudication, nor has he asserted that the Adjudication rests on a legal ground or factual finding that has not been proposed by any party. The handful of debris that remained on the property had been removed by Mr. Baker himself, and the evidence of waste oil found at the area of equipment maintenance fell far below the Act 2 based standards. Mr. Baker provided no basis for overturning the Stage

1 bond release on the grounds of waste disposal, and he has provided no basis for overturning the Board's ruling on this issue in our Adjudication.

Approximate Original Contour

Mr. Baker argues that the Board adopted a new test with regard to measuring approximate original contour. In our Adjudication, the Board gave greater weight to the measurements taken by Charles Lightfoot, Amerikohl's expert, than to the measurements taken by William Rosner, Mr. Baker's expert, because Mr. Lightfoot followed the methodology for measuring slopes set forth in the mining regulations. Mr. Baker argues that the regulation that sets forth the methodology, 25 Pa. Code § 87.54(a)(21) deals with permit applications and not bond release and, therefore, should not have been relied on by the Board. However, Section 87.54(a)(21) provides an accepted method for measuring slopes, and when faced with conflicting testimony by two experts, the Board chose to assign a higher degree of reliability to the testimony of the expert who utilized the methodology set forth in the regulations. Mr. Baker may disagree with that methodology, but it is not a basis for reconsideration.

Conclusion

In conclusion, we find that Mr. Baker has not satisfied the criteria set forth in 25 Pa. Code § 1021.152 for granting reconsideration of our Adjudication.

.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 20th day of April, 2016, it is hereby ordered that the Appellant's Petition for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 20, 2016

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Mary Martha Truschel, Esquire
(via electronic filing system)

For Appellant:
Philip L. Hinerman, Esquire
John Gotaskie, Esquire
Adam H. Cutler, Esquire
(via electronic filing system)

For Permittee:
Kevin J. Garber, Esquire
Jean M. Mosites, Esquire
Abigail F. Jones, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD SEBASTIANELLI, SAMUEL SEBASTIANELLI, TIMOTHY SEAMANS, RICHARD DEMBOSKI, FR. WILLIAM PICKARD, ALLISON PETRYK AND ALEXANDER LOTORTO	:	
v.	:	**EHB Docket No. 2016-012-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA ENERGY CENTER, LLC, Permittee	:	**Issued: May 2, 2016**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a motion to dismiss filed by a permittee. Among other things, the Board holds that the Department did not have an obligation to evaluate a plan approval for a new power plant in the context of any potential future requirements mandated by Pennsylvania's implementation of the federal Clean Power Plan.

O P I N I O N

The Appellants filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval No. 35-00069A to Lackawanna Energy Center, LLC ("Lackawanna") for the construction and temporary operation of a natural gas fired power production facility in the Borough of Jessup, Lackawanna County. Lackawanna has moved to dismiss Objections 6, 7, and 8 in the notice of appeal, as well as an amendment to the notice of appeal filed by Richard Demboski, one of the Appellants, at a time when the Appellants

proceeded individually *pro se*. The Department has joined in the motion with respect to Objections 6 and 7 (but not 8). The Appellants have agreed to the dismissal of Mr. Demboski's amendment but oppose dismissal of Objections 6, 7, and 8.

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Snyder v. DEP*, 2015 EHB 857, 860; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley*, *supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54, *recon. denied*, 2015 EHB 117, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390. As a practical matter, whether or not there are "factual disputes" on the record is irrelevant with respect to a motion to dismiss, because the operative question is: even assuming everything the non-moving party states is true, can—or should—the Board hear the appeal? *Consol*, *supra*, 2015 EHB 48, 55.

Objection 6 in the notice of appeal states:

> The structural integrity of the power plant is at risk due to a municipal landfill and abandoned coal mine shafts and tunnels beneath the proposed site. This presents an imminent danger to the public, employees, and construction contractors.

Lackawanna and the Department argue that the objection should be dismissed because the Department is not required to analyze a project's structural integrity when reviewing an application for a plan approval. The Appellants concede that there is no requirement under the

Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, or its implementing regulations to review the structural integrity of a source, but they say that Lackawanna's project must be structurally sound under local land use requirements, and therefore, the Department should have considered the issue pursuant to Acts 67 and 68, which include a provision stating that the Department "shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the…permitting of…facilities." 53 P.S. §§ 10619.2 and 11105 ("Acts 67 and 68").

There is no record at this early juncture to support the Appellants' assertion that an analysis of a project's structural integrity is a component of some applicable comprehensive plan or zoning ordinance. Even if there were such a record, the Department's duty to consider comprehensive plans and zoning ordinances when reviewing an application for an air quality plan approval under Acts 67 and 68 does not translate into a duty to evaluate the structural integrity of the source, even if the host municipality's plan or ordinances require such an evaluation. To the extent that proof of structural integrity is required under some local requirement,

> local zoning issues must be decided at the local level. *Casey v. DEP*, 2014 EHB 439; *Lyons v. DEP*, 2011 EHB 169; *Cnty. Of Berks v. DEP*, 2005 EHB 233. The Department has no role in actually enforcing local land use and zoning requirements. *New Hanover Twp*., 2011 EHB at 680. Indeed, the Department is not required to conduct an independent investigation whether a project complies with local zoning requirements before permitting the project. *Heasley v. DER*, 1991 EHB 1758. It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue. In this respect, the Department's role is analogous to its role when a legitimate dispute regarding a permittee's legal right to enter land is identified; the Department must account for

> the dispute, not decide it. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599-606, 613; *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229.

Tri-County Landfill v. DEP, 2015 EHB 324, 330-31.

Therefore, the Department and Lackawanna are correct that the Department was not necessarily *required* as a matter of law to review the structural integrity of Lackawanna's project. However, saying that the Department is not *required* to consider the structural integrity of an air pollution source under either the Air Act and its regulations or Acts 67 and 68 does not mean that the Department lacks the authority to do so in an appropriate case. Viewing the notice of appeal in the light most favorable to the Appellants, they seem to have objected that the Department should have exercised that authority here. Importantly, neither Lackawanna nor the Department argue that the Department lacks that authority, so we need not address that issue further, other than to hold that Lackawanna's motion to dismiss Objection 6 must be denied.[1]

Objection 7 of the notice of appeal states:

> The Environmental Protection Agency's Clean Power Plan has delegated Pennsylvania the responsibility of submitting a plan to cap emissions from the electricity generation sector. The final Clean Power Plan rule was issued prior to the issuance of [Lackawanna's] plan approval and should have triggered further review as the state attempts to comply with federal laws. This issuance is out of compliance with the new EPA CPP rule.

Pursuant to authority derived from the Clean Air Act, EPA's final rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, or what is colloquially known as the Clean Power Plan, establishes emissions guidelines for greenhouse gases emitted by existing power plants. 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be

[1] Lackawanna adds that the Appellants are estopped from challenging the structural integrity of the project because that issue was decided at the local level. To address that issue would require more of a record review than is appropriate in the context of a motion to dismiss.

codified at 40 C.F.R. pt. 60). The Plan establishes emissions targets that are first to be met in the interim by 2022 to 2029, and then more stringent final emissions targets that are to be met by 2030. The Plan requires states to develop individual plans to reduce greenhouse gas emissions from their electricity generating sectors through the use of the best system of emissions reduction (BSER). Alternatively, a state can choose to refrain from developing its own plan and the EPA will impose a default federal plan on the state. The Clean Power Plan gives states some flexibility in choosing how to meet the emissions reduction targets by allowing states to pursue different methods to achieve reductions and to craft plans that best suit their individual needs and capabilities. Any state-developed plan must be submitted to the federal government for its review and approval. States are required to submit a final plan to EPA by September 6, 2016; however, a state may request a two-year extension until September 6, 2018. 80 Fed. Reg. 64669. On February 9, 2016, the United States Supreme Court granted an application to stay the implementation of the Clean Power Plan pending the disposition of challenges to the rule before the D.C. Circuit Court of Appeals, and any subsequent writ of certiorari should it be granted. *West Virginia v. EPA*, 136 S. Ct. 1000, 2016 U.S. LEXIS 981 (2016).

Pennsylvania's effort to develop a plan is in its infancy, so the contents of its plan and the mixture of emissions reduction measures the plan will contain are unknown at this point. Given the Supreme Court's stay, it is unclear if and when Pennsylvania will be required to complete the plan. The plan will be subject to a lengthy regulatory review and approval process that has not even begun. All of this underscores the point that any as yet undefined enforceable requirements of Pennsylvania's eventual plan are far too attenuated to have any practical impact on the Department's review of the plan approval for this facility. We can decide as a matter of law that the Department did not err when it did not evaluate the plan approval against the backdrop of any

speculative future requirements that may be imposed by Pennsylvania's initiative pursuant to the Clean Power Plan.[2]

Objection 8 of the notice of appeal states:

> The Department of Environmental Protection's action was arbitrary and capricious, abused the Department's discretion, acted contrary to law, and was unreasonable in the issuance of the plan approval. Appellants and their counsel reserve the right to amend the appeal upon the discovery of new information related to Lackawanna Energy Center and the plan approval, and other projects developed by Invenergy or subsidiaries in the Commonwealth of Pennsylvania, the United States, and in foreign countries, territories, or possessions thereof.

Lackawanna (but not the Department) argues that this objection is superfluous. We recently addressed a similar argument in support of a motion to dismiss a similar objection in *Snyder v. DEP*, 2015 EHB 857, 885, where we had this to say:

> It is a common and perhaps even a well-advised practice to include a catch-all objection like the Appellants' objection in a notice of appeal. Notices of appeal must be filed within 30 days of the Department's action, even in complex cases such as this one. It is perfectly understandable that an appellant's case will require refinement as it progresses toward an adjudication, but we do not view [a party's] motion to dismiss as an appropriate vehicle for advancing this refinement in this case.

It is true that the Appellants' general objection does not add much value. General objections like this generally will not by themselves excuse a failure to include a more specific objection. *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127; *Williams v. DEP*, 1999 EHB

[2] In addition, Lackawanna and the Department tell us that the Clean Power Plan applies primarily to existing power plants—defined as any affected power plant that was in operation or had commenced construction as of January 8, 2014. 80 Fed. Reg. 64715-16. The plan approval under appeal here, issued December 23, 2015, of course, authorizes construction of Lackawanna's power plant, thus probably excepting it from mandatory coverage under the Clean Power Plan. We note that EPA has also published a final rule separate from the Clean Power Plan regarding new, modified, or reconstructed power plants. *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98).

708, 716. In such cases an amendment to the appeal will ordinarily be necessary. Nevertheless, the general objection recognizes the reality that discovery may reveal a basis for additional objections and we see no harm in keeping it in.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD SEBASTIANELLI, SAMUEL SEBASTIANELLI, TIMOTHY SEAMANS, RICHARD DEMBOSKI, FR. WILLIAM PICKARD, ALLISON PETRYK AND ALEXANDER LOTORTO	:	
v.	:	**EHB Docket No. 2016-012-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA ENERGY CENTER, LLC, Permittee	:	

O R D E R

AND NOW, this 2nd day of May, 2016, it is hereby ordered as follows:

1. The amendment to the notice of appeal filed by Richard Demboski is **dismissed** by consent;
2. Objection 7 in the notice of appeal is **dismissed**; and
3. The Permittee's motion to dismiss is in all other respects **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 2, 2016

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

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

For Appellants:
Michael Ewall, Esquire
(*via electronic filing system*)

For Permittee:
Lorene Boudreau, Esquire
Ronald M. Varnum, Esquire
Harry Weiss, Esquire
Michael S. Blazer, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	**Issued: May 6, 2016**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion for partial summary judgment in an appeal from an NPDES permit because the permit is ambiguous with respect to what it requires regarding the monitoring and discharge of trihalomethanes.

O P I N I O N

This is Chester Water Authority's ("Chester Water's") appeal from the Department of Environmental Protection's (the "Department's") issuance on April 9, 2015 of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0265951 to Old Dominion Electric Cooperative ("Old Dominion") for its Wildcat Point Generating Facility, a new gas-fired power plant in Cecil County, Maryland. Old Dominion will discharge cooling tower blowdown to the Conowingo Pond portion of the Susquehanna River in Lancaster County. The Conowingo Pond is a 14-mile portion of the Susquehanna River that is bounded upstream by the Holtwood Dam and is impounded downstream by the Conowingo Dam in Maryland. The pond is the source and receiver of water for the Peach Bottom Atomic Power Station, the Muddy Run Pumped Storage

Facility, and the York Energy Center. It also serves as the drinking water supply for the city of Baltimore and the Appellant, Chester Water, which supplies many thousands of users in Pennsylvania and Delaware. Old Dominion's plan is to withdraw water from the Pond, after which it will be clarified, chlorinated, treated with an antiscaling agent, and then used in cooling towers where it is expected that about 90 percent will be evaporated and about 10 percent will eventually be returned to the Pond. If the Pond were a free-flowing river, Chester Water's intake, located 940 feet away from Old Dominion's discharge in the direction of about 90 degrees relative to the direction of the river's expected flow, would probably be considered upstream of Old Dominion's discharge. The Pond, however, looks more like a lake than a river and is heavily managed and utilized, so under some conditions we are told that Old Dominion's intake and discharge could conceivably cause Old Dominion's discharge plume to spread toward Chester Water's intake. Chester Water's concern for maintaining acceptable water quality at its intake is the reason we have this appeal.

The Department has moved for partial summary judgment. Its motion relates to Paragraph 11.f of Chester Water's notice of appeal, wherein Chester Water objects that the Department (among other things) failed to include a discharge limit for trihalomethanes (THMs) in Old Dominion's permit. The Department says that is simply not true and it asks us to dismiss the objection. Whether Old Dominion agrees with the Department is not perfectly clear in light of its statement in its brief in opposition to Chester Water's separate motion for summary judgment, which statement reads in the relevant part as follows:

> Chester Water's argument on summary judgment is based on its and the Department's interpretation of the Permit condition to prohibit Priority Pollutants in the Wildcat Power Plant discharge, and not just in the chemical additives to the cooling tower. For purposes of argument on summary judgment, Old Dominion assumes the correctness of this interpretation. As described in Old

> Dominion's Memo, Old Dominion also can monitor Priority Pollutant levels at its intake to determine whether any priority pollutants in the discharge were present before the water entered the Wildcat system.[1]

Now, it appears that Chester Water generally agrees with the Department. In its own motion for summary judgment (which we will address in a separate Opinion), Chester Water says: "The Permit bans any detectable discharge of Priority Pollutants, including Trihalomethanes." In its response to the Department's motion, Chester Water explains that including the objection in its notice of appeal was understandable because the permit is confusing on this issue. It concedes that its objection was at least partially unfounded, but it opposes unconditional summary judgment on the issue because it says that a remand to the Department is still necessary because the permit needs to be clarified.

Chester Water's point that the permit is ambiguous or at least difficult to understand is well taken.[2] As noted above, Old Dominion also seems to acknowledge that at least one

---

[1] Old Dominion makes the following rather qualified statement in its reply brief in support of its own motion for summary judgment: "[Old Dominion] provided affidavits establishing that under any operating condition reasonably expected to exist the [Wildcat] discharge will not contain the Four Priority Pollutant THMs in concentrations that are a detectable net increase above any ambient as measured by the testing protocol set forth in the Permit."

[2] In addition to the ambiguities in the permit itself as explained below, the Department in its comment response document said, "Regarding permitted levels, based on the information provided in the permit application and subsequent analysis by DEP, no permit limits are required for DBPs [disinfection by-products]." The specific THMs listed in the permit are DBPs. Chester Water also registered the following complaint regarding the Department's discovery responses:

> In CWA's first set of interrogatories to DEP, CWA asked: "With respect to Trihalomethanes in the discharge authorized by the Permit, state the reasons why a) no effluent limit was imposed, b) sampling was specified on only a once per month basis, and c) composite sampling was specified." DEP responded by referring to several prior interrogatory answers, which do not mention THMs at all, except to repeat the monitoring and effluent limit tables from the Permit (and again showing the entry "XXX" to indicate no limit for THMs), and by stating: "The Department determined that any trihalomethanes in the ODEC discharge would not cause or have a reasonable potential to cause or contribute to an excursion above any water quality standard." This question provided DEP the perfect opportunity to respond that the Permit did contain a limit, and in fact a prohibition, on THM discharges; but, DEP provided no such information in its

interpretation issue lurks. Part A of the permit is where all of the effluent limitations are normally listed. Part A of Old Dominion's permit lists "Trihalomethanes" as a separate parameter. There are many trihalomethanes, which are chemical compounds in which three of the four hydrogen atoms of methane are replaced by halogen atoms. It may be understood among the parties that the separate designation for "Trihalomethanes" is limited to the four THM disinfection by-products that are of concern to water suppliers and are referred to as "TTHM." There is a maximum contaminant level for TTHM. 40 CFR § 141.64. There does not appear to be a numeric limit for "Trihalomethanes" as a distinct parameter anywhere in the permit. Presumably, if the limit for each of the four specified THMs is non-detect, the limit for TTHM is also non-detect, but that is not in the permit. It is not clear why there is a separate parameter for "Trihalomethanes," which Old Dominion is required to sample for once a month.

Part A then goes on to list the four THM disinfection by-products specifically: chloroform, bromoform, dibromochloromethane, and dichlorobromomethane. No effluent limit is included for these substances. Instead, in the spaces where limits are to be inserted for mass units, as well as for minimum, average monthly, and instantaneous maximum concentration limits, the permit simply says "XXX." In the space for a daily maximum concentration limit the permit says "Report" for each substance. In the space for monitoring requirements the permit says "1/month 24-Hr Composite" for each substance. Anyone reading Part A of the permit would understand that Old Dominion may discharge unlimited amounts of THMs, including the four named THMs, so long as it reports it. The Department says that the permit limit for the four named THMs is non-detect, but Part A does not say that.

> response. Instead, the answer indicates an assessment by DEP that THMs would be present in the discharge, but not in concentrations or amounts that DEP deemed to be problematic.

(Chester Water Reply Brief at 6.)

The Department's position is based on Part C.I.A. on page 20 of the permit, which reads as follows:

> Cooling tower blowdown discharges shall contain no detectable amounts of the 126 Priority Pollutants listed in 40 CFR Part 423, Appendix A, with the exception of Total Chromium and Total Zinc. When requested by DEP, the permittee shall conduct monitoring or submit engineering calculations to demonstrate compliance with 40 CFR 423.13(d)(a). Should monitoring of the 126 Priority Pollutants be requested by DEP, the permittee may report both influent and effluent pollutant concentrations to demonstrate no net increase in the concentration of each of the pollutants. The 126 Priority Pollutants are also listed below for convenience.

The four named THMs in Part A of Old Dominion's permit are four of the "126 Priority Pollutants listed in 40 CFR Part 423, Appendix A," listed as Numbers 23, 47, 48, and 51. Thus, under the first sentence, the limit for the four THMs does appear to be non-detect. Unlike Part A, Part C only seems to require monitoring if the Department specifically requests it, and there is some allowance for "engineering calculations." Under the third sentence, Old Dominion can get a credit for any amounts in the influent. The second sentence adds a bit more confusion by referring to 40 CFR 423.13(d)(a). That federal regulation establishes effluent limitation guidelines for the steam electric power generating point source category. It includes a "no detectable amount" limit for the 126 priority pollutants, but only as "contained in chemicals added for cooling tower maintenance." It may be that these various qualifications to the general rule of non-detect explain why the non-detect limit is not included in Part A, but there is no explanation in the permit.

It seems that the Department is correct that the permit does indeed provide limits for THMs, but Chester Water and Old Dominion are correct that it is not clear exactly what those limits are. In its motion the Department says the limit for the four listed THMs is non-detect, but

that is somewhat misleading, we think. If we are reading the permit correctly, which we freely admit may not be the case, only the four THM disinfection by-products are covered by the permit. Old Dominion must sample for THMs even though Part C might suggest otherwise. The limit for the four THMs is non-detect, even though Part A might suggest otherwise. If that sampling reveals detectable THMs, Old Dominion will still be in compliance with its permit so long as the THMs in the effluent are no greater than the THMs in the influent. If no credit is available for the influent (e.g. because Old Dominion did not sample for it), it is not clear to us (or apparently Old Dominion) whether Old Dominion is still in compliance if it can show that the THMs were not contained in chemicals added for maintenance. Whether a remand is necessary as suggested by Chester Water or whether the matter can be adequately clarified by our Adjudication remains to be seen, but we do not feel comfortable granting summary judgment on the issue without a better understanding of exactly what the permit requires. The matter is clearly not free from doubt.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	

O R D E R

AND NOW, this 6th day of May, 2016, it is hereby ordered that the Department's motion for partial summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: May 6, 2016

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

For the Commonwealth of PA, DEP:
Beth L. Shuman, Esquire
Curtis C. Sullivan, Esquire
Janna E. Williams, Esquire
(*via electronic filing system*)

For Appellant:
Francis G.X. Pileggi, Esquire
David Rockman, Esquire
Tara L. Lattomus, Esquire
(*via electronic filing system*)

For Permittee:
Eugene Dice, Esquire
Brian Wauhop, Esquire
James Patrick Guy, Esquire
John M. Robb, Esquire
Thomas M. Wolf, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 9, 2016**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND DEPARTMENT'S CROSS MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board denies an appellant's motion for partial summary judgment because the appellant has not established as a matter of law that its interpretation of the definition of a public water system under the Pennsylvania Safe Drinking Water Act is correct. The appellant also has not established the necessary elements for its claims of estoppel with respect to the Department's enforcement of a particular permit condition and the Department's revocation of the appellant's permit. The Department's cross motion for summary judgment is denied for many of the same reasons that the appellant's motion is denied. The appellant's motion to strike the Department's cross motion is denied as moot.

O P I N I O N

M.C. Resource Development Company a/k/a M.C. Resources Development, Inc. ("MCRD") has appealed a January 28, 2015 letter from the Department of Environmental Protection (the "Department") revoking MCRD's public water supply permit no. 3546482,

which authorizes the operation of Pine Valley Farms Spring No. 1 ("Pine Valley Spring") as a bulk water hauling system located in East Brunswick Township, Schuylkill County. The permit was revoked because, according to the Department, MCRD no longer met the definition of a public water system under the Pennsylvania Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17.

MCRD's Pine Valley Spring consists of two groundwater well sources and a small infrastructure network of pipelines, water treatment instruments, and distribution buildings. MCRD uses Pine Valley Spring for harvesting spring water for sale to bottled water plants. MCRD sells raw water to its customers, which provide further treatment to produce water for human consumption that is then bottled and sold. In addition to selling water harvested from Pine Valley Spring, MCRD also purchases water from several other sources and resells it to its bottled water customers. MCRD first obtained a public water supply construction permit for Pine Valley Spring in 2001, and it obtained its operations permit in 2002. (DEP Resp. Ex. 3, 5.) The operations permit indicates that MCRD is a public water supply that operates as a bulk water hauling system. (DEP Resp. Ex. 5.) The permit contains a condition providing for what the parties term a conservation bypass or pass-by flow requirement. That condition, Special Condition No. 2, provides as follows:

> When production begins, the conservation bypass of 56.1 gpm (0.125 cfs), shall be maintained immediately downstream from the spring and be measured at least daily. When the stream flow is less than 56.1 gpm (0.125 cfs), no water may be withdrawn from Wells 1 and 2.

(DEP Resp. Ex. 5.)

Discussions between the Department and MCRD occurred in 2007 regarding whether MCRD met the definition of a public water system due to the fact that it did not appear to be hauling water to 25 customers at least 60 days out of the year, and it did not appear to be hauling

finished water.[1] The Department suspended MCRD's permit in March 2013 due to MCRD's alleged failure to meet the definition of a public water system. After some discussions back and forth between the Department and MCRD, the Department reinstated the permit in April 2014 with revised special conditions requiring MCRD to make more reports to the Department. Special Condition No. 2 remained intact, but a sentence was added to provide for more frequent monitoring: "The bypass flow shall be recorded daily, and all data shall be submitted monthly to the Pottsville District Office, c/o Sanitarian Supervisor." (DEP Resp. Ex. 6.) Pine Valley Spring was inspected in the fall of 2014 and was found to be in violation of its permit. The Department conducted an enforcement conference with MCRD on November 20, 2014, at which point it became clear to the Department that MCRD was not operating in a way that the Department believed to be consistent with the definition of a public water system. The permit revocation followed.

On March 10, 2015, MCRD filed a petition for supersedeas and an application for temporary supersedeas. The Board granted a temporary supersedeas following a conference call with the parties, and a hearing on the supersedeas was held on March 20, 2015. The temporary supersedeas was to remain in effect until the Board issued its decision on the supersedeas. Following a review of the transcript from the supersedeas hearing, we issued our Opinion and Order. *M.C. Res. Dev. v. DEP*, 2015 EHB 261. Because at that point there was no record evidence of environmental harm that would result from allowing MCRD to continue to operate under its permit, and because there was a demonstration of significant economic harm to MCRD and its customers, we granted the petition for supersedeas on the condition that MCRD continue

[1] Finished water is defined in the regulations as "[w]ater that is introduced into the distribution system of a public water system and is intended for distribution and consumption without further treatment, except as necessary to maintain water quality in the distribution system (for example, booster disinfection or addition of corrosion control chemicals)." 25 Pa. Code § 109.1. Water not classified as finished water is referred to as raw water.

to comply with its permit and all permit conditions. After granting two requests to extend the deadlines for completing discovery and filing dispositive motions, we denied a third request to extend the dispositive motion deadline due to a lack of justification from the parties, the extraordinary nature of a supersedeas, and the importance the Commonwealth places in ensuring safe drinking water. *M.C. Res. Dev. v. DEP*, EHB Docket No. 2015-023-C (Opinion, Feb. 25, 2016). *See also* 35 P.S. § 721.2.

MCRD has now filed a motion for partial summary judgment. MCRD argues that it is entitled to summary judgment on Pine Valley Spring meeting the definition of a public water system under a plain reading of the Safe Drinking Water Act. MCRD also argues that the Department should be estopped from revoking its permit in light of what MCRD contends is an abrupt change in position on the part of the Department in how the Department is applying the definition of a public water system to Pine Valley Spring. MCRD also says that the Department is justifying the permit revocation in part on the basis of MCRD's alleged failure to comply with the conservation bypass in Special Condition No. 2, and argues that the Department should also be estopped from purportedly changing its position with respect to this permit condition.

The Department, of course, opposes MCRD's motion for summary judgment. The Department argues that its interpretation of the Safe Drinking Water Act and the Chapter 109 regulations is lawful, reasonable, and supported by Board caselaw. In addition, the Department argues that MCRD is not entitled to estoppel because the Department cannot be estopped from enforcing the law and carrying out its statutory obligations under the Safe Drinking Water Act. The Department also contends that the differences of interpretation over the conservation bypass condition render summary judgment inappropriate on that issue.[2]

[2] Concurrent with its response to MCRD's summary judgment motion, the Department filed a cross motion for summary judgment on the issue of whether MCRD meets the definition of a public water

Both parties have advanced plausible readings of the Safe Drinking Water Act and neither party has convinced us that its interpretation is indisputably correct. In addition, MCRD has fallen short of establishing the elements necessary for its estoppel claims. Therefore, summary judgment must be denied.

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Kazmierczak v. DEP*, EHB Docket No. 2015-062-C, slip op. at 5 (Opinion, Mar. 18, 2016); *Citizens for Pa.'s Future v. DEP*, 2015 EHB 750, 751; *Global Eco-Logical Servs., Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001). *See also Cnty. of Adams v. Dep't of Envtl. Prot.*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. The Board views the record in the light most favorable to the non-moving party and resolves all doubts regarding the existence of a genuine issue of material fact against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *City of Phila. v. DEP*, 2014 EHB 156, 159; *Holbert v. DEP*, 2000 EHB 796, 808. Summary judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106.

---

system, which the Department says is dispositive to the entire appeal. The Department incorporated as support the filings it made in response to MCRD's motion. MCRD moved to strike the cross motion on the basis that the deadline for filing dispositive motions was February 29, 2016 and the Department's cross motion was not filed until March 30, 2016. The Department did not file a response to the motion to strike, and it never provided the authority for the allowance of a cross summary judgment motion after the deadline for filing dispositive motions has passed. However, even considering the Department's cross motion, it must be denied for the same reasons discussed *infra* with respect to MCRD's motion—there are too many unresolved questions in this appeal. Accordingly, the Department's cross motion is denied and MCRD's motion to strike is denied as moot. *See Drummond v. DEP*, 2002 EHB 413, 422-23.

Interpretation of Public Water System

The primary dispute in this case centers on competing interpretations of the definition of a public water system. The Safe Drinking Water Act defines a public water system as:

> A system for the provision to the public of water for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The term includes:
>
> (1) Any collection, treatment, storage and distribution facilities under control of the operator of such system and used in connection with such system.
>
> (2) Any collection or pretreatment storage facilities not under such control which are used in connection with such a system.
>
> (3) A system which provides water for bottling or bulk hauling for human consumption.

35 P.S. § 721.3.[3] MCRD argues that the three enumerated clauses following the leading sentence expand the definition of a public water system. According to MCRD, the Act effectively deems a bottling or bulk hauling system providing water for human consumption as a public water system. In MCRD's view, it does not matter that MCRD is selling raw water because that water is eventually intended for human consumption after being treated by its

[3] The regulations in turn define "system" as:

> (i) A group of facilities used to provide water for human consumption including facilities used for collection, treatment, storage and distribution. The facilities shall constitute a system if they are adjacent or geographically proximate to each other and meet at least one of the following criteria:
>
> (A) The facilities provide water to the same establishment which is a business or commercial enterprise or an arrangement of residential or nonresidential structures having a common purpose and includes mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels.
>
> (B) The facilities are owned, managed or operated by the same person.
>
> (C) The facilities have been regulated as a single public water system under the Federal act or the act.
>
> (ii) This definition may not be interpreted to require two or more currently-regulated public water systems to become one system.

25 Pa. Code § 109.1. Facility is defined as "[a] part of a public water system used for collection, treatment, storage or distribution of drinking water." *Id.*

bottling customers. The Department, on the other hand, contends that any entity wishing to qualify as a public water system, including those addressed by the three clauses, must first satisfy the leading sentence of the definition—that a system providing water for human consumption have at least 15 service connections or regularly serve an average of at least 25 individuals daily at least 60 days per year. For the Department, a system providing water for bottling or bulk hauling must nevertheless have 15 service connections or regularly serve 25 people; they are not otherwise regulated as a public water system.

MCRD focuses in on the word "includes" in the initial portion of the definition of a public water system and tells us that the term is widely accepted as one of enlargement. For support on this point, MCRD cites *Dep't of Envtl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014). While it is generally true that "includes" enlarges rather than restricts, the statutory construction exercise undertaken in *Cumberland Coal* centered on a statutory provision that is fundamentally different than the one before us now. *Cumberland Coal* looked at the enumerated examples provided in the definition of an "accident" in the Bituminous Coal Mine Safety Act, 52 P.S. §§ 690-101 – 690-708. The pertinent language defined an accident as "[a]n unanticipated event, including any of the following…" and proceeded to list 14 examples of situations that were to be considered an accident.[4] 52 P.S. § 690-104. The definition of a public water system in the Safe Drinking Water Act is not composed in the same way. There is considerably more language to parse, and the three enumerated clauses read less as a list of illustrative examples and perhaps more as a selection of points of explanation. For these reasons we do not think that *Cumberland Coal* is entirely helpful for our current purposes.

[4] These include, for example: a death of an individual at a mine; an injury to an individual at a mine, which has a reasonable potential to cause death; an unplanned ignition or explosion of gas or dust; an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage; and failure of an impoundment or refuse pile. 52 P.S. § 690-104(1), (2), (5), (9), (12).

We note that the third enumerated clause in the definition of public water system, which is at central issue here, is distinctly different from the first two numbered clauses. Clauses (1) and (2) are fairly similar and seem to clarify the definition of a public water system by explicitly stating that a public water system includes appurtenant facilities whether or not those facilities are under the control of the operator of the public water system. The second clause implicitly references the first clause. The third clause differs in that it does not appear to build upon or rely on the first two clauses in any way. The third clause instead addresses two specific classes of public water systems—bottling and bulk hauling. It does not appear to clarify what can be encompassed in a single public water system, but rather further defines what types of operations are to be regulated as public water systems in the first instance.

We also do not find much guidance in the federal analogue. While the Pennsylvania definition of a public water system is substantially similar to the definition contained in the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f – 300j-26, nothing resembling the third clause is found in the federal definition.[5] The federal act as a whole contains no mention of bulk water hauling and only a passing reference to bottled water. Pennsylvania's definition also does not contain the restriction that water must be provided "through pipes or other constructed conveyances." We do not know whether Pennsylvania's third clause, and its regulation of bottling and bulk hauling, is entirely unique to Pennsylvania or if similar provisions are contained in the statutes of other states that have assumed primacy over safe drinking water

[5] *See* 42 U.S.C. § 300f(4)(A):

> The term "public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

enforcement. While the safe drinking water primacy program mandates that states have regulations at least as strict as the federal regulations, there appears to be nothing preventing states from also regulating a broader class of public water systems as Pennsylvania does. *See* 40 C.F.R. §§ 142.10 – 142.19 (relating to requirements for state primary enforcement authority).

The Department relies on the Chapter 109 regulations to argue that bottled water systems and bulk water hauling systems are types of public water systems that do not include systems providing only a source of water for a bottled or bulk water hauling system, which is how the Department views Pine Valley Spring's operations. The Department points us to the regulatory definitions:

> *Bottled water system*—A public water system which provides water for bottling in sealed bottles or other sealed containers. The term includes, but is not limited to, the sources of water and treatment, storage, bottling, manufacturing and distribution facilities. The term does not include a public water system which provides only a source of water supply for a bottled water system and excludes an entity providing only transportation, distribution or sale of bottled water in sealed bottles or other sealed containers.
>
> *Bulk water hauling system*—A public water system which provides water piped into a carrier vehicle and withdrawn by a similar means into the user's storage facility or vessel. The term includes, but is not limited to, the sources of water, treatment, storage or distribution facilities. The term does not include a public water system which provides only a source of water supply for a bulk water hauling system.

25 Pa. Code § 109.1. The Department draws attention to the final sentences of the two definitions in support of its conclusion that systems that provide only a source of supply are not regulated because they do not meet the definition of a public water system.[6] However, the Department reads "public water system" out of the definitions when making its argument and

[6] The regulations define a source as "[t]he place from which water for a public water system originates or is derived, including, but not limited to, a well, spring, stream, reservoir, pond, lake or interconnection." 25 Pa. Code § 109.1.

instead talks strictly in terms of "systems." The last sentences of the two definitions say that the terms do "not include a **public water system** which provides only a source of water supply," which seems to suggest that there is in fact some type of public water system that is merely a source of water supply. Further, the final sentence of the definition of a bottled water system switches its use of terms in the second clause from "does not include a public water system" to "excludes an entity," which suggests that the scenario contemplated by the first clause—providing a source of water supply—is still regulated in some manner as a public water system, while the scenario contemplated by the second clause—providing transportation, distribution, or sale of bottled water—is not regulated. Although the Department's argument may have some merit that a source of supply is not a bottled water or bulk water hauling system on its own, those definitions do not support the argument that a source of supply is not a public water system at all.

In support of its argument, the Department cites the Board's opinions in *Rannels v. DER*, 1990 EHB 1617 (*Rannels I*); 1991 EHB 1523 (*Rannels II*), *aff'd*, 610 A.2d 513 (Pa. Cmwlth. 1992). In that case, Carol Rannels, owner of Crystal Springs Water, appealed an order of the Department requiring Crystal Springs to conduct microbiological sampling because the Department asserted that Crystal Springs was a bottled water system subject to regulation. Ms. Rannels contended that Crystal Springs was not required to perform the sampling because it was a non-public, noncommunity water system. In *Rannels I*, the Board denied the Department's motion for summary judgment because it was not clear as a matter of law that Crystal Springs met the definition of a bottled water system because it did not have any service connections and it did not regularly serve at least 25 year-round residents. The regulatory definitions in effect at the time were different than the definitions that exist now.[7] The Board based its ruling on the

[7] At that time, a "bottled water system" was defined as follows:

fact that the existing definition of a bottled water system relied on the definition of a community water system, which was defined under the Act as it still is today as "[a] public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents." 35 P.S. § 721.3. The Board found that under the definitions at the time, a bottled water system was a type of a community water system, and so a bottled water system necessarily had to regularly serve 25 year-round residents. *Rannels I*, 1990 EHB at 1621. The Board affirmed its ruling on a request for reconsideration in *Rannels II*, 1991 EHB 1523.

The Department argues that the reasoning of *Rannels* controls in our current matter, but the Department never takes the time to explain how *Rannels* applies to the situation at hand. Given the regulatory changes, we do not believe the case is controlling. In *Rannels* we found that Crystal Springs ultimately did not meet the definition of a community water system, but the question of whether that same operation met the definition of a public water system was not addressed. Interestingly, the Department's position in *Rannels* is essentially the opposite of its position in this case. At that time, the Department argued that certain provisions of the regulations effectively deemed a bottled water system to be a community water system regardless of how many people it served or how many service connections it had. *See Rannels II*, 1991 EHB at 1525 ("DER contends that the Chapter 109 regulations deem a bottled water system to be a community water system.") This is more or less MCRD's position now. Of

---

> A **community water system** which provides artificial or natural mineral, spring or other water for bottling as drinking water whether or not containers are provided by the water supplier. The term includes, but is not limited to, the sources of water, and treatment, storage, bottling, manufacturing or distribution facilities. The term excludes a public water system which provides only a source of water supply for a bottled water system and excludes an entity providing only transportation, distribution or sale of bottled water in sealed bottles or other sealed containers.

Rannels I, 1990 EHB 1617, 1679 (emphasis added). The current definition of a bottled water system, quoted *supra*, no longer rests on the definition of a community water system, but instead relies upon the definition of a public water system.

course, there have been numerous changes to the Chapter 109 regulations since *Rannels* was decided.[8] Most importantly, the definitions of bottled water system and bulk water hauling system were changed in 1992, removing the reference to "community water system" and replacing it with "public water system." Our own research of the pertinent publications in the *Pennsylvania Bulletin* leading up to the change does not reveal any explanation as to why the definitions were changed in that way. *See, e.g.,* 20 Pa.B. 3988 (Jul. 21, 1990); 21 Pa.B. 1820 (Apr. 20, 1991); 22 Pa.B. 2621 (May 16, 1992). No party has provided an explanation either. The current regulatory definitions, by referring back to the definition of a public water system, do not appear to shed much light on a key issue in this case—whether the Act effectively excepts the 15 connections and 25 individuals requirement with respect to bottled water and bulk water hauling systems.

If the service connections requirement does apply, we wonder how service connections are defined in terms of a bottled water system or bulk water hauling system. Service connections are not defined in the Act or the regulations. Does it mean that a bulk water hauling system must have enough connections to be able to accommodate transferring water into 15 trucks simultaneously? Should we ignore the service connection requirement altogether with respect to bulk water hauling systems and instead focus on the number of people served? In terms of serving an average of 25 individuals at least 60 days out of the year, must a bulk water hauling system meet that requirement by delivering water by truck to water buffalos on individual properties, provided that 25 people live on those properties in the aggregate and receive water deliveries 60 days a year? We simply do not have enough information to answer these questions, among others.

[8] We do not know if any of the changes were specifically made in response to the *Rannels* decisions.

MCRD quotes deposition testimony from Richard Stepanski, who was formerly employed by the Department's Bureau of Safe Drinking water for more than 35 years, and who was involved in the permitting of Pine Valley Spring in and around 2001. (MCRD Ex. Q.) At one point Stepanski says that bulk water hauling systems "don't normally have individual connections to individuals[;] to meet that definition they're grouped together as a type of facility that is assumed to be providing that service." (MCRD Ex. Q at T. 21.) This again seems to raise a question about how bulk water hauling systems are treated under the Safe Drinking Water program. However, while Stepanski's deposition testimony might raise a question about the Department's proffered interpretation in this case, at this point it is by no means the silver bullet MCRD makes it out to be entitling it to summary judgment. Under certain circumstances we are required to defer to the Department's interpretation of the statutes and regulations it administers. *See Snyder v. DEP*, 2015 EHB 857, 872; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 491; *Gadinski v. DEP*, 2013 EHB 246, 294-95. In this respect, the Department's institutional interpretation is a relevant fact. 1 Pa.C.S.A. § 1921(c)(8); *Primrose Creek Watershed Ass'n v. DEP*, 2013 EHB 187, 192; *Joseph J. Brunner, Inc. v. DEP*, 2004 EHB 170, 174. Stepanski's statements are the statements of one former Department program staff. We do not know whether the statements reflect the Department's institutional interpretation, or indicate a change in institutional interpretation over time, but we expect to hear more at the hearing on the merits.

In addition, there exist other definitions in the Act and the Chapter 109 regulations that we believe would benefit from clarification to the extent that they shed light on the current dispute. For instance, while a community water system requires 15 service connections or regular service to 25 year-round residents, the Act provides an unhelpfully broad definition of a noncommunity water system—"[a] public water system which is not a community water

system." 35 P.S. 721.3. We wonder precisely what aspect of a community water system a noncommunity water system is not. Does it contemplate a public water system that does not have 15 service connections or regularly serve 25 people? The regulations define a nontransient noncommunity water system as "[a] noncommunity water system that regularly serves at least 25 of the same persons over 6 months per year." 25 Pa. Code § 109.1. A transient noncommunity water system is then defined as "[a] public water system which is not a community, nontransient noncommunity, bottled or vended water system, nor a retail water facility or a bulk water hauling system." 25 Pa. Code § 109.1. A wholesale system is defined as "[a] public water system that treats source water as necessary to produce finished water and then delivers some or all of that finished water to another public water system. Delivery may be through a direct connection or through the distribution system of one or more public water systems." 25 Pa. Code § 109.1. Again, we wonder whether a wholesale system must itself have 15 service connections or serve an average of 25 individuals daily, or whether that requirement is somehow satisfied through the connection to other public water systems, or whether it applies at all. If all of these public water systems must have 15 service connections or regularly serve 25 people, it supports the Department's position. However, if any of them do not need to meet that requirement, it supports MCRD.

It is obvious that this case would benefit from a more comprehensive understanding of how the Safe Drinking Water program works and how the Department interprets the various iterations of public water systems. In our Opinion granting a supersedeas we lamented that at that point neither party had presented us with a complete analysis of the interaction of the various terms and definitions used across the Safe Drinking Water Act and its regulations, and how those terms and definitions apply to MCRD's Pine Valley Spring. *M.C. Res. Dev. v. DEP*, 2015 EHB

261, 272. Here again, neither party has provided us with an analysis that convinces us as a matter of law that its interpretation is the one that should ultimately prevail. The parties' filings have left a number of questions unresolved, which is a hallmark indication that the entry of summary judgment is not justified. We can only hope that our outstanding questions will be sufficiently answered at the hearing on the merits.

Estoppel

MCRD raises but does not seriously pursue arguments that it is entitled to summary judgment on various bases of estoppel. MCRD's first argument is that the Board has already determined that Pine Valley Spring is a public water system, and therefore, MCRD is entitled to summary judgment on the basis of collateral estoppel or issue preclusion. MCRD points to the Board Opinions of *Drummond v. DEP*, 2002 EHB 413 (granting partial summary judgment in an appeal of the Department's issuance of MCRD's public water supply construction permit), and *Smith v. DEP*, 2002 EHB 531 (dismissing an appeal of MCRD's operating permit), in support of its argument that we have somehow adjudicated Pine Valley Spring's operation as meeting the definition of a public water system. To be clear, we have done no such thing, and find the suggestion to be entirely disingenuous. MCRD quotes a portion of *Smith v. DEP* that merely describes by way of background what is covered by the permit under appeal. 2002 EHB at 531-32. Importantly, we never decided the merits of whether Pine Valley Spring was a public water system. In *Drummond v. DEP*, we granted summary judgment only with respect to barring a collateral attack on an unappealed amended permit. Again, we never reached any decision on the merits.

MCRD's argument on this point is made only in a footnote without addressing any of the elements of collateral estoppel, apart from MCRD unhelpfully telling us that the Department,

which is a party in nearly every case that comes before the Board, was unsurprisingly a party in these two prior cases.[9] We do not feel compelled to expound on the doctrine of collateral estoppel since the argument was given such cursory treatment. However, as indicated above, any issue involving whether Pine Valley Spring was a public water system was never actually put to the test in the prior litigation culminating in a final decision on the merits, which is enough to defeat a claim of collateral estoppel.[10] *See Borough of St. Clair v. DEP*, 2015 EHB 290, 310-11 ("Regarding the fifth element, the key is that the issue must have been put to the test."); *Sedat, Inc. v. DEP*, 2000 EHB 927, 939-40 ("A finding that was of no consequence in the first case should not be given immutable weight in another case where it could have determinative consequences.").

MCRD also argues that the Department should be equitably estopped from revoking its permit, and from allegedly changing its interpretation of the bypass requirement in MCRD's permit. The Department counters that a government agency cannot be estopped from carrying out its statutory duties under the Safe Drinking Water Act and enforcing the law.

---

[9] Collateral estoppel applies when the following five elements are met:

> (1) The issued decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action;
>
> (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and
>
> (5) The determination in the prior proceeding was essential to the judgment.

Kuzemchak v. DEP, 2010 EHB 564, 566 (citing *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50-51 (Pa. 2005); *Church of God Home, Inc. v. Dep't of Pub. Welfare*, 977 A.2d 591, 593 (Pa. Cmwlth. 2009); *Emp'rs Mut. Cas. Co. v. Boiler Erection and Repair Co.*, 964 A.2d 381, 394 (Pa. Super. 2008)).

[10] *Drummond* was dismissed prior to adjudication as a sanction for the appellant's failure to file a pre-hearing memorandum. In *Smith*, the appeal was dismissed after the appellant conceded that her objection related to local zoning was moot and she withdrew her other objections. 2002 EHB 531.

The doctrine of equitable estoppel applies when an agency of the Commonwealth (1) intentionally or negligently misrepresented a material fact; (2) knowing or having reason to know that another person would justifiably rely on that misrepresentation; (3) or where the other person has been induced to act to her detriment because she justifiably relied on the misrepresentation. *Natiello v. Dep't of Envtl. Prot.*, 990 A.2d 1196, 1203 (Pa. Cmwlth. 2010). In order to establish estoppel, the party asserting the claim must show (1) misleading words, conduct, or silence by the agency; (2) unambiguous proof that the asserting party reasonably relied upon the agency's misrepresentation; and (3) the lack of a duty to inquire on the asserting party. *Baehler v. Dep't of Envtl. Prot.*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004); *Baldwin Health Ctr. v. Dep't of Pub. Welfare*, 755 A.2d 86 (Pa. Cmwlth. 2000).

MCRD has not convinced us that it is entitled to equitable estoppel here. Apart from saying that it relied on having a public water supply permit, MCRD has not demonstrated that the other elements for estoppel have been satisfied. MCRD would like to impart misleading conduct or silence to the Department, but MCRD has not established that. In addition, MCRD never addresses any duty on its own behalf to inquire into the status of the permit. MCRD's summary conclusion that it is entitled to estoppel is insufficient to prevail.

Likewise, MCRD has not established that it is entitled to equitable estoppel on the issue of the conservation bypass. In its reply brief MCRD again quotes deposition testimony from Richard Stepanski. Stepanski testified that he was aware that MCRD was supplementing flow to Indian Run, and his testimony seems to suggest that the permit condition contemplated such supplementation. (MCRD Ex. Q at 34-36, 40-41.) MCRD points to this as dispositive evidence of the Department changing its position, but we are not convinced at this point that his statements should prompt us to grant summary judgment. It is again the testimony of a single

former Department staff member. If the Department has in fact changed its position on this particular permit condition, or it has changed its position with respect to the enforcement of that condition, those are issues that will need to be developed further at the hearing on the merits.

We enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.C. RESOURCE DEVELOPMENT COMPANY a/k/a M.C. RESOURCES DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 2015-023-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 9th day of May, 2016, it is hereby ordered as follows:

1. M.C. Resource Development's motion for partial summary judgment is **denied**;
2. The Department's cross-motion for summary judgment is **denied**; and
3. M.C. Resource Development's motion to strike the Department's cross-motion is **denied as moot**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: May 9, 2016

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

For the Commonwealth of PA, DEP:
Lance H. Zeyher, Esquire
David Stull, Esquire
(*via electronic filing system*)

For Appellant:
Brett A. Datto, Esquire
Lauren Schwimmer, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	**Issued: May 11, 2016**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Appellant's and the Permittee's competing motions for summary judgment in an appeal from an NPDES permit. The Appellant's motion is based in part on objections that are not within the genre of the issues raised in the Appellant's notice of appeal. The motion is also based in part on alleged deficiencies in the Department's review of the permit without adequate explanation of why those alleged deficiencies have any practical significance in terms of our review of the permit. It is also clear from a review of both motions that numerous unresolved genuine issues of material disputed fact prevent summary judgment from being entered in favor of either party.

O P I N I O N

This is Chester Water Authority's ("Chester Water's") appeal from the Department of Environmental Protection's (the "Department's") issuance on April 9, 2015 of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0265951 to Old Dominion Electric Cooperative ("Old Dominion") for its Wildcat Point Generating Facility, a new gas-fired power

plant in Cecil County, Maryland. Old Dominion will discharge cooling tower blowdown to the Conowingo Pond portion of the Susquehanna River in Lancaster County. The Conowingo Pond is a 14-mile portion of the Susquehanna River that is bounded upstream by the Holtwood Dam and is impounded downstream by the Conowingo Dam in Maryland. The pond is the source and receiver of water for the Peach Bottom Atomic Power Station, the Muddy Run Pumped Storage Facility, and the York Energy Center. It also serves as the drinking water supply for the city of Baltimore and the Appellant, Chester Water, which supplies many thousands residents in Pennsylvania and Delaware. Old Dominion's plan is to withdraw water from the Pond, after which it will be clarified, chlorinated, treated with an anti-scaling agent, and then used in cooling towers where it is expected that about 90 percent will be evaporated and about 10 percent will eventually be returned to the Pond. If the Pond were a free-flowing river, Chester Water's intake, located 940 feet away from Old Dominion's discharge in the direction of about 90 degrees relative to the direction of expected flow, would probably be considered upstream of Old Dominion's discharge. The Pond, however, looks more like a lake than a river and is heavily managed and utilized, so under some conditions we are told that Old Dominion's intake and discharge could conceivably cause Old Dominion's discharge plume to spread toward Chester Water's intake. Chester Water's concern for maintaining acceptable water quality at its intake is the reason we have this appeal.

Both Chester Water and Old Dominion have moved for summary judgment. The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Sludge Free UMBT v. DEP*, 2015 EHB 469, 470; *Global Eco-Logical Servs., Inc. v. Dep't of Envtl. Prot.*, 789 A.2d 789, 793 n.9 (Pa.

Cmwlth. 2001). *See also Cnty. of Adams v. Dep't of Envtl. Prot.*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. Although summary judgment may also be granted where a party who will bear the burden of proof at the hearing on the merits has failed to produce evidence of facts essential to its case which in a jury trial would require the issues to be submitted to a jury, Pa.R.C.P. No. 1035.2(2), the Board does not often grant summary judgment on that basis. We review the Department's actions *de novo* to determine whether they constitute reasonable exercises of the Department's discretion that are lawful, supported by the facts, and consistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519.

Old Dominion's basic position in support of its motion for summary judgment is that all of Chester Water's objections are "nothing more than a collection of speculations, beliefs, fears, and legal conclusions without a single iota of factual support." In contrast, it refers to the expert reports of its and the Department's witnesses to show that the Department after careful consideration concluded correctly that Old Dominion's discharge will not have an adverse effect on Chester Water's supply.

Chester Water's basic position is that the permit as written allows for an unlimited discharge of bromide, haloacetic acids (HAAs), and total dissolved solids (TDS), which makes no sense since at least some of the discharge might be pulled into its water intake, which serves thousands of users. No comfort is to be had by the fact that the permit requires sampling of those substances because, in the opinion of its experts, the sampling is too infrequent and it can be performed using a methodology that allows samples to be combined in a way that will mask the highest levels of the substances. It says that the Department among other things selectively used

in-stream sampling data that understates background bromide levels, relied too heavily on Old Dominion's computer model regarding the extent to which the discharge may be diluted before it reaches Chester Water's intake, made unwarranted assumptions about the presence and persistence of HAAs and disinfection byproducts (DBPs) in the discharge, and performed a cursory review of Old Dominion's use of additives and its operating procedures. Chester Water has supplied expert reports that it believes could support all of these claims.

Before turning to some of the parties' arguments in more detail, it should already be obvious that this appeal is not ripe for summary judgment in favor of either party. When a party needs to submit volumes of exhibits and expert reports in support of its motion as these parties have done, it should send a clear signal that summary judgment is inappropriate. Summary judgment is only granted in the "clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106. *See also Sludge Free UMBT v. DEP*, 2015 EHB 469, 493 (summary judgment is rarely appropriate for resolving issues that are the subject of competing expert analysis).

We have every indication that this appeal will turn on a battle of the experts. There does not appear to be much disagreement on the applicable principles of law. For example, the parties agree that the Department has a duty to ensure that existing instream water uses and the level of water quality necessary to protect the existing uses must be maintained and protected notwithstanding Old Dominion's discharge. 25 Pa. Code § 93.4a(b). Chester Water's use of the Pond as a drinking water supply is a protected existing use. In addition, "[w]ater may not contain substances attributable to point or nonpoint source discharges in concentrations or

amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life." 25 Pa. Code § 93.6(a). The Department's need to analyze the potential impact of Old Dominion's discharge and monitoring requirements even where a particular numerical limit is not regulatorily mandated is consistent with its duty to enforce and protect water quality criteria under 25 Pa. Code § 93.6(a).

Issues Not Included in the Notice of Appeal

As the first basis for its motion for summary judgment Chester Water argues that Old Dominion's permit should have been denied in the first place, and now presumably revoked, because Old Dominion will not be able to comply with the permit requirement that there be no detectable discharge of trihalomethanes (THMs). Chester Water refers us to the Department's Technical Guidance Document 362-2000-001, *Permitting Policy and Procedural Manual*, which states that the Department will deny a permit application if it is clear that a new discharger will be unable to comply with effluent limitations or other permit requirements. Chester Water then points to record evidence that it believes would support a finding that Old Dominion will not be able to comply with the permit's ban on any detectable discharge of THMs.

Before pointing to considerable record evidence that Old Dominion *will* be able to meet its permit limits, the Department and Old Dominion complain in their responses to Chester Water's motion that summary judgment on this argument should be unavailable because Chester Water did not include the issue in its notice of appeal, citing 25 Pa. Code § 1021.51(e) (duty to set forth specific objections in notice of appeal). They say that Chester Water did not identify the issue in discovery or otherwise and that, in fact, the argument appears for the very first time in Chester Water's motion for summary judgment. They add that Chester Water has not moved to amend its appeal to add to this issue.

We agree with Old Dominion and the Department. We have reviewed Chester Water's lengthy and detailed notice of appeal and, not only is the issue of an unattainable permit absent, Chester Water presented the wholly incompatible objection that the permit limits that it now says cannot be met did not exist.

It is true that we have on occasion been rather indulgent in interpreting notices of appeal in the face of waiver challenges, *see e.g., New Hanover Twp. v. DEP*, 2011 EHB 645, 671; *Ainjar Trust v. DEP*, 2001 EHB 59, 65-66, but no such indulgence is called for here. It is simply not appropriate to spring an entirely new issue upon opposing parties in a motion for summary judgment. Chester Water says everybody knows that THMs are an issue in this case, but saying that THMs are generally an issue and saying Old Dominion's permit must be revoked because the THM limit in the permit cannot be met are two entirely different things. Furthermore, a general, catch-all objection like Chester Water's Objection 16 (the Department's action is otherwise contrary to law, etc.) is not sufficient by itself to excuse a failure to include a more specific objection. *Sebastianelli v. DEP*, EHB Docket No. 2016-012-L, slip op. at 8 (Opinion issued May 2, 2016); *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127; *Williams v. DEP*, 1999 EHB 708, 716.

Chester Water argues that it should be allowed to pursue its argument because the Department created unnecessary confusion regarding the issue, because the opposing parties could not possibly have been surprised by the issue and will not suffer any undue prejudice, and because the issue could not have been articulated absent revelations uncovered for the first time in discovery. However, these are arguments that relate to whether an amendment to the notice of appeal should be allowed, not whether a party may simply raise an issue for the first time in a motion for summary judgment. The proper way to go about adding a new objection is to seek

permission to amend the notice of appeal. 25 Pa. Code § 1021.53. It is in that context that the various considerations such as lack of prejudice apply.[1]

In the alternative, Old Dominion and the Department argue that the question of whether there are likely to be THMs in the discharge, which is a necessary component of Chester Water's argument, is a disputed issue of fact. We agree. Both sides have directed our attention to record evidence that would support their position on this question. We would add that further uncertainty is added by the lack of clarity, as least on our part, about exactly what the permit limits are for THMs. We discussed this issue in greater detail in our Opinion denying the Department's motion for partial summary judgment in this appeal. (Opinion and Order issued May 6, 2016.)

Another argument that Chester Water advances in support of summary judgment is that the Department failed to give due consideration and proper notice regarding the portion of Wildcat's discharge that will originate from Old Dominion's adjacent Rock Springs facility's wastewater. Wastewater from the Rock Springs facility that is currently being used for irrigation will now apparently be added to Wildcat's cooling tower water. Old Dominion and the Department complain that this objection was also raised for the first time in the motion for summary judgment. They accurately point out that it was not included in the notice of appeal. Chester Water responds that this is not really a separate objection but merely another example of how the Department failed to conduct a proper analysis of Wildcat's discharge. The difficulty with Chester Water's response is that virtually any new criticism that it could come up with could probably be described as another example of the Department's inadequate investigation.

[1] To be clear, Chester Water may pursue its objection that the Department's analysis of THMs was "deeply flawed" and that the discharge of THMs threatens its system, but if it intends to pursue the separate and distinct argument that Old Dominion cannot comply with its permit, it needs to seek permission to amend its appeal.

Its response also does not address the part of the new objection regarding public notice. In developing the pertinent facts regarding Old Dominion's discharge we fully expect that there may be evidence regarding the Rock Springs water, but if Chester Water wants to pursue this issue as an independent basis for the Board taking some action regarding the permit, it must comply with our rule regarding amendment of appeals.

Temperature

Old Dominion's permit contains a daily maximum limit of 110 degrees. Chester Water's notice of appeal contains the following objection:

> DEP failed to impose an appropriate temperature requirement on the [Old Dominion] discharge in the Permit. Temperature is a concern because, among other reasons, it can increase the probability of DBP formation. DEP imposed a temperature limit that is inconsistent with, and significantly higher than, the temperature value used in modeling of temperature effects of the [Old Dominion] discharge.

Old Dominion's motion asks us to dismiss this objection because Chester Water did not perform any modeling of its own. It continues:

> There is no factual evidence presented or referred to by [Chester Water] to contradict the findings by the Department as to the temperature. [Chester Water's] argument is, in effect, that the Department should have conducted its analysis of temperature impacts in a different manner. [Chester Water's] unsupported allegations fail to establish that the analysis completed by the Department and [Old Dominion] was unreasonable, or that a different analysis would show an adverse impact. [Chester Water] has the burden to establish—based on admissible evidence—that the permit either violated a regulation or was manifestly unreasonable based on a preponderance of the evidence. Here, [Chester Water] has offered no evidence that the discharge limitation in the permit with regard to temperature was erroneous or that it would allow or cause a violation of the standard. Nor does any evidence it has identified show that the temperature of the discharge would in fact adversely affect [Chester Water's] water treatment system, or cause an increase in DPB formation in their system.

(Brief at 16-17.) Old Dominion then goes on to describe the record evidence that it believes supports the Department's analysis and conclusions. This evidence largely consists of the technical work of the parties' experts.

Chester Water counters that its experts will show that the Department's analysis of the temperature issue was indeed flawed. It cites the following opinion from its expert in support of its motion and in opposition to Old Dominion's motion:

> The NPDES Permit includes a maximum Outfall 001 temperature limitation of 110 degrees (°) Fahrenheit and the Fact Sheet states that the Pennsylvania temperature standards at 25 Pa. Code 93.7(a) in addition to the 2 °F rise limitation at 25 Pa. Code 96.6(b) would be met. However, the details for the model that was used to demonstrate compliance with the 2 °F temperature rise are too conservative. Specifically, the model utilizes an end-of-pipe (discharge) summer temperature of 79 °F (assuming a [Wildcat] discharge temperature of 100 °F before discharge to the 5-mile underground conveyance to the discharge location) and an end-of-pipe (discharge temperature) of 58 °F winter temperature to evaluate compliance. As noted though, the NPDES Permit explicitly allows a discharge temperature of 110 °F.
>
> It is more appropriate to model compliance with a 2 °F temperature rise utilizing the authorized discharge temperature of 110 °F, not the estimated discharge temperatures.
>
> If [Wildcat], however, intends to manage temperature to comply with the 2° temperature rise, then the daily maximum discharge temperature should be lowered to a level to assure compliance; and that level is not the 110 °F discharge temperature.
>
> It is inconsistent with PADEP rules and guidance to conduct the assessment of compliance with instream water quality standards on one effluent level yet establish the limit on a higher effluent level.

(O.D. Ex. 13 at 13-14.)

We discuss the temperature issue early in this Opinion not because it is more important than the other issues in the case, but because it illustrates why both parties' motions for summary judgment must be denied. Chester Water, with considerable merit, accuses Old Dominion of

relying too heavily on its own expert reports in support of its motion. Chester Water is able to point to its own expert reports to show that there is a legitimate dispute that will require expert testimony at a hearing. Whether a particular scientific analysis has been performed in accordance with generally accepted scientific principles and is otherwise supportable is inevitably the subject of expert testimony. We depend on experts to explain a scientific investigation. As we said in *Sludge Free UMBT v. DEP*, 2015 EHB 469, 493-94,

> The resolution of issues that are the subject of competing expert analyses is rarely appropriate for summary judgment. *See Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 90, 94 ("Where there is a legitimate dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment motions.") Our ultimate decision on these issues will be grounded in weighing the credibility of the various experts and assessing the soundness of their analyses after they have been subjected to direct and cross examination. We are unwilling to conduct a trial on paper to reach these assessments. *Pileggi v. DEP*, 2010 EHB 244, 249.

To a certain extent we can sympathize with Old Dominion's criticism. Chester Water criticizes the temperature limit of 110 degrees, but it does not propose a different limit. Its expert criticizes Old Dominion's model as too conservative but fails to explain that the purported errors in modeling mean that there should be a limit different than 110 degrees in the permit. Chester Water also fails to explain why a 110-degree limit is insufficiently protective of the environment in general or its water supply in particular. As we have said in many other cases but originally in *Shuey v. DEP*, 2005 EHB 657, 711, "appellants may not raise an issue and then speculate that all types of unforeseen calamities may occur." *See also Borough of St. Clair v. DEP*, 2015 EHB 290, 314; *Brockway Borough Mun. Auth., supra*, 2015 EHB 221, 238-39. We review the permit as issued, not the Department's review process leading up to the permit. That is a subtle but important distinction. "We are charged with reviewing the Department's decision,

not its conduct. Our focus is on the action itself. That is why going through the record to pick at errors the Department made along the way in reaching a decision is usually an unnecessary and unproductive distraction. *O'Reilly v. DEP*, EHB 19, 51. What really matters is whether the Department made the right call in the end." *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 476.

Third-party appellants challenging the Department's issuance of a permit can prevail by showing that the Department and/or permittee have not performed an analysis that they are legally required to perform. *See, e.g., Borough of St. Clair v. DEP*, 2014 EHB 76 (failure to complete mine subsidence study); *Blue Mt. Pres. Ass'n. v. DEP*, 2006 EHB 589 (failure to perform antidegradation analysis). It is not absolutely necessary in such cases to prove a particular conclusion would have been reached if the appropriate analysis had been performed, although as we said in *Blue Mountain*, that obviously makes for a stronger case. *Blue Mt. Pres. Ass'n.*, 2006 EHB at 605-06. A weaker case is presented where, as here, the Department and/or permittee performed the required analysis but the third-party appellant who bears the burden of proof challenges some aspect of the analysis but fails to explain why the Department's final conclusion is wrong. That is not to say that a woefully inadequate investigation can be allowed to stand, but as we recently said in *Sludge Free UMBT*, 2015 EHB 469, 484, "given the Board's extensive *de novo* review, an appellant who rests on the fact of an inadequate investigation or analysis alone often does so at its peril." (citing *Kiskadden v. DEP*, 2015 EHB 377, 410). Our review of the permit is not an academic evaluation of scientific technique divorced from reality. We will not remand the permit for a further study purely for the sake of obtaining greater knowledge.

That said, Chester Water has pointed to enough evidence in the record regarding the Department's allegedly deficient investigation regarding the temperature issue to survive Old Dominion's motion for summary judgment. Whether pointing to nothing more than limited modeling errors is of more than academic interest remains to be seen.

Bromide

Chester Water objects to the permit because it believes that the Department failed to provide for adequate control of the discharge of bromides and DBPs in the permit. Old Dominion's permit does not contain discharge limits for bromide, total dissolved solids (TDS), haloacetic acids (HAAs), or five specific HAAs (monobromoacetic acid, monochloroacetic acid, dibromoacetic acid, dichloroacetic acid, and trichloroacetic acid).[2] Similar to the temperature issue, Chester Water says there should be limits but does not tell us what those limits should be. It attacks aspects of the Department's analysis but does not explain how that analysis resulted in a defective result.

For example, Chester Water objects that the Department in measuring background levels of bromide in the river improperly relied exclusively on data from a single monitoring station with the designation WQN201 located near Marietta, Pennsylvania. It says the Department should instead have used results obtained by the Susquehanna River Basin Commission in the Conowingo Pond and/or required Old Dominion to conduct sampling in the Pond. It says that the bromide background level would have been higher if results from the Pond had been used instead of the results from the relatively more distant Marietta station upstream of the Pond. However, Chester Water has not explained why or how the use of data obtained from sampling in the Pond instead of near Marietta should have compelled the Department to impose a bromide

[2] As discussed in our separate Opinion denying the Department's motion for partial summary judgment, the precise extent to which Old Dominion's permit regulates trihalomethanes (THMs) and four specific THMs is subject to further review on our part.

limit, let alone a particular value for bromide. We understand the concern with background bromide being concentrated by the cooling tower process, but a generalized concern does not justify a remand for further study.

In any event, the Department says that it did in fact use the Susquehanna River Basin Commission's data in conjunction with the Marietta data. It cites the views of its own experts to the effect that the combined use of the data sources gives the most accurate and year-round representation of ambient bromide levels in the Conowingo Pond. In addition to making the same arguments, Old Dominion adds that Chester Water has itself measured bromide levels at its intake, and those results also support the Department's action. These arguments do not justify summary judgment in favor of Old Dominion, but they do demonstrate that there are disputed issues of material fact that prevent us from granting Chester Water's motion for summary judgment.

Chester Water complains that the Department erroneously uses a 150 parts per billion (ppb) "planning level" for bromide. Again, we understand the indeterminate concern that the "planning level" might cause the Department to discount the seriousness of the issue, but Chester Water fails to explain how the Department's use of a more appropriate "planning level" or the use of no "planning level" at all would have or could have translated into different permit terms, let alone what those terms would have been. It has failed to explain how remanding the permit to the Department for consideration not including the "planning level" would have any value. In any event, here again we need not go far before bumping into legitimate factual disputes. Old Dominion cites to record evidence that any permit limit for bromide that the Department might have imposed would have reflected a level necessary to prevent exceedances of drinking water MCLs in well-operated community water systems and would not have anything to do with the

planning level. The Department flatly states that it "did not use the planning level to arrive at its permitting decision regarding any potential impact on [Chester Water's] intake."

Chester Water argues that it is entitled to summary judgment because the Department's action on the permit was deficient in that it only evaluated the scenario where the cooling tower operates at a rate of 10 cycles, and did not either consider potential alternative scenarios or impose a requirement to operate at the assumed 10 cycles. Chester Water's argument falls well short of serving as a basis for summary judgment. As with most of its other arguments, aside from speculation that it might make a difference, Chester Water fails to explain how a remand for further consideration of the issue would translate into a change in the permit, or why it is important to hold Old Dominion to 10 cycles at all times. For all we know, the range of variability may be insignificant. For all we know, the number of cycles may be as significant or insignificant as whether water in the tower flows clockwise or counter-clockwise, or whether pipes in the plant are painted green or blue. In fact, Chester Water admits that it does not know whether or how operation of the cooling tower at greater or less than 10 cycles would make any difference. In any event, summary judgment is not appropriate because both the Department and Old Dominion cite to record evidence that would support a finding that the Department fully and adequately considered the implications of Old Dominion's multiple operating cycles.

We will not belabor the point further. There clearly are multiple disputed issues of fact on whether the Department acted reasonably when it decided not to include limits for bromide, or for HAAs for that matter, in the permit. Resolution of the issue requires a hearing.

TDS

The permit also does not include a limit for TDS. Chester Water objects that the Department "attempted" to analyze the amount of TDS in Old Dominion's discharge but failed

to "fully account" for all of the potential TDS in the discharge, including TDS introduced by the use of water treatment chemicals. It says the Department's focus on "chemical additives" as narrowly defined to exclude neutralizing additives may be well suited to the evaluation of the direct toxic effects of chemicals on the aquatic environment, but it was insufficient when it comes to protection of drinking water supplies in the current situation. Chester Water says that Old Dominion and the Department have dramatically different estimates of what TDS will be in the discharge, which shows that an inadequate analysis was performed. As usual, however, Chester Water does not provide its own estimate. It disputes the Department's conclusion that TDS contributions from chemical additives will be negligible, but it does not posit an opinion on what they will be. It does not propose any particular permit limit. It says that Old Dominion has not made the necessary information available to form a coherent estimate.

The Department and Old Dominion respond that the Department considered very high levels of TDS that are very unlikely to occur in order to see if they would have any adverse effect on Conowingo Pond or Chester Water. The Department concluded that the TDS level at Chester Water's intake will remain well below the 500 mg/L level required under 25 Pa. Code Chapter 93 for potable water supplies. The Department says its analysis of an Old Dominion TDS discharge level of 6,620 mg/L revealed that TDS at Chester Water's intake would only increase 3.1 percent from 262 mg/L to 270 mg/L.

If the Department and Old Dominion are correct, it may be that Chester Water's assignments of error even if taken altogether and assumed to be true would not change the final analysis that a permit limit is not necessary for TDS. Of course, that can cut both ways. If Old Dominion is not going to exceed it, and a limit provides some protection, why not include one?

Once again, it is obvious that this is not the sort of controversy that we are able to resolve in the context of competing summary judgment motions.

Analytical Method for HAAs

Chester Water argues in its motion for summary judgment that Old Dominion's permit must be remanded because it failed to specify the analytical method to be used for haloacetic acids (HAAs). There is no discharge limit in the permit for HAAs, but the monitoring requirement in Part A of the Permit covers both HAAs as a category and the five individual HAAs that are regulated under the Safe Drinking Water Act (monobromoacetic acid, monochloroacetic acid, dibromoacetic acid, dichloroacetic acid, and trichloroacetic acid).[3] Chester Water is correct that the analytical method to be used for HAAs is not in the permit. It complains that the analytical methods to be used should have been spelled out in the permit itself rather than in some later correspondence so that Chester Water and the public would have had an opportunity to ensure that appropriate test methods would ultimately be used.

As a general matter we understand the importance of transparency and memorializing compliance requirements in the permit itself rather than leaving important determinations to be made in side letters outside of the public eye. That said, there must be limits to that concept or permits would be 400 pages long and become unmanageable. Whether it is necessary to include the analytical method to be used for every analyte in the permit itself is not a question we need to answer at this time. On April 8, 2016, the Department by letter notified Old Dominion of the test methods that it expects to be used for the analysis of HAAs, to wit, the methods set forth in 40 CFR Part 141. In its reply brief Chester Water "acknowledges that DEP's letter creates a factual and expert opinion dispute that it is no longer appropriate for resolution for a component of

[3] As with THMs, there are more HAAs than just the five listed separately in the permit, so the reason for a separate monitoring requirement that simply says "Haloacetic Acids" is not clear, although we suspect that it is limited to the five listed HAAs (HAA5).

[Chester Water's] motion for summary judgment." Accordingly, we will not address the issue further here.

In conclusion, we have not attempted to address the salmagundi of issues that both Chester Water and Old Dominion have relied upon in support of their own motion and/or in opposition to their opponent's motion, virtually all of which are tied up in conflicting expert reports. An incomplete list of such issues not already addressed includes the significance, if any, of jar tests performed by Chester Water, whether monthly sampling is adequate, whether grab samples would be better than composite sampling, the extent to which Old Dominion's discharge will be diluted before it reaches Chester Water's intake, the amount of DBPs, if any, in the discharge, and the variability of the discharge. All of these issues are reasonably disputed. It is interesting how frequently Chester Water and Old Dominion both claim that they are entitled to summary judgment on a particular technical issue, but then in response to the other party's motion on a nearly identical issue they argue that there are disputed issues of material fact that prevent the issuance of summary judgment. Whereas Chester Water argues that it is clear as a matter of undisputed fact that the Department did not perform an adequate analysis, Old Dominion argues that it is clear as a matter of undisputed fact that the Department did perform an adequate analysis. In the end, both motions must be denied.

Accordingly, for the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	

O R D E R

AND NOW, this 11th day of May, 2016, it is hereby ordered that the motions for summary judgment of the Appellant and the Permittee are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 11, 2016

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

For the Commonwealth of PA, DEP:
Beth L. Shuman, Esquire
Curtis C. Sullivan, Esquire
Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellant:
Francis G.X. Pileggi, Esquire
Tara L. Lattomus, Esquire
David Rockman, Esquire
(*via electronic filing system*)

For Permittee:
Eugene Dice, Esquire
Brian Wauhop, Esquire
James Patrick Guy, Esquire
John M. Robb, Esquire
Thomas M. Wolf, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	**Issued: June 6, 2016**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

Following an earlier remand by the Board of a landfill permit, the permittee and the Department conducted additional studies regarding on-site wind conditions and potential mine subsidence under the landfill. The Department reissued the permit and the neighboring municipality that had appealed the original permit appealed again. The Board finds that the work following remand supplied the necessary, previously missing information, and that the Department acted lawfully and reasonably in reissuing the permit. Among other things, the Board finds that a surface mining permit did not need to be issued in conjunction with this landfill permit.

BACKGROUND

This is the Environmental Hearing Board's third Adjudication resulting from the Borough of St. Clair's ("St. Clair's") effort to prevent Blythe Township ("Blythe") from opening a new construction and demolition waste landfill known as the Blythe Recycling and Demolition Site ("BRADS") Landfill in Blythe Township. Blythe first submitted a permit application to the

Department in 2004. Eight years later, on July 13, 2012, the Department of Environmental Protection (the "Department") issued Solid Waste Permit No. 101679 to Blythe for the landfill. St. Clair filed its first appeal from the issuance of the permit on August 10, 2012. Following a hearing in that appeal we rejected most of St. Clair's objections, but remanded the permit to the Department to do the following:

1. Complete a review of Blythe's mine subsidence plan for the area of the site where the landfill's Cell 4 will be built;
2. Revise its review of Blythe's nuisance minimization and control plan (NMCP) based upon site-specific meteorological data;
3. Reevaluate its environmental assessment to ensure that the revised analyses of the mine subsidence mitigation plan and nuisance minimization and control plan did not change the Department's conclusion that the BRADS Landfill satisfied the harms-benefit test set forth in 25 Pa. Code § 271.127; and
4. Reissue the permit, if appropriate, to Blythe Township as opposed to BRADS.

Borough of St. Clair v. DEP, 2014 EHB 76 (March 3, 2014). St. Clair appealed our Adjudication to the Commonwealth Court but the Court quashed the appeal pending the results of the remand of the permit to the Department. *Borough of St. Clair v. Dep't of Envtl. Prot.*, No. 532 CD 2014 (Pa. Cmwlth. Apr. 16, 2014).

Following the remand, Blythe submitted new information to the Department regarding on-site meteorological conditions and the potential for mine subsidence. The Department evaluated the new information and ultimately decided to reissue the permit, this time to Blythe Township instead of "BRADS," which solved the fourth issue leading to the remand. The instant appeal is St. Clair's appeal of the reissued permit.

Meanwhile, overlapping these developments regarding the landfill permit, on June 18, 2013, the Department issued Water Obstruction and Encroachment Permit No. E54-325 to Blythe, which authorized Blythe to install a pipe under the landfill to be used in case the currently nonexistent Little Wolf Creek is ever restored. On August 9, 2013, St. Clair filed a notice of appeal of the encroachment permit. Following another hearing on the merits, the Board rejected all of St. Clair's objections. *Borough of St. Clair v. DEP*, 2015 EHB 290 (May 20, 2015). St. Clair appealed that Adjudication to Commonwealth Court but later withdrew that appeal. *Borough of St. Clair v. Dep't of Envtl. Prot.*, No. 1040 CD 2015.

In this appeal, St. Clair challenges the way the Department handled all three of its assignments on remand. First, it takes issue with the Department's analysis of meteorological conditions at the site, which the Department relied upon in support of its conclusion on remand that Blythe's nuisance mitigation and control plan is adequate. Second, it challenges the Department's conclusion that Blythe's revised mine subsidence plan is adequate. Third, it asserts that the Department failed to reconsider the harms and benefits of the landfill in light of the new meteorological and subsidence studies, as required by our remand order. Following post-hearing briefing this matter is now ripe for adjudication.

Stipulated Facts

1. The BRADS Landfill is located in Blythe Township on Burma Road about two miles away from St. Clair. (Joint Stipulation of Facts No. ("Stip.") 25, 26.)[1]

2. The site consists of approximately 400 acres, with a permitted area of 252 acres and a disposal area of 110 acres. (Stip. 27, 28.)

3. The landfill will have six cells. (Stip. 32.)

[1] Many of the parties' stipulated facts are drawn from our prior Adjudication and we do not find it necessary to repeat them here. This Adjudication focuses on the Department's action following our remand.

4. The majority of the landfill site consists of an unreclaimed surface mine. (Stip. 33.)

5. There is an acknowledged potential for mine subsidence underneath the landfill due to the existence of abandoned underground coal mines. (Stip. 34.)

6. The Department failed to complete its analysis of the potential threat posed by mine subsidence occurring under the landfill before originally issuing the permit on July 13, 2012. (Stip. 35.)

7. Instead of completing its analysis of the potential threat posed by mine subsidence under the landfill before issuing the permit on July 13, 2012, the Department issued the permit with Permit Condition No. 34(h), which required Blythe to have a mine subsidence plan approved by the Department and successfully implemented prior to the construction of Cell 4. (Stip. 36.)

8. On July 13, 2012, the Department approved Blythe's nuisance minimization and control plan (NMCP) even though the plan was not based upon a determination of normal and adverse weather conditions based on site-specific meteorological data as required by the regulations. Instead, Permit Condition No. 33 only required Blythe to construct a weather station and collect weather data prior to the acceptance of waste at the facility. (Stip. 37.)

9. Following the Board's first Adjudication remanding the permit to the Department for further consideration, Blythe conducted additional studies on the potential for subsidence in the Cell 4 area. After a review of the new reports, the Department concurred that the subsidence potential in this area was within the acceptable limits of the landfill's design and that no additional mitigation would be necessary in that area. The Department also reviewed Blythe's submissions of site-specific weather data collected during 2014 and January 2015, in conjunction

with data previously provided in the permit application, to conclude that the landfill's NMCP was adequate to mitigate potential nuisances. (Stip. 39.)

10. The Form 54 Background Meteorological Monitoring ("Form 54"), submitted by Blythe with its application materials, detailed Blythe's plan to gather on-site meteorological data including the installation and use of a RainWise, Inc. weather station. The Department agreed that less than one full year of on-site meteorological data could be submitted by Blythe. (Stip. 40, 46, 47.)

11. When it re-reviewed the NMCP following remand, the Department compared on-site meteorological data collected by Blythe in 2014 and January 2015 with off-site data previously supplied by Blythe. (Stip. 41.)

12. After the remand, the Department determined the landfill's nuisance minimization and control plan was adequate to mitigate potential nuisances from the landfill operation and that no modification to the plan was necessary. (Stip. 44.)

13. On January 20, 2015, the Department reissued Solid Waste Permit No. 101679 for the operation of the BRADS Landfill. The instant appeal is from the issuance of that permit. (Stip. 45.)

14. In reissuing the permit to Blythe, the Department incorporated by reference and approved the Form 54 submission by Blythe. (Stip. 46.)

15. Form 54 states that "[o]ne year of meteorological data is required, unless a shorter period of time is approved by the Department." (Stip. 48.)

16. In July of 2014, Blythe installed the weather station on the BRADS Landfill site. (Stip. 49.)

17. On October 21, 2014, via correspondence, Richard Bodner, P.E., on behalf of Blythe, provided daily and hourly wind speed and direction data from the BRADS Landfill site to the Department for the following 78-day range: 7/31/14 – 10/17/14. (Stip. 50.)

18. On January 9, 2015, via correspondence, Bodner, on behalf of Blythe, provided daily and hourly wind speed and direction data from the BRADS Landfill site to the Department for the following ranges: 10/18/14 – 11/15/14 and 12/17/14 – 12/24/14, totaling 36 days. (Stip. 51.)

19. As part of its original application for the permit, Blythe submitted Form 14 and an attached NMCP. The NMCP provided, among other things, that, in the unlikely event of odors emanating from the BRADS Landfill, additional cover materials will be utilized, flaring of the gas extraction system would be performed, and leachate and seep monitoring and control would mitigate odors attributed to leachate. Blythe would also have a monitoring plan for odors including daily working face inspections and quarterly surface emissions monitoring for both hydrogen sulfide and methane. (Stip. 52.)

20. On August 31, 2015, via correspondence, Bodner, on behalf of Blythe, provided daily and hourly wind speed and direction data from the BRADS Landfill site to the Department for each day of the following date ranges: 10/18/14 – 11/15/14 and 12/17/14 – 12/24/14, 1/15/15 – 1/21/15, and 4/24/15 – 7/31/15. (Stip. 54, 62.)

21. On October 27, 2015, via correspondence, Bodner, on behalf of Blythe, provided daily and hourly wind speed and direction data from the BRADS Landfill site to the Department for each day of the following 79-day range: 8/1/15 – 10/19/15. (Stip. 55, 62.)

22. Upon remand of the solid waste permit, Blythe retained the services of Robert Hershey, P.G., and his firm, Meiser & Earl, Inc., to determine the state of collapse of the underground mines beneath Cell 4 of the BRADS Landfill. (Stip. 56.)

23. Hershey prepared a plan to drill 13 coreholes throughout Cell 4 to points beneath the floor of the underground mine in areas where voids were depicted on the most recent mining map for the area. (Stip. 57, 63.)

24. The Department approved Hershey's drilling plan and, at the direction of Hershey, 13 coreholes were drilled at the approved locations between August 25, 2014 and September 24, 2014. (Stip. 58, 63.)

25. Based upon drilling data obtained at Cell 4 of the BRADS site and the analysis of that data via the INTEX Model, Dr. Christopher Bise, in conjunction with Meiser & Earl, rendered the liner report and provided a subsidence analysis for Cell 4. The liner report, as Appendix VII to the subsidence evaluation report, was submitted to the Department as part of Blythe's permit application. (Stip. 64.)

26. Alexander J. Zdzinski, P.G., the Department's geologist, reviewed the Cell 4 Potential Mine Subsidence Evaluation report (the "Subsidence Evaluation Report") submitted to the Department on October 9, 2014 under the seal of Mr. Hershey in support of Blythe Township's application as well as a Subsidence Analysis for Cell 4 prepared by Dr. Bise in conjunction with Meiser & Earl (the "Liner Report") that was attached as Appendix VII to the Subsidence Evaluation Report. (Stip. 67.)

27. Zdzinski has over 28 years of experience working with the Department. He has been a licensed Professional Geologist since June 21, 1995. (Stip. 65.)

28. In his capacity as a licensed Professional Geologist with the Department, Zdzinski has reviewed drilling data and mine subsidence reports on various projects as part of the landfill permit review process to make a determination on whether the application materials satisfy the applicable regulations including 25 Pa. Code 271.201(6). He has customarily based his opinions on information and reports of this nature. (Stip. 66.)

29. Prior to performing the subsidence analysis contained in the Liner Report, Zdzinski had instructed Hershey that his firm would need to calculate the potential mine subsidence that would be associated with the site using a mathematical mine subsidence model and the data resulting from the corehole exploration. (Stip. 68.)

30. Following the submission of the subsidence evaluation to the Department, the Department asked that Blythe determine the potential subsidence and perform corresponding liner strain calculations for each of the 13 coreholes. (Stip. 59.)

31. On January 12, 2015, Hershey provided the Department with the results of his calculations of the potential subsidence and liner strain for each of the remaining coreholes. (Stip. 60.)

32. On January 15, 2015, following review of analyses provided by Meiser & Earl and the review of such analyses by Zdzinski, the Department via a memo issued by Tracey McGurk, concluded that the "subsidence potential poses no risk to the liner integrity and that no mitigation is required." (Stip. 61.)

33. Zdzinski memorialized the details of his calculations and findings in a memorandum dated January 16, 2015. (Stip. 69.)

34. Based on the Cell 4 studies and information submitted on subsidence and liner strain, the Department concluded that the information regarding mine subsidence under Cell 4 at BRADS satisfied 25 Pa. Code § 271.201(6). (Stip. 70.)

35. As a result of a review of deep mine maps, documents, and site observations during Blythe's analysis of the state of the underground mining beneath Cell 4 of the landfill, Blythe discovered evidence that a near vertical portion in the Buck Mountain coal seam had been deep mined. (Stip. 71)

36. Throughout its review, the Department considered, among other things, Blythe's application materials, applicable statutory and regulatory authority, including the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, the Department's municipal waste regulations and the Department's environmental assessment policy. (Stip. 74.)

37. The BRADS permit approval is conditioned upon full compliance with all applicable provisions of the Solid Waste Management Act, the Act of July 7, 1980, Act 97, 35 P.S. §§ 6018.101 – 6018.1003; the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, Act 101, 53 P.S. §§ 4000.101 – 4000.1904, and the regulations contained in 25 Pa. Code Article VIII, Municipal Waste Chapters 271-285. (Stip. 75.)

Additional Findings of Fact

1. Wind Data

38. Blythe prepared and submitted a Form 14 operation plan for the landfill that includes a nuisance minimization and control plan (NMCP). (Notes of Transcript page ("T.") 280, 361; Blythe Township Exhibit ("B. Ex.") 24.)

39. The NMCP constitutes the landfill operator's plan to minimize nuisances from the operation of the landfill related to, e.g., odors, litter, noise, and dust. (T. 253, 258, 361.)

40. The Department reviews the proposed plan to ensure that it will be effective in controlling nuisances arising from operation of the facility. (T. 254, 258-59.)

41. Wind speed and direction are potentially relevant to determining how to minimize nuisances and assess where and the extent to which nuisances may manifest off-site if not properly minimized. (T. 68, 254, 258-59.)

42. Wind speed and direction are not particularly determinative with respect to the BRADS Landfill's NMCP because, regardless of the wind's characteristics, the procedures set forth in the plan will not change. (T. 258-59, 280-81, 379-80, 392-93, 435, 437-42.) In other words, regardless of the direction and speed of the wind, Blythe's NMCP adequately addresses the minimization and control of nuisances. (T. 379-80, 394, 435-38, 441-42.)

43. For example, Blythe's plan to control odors (e.g. tarps on trucks, close down operations in high winds, apply cover materials, venting/destroying gas, monitoring, controlling leachate) does not turn on wind speed or direction. (T. 280-81, 363, 392-94, 437-42; B. Ex. 24.)

44. Blythe's NMCP employs techniques that are common and accepted practices at landfills for minimizing nuisances. (T. 70-71, 283.)

45. Similarly, Blythe's dust control measures do not vary based on wind speed or direction. (T. 392.)

46. There may be landfills where wind speed and direction might make a difference in terms of, for example, more frequent monitoring or placement of a litter fence, but the BRADS site is not one of them. (T. 258-59, 379-80, 435-42.)

47. Nevertheless, following the Board's remand, which pointed out that the applicable regulation requires that the NMCP must be based at least in part on on-site wind data, Blythe

proposed, got approved, and then installed a RainWise weather station on-site to collect wind speed and direction. (T. 55-57, 252-53, 305-06, 372-73; B. Ex. 3.)

48. The weather monitoring equipment installed by Blythe on the site was generally adequate for the purpose for which it was being employed. (T. 15, 376-78.)

49. Although the equipment may not have satisfied all of the criteria set forth in EPA's "Meteorological Monitoring Guidance for Regulatory Modeling Applications," the wind data was not being gathered in this case to perform air quality modeling, but rather, for use in the design of the NMCP. (T. 15-25, 27-30, 35-37, 68, 88; Borough of St. Clair Exhibit ("S. Cl. Ex.") 5-8.)

50. The Department agreed to accept less than one year of monitoring data following the remand. (T. 41, 56-57, 59, 92, 247-48, 255, 314-15, 374-75; S. Cl. Ex. 8.)

51. Less than one year of monitoring data was sufficient under the circumstances presented here to evaluate Blythe's NMCP. (T. 41-42, 57.)

52. Form 54 in the landfill permit application materials says that an applicant should collect one year of on-site data unless the Department agrees to a shorter period. (T. 56-57, 374; B. Ex. 3.)

53. The Department typically does not require a full year of on-site data. (T. 363.)

54. The Department reviewed three and a half months (114 days) of meteorological data collected over the course of six months before issuing the permit. (T. 42, 91, 254.)

55. The Department agreed to continue to accept additional meteorological data during the pendency of this appeal. (T. 55-57, 92.)

56. The Department's decision to reissue the permit, however, was not made contingent upon the additional data. (T. 94.)

57. By the time of the hearing in this matter, the Department had reviewed more than 300 days of data. (T. 45-46, 69, 255; B. Ex. 5, 6, 7, 11, 12.)

58. The on-site data collected by Blythe are consistent with the year's worth of previously supplied off-site wind data collected from about three miles from the landfill site. (T. 54, 73, 92-93, 255, 373; B. Ex. 29, 32, 33.)

59. The wind for the most part blows from the northwest to the southeast away from St. Clair, which is located to the southwest of the landfill site. (T. 52, 73, 110, 111, 263, 267, 318, 389, 392.)

60. There are exceptions, such as during a nor'easter. (T. 111-12, 307-08.)

61. There are three or four houses located about a mile east southeast of the site. (T. 112, 259, 306.)

62. No changes need to be made to the previously approved NMCP as a result of the on-site meteorological data collected by Blythe pursuant to this Board's remand order. (T. 46, 47, 52, 59, 69, 72, 73, 256, 417, 435-41.)

63. Wind data collected on-site after the remand confirmed that Blythe's NMCP is adequate. (T. 45-46, 59, 69, 71, 255-56, 318-19, 379-80, 387-89, 394-95; B. Ex. 29, 30, 33; Commonwealth Exhibit ("C. Ex.") 14.)

64. St. Clair presented no evidence that Blythe's NMCP is inadequate.

2. Subsidence

65. The Board's remand of Blythe's permit required the Department to assess the risk of mine subsidence under Cell 4. (Adjudication, 2014 EHB 76, 108-13.)

66. Subsidence, which is the movement or settlement of the earth, can be caused by the collapse of voids from historic deep mining below a landfill. (T. 365.)

67. The purpose of the subsidence investigation is to predict how much subsidence could occur at the site and design the landfill to accommodate that potential subsidence. (T. 365-67.)

68. Potential subsidence is relevant in landfill design primarily because the liner needs to account for the stretching or strain that would occur to the liner if there is subsidence. (T. 367.)

69. Each liner material has a maximum amount of strain that it can accommodate before it is compromised. (T. 364, 367.)

70. Following the remand, Blythe evaluated the potential for subsidence and developed a drilling program using a circa 1920 mine map of the mining of the Buck Mountain coal seam beneath the site, which was supplied by Reading Anthracite. (T. 148-49, 469-76, 552; B. Ex. 18, 37.)

71. By comparing the 1920 map to an earlier map dated 1906, Blythe was able to determine that additional mining had taken place in that time period, which included the removal of existing pillars, such that virtually all of the coal has been removed in the area of concern. (T. 148-49, 471-73, 477-78, 551-52; B. Ex. 18.)

72. Following the Board's remand, Blythe, pursuant to a drilling plan approved by the Department, drilled 13 coreholes into the Cell 4 footprint and analyzed the cores. (T. 395, 469, 478-81, 483; B. Ex. 18.)

73. Corehole locations were selected using the mine maps in an effort to find openings (i.e. uncollapsed areas) in the mine to establish the worst case scenario from a subsidence perspective. (T. 481-82, 495.)

74. Robert Hershey, P.G., Blythe's highly qualified geologist and the compiler of Blythe's mine subsidence evaluation report, credibly opined that the drilling study provided a sufficient amount of data to properly evaluate the risk of subsidence to the landfill's liner. (T. 469, 496-97.)

75. The fracturing shown in the core logs at the site is indicative of the collapse of the deep mines. (T. 489, 492-95.)

76. In corehole 20 there was an open space of 7 feet, which is consistent with the thickness of the coal seam and which shows a portion of the mine where it did not collapse. This was used as the worst-case scenario for predicting potential subsidence on the site; i.e., it was presumed that there would be seven feet of cave-in throughout the entire study area. (T. 404-11, 495-96, 550, 552-53; B. Ex. 18, 28.)

77. In reality, the void is likely a very small area at the edge of one of the few remaining pillars. (T. 553.)

78. No other coreholes encountered large voids. (T. 496; B. Ex. 18.)

79. Hershey credibly opined that the vast majority of the deep mine below Cell 4 has already collapsed. (T. 496.)

80. The INTEX model is a generally accepted model for predicting the maximum amount of subsidence that could occur at a site in the anthracite coal fields. (T. 365-66, 401-02.)

81. The model is expressed as a mathematical equation that yields an "S max," which is the maximum subsidence that can occur at the designated surface level. (T. 366, 396-98.)

82. The model inputs include the depth and thickness of the coal, the amount of pillars left in place, and whether the roof has collapsed. (T. 366, 396; B. Ex. 28.)

83. The model does not predict if or when subsidence will occur, just how much of a surface effect there would be if it does occur. (T. 365-66.)

84. The INTEX model equation is SMax = 0.535[m – 0.017d][w/d(f)][P][F]. "SMax" represents the maximum subsidence that will occur at the designated surface, in this case at the liner; "0.535" is an industry-accepted constant; "m" represents the seam thickness in feet; "0.017" is an industry-accepted constant; "d" represents the depth of the seam; "w/d(f)" represents the width-to-depth factor—in an extensive mine such as the one beneath the BRADS Landfill, the width-to-depth factor is 1.0; "P" represents the ratio of void area within the mine—if the mine is completely mined, the ratio is 1.0; if pillars remain, the ratio is 0.5; and "F" represents the condition of the mine as determined via drilling—if the mine is uncollapsed, 1.0 is utilized; if the mine is partially collapsed, 0.6 is utilized; and, if the mine if fully collapsed, 0.1 is utilized. (T. 399-403, 410; B. Ex. 28.)

85. Combining the data from the coreholes, information gleaned from the mining maps, and using the INTEX model, a worst-case analysis reveals a maximum potential subsidence of 3.69 feet at the site. (T. 396-408, 452-53; B. Ex. 28.)

86. Among other things, the worst-case analysis assumes that none of the mine workings have collapsed when, in fact, the vast majority the mine has collapsed. (T. 405-06, 496.)

87. The smaller the area in which 3.69 feet of settlement occurs, the more the liner is stretched in that area. (T. 404-09, 452-53; B. Ex. 28.)

88. Liner strain refers to a landfill liner's elongation at yield; that is, how much a liner can stretch before it ceases resisting and sags to the point that it cannot return to its original shape. (T. 83-84, 412-13.) Liner strain is expressed as a percentage. (T. 413.)

89. The Department has determined that 5.0% is the maximum amount of strain to which a landfill liner should be properly designed. (T. 84, 364-65.)

90. Using a worst-case angle of draw based on worst-case subsidence, the area of liner "stretching" (elongation) at the site will be from 27.388 to 28.636 feet, or .248 feet. (T. 408-09; B. Ex. 28.)

91. A .248-foot change in the length of the liner means a worst-case 0.9056 % strain. (T. 409, 455; B. Ex. 28.)

92. The liner to be used at the site can accommodate a strain of 10 to 13 percent, which is far above the calculated worst case of 0.9056 percent that can occur at the site from mine induced subsidence. (T. 84, 365, 410, 412, 455.)

93. The actual (as opposed to worst case) strain is likely to be approximately 0.16 percent. (T. 81, B. Ex. 10, C. Ex. 8.)

94. Richard Bodner, P.E., Blythe's highly qualified engineering expert, credibly opined that the BRADS Landfill liner is capable of safely accommodating the maximum strain from potential subsidence in Cell 4. (T. 411.)

95. The subsidence investigation demonstrated that subsidence will not endanger or lessen the ability of the BRADS Landfill to operate in a manner that is consistent with all applicable regulations and will not cause the facility to endanger the environment, public health, safety, or welfare. (T. 411; B. Ex. 18; C. Ex. 3.)

96. Subsidence poses no appreciable risk to liner integrity; therefore, no further mitigation will be necessary under the vast percentage of the Cell 4 area (with the exception of a small area where the coal seams turns vertical, discussed below). (T. 411; C. Ex. 3.)

97. St. Clair did not present any evidence to contradict Blythe's or the Department's liner strain findings.

98. Given Blythe's assumption that there has been no historic collapse of the mine workings, further core drilling or other investigative techniques to assess the extent of actual collapse would have been pointless. (T. 422, 505-08, 519.)

99. Groundwater characteristics and position have no relevance to the subsidence issue at the BRADS Landfill. For example, groundwater will not "wash away" material in voids and/or cause any subsidence. It could not, in any event, increase the maximum possible subsidence, which is what Blythe's analysis is based upon. (T. 444-45, 503-04, 513, 517-19, 521.)

100. The mined out Buck Mountain coal seam is relatively flat under most of Cell 4, with a maximum dip of approximately 15 degrees. (T. 473-74, 518.)

101. As the seam goes to the north and gets close to the former limit of the coal, it gets very steep, at over 80 degrees. (T. 473-74, 501; S. Cl. Ex. 40; B. Ex. 18, 37.)

102. The near vertical section is approximately 100-120 feet high (the "vertical section"). (T. 132, 139, 140, 474.)

103. Although not known with certainty, it is unlikely that there is any coal left in the vertical section. (T. 129-30, 430, 473-78, 566-68.)

104. Thus, what remains is likely an open 8 to 9 foot wide vertical trench that is 600 feet long that is filled to some degree with rubble and debris. (T. 132, 139, 430, 478.)

105. Although Blythe originally considered performing a more detailed investigation of the vertical section, due in part to safety concerns, it decided to simply excavate the whole

thing and backfill it with engineered backfill material as part of its subsidence plan. (T. 130-35, 140, 148, 291, 430, 445, 448-49, 502-08.)

106. As a result of this mitigation, there will be no subsidence associated with the vertical section. (T. 291, 502-03, 507-08; B. Ex. 9, 19, 22.)

107. There will be a significant amount of excavation associated with construction of the landfill. (T. 397, 428-29, 493.)

108. The backfill design is addressed generally in the Form 24 QA/QC plan, which describes placement of structural fill. (T. 444.)

109. Other than excavation in the area of the vertical section, there are no other remediation measures proposed or needed as part of the mine subsidence mitigation plan. (T. 66-67, 105, 141.)

110. If coal remains in the vertical section, Blythe will need to obtain a surface mining permit. (T. 62, 130-31, 329-31.)

111. Blythe does not expect to be in the area of Cell 4 for at least 10 years after the project is started. (T. 131, 443-44, 506.)

112. The Department's practice is for a potential landfill permittee to apply for a surface mining permit after it has obtained the necessary solid waste permits and approvals and just before the potential permittee intends to initiate excavation. (T. 331-36, 356.)

113. In the unlikely event that coal needs to be removed during the excavation and backfilling of the vertical section, the Department considers it incidental coal mining pursuant to construction of the landfill under the solid waste permit. (T. 348-50.)

114. The Department will not issue a surface mining permit for mining not to take place until 10 to 15 years from now because a mining permit that is not activated within 3 years becomes null and void. (T. 131, 330-33, 356, 443, 506.)

115. Blythe has a reasonable likelihood of obtaining a surface mining permit in the unlikely event that one becomes necessary approximately 10 years from now. (T. 326-57.)

3. Harms-Benefits

116. The Department evaluated whether the harms-benefits analysis needed to be changed based upon any of the new information obtained following the Board's remand. (T. 65-67, 69-70, 104-06, 256-58, 293-94; C. Ex. 14; B. Ex. 9.)

117. The harms and benefits of the project did not change based upon the new information obtained following this Board's remand of the permit. (T. 256-58, 293-94; C. Ex. 14; B. Ex. 9.)

118. The harms potentially associated with potential nuisances and mine subsidence have been adequately mitigated and accounted for pursuant to the nuisance minimization and control plan, which will control nuisances, and the subsidence investigation, which revealed that there is no threat to the environment or to public health, safety, and welfare from subsidence. (T. 256-58, 291, 300, 318-19.)

119. No new or additional harms were discovered following the remand. (T. 256-57.)

120. The plan to excavate and backfill the vertical section is a subsidence mitigation measure, not a net harm or benefit. (T. 292, 296, 300.)

DISCUSSION

In third-party appeals of Department actions such as this one, the appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellant must show by a preponderance of

the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269. In this appeal, St. Clair has not raised any constitutional claims, so it must show by a preponderance of the evidence that the Department acted unlawfully or unreasonably in reissuing the landfill permit to Blythe based on the facts as we have found them to be. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). Our review in this appeal is constrained by the fact that we only remanded the permit to the Department for consideration of three issues; namely, review of the nuisance minimization and control plan (NMCP) in light of on-site wind data, completion of the mine subsidence plan, and rechecking the harms-benefits analysis to ensure that the conclusion had not changed in light of the new analyses of wind data and mine subsidence. *See Blue Mountain Pres. Ass'n v. DEP*, 2011 EHB 556; *Solebury Twp. v. DEP*, 2007 EHB 713. *See also Cnty. of Schuylkill v. DER*, 1991 EHB 1.

Nuisance Minimization and Control Plan

The regulations require that an applicant submit with its permit application a nuisance minimization and control plan (NMCP) that is developed in part with the use of site-specific meteorological data. 25 Pa. Code § 277.136. The NMCP details the measures that a landfill operator will take to minimize and control nuisances arising from things like odors, litter, dust, vectors, and noise. The reason for requiring site-specific data is to assess wind speed and

direction at the proposed landfill, which could play a role in determining the tactics to employ at a site to control any nuisances that would potentially extend beyond the boundaries of the landfill. In the prior appeal, Blythe's NMCP relied entirely on off-site weather data obtained from a location approximately three miles away from the site. Adjudication, 2014 EHB 76, 116-18. We held that, contrary to the regulatory requirements, the Department approved the NMCP despite the fact that it contained no site-specific data. We remanded Blythe's permit back to the Department so that the Department could assess Blythe's NMCP in light of the regulatorily-required on-site weather data.

During the period of the remand, Blythe installed a RainWise weather station on the site and obtained 114 days of weather data collected over the course of six months and submitted that data to the Department. The Department approved Blythe's NMCP and issued the permit after reviewing that data in conjunction with the previously submitted off-site data. The Department determined that the site-specific data largely mirrored the off-site data and no changes needed to be made to Blythe's NMCP. Nevertheless, the Department, in response to a proposal from Blythe, agreed to accept additional weather data from Blythe during the pendency of the appeal. Blythe continued to supplement that data and had submitted to the Department approximately 300 days of data by the time of the hearing. (T. 45-46, 69, 255.) None of the additional on-site weather data was inconsistent with the prior data.

St. Clair critiques the adequacy of the weather data both in terms of the quantity of data and its accuracy. St. Clair argues that Blythe should have collected a full year of on-site data and it questions the reliability of the data that was collected because of what St. Clair views as deficiencies in the installation and maintenance of the weather station.

St. Clair's expert, A. Roger Greenway, opined that the weather data Blythe collected did not meet the standards outlined in an EPA guidance document titled, "Meteorological Monitoring Guidance for Regulatory Modeling Applications." (St. Cl. Ex. 4.) St. Clair places heavy emphasis on this guidance document because it is referenced generally on the Department's Form 54 portion of the application, along with two Pennsylvania regulatory provisions relating to nuisance minimization and control plans. (B. Ex. 3.)[2] The EPA guidance proposes the collection of one year of on-site data or five years of off-site data. (T. 23.) In addition, Form 54 states that the Department requires one year of meteorological data unless a shorter time is approved by the Department. Greenway contends that a full year of data is necessary because it is important to get representative data from the weather conditions during all four seasons. (T. 27.) He argues that off-site data can be used to supplement on-site data, but only if there is at least 90-percent recovery from the on-site data; off-site data cannot compensate for a significantly smaller amount of on-site data, which St. Clair argues is what was done in this case. (T. 23.) Greenway also says that the RainWise station should have been installed higher up off of the ground, that no one checked to recalibrate the device, and that battery failures led to gaps in data recovery, all of which, he argues, undermine the accuracy of the data. (St. Cl. Ex. 2.)

The flaw in St. Clair's argument is that both the EPA guidance and Greenway's testimony are clearly geared toward full-scale air quality modeling, which is something that is simply not required for this landfill permit. Greenway repeatedly couched his criticism in terms of air quality modeling (T. 16, 22, 23), yet he admitted that the purpose of gathering the wind data for the NMCP is not to perform an air quality modeling study (T. 36-37). The EPA guidance document plainly states that its purpose is "for the collection and processing of

[2] Form 54 provides near the top of the form: "General References: Chapter 273.136 and 277.136; February 2000 EPA document, 'Meteorological Monitoring Guidance for Regulatory Modeling Applications,' EPA-454/R-99-005, http://www.epa.gov/scram00l/guidance/guide/mmgrma.pdf."

meteorological data for general use in air quality modeling applications." (St. Cl. Ex. 4 at 1-1.) In the landfill permitting context, the Department is not using the weather data to evaluate, for instance, downwind pollutant concentrations in a dispersion model. Instead, the wind data is used to get a general sense of the prevailing wind direction at the site to determine whether the wind direction will exacerbate any nuisances for any population around the landfill. (T. 68, 254.) If the wind data reveals that there may be an impact to a population near the landfill, the Department may require an operator to conduct more monitoring at the site or take other measures to protect the population. (T. 258-59.) The weather data is not being used for a more sophisticated purpose. Here, both the on-site and off-site data show that the wind primarily blows from the northwest to the southeast, away from St. Clair. (T. 52, 73, 110-12, 263, 267, 307-08, 318, 389, 392.) The closest population to the landfill is a group of three to four houses approximately one mile southeast of the site that are not expected to be impacted by any nuisances originating from the landfill. (T. 112, 259, 306.)

Even accepting for the moment St. Clair's argument that the lack of a full year of site-specific data and the irregularities with the weather station are of some significance, St. Clair never explains why it makes a difference in terms of Blythe's NMCP. St. Clair does not explain how the wind data that was collected renders the NMCP inadequate or how additional and/or more accurate wind data would require any changes to the NMCP.[3] Importantly, St. Clair never argues that the measures contained in the NMCP will not effectively control nuisances from the site, or that additional or alternative measures would be more effective. On the contrary, an abundance of evidence establishes that the measures contained within the NMCP are completely capable of handling any nuisance conditions.

[3] Appropriately, at one point during the examination of the Department's Waste Management Permits Chief, Jeff Spaide, counsel for St. Clair, in the course of pressing Spaide on alleged issues with the weather station, stated, "I'm not asking you about changes to the plan." (T. 46.)

Because of the way Blythe's NMCP is designed, the direction of the wind does not make much of a difference in how nuisances are dealt with, and the Department correctly determined that nothing in the site-specific data requires any change to the plan. The measures employed by Blythe to minimize and control nuisances, which include tarping trucks, applying soil cover, eliminating gas, spraying water to suppress dust, controlling leachate, patrolling and monitoring litter, maintaining fencing around the working area of the landfill, and shutting down operations during conditions of particularly high winds, will be undertaken irrespective of the direction of the wind. (B. Ex. 24; T. 379-80, 392-93, 435, 437-42.) Although wind speed and direction can be helpful to know ahead of time, Blythe's highly qualified landfill engineer, Richard Bodner, P.E., testified that none of the nuisance minimization and control measures in Blythe's plan are so inflexible that they would be ineffective even if the wind changes direction. (T. 379-80.) For instance, Blythe will utilize portable windscreens that will be placed downwind of the working face of the landfill, which can be moved in response to the daily changes in wind direction to control any blowing litter and debris on the site. (T. 379-80.) Blythe will apply cover to any waste emitting odors when those odors are discovered, no matter what direction the wind is blowing. (T. 437-42.) In this respect odors are controlled at the source, thereby neutralizing the problem before odors ever come in contact with the wind. The simple fact is that if the wind is blowing in a certain direction, the measures outlined in the NMCP are capable of adapting in response. We have no indication that the NMCP is inadequate in any respect. Under certain circumstances at certain landfills wind speed and direction and other meteorological data may require the development of different measures to effectively minimize and control nuisances, but no one has told us in this case that wind speed and direction matter all that much.

In any event, we conclude that it was reasonable for the Department to accept less than a full year of site-specific weather data. Form 54 requests a full year of site-specific data but specifically says that the Department may approve a shorter period, which is exactly what occurred here. The regulations do not specify an amount of site-specific data that needs to be supplied by the applicant and evaluated by the Department. *See* 25 Pa. Code § 277.136(b)(2). Here, the Department agreed to accept less than one year of on-site data if the three months of on-site data demonstrated that no changes needed to be made to the NMCP. (T. 41-42, 56-57, 59, 253.) There is no credible evidence that the shorter period that the Department accepted failed to provide adequately representative data. To the extent Mr. Greenway opined otherwise, we do not credit that opinion. Our *de novo* review allows us to consider data generated up until the time of the hearing, all of which merely confirmed the unsurprising trends revealed in the data obtained prior to permit issuance. Finally, as outlined above, we do not have a sense that additional weather data or even significantly different weather data would have necessitated any changes to Blythe's NMCP.

To St. Clair's final point that the Department erred because it considered the original off-site data and used it as a point of comparison with the on-site data, we note that St. Clair does not point to any statutory or regulatory requirement preventing the Department from evaluating additional meteorological data in its assessment of a nuisance minimization and control plan. In fact, in some circumstances it may be prudent for the Department, in exercising its discretion, to analyze additional data points in its review of a nuisance plan. In this case, it was not unreasonable for the Department to review the on-site data in conjunction with the off-site data. The important point is that Blythe and the Department on remand complied with the regulatory requirement for assessing on-site data and that data proved the NMCP to be adequate.

Mine Subsidence

The Department originally issued the landfill permit to Blythe without requiring Blythe to complete its mine subsidence plan for the entire site. Instead, it allowed Blythe to go forward with construction and submit a plan at some indeterminate future date for the area of the site where Cell 4 will be located. We found this to have been an error. We held that the Department needed to approve a plan for the entire site before it issued the permit, and we remanded the permit to the Department for that purpose.

The Department on remand required Blythe to perform an extensive investigation and analysis of possible subsidence underneath Cell 4. Blythe performed the study and successfully persuaded the Department that mine subsidence under Cell 4 would not endanger the environment or the public health, safety, or welfare. St. Clair objects that the subsidence study was inadequate.

The regulation at 25 Pa. Code § 277.120 reads as follows:

> (a) If the proposed permit area and adjacent area overlie existing workings of an underground mine, the applicant shall submit sufficient information to evaluate the potential for mine subsidence damage to the facility, including the following:
>
> (1) Maps and plans showing previous mining operations underlying the proposed facility.
>
> (2) An investigation, with supporting documentation, by a registered professional engineer with geotechnical expertise addressing the probability and potential impacts of future subsidence. The investigation shall address the potential for additional mining beneath the permit and adjacent area, the stability of the final underground workings, the maximum subsidence likely to occur in the future and the effect of that subsidence on the integrity of the facility, and any measures which have been or will be taken to stabilize the surface.

Along the same lines, 25 Pa. Code § 271.201(6) requires that the Department ensure that, "[w]hen the potential for mine subsidence exists, subsidence will not endanger or lessen the

ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and will not cause the proposed operation to endanger the environment or public health, safety or welfare."

The engineers who design a landfill must be able to ensure that the landfill will be able to safely withstand any subsidence under the landfill. The purpose of the mine subsidence study is to provide the data needed to design a safe landfill. The mine subsidence plan that a landfill such as Blythe is required to prepare essentially has two parts. The first part is an investigation to determine the extent of potential subsidence under the landfill. The second and arguably more important part is to use the results of that investigation to design a safe landfill that will be able to safely handle the potential subsidence if it occurs. A fundamental shortcoming in St. Clair's case is that it challenged the first part but not the second part: It criticized Blythe's investigation but not its design. It did not present expert testimony or *any* other evidence that Blythe's design is inadequate or unsafe. It made no attempt to even argue that subsidence will hurt the landfill liner.[4]

The second fundamental flaw in St. Clair's case relates to the fact that Blythe designed its landfill based not upon how much subsidence is *likely* to occur, but upon the amount of subsidence that could *possibly* occur. St. Clair's criticisms, even if they had been valid, only relate to how much subsidence is likely to occur. How much subsidence is likely to occur is rather inconsequential in this case because Blythe's design, which is what ultimately matters, is based on the worst possible case. St. Clair made no attempt to show that subsidence even worse than that used by Blythe in its engineering and design could possibly occur.

[4] St. Clair argues that the Department itself was not qualified to conduct an adequate engineering evaluation of liner strain. This is inconsistent with the stipulations of fact. (Findings of Fact 25-29, 32-34.) Even if it were true, and we are not saying that it is, our *de novo* review reveals that there is no threat of untoward liner strain.

As it happens, St. Clair's criticisms of Blythe's investigation (and the Department's review thereof) have no merit. St. Clair's witness on the issue was Samuel H. Baughman II. Mr. Baughman is a geologist, not an engineer, and he has no experience with landfill design. He was not asked to offer any opinions regarding the landfill design. His testimony only related to the subsidence investigation itself. With respect to the subsidence investigation itself, Mr. Baughman did not present any testimony that credibly challenged Blythe's conclusion that the worst mine collapse that could possibly occur under Cell 4 is 7 feet, which very conservatively translates to 3.69 feet at the applicable surface, where the liner will be located, which is the basis for Blythe's design. Therefore, even if we accepted all of Mr. Baughman's opinions as credible, his testimony would not have satisfied St. Clair's burden of proving that the Department erred in approving the subsidence plan.

However, we actually are unable to credit Mr. Baughman's opinions, limited as they were. He has no experience regarding the interplay between landfills and mine subsidence. He performed a very cursory review of the pertinent facts. For example, after assuring the Board that he had carefully reviewed the drill logs prepared as part of the subsidence investigation—data which are absolutely central to the investigation—and then criticizing them as being incomplete, he was forced to admit on cross-examination that the information that he testified on direct was missing was in fact very clearly presented on the logs. (T. 228-32.)

Mr. Baughman did not perform a subsidence analysis of his own. (T. 233-34.) He did not testify that Blythe's or the Department's findings or conclusions were wrong. He seemed to fundamentally misunderstand the purpose of the study. For example, he criticized the drilling program for not looking for extant support pillars when in fact the goal was to find openings in the mine workings that have not yet collapsed in order to assess maximum possible future

subsidence. (T. 482.) Similarly, Mr. Baughman complained that Blythe had not done a fracture trace analysis, but again, that is actually where, if anything, collapses would already have occurred, which is exactly the wrong place to look. (T. 482-83.) Mr. Baughman testified that additional investigative techniques such as video could have been used, but that would have been a waste of time because knowing the size of voids was rendered meaningless once Blythe's experts decided to design the landfill based on the worst possible case that could occur and then assuming it would occur everywhere. (T. 508.) Mr. Baughman testified that "open questions remained" regarding groundwater, and even if we assume (inaccurately (T. 519)) that is true, groundwater is meaningless at this site as it relates to the subsidence question. (T. 444, 513, 517-19.) We do not credit Mr. Baughman's theory about debris "washing away" in the mine workings as a result of groundwater flow, but again, all of Blythe's calculations are based on the maximum possible subsidence manifesting at the surface in the worst possible way, so the theory simply does not hold water. Mr. Baughman expressed concern that Blythe had not searched for old gangways, but subsidence related to such open gangways would be less at the surface than what Blythe assumed would occur in its calculations related to liner strain. (T. 513-515.)

In stark contrast to Mr. Baughman's testimony, Blythe presented the credible testimony of two highly qualified experts, Robert Hershey in geology and Richard Bodner in landfill engineering. Hershey and Bodner testified in great detail concerning the drilling program at the site, which, if anything, was more extensive than was really necessary, and the detailed calculations that were used to ensure that the Cell 4 liner will be more than capable of withstanding the strain caused by the worst possible case of subsidence that could occur.

After our remand, Hershey prepared a plan to drill 13 coreholes throughout Cell 4 to points beneath the floor of the underground mines in areas where voids were depicted on the

most recent mining map from the area. Hershey designed the Cell 4 drilling plan to locate mine voids for the purpose of assessing the worst-case scenario concerning the state of collapse of the mines beneath Cell 4. His drilling plan sought to drill in areas where voids were depicted on mine maps as opposed to drilling in areas where pillars were depicted in order to evaluate a larger area for potential subsidence. The Department approved Hershey's drilling plan and, at Hershey's direction, 13 coreholes were drilled at the approved Cell 4 locations between August 25 and September 24, 2014.

Blythe submitted its subsidence evaluation report to the Department, which detailed the results of the corehole drilling, including the drilling logs for each of the coreholes. Hershey concluded that eight of the coreholes encountered caving conditions, four of the coreholes encountered solid coal, and a single corehole encountered a 7-foot void. The corings also showed cracks and small voids in the rock above the deep mines, reflecting that settlement had already occurred. The cores provided direct physical evidence of the state of subsurface conditions below the future Cell 4. The vast majority of the mine had collapsed, consistent with what would have been expected from a review of the mine maps. The maximum void was shown to be 7 feet, which, again, correlates extremely well with the mine maps.

Following Blythe's submission of its initial subsidence evaluation to the Department based on the corehole with the maximum void space, the Department asked Blythe to determine the potential subsidence and perform corresponding liner strain calculations for each of the remaining 12 coreholes. Hershey provided the Department with the results of his calculations of the potential subsidence and liner strain for each of the remaining coreholes. The maximum liner strain that Hershey calculated at the remaining 12 coreholes was approximately 0.16 percent, well below the 5 percent maximum amount of strain to which a liner may be subjected according

to the Department. (Blythe will be using a liner that is capable of withstanding strains of between 10 and 13 percent.) Alex Zdzinski, a licensed professional geologist with the Department, reviewed the subsidence evaluation report, including the liner report attached thereto and Hershey's calculations of the potential subsidence and corresponding potential liner strain for the 12 remaining coreholes. He performed his own calculations of potential subsidence and corresponding potential liner strain, with the assistance of Nsobiari Warmate, another Department employee. Zdzinski concluded that no subsidence mitigation plan was needed because his results were similar to Hershey's and that Hershey's results satisfied the Department's request for additional analyses. Zdzinski concluded that the "subsidence potential poses no risk to the liner integrity."

Bodner then conducted a worst-case scenario INTEX analysis. The INTEX model is a generally accepted model used to estimate maximum potential mine subsidence. St. Clair did not question the use of the model. Bodner calculated every permutation of the INTEX analysis to determine the maximum potential liner strain under all possible conditions. Bodner's worst-case scenario revealed that the maximum subsidence that could occur at any point in Cell 4 was 3.69 feet. His analysis also revealed that the maximum 3.69 feet of subsidence could, given the most extreme 15 degree of draw, result in a maximum liner strain of 0.9056%, which is 5 times less than the Department's standard and at least 10 times less than Blythe's liner system is capable of withstanding.

Thus, Blythe demonstrated by rigorous scientific analyses that the BRADS Landfill's proposed liner is capable of withstanding any strain that it might encounter. As previously mentioned, St. Clair did not present *any* evidence, including any expert testimony, concerning any of the liner strain analyses performed by Blythe or the Department.

Blythe's subsidence investigation revealed a portion of the Buck Mountain coal seam that gets very steep as it approaches the former limit of the coal (the "vertical section"). Blythe intends to eliminate any subsidence in this section by excavating the entire thing and then backfilling it with engineered backfill material. Importantly, St. Clair has not cited to any credible evidence that there is anything wrong with this plan. St. Clair has not alleged, for example, that Blythe's approach will result in unacceptable liner strain. The record demonstrates that the vertical trench, if it still exists, will be backfilled one way or the other. Whether coal is in there is irrelevant from a subsidence perspective. St. Clair's allegation that a determination of how subsidence risk will be addressed with respect to the vertical section has been deferred for ten years is simply not true.

Instead, St. Clair has variously alleged that Blythe will either need a surface mining permit for the excavation, or it should have at least explained "how it is going to comply with the surface mining laws and regulations." St. Clair's theory is premised on there still being some coal in the vertical section, yet it provided no evidence at the hearing that there is any remaining coal, and Blythe's experts have credibly testified that it is unlikely that any coal remains. Most convincingly, Hershey testified that there is no logical reason why the miners would have left the coal in place, and the old mine maps designate "clay" at the top of the seam, which is a very strong indicator that the limit of minable coal in the seam had been reached, i.e., that no coal was left to mine. (T. 474-76; B. Ex. 37.) St. Clair nevertheless insists that Blythe's landfill permit must be revoked because a mining permit was not issued or compliance with mining laws was not otherwise addressed in conjunction with the issuance of the landfill permit.

Turning first to St. Clair's allegation that Blythe needs a mining permit, this case presents a timing question. The question presented by St. Clair's argument is *not* whether a mining

permit will be required if coal is found in the vertical section. There is no dispute that Blythe will need a permit in the unlikely event it needs to excavate residual coal. The question is also *not* whether Blythe's landfill permit authorizes coal mining. Again, there is no dispute that it does not. The question, then, is whether the Department acted unlawfully or unreasonably by not issuing a mining permit *at the same time* as the landfill permit.

St. Clair has not referred us to any statute, regulation, or case law that required the Department to issue a mining permit in conjunction with Blythe's landfill permit. St. Clair relies on *Jay Township v. DER*, 1994 EHB 1724, which is curious because in that case, as in this case, the Board found that it was unlikely that any coal remained on the proposed site. Therefore, the Board held that no mining permit was necessary. *Jay Twp.*, 1994 EHB at 1762-64. We are not independently aware of any regulatory requirement that a mining permit must in every case be issued simultaneously with the landfill permit if there is any possibility of coal needing to be removed, no matter how remote.

To the extent St. Clair is arguing that it was otherwise unreasonable not to require a mining permit at the same time as the landfill permit, it has provided no support for such a position. In fact, it was entirely reasonable for the Department to not require Blythe to obtain a mining permit in conjunction with its landfill permit. Blythe's primary objective is obviously to build a landfill, not mine and sell coal. The Solid Waste Management Act and the regulations require compliance with all other applicable laws, *see* 35 P.S. §§ 6018.502(d), 6018.503(c); 25 Pa. Code § 277.201(c), so if it turns out that Blythe needs a mining permit, it will need to get one before removing the coal. St. Clair has not shown how this could possibly have any impact on the landfill's ongoing operations. As previously mentioned, it is unlikely that there is any coal left in the vertical section. For the Department to have insisted upon a permit for mining coal

that probably does not exist strikes us as unreasonable. *See Jay Twp., supra*. Mine permits expire in five years and become null and void if not activated within three years of issuance. Blythe's operation is not likely to encounter the area of the vertical section for as much as ten years, but certainly more than three years. Reviewing a mining permit application at a time close to when mining will actually occur rather than at some distant time when it is not even clear mining will occur makes perfect sense.[5]

As we have previously discussed, in our original Adjudication we held that the Department acted unlawfully and unreasonably by issuing the landfill permit without insisting on an acceptable and complete subsidence plan before a permit is issued. *See also Jefferson Cnty. Comm'rs v. DEP*, 2002 EHB 132, 187, *aff'd*, 819 A.2d 604 (Pa. Cmwlth. 2004) (Department must determine whether a permit applicant can mitigate a potential nuisance *before* it issues the permit). The regulations specifically require a subsidence mitigation plan *before* a landfill permit is issued, 25 Pa. Code § 277.120, and for the reasons described in our prior Adjudication it would have been otherwise unreasonable for the Department to allow the landfill to be built without first ensuring that subsidence under the landfill would not cause harm. There is no similar requirement grounded in law or reason that a mining permit be issued to remove a small amount of residual coal incidental to landfill construction before a landfill permit is issued. Unlike the need to plan to account for subsidence in advance, the safety of the landfill does not depend on whether a permit for removal of a small amount of coal becomes necessary. The landfill has been engineered based upon the removal of any remaining debris in the vertical section, and it does not matter from a subsidence or design perspective whether that debris contains some coal.

[5] Exactly what type of mining permit might be required years from now is one step further removed from relevancy. The parties' debate about whether an "incidental" permit will be the appropriate vehicle may be the subject of a separate appeal but it is not the appropriate subject of this appeal.

At certain points in its briefs St. Clair backs off from its argument that an actual mining permit should have been required and instead insists that Blythe should have at least been required to explain how it will comply with the mining regulations. It relies on Section 502(d) of the Solid Waste Management Act, 35 P.S. § 6018.502(d), which requires that the application for a landfill permit shall (among other things) set forth the manner in which the operator plans to comply with the requirements of the Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 1396.1 – 1396.19a. First, we note that Section 502(d) does not require the simultaneous issuance of a mining *permit*. In fact, we have specifically held that Section 502(d) does not require the same level of information that would be required to obtain a mining permit. Rather, the Department need only be able to conclude that the applicant has a reasonable likelihood of securing necessary permits. *Tinicum Twp. v. DEP*, 1997 EHB 1119; *Jefferson Cnty. Comm'rs v. DEP*, 1996 EHB 997. In this case, the Department's mining manager credibly testified at length that obtaining the necessary permit is not likely to be a problem. (T. 326-57.) Given the facts of this case, precise details regarding exactly how any residual coal will be excavated from the vertical trench are not necessary in the immediate context. The important point for our present purposes is that subsidence will be prevented.

St. Clair's only attempt to suggest or imply that Blythe will be unable to obtain the necessary permit is a vague reference to the requirement that mines be returned to their approximate original contour (AOC). The Department has accurately pointed out that a waiver from that requirement is available and likely to be granted in situations such as this. 25 Pa. Code § 88.117. St. Clair's suggestion that removal of a small amount of hypothetical coal in a small section of a seam mined 100 years ago below the grade of a permitted landfill will require reclamation to AOC is difficult to credit.

Harms-Benefits

On remand, we also directed the Department to make sure that nothing in the revised analyses of nuisance control and subsidence changed the Department's prior conclusion that the landfill satisfies the harms-benefits test set forth in 25 Pa. Code § 271.127. St. Clair contends that the Department did not do this. St. Clair says that the Department, at the most, misinterpreted our remand and simply considered whether the removal of potential profits as a limited benefit from the evaluation did not change the results of the balancing test.[6] Importantly, St. Clair does not allege that the result of the harms-benefits test should have changed based on the new analyses. It does not point to any new net harms or benefits, let alone any new harms or benefits significant enough to alter the harms-benefits comparison. St. Clair, somewhat in passing, refers to the speculative removal of coal in the vertical section but does not tell us whether that is a new harm or benefit.

St. Clair relies heavily on a review memo prepared by Tracey McGurk that does not on its face state that the Department reevaluated the harms and benefits of the landfill in light of the on-site wind data and the completed subsidence plan. (B. Ex. 9.) St. Clair places too much weight on one memorandum. There is no record evidence that that one memorandum was intended to be the exclusive description of everything that the Department considered on remand. To the contrary, there is ample record evidence that the Department did in fact ensure that there was no change to the conclusion that the landfill satisfies the harms-benefits test as a result of the revised analyses of the NMCP and the subsidence plan. (T. 63-66, 104, 256-58, 283, 293-94, 318-19.) Newly obtained wind data, which turned out not to be surprising in any way, did not

[6] In our original Adjudication we held that the Department erred by considering potential profits as a potential benefit. We went on to hold *de novo* that elimination of potential profits did not change the results of the harms-benefits analysis.

reveal the potential for any new or different nuisances or harms. Similarly, no new harms associated with mine subsidence were revealed.

The Department evaluates the known and potential environmental harms of the project and how the applicant plans to mitigate those harms. 25 Pa. Code § 271.127. As Tracey McGurk aptly testified at the hearing leading up to our first Adjudication, "If we don't believe that they've [the harms] been adequately mitigated, we're not likely to move forward with the balancing of the harms and benefits because the Department's main concern is that the harms are adequately mitigated to protect the public health, safety, and the environment." Adjudication, 2014 EHB at 95. Here, St. Clair presented no evidence that the potential harms associated with the operation of Blythe's landfill have not been adequately mitigated.

St. Clair argues that Blythe's revised subsidence plan differs dramatically from the original plan. Actually, the difference is not so dramatic because the original plan simply referred to future investigations and possible flushing of old workings depending on the results of that investigation. It is not clear that any measures would have been taken with respect to the mine workings even under the original plan. But much more importantly, the "harm" at issue is not subsidence; the "harm" is damage to the landfill as a result of subsidence, which in turn could result in harm to the environment or public welfare. Here, it has been shown to the Department's and our satisfaction that any threat to the safety of the liner has been shown either not to exist or, in the case of the vertical section, that it will be fully mitigated. There is no threat of harm to the environment or the public welfare. There is no new "harm" to tip the balance of harms and benefits. If anything, where before there was an undefined risk, that risk has now been shown not to exist. Similarly, any harms associated with odors or dust where wind can be a

factor have been shown to be capable of adequate mitigation pursuant to St. Clair's unchallenged NMCP.

CONCLUSIONS OF LAW

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

2. St. Clair has standing to pursue this appeal, which is essentially a continuation of its original appeal from the same landfill permit, which the Department reissued following our remand. *Borough of St. Clair v. DEP*, 2014 EHB 76.

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

4. The appellant must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269.

5. St. Clair has not raised any constitutional claims, so it must show by a preponderance of the evidence that the Department acted unlawfully or unreasonably in reissuing the landfill permit to Blythe based on the facts as we have found them to be.

6. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

7. Our review in this appeal is confined to the issues remanded to the Department for further consideration: review of the nuisance minimization and control plan (NMCP) in light of on-site wind data, completion of the mine subsidence plan, and rechecking the harms-benefits analysis to ensure that the conclusion had not changed in light of the new analyses of wind data and mine subsidence. *See Blue Mountain Pres. Ass'n v. DEP*, 2011 EHB 556; *Solebury Twp. v. DEP*, 2007 EHB 713. *See also Cnty. of Schuylkill v. DER*, 1991 EHB 1.

8. An applicant for a construction and demolition waste landfill must submit with its permit application a nuisance minimization and control plan that is developed in part with the use of site-specific meteorological data. 25 Pa. Code § 277.136.

9. The Department acted reasonably in accepting 114 days of site-specific meteorological data and comparing it to previously collected off-site meteorological data.

10. The Department properly concluded that Blythe Township's nuisance minimization and control plan will adequately control nuisances that emanate from the BRADS Landfill site.

11. If a landfill will be constructed over old mine workings, an applicant must submit a mine subsidence investigation assessing the potential future impacts of subsidence at the site. 25 Pa. Code § 277.120.

12. When there is the potential for mine subsidence, the Department must ensure that "subsidence will not endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and will not cause the proposed operation to endanger the environment or public health, safety or welfare." 25 Pa. Code § 271.201(6).

13. Blythe Township's mine subsidence investigation shows that the landfill liner that will be installed on the site is more than capable of withstanding even the unlikely worst-case scenario of subsidence.

14. Blythe Township was not required to obtain a mining permit in conjunction with its landfill permit. 35 P.S. § 6018.502(d); *Tinicum Twp. v. DEP*, 1997 EHB 1119; *Jefferson Cnty. Comm'rs v. DEP*, 1996 EHB 997.

15. The Department properly concluded on remand that the BRADS Landfill satisfies the harms-benefits test. 25 Pa. Code § 271.127.

16. St. Clair did not meet its burden of proof to establish that the Department acted unreasonably or contrary to law in reissuing the landfill permit to Blythe Township. 25 Pa. Code § 1021.122(c)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF ST. CLAIR	:	
	:	
v.	:	**EHB Docket No. 2015-017-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BLYTHE TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 6th day of June, 2016, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 6, 2016

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

For the Commonwealth of PA, DEP:
David R. Stull, Esquire
(*via electronic filing system*)

For Appellant:
Edward M. Brennan, Esquire
(*via electronic filing system*)

For Permittee:
Andrew D. Klein, Esquire
Brian S. Uholick, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: June 6, 2016**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board denies a Motion for Summary Judgment where the right to a summary judgment is not clear and free from doubt and there are genuine issues of material fact. The Center for Coalfield Justice and Sierra Club assert that the Department acted contrary to law when it issued permits to Consol that authorized longwall mining at the Bailey Mine in Greene County, Pennsylvania. The principal legal dispute centers on whether the alleged impact to streams resulting from the longwall mining authorized by the permits violated the Clean Streams Law and associated regulations. The Board finds that the Center for Coalfield Justice and Sierra Club are not entitled to summary judgment because it is not clear as a matter of law that the issuance of the permits was prohibited by the Clean Streams Law and/or the regulations. In addition, while the Center for Coalfield Justice and Sierra Club assert that there are no issues of material fact, the Board finds that there are material factual issues that prevent the grant of summary judgment in this case.

O P I N I O N

Introduction

The Center for Coalfield Justice ("CCJ") and the Sierra Club ("SC") (together "CCJ/SC") appealed the Department of Environmental Protection's ("DEP" or the "Department") issuance to Consol Pennsylvania Coal Company, LLC ("Consol") of permit revisions No. 180 and No. 189 ("Permit Revisions") to Coal Mining Activity Permit ("CMAP") No. 30841316 for the Bailey Mine in Greene County, Pennsylvania. The Bailey Mine is a full extraction mine using longwall mining. The Permit Revisions under appeal in this case revised the existing CMAP to allow full extraction mining on 3,175 subsidence control plan acres.

The discovery period in this matter ran for an extended length of time and closed on March 14, 2016. Following the close of discovery, CCJ and SC requested an opportunity to amend their Notices of Appeal, the Department and Consol did not object to the proposed amendments and therefore, CCJ and SC filed amended Notices of Appeal on April 1, 2016. A day earlier, on March 31, 2016, CCJ/SC filed a Motion for Summary Judgment, a Statement of Undisputed Facts and a Brief In Support of their Motion. The Department and Consol filed separate Responses to the Motion for Summary Judgment on April 22, 2016, along with Responses to the Statement of Undisputed Facts and Brief/Memorandum of Law in Opposition to CCJ/SC's Motion. CCJ/SC filed a Reply Brief In Support of Motion For Summary Judgment on May 9, 2016. Consol filed a Motion to Strike Portions of Reply Brief, Or, in the Alternative for Leave to File Surreply, and for Oral Argument. CCJ/SC and the Department filed Responses to Consol's Motion to Strike/Leave to File Surreply on May 20, 2016 and the Board issued an Order denying Consol's Motion to Strike/Leave to File in its entirety on May 23, 2016. The filings related to the Motion for Summary Judgment are now complete and the Board is in a position to issue its ruling on the Motion.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC.*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

Arguments

CCJ/SC contend that their Motion "raises two narrow legal questions: 1) whether the Department acted contrary to law when it authorized an activity that will cause, has the potential to cause, or has caused pollution to waters of the Commonwealth based on a stream mitigation plan; and 2) whether the Department acted contrary to law when it failed to evaluate the possible effect of CPCC's longwall mining at the Bailey Lower East Expansion on UT-32599's exceptional value ("EV") existing use." Reply Brief of Appellants in Support of Motion For Summary Judgment, p. 1.[1] In support of the arguments set forth in their Motion for Summary

[1] It certainly would have been more consistent with normal practice had CCJ/SC succinctly articulated the two legal questions it was raising in its initial Brief in Support of Motion for Summary Judgment rather

Judgment, CCJ/SC rely on the 57 facts listed in their Statement of Undisputed Facts and the 22 exhibits attached to their Motion. The Department and Consol oppose the Motion for Summary Judgment and set forth various reasons they contend the Board should deny CCJ/SC's Motion. In support of its positions, the Department responded to CCJ/SC's Statement of Undisputed Facts by denying a significant portion of the allegedly undisputed facts and providing 11 exhibits of their own. Consol disputed an even higher percentage of the allegedly undisputed facts submitted by CCJ/SC and provided 23 exhibits in support of its position.[2]

Pollution and Mitigation Plans Issue

As we understand their position, CCJ/SC contend that the longwall mining authorized by the Permit Revisions will cause severe flow loss and pooling in the streams overlying the area proposed for mining and that these impacts constitute pollution under the Clean Streams Law. They principally rely on portions of Module 8: Hydrology ("Module 8") of Consol's permit application (CCJ/SC Exhibit 3) that identify potential subsidence impacts on the streams in the area of the proposed mining. They further argue that such flow loss and pooling will impair the streams' aquatic life and recreational uses. CCJ/SC assert that the pollution and impairment of the streams violate the Clean Streams Law and related regulations and should have prevented the Department from issuing the Permit Revisions.

CCJ/SC specifically argue that the Permit Revisions violate 35 P.S. § 691.611 which they contend makes it unlawful for any person to cause water pollution. They also argue that the

---

than doing so in its Reply Brief. In doing so, CCJ/SC, in our estimation, invited Consol's Motion to Strike/File a Surreply that the Board denied by Order dated May 23, 2016.

[2] We do intend to suggest that because the parties dispute various facts and provided voluminous pages of exhibits in support of their respective positions, that this alone prevents the Board from granting a motion for summary judgment. Of course that is not the case and what matters is whether the factual disputes are legitimate and are material to the arguments raised in the Motion. We cite to the number of facts that are disputed and the volume of exhibits submitted by all the parties to provide some context regarding the complexity of the issues raised by this case in general and the Motion for Summary Judgment in particular.

Permit Revisions violate numerous water and mining regulations including, but not limited to, 25 Pa. Code § 86.37(a)(3) (a permit will not be approved unless the applicant demonstrates that there is no presumptive evidence of potential pollution of the waters of the Commonwealth); 25 Pa. Code § 89.36(a) (the operation plan shall describe the measures to be taken to ensure the protection of the hydrologic balance and to prevent adverse hydrologic consequences); 25 Pa. Code § 89.52(a) (underground mining shall be planned and conducted to minimize changes to the prevailing hydrologic balance) and 25 Pa. Code § 93.4(a) (existing uses shall be maintained and protected). They further argue that the Department improperly relied on the mitigation plans submitted by Consol to justify issuance of the Permit Revisions. In their opinion, the Clean Streams Law and the cited regulations require the Department to prevent pollution in the first place and not rely on an after-the-fact fix outlined in mitigation plans submitted by Consol. CCJ/SC are highly critical of the proposed mitigation activities outlined in the plans and contend that Consol failed to demonstrate that the mitigation plan for Polen Run will prevent permanent pollution.

Consol and the Department argue that CCJ/SC's position is not correct as a matter of law and that there are issues of material fact concerning this issue. Consol asserts that the reading of 35 P.S. § 691.611 advocated by CCJ/SC would prohibit any changes to the waters of the Commonwealth and is therefore inconsistent with other provisions of the Clean Streams Law that expressly provide the Department the authority to issue permits that result in pollution to the waters of the Commonwealth. Consol further argues that the position advocated by CCJ/SC also runs contrary to numerous provisions of the Mining Subsidence Act.

Consol makes similar arguments regarding the various regulations cited by CCJ/SC. Consol specifically contends that the interpretation of the requirement of 25 Pa. Code § 86.37(a)

that there be a finding of no presumptive evidence of pollution offered by CCJ/SC would create "absurd results". Permittee's Response, p. 18. Similarly, Consol argues that CCJ/SC's reading of the antidegradation requirements found at 25 Pa. Code § 93.4a is not the law in Pennsylvania. Even if the Board were to agree with some or all of the legal interpretations offered by CCJ/SC, Consol maintains that there are a number of facts relied on by CCJ/SC that are disputed. While acknowledging the permit application language relied on by CCJ/SC, Consol argues that the application is selectively quoted and that this gives an incomplete and inaccurate picture of the facts. Consol also contends that the issue of whether the mitigation plans approved by the Department are adequate is fact dependent, requires expert testimony and is not an issue that should be decided by summary judgment.

The Department's responses on this issue focus on the presence of disputed facts and argue that it did not abuse its discretion when it issued the Permit Revisions. The Department argues that the law is not as clear as claimed by CCJ/SC and that they misrepresent the Department's actions in this case. The Department states that it did not authorize pollution as CCJ/SC is seeking to have the Board interpret that term. The Department cites to the Board's decision in *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, for the statement that the term pollution is extremely broad and notes that the facts of the *UMCO Energy* case are different than the facts present in this case. Furthermore, the Department points out that CCJ/SC selectively quotes from Module 8 of Consol's permit application in setting forth CCJ/SC's allegedly undisputed material facts. As a result, the Department denied many of the material facts asserted by CCJ/SC. As an example, the Department cites CCJ/SC's Fact No. 19 that states "A mining-induced impact is likely for stream UT-32605 to North Fork Dunkard Fork." (Appellants' Statement of Undisputed Facts, p. 2) and then notes that the remaining portion of this Module 8

section stating that "the stream will be able to maintain its existing use in the event of a mining-induced flow loss and the impact would be temporary" creates a very different meaning than the one alleged by CCJ/SC. Department's Memorandum of Law, p. 8. The Department cites to several other similar examples. Finally, the Department notes that the issues in this case involve complex issues of fact and law and require expert testimony and suggests that the Board rarely grants summary judgment in these types of cases, preferring to decide them on a fully developed record.

Analysis of Pollution/Mitigation Plans Issue

We have reviewed in detail the arguments set out by the parties in their Briefs, as well as the voluminous facts and exhibits presented for our consideration. Viewing that information in the light most favorable to the Department and Consol, drawing all reasonable inferences in favor of the Department and Consol and resolving all doubt as to the existence of a genuine issue of material fact against CCJ/SC as we are required to do, we find that CCJ/SC are not entitled to summary judgment on this issue because the right to summary judgment is not clear and free from doubt. We agree with the Department that this issue involves mixed questions of fact and law that make a grant of summary judgment inappropriate in this case. The Board finds that issues of this type are best decided following a full hearing that allows all sides in the case to present their evidence so that the law can be applied to a fully developed factual record. *National Fuel Gas Midstream Corp. v. DEP*, 2014 EHB 914, *Department of Environmental Protection v. Sunoco Logistics Partners L.P. and Sunoco Pipeline, L.P.*, 2014 EHB 791; *Clean Air Council v. Department of Environmental Protection and MarkWest Liberty Midstream*, 2013 EHB 404.

In their initial Brief, CCJ/SC state that they are "not arguing that an underground mine may not cause *any* reduction in stream flow or *any* change to the hydrologic regime. Appellants are not asserting an absolute no-impact standard." Appellants' Brief in Support of Motion for Summary Judgment, p. 2. (emphasis in original). However, that is not the way the legal arguments set forth by CCJ/SC actually read and, in fact, to us they appear to do exactly that. CCJ/SC state "Section 611 makes plain that the Generally (sic) Assembly had as its most basic goal in enacting the Clean Streams Law that no person, regardless of type of operations or conduct, may engage in activity that causes pollution to the waters of the Commonwealth." Appellants' Brief in Support of Motion for Summary Judgment, p. 6. CCJ/SC further assert that the Clean Streams Law "plainly makes it unlawful for any person to engage in activity that causes pollution to waters of the Commonwealth." *Id*. Despite their statement to the contrary, the position actually advocated by CCJ/SC clearly calls for a no-impact standard when it comes to the Department's permitting scheme for longwall mining. We do not think that it is clear as a matter of law that the Clean Streams Law requires a no-impact standard. Interpreting the prohibition in Section 611 of the Clean Streams Law in the manner advocated by CCJ/SC requires us to entirely ignore other sections of the Clean Streams Law that clearly authorize the Department to issue permits. A permit, at its most basic, is permission from the state to undertake activities that may impact the environment and cause pollution. Therefore, we cannot say as a matter of law that CCJ/SC is entitled to summary judgment on its position that the Clean Streams Law prohibits the issuance of the Permit Revisions because they authorize pollution.[3]

[3] While we think that it is inconsistent with the actual legal arguments set forth in their Brief, if we accept CCJ/SC's position that they are not advocating an absolute no-impact standard, other issues arise that we find prevent summary judgment. Principally, we think it then becomes a question of the actual impact on the waters of the Commonwealth that will result from the Permit Revisions and that this creates factual issues that prevent a grant of summary judgment.

CCJ/SC's arguments regarding the various regulations cited in this portion of their Brief suffer from the same issue as their Clean Streams Law argument. The conclusions that they believe the Board should reach are not as clear cut as suggested by CCJ/SC. A number of the regulations they cite discuss prevention of potential impacts to streams and the hydrologic balance but we do not find a reading of those regulations, in the context of the overall statutory and regulatory scheme, clearly supports the position that the issuances of the Permit Revisions by the Department were inappropriate as a matter of law. The most challenging regulatory provision is 25 Pa. Code § 86.37(a)(3). This provision requires that the applicant affirmatively demonstrate and the Department find that there is "no presumptive evidence of potential pollution of the waters of this Commonwealth." 25 Pa. Code § 86.37(a)(3). This is an odd phrase and none of the parties provided any citation to cases that are helpful in interpreting its meaning.

In its technical guidance document entitled "Surface Water Protection-Underground Bituminous Coal Mining Operations," the Department discusses the regulations that can apply to impacts associated with mining beneath streams and provides that Chapter 86 requires the Department to find that the activities proposed under the application "will not result in pollution to the waters of the Commonwealth (§ 86.37(a)(3))." Department Exhibit B, Technical Guidance Document, p. 5. The Department does not discuss its interpretation of this section in its Brief but it clearly does not read the regulation as an absolute prohibition on issuing permits that allow flow loss or pooling. Once again, a literal interpretation using the broad definition of pollution suggested by CCJ/SC would render other parts of the same regulation, as well as other statutes or regulations, superfluous. For instance, the very next section of the Chapter 86 regulations, 25 Pa. Code § 86.37(a)(4), requires that the applicant demonstrate and the

Department find that "the activities proposed under the application have been designed to *prevent material damage to the hydrologic balance* outside the proposed permit area." (emphasis added). It is difficult to see how these two back-to-back provisions can both be given meaning if one accepts a broad definition of pollution and an absolutist interpretation of "no presumptive evidence of potential pollution" given that the use of the term "material damage" in the next section suggests some level of impact to the hydrologic balance is permissible. Summary judgment requires that the issues being determined be clear as a matter of law. Based on our review of the regulations, the issue is not sufficiently clear and free from doubt for a grant of summary judgment.

CCJ/SC also focus on the Chapter 93 regulatory provisions that require that existing and designated uses of surface waters be maintained and protected. They state that "the Department is attempting to avoid the rather obvious, common sense notion that as the water goes, so do the uses. … Moreover, it is undeniable that the existing and designated uses of a stream are eliminated during stream restoration." Appellants' Brief, p. 7. We again find that the law is not as clear as asserted by CCJ/SC and, more importantly, there are material facts on this issue that are subject to dispute. CCJ/SC's principal legal argument on this point appears to be that any disruption to the existing stream uses, even a temporary one resulting from stream restoration, is contrary to law. Appellant's Brief, p. 7. The relevant portion of Chapter 93 states as follows: "[E]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 25 Pa. Code § 93.4a(b). The language of the regulation does not provide any specific indication regarding whether the existing uses must be maintained at all times, or whether the uses may be disrupted on a temporary basis. CCJ/SC does not point to any case law that clearly supports, under the facts of this case, the interpretation they are

urging the Board to adopt. We are aware that the Department routinely issues permits under the Clean Streams Law allowing persons to conduct stream restoration activities that, at a minimum, temporarily disrupt water flow and existing uses. We understand that these stream restoration permits are distinct from the Permit Revisions at issue in this case but, in light of the overall regulatory scheme and in the absence of specific case law to the contrary, we are not prepared to say at this point on the record before us that any disruption, regardless of the purpose for or the duration of the disruption, is a violation of the Chapter 93 regulations.

Furthermore, the impact on the existing and designated uses of the streams as a result of the Permit Revisions is clearly a disputed fact issue. As previously discussed, CCJ/SC quote portions of Module 8 of the permit application regarding the predicted impact on the streams. See Appellants' Statement of Undisputed Facts, p. 2-3. The Department and Consol point out that the quotes relied on by CCJ/SC are selective and ignore the portions of Module 8 that, in most instances, state that existing uses will be maintained. See Appellants' Exhibit 3, p. 14-20. Looking at the arguments and exhibits addressing this issue and resolving the dispute over the existence of material facts in favor of the nonmoving party as we are required to do, we think that the issue of the impact on the streams and their existing uses is best resolved after all the facts are presented at a full hearing.

The final argument raised by CCJ/SC on this issue is that the Department improperly relied on mitigation plans submitted by Consol to support its issuance of the Permit Revisions. CCJ/SC's argument on this issue again appears to be based on a reading of the Clean Streams Law and the regulations that prohibit any impact to waters of the Commonwealth. If you cannot have any impact on streams in the first place, they argue it necessarily follows that you cannot rely on mitigation plans that are designed to address that impact, as a basis for approval. As we

have discussed previously, we do not think the law on what, if any, impact is permissible is as clear as CCJ/SC suggests and it is certainly not clear enough to be the basis for a grant of summary judgment. CCJ/SC's arguments concerning the mitigation plans also challenge the effectiveness of past mitigation efforts by Consol and questions whether it was proper for the Department to rely on similar mitigation approaches as a basis for permit approval. The Department and Consol assert that CCJ/SC are wrong and that past mitigation efforts are more successful than claimed by CCJ/SC and that engineering analysis supports the approval of the mitigation plans. We think that the arguments raised by CCJ/SC rely on a contested set of facts and therefore, summary judgment on the basis of this argument is not proper. The issue of the mitigation plans and their effectiveness in addressing potential impact to the streams is best determined after both sides have an opportunity to present testimony on that issue at a hearing.

UT-32599's EV Existing Use and the Antidegradation Program

CCJ/SC argue that the Department failed to properly evaluate one specific stream, UT-32599, under the antidegradation program. CCJ/SC assert and the Department and Consol acknowledge that UT-32599 has an exceptional value existing use. Identification of existing stream uses is part of the application process and there is some question whether UT-32599's exceptional value existing use was properly identified in the permit application. The Department and CCJ/SC say that it was not and Consol disputes that fact. Module 8 of Consol's permit application states as follows: "Fourteen streams which overlie the permit expansion area are described below and in Table 8.5. Each of these streams have an existing and designated use (Chapter 93, see Form 8.3B) as TSF." CCJ/SC Exhibit 3, p. 8-14. UT-32599 is one of the fourteen streams described in the section following this statement and listed in Table 8.5. CCJ/SC Exhibit 3, p. 8-15, 327. Our understanding of this information supports CCJ/SC's

contention that UT-32599 was not properly identified as an exceptional value stream in the permit application.

The misidentification of the EV status of UT -32599 in the permit application does not by itself warrant the grant of summary judgment in this case and even CCJ/SC do not appear to be asserting otherwise. Our understanding of their argument is that, at least in part because of the misidentification, the Department failed to perform an antidegradation analysis and that this failure was contrary to law. However, based on our review of the record, there appear to be issues of fact regarding the scope and nature of the analysis that was conducted by the Department. Further, it is not clear as a matter of law that the analysis that arguably was conducted by the Department fails to meet the requirements of the regulation. The provisions dealing with the implementation of the antidegradation analysis are found at 25 Pa. Code § 93.4c. As a general matter, the section provides that the Department will make a final determination of existing use protection for the surface water as part of the final permit or approval action. 25 Pa Code § 93.4c(a)(1)(iv). The remaining implementation section discusses the protection of High Quality or Exceptional Value Waters but specifically applies only to point source discharges, nonpoint source discharges and sewage facilities. 25 Pa. Code § 93.4c(b)-(c). The specific procedural requirements set forth in these sections therefore do not apply to the issues in this case and there are no other procedural requirements set forth in the regulations.

In the absence of a specific regulatory procedure for an antidegradation analysis in a situation that does not involve a point or nonpoint source discharge or sewage facilities, the issue becomes what type of analysis is required and what, if anything, did the Department do in this case. Our understanding of the applicable regulation, 25 Pa Code § 93.4c(a)(1)(iv), is that the Department is required to make a determination that the existing use of the stream will be

protected as part of its permit decision but that there is no particular process that must occur to satisfy that requirement. Turning to the particulars of this case, we think that there are issues of material fact regarding the information provided and the Department's determination of existing use protections for UT-32599 that prevent us from granting summary judgment on this issue.

CCJ/SC acknowledge that the Department required that Consol include UT-32599 in its pre-mining hydrologic and biologic assessment. Consol did not identify UT-32599 as an exceptional value stream but discussed the stream in its application for permit revision 180 and stated that mining-induced flow loss was not probable, noting that UT-32599 does not flow over the longwall panels covered by the permit application. What exactly the Department did with the permit application information is not entirely clear from the current record but there appears to be some deposition testimony that indicates that the Department did consider potential mine subsidence impacts to UT-32599 as part of its review of the permit application. For instance, the Manager of the California District Mining Office, Mr. Joel Koricich, testified in a deposition that "to the best of my recollection and the best of my understanding to date, we anticipated no effects from mining to either of those tributaries [UT-32599 and UT-32599A]" CCJ/SC Exhibit 7, p. 36-37. Mr. Koricich was specifically asked about the Department determination of how the use of UT-32599 would be maintained and protected:

> Q. How did the department determine that UT 32599's EV existing use would be maintained and protected?
>
> A. The same way we would have determined that other streams' uses would have been protected in that we would have evaluated the company's data and evaluated whether there would be any permanent effects to the stream uses.

Id.

In addition, Mr. Koricich testified as follows:

> Q. Did the department anticipate or did the department think that it was possible that temporary effects may happen to UT 32599 as a result of Consol's longwall mining?
>
> A. To the best of my knowledge, we believed there would be no temporary or permanent effects to those two tributaries.

CCJ Exhibit 7, p. 38.

Viewing the record in the light most favorable to the Department and Consol and resolving all doubt as to the existence of a genuine issue of material fact against CCJ/SC as we are required to do, we do not think that summary judgment is warranted on the issue of whether the Department properly evaluated UT-32599 under the requirements of the antidegradation regulations found at 25 Pa. Code § 93.4c. We think this is an issue better decided after a full hearing.

Conclusion

Summary judgment is appropriate where the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The issues raised in this case are both legally and factually complex. They do not appear to be easily resolved by a straightforward reading of the statutes and regulations or the application of existing case law. Many of the key facts are disputed between the parties. In such cases, the Board generally will not grant summary judgment believing that it is best to hold a hearing to allow the full development of the facts before determining the outcome. In the end, having reviewed the motion, the responses, the exhibits, and the well-argued briefs of the parties, we think that the Board will benefit from hearing the live testimony of the witnesses on all sides in this matter before resolving the important issues raised in this appeal. Therefore, we hold that CCJ/SC's Motion For Summary Judgment is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 6th day of June, 2016, it is hereby ordered that Appellants' Motion for Summary Judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 6, 2016

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

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

For Appellants:
Oday Salim, Esquire
Sarah E. Winner, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	**Issued: June 7, 2016**

OPINION IN SUPPORT OF ORDER GRANTING
MOTION TO AMEND NOTICE OF APPEAL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board issues an Opinion in support of a previous Order granting an appellant's motion to amend its notice of appeal. The Appellant has satisfied its burden of showing that no undue prejudice will result to the opposing parties by allowing the amendment.

O P I N I O N

This is Chester Water Authority's ("Chester Water's") appeal from the Department of Environmental Protection's (the "Department's") issuance on April 9, 2015 of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0265951 to Old Dominion Electric Cooperative ("Old Dominion") for its Wildcat Point Generating Facility, a new gas-fired power plant in Cecil County, Maryland. Old Dominion will discharge cooling tower blowdown to the Conowingo Pond portion of the Susquehanna River in Lancaster County. The pond serves as the drinking water supply for the city of Baltimore and the Appellant, Chester Water, which supplies many thousands of users in Pennsylvania and Delaware. Old Dominion's plan is to withdraw water from the Pond, after which it will be treated and then used in cooling towers where it is

expected that about 90 percent will be evaporated and about 10 percent will eventually be returned to the Pond. Chester Water's intake is located 940 feet away from Old Dominion's discharge. Chester Water's concern for maintaining acceptable water quality at its intake is the reason we have this appeal.

We previously issued two Opinions in this matter denying motions for summary judgment and partial summary judgment that had been variously filed by all three parties. The briefing was extensive on all sides. We ultimately found that there existed numerous genuine issues of disputed material fact that rendered summary judgment inappropriate. Chester Water included two arguments in its motion for summary judgment that are pertinent to our immediate discussion. First, it argued that Old Dominion's permit must be revoked because Old Dominion will not be able to comply with the permit requirement that presumably forbids any detectable discharge of trihalomethanes (THMs). Second, it argued that the Department erred by finding that standards set forth in 25 Pa. Code § 95.10 relating to the discharge of total dissolved solids (TDS) did not apply to Old Dominion's discharge. We rejected Chester Water's first argument not on the merits but because it was not included in its notice of appeal and a party may not raise an entirely new objection to the Department's action in a motion for summary judgment. We did not specifically address the second argument, although we held generally that all of Chester Water's arguments at best depended upon the resolution of disputed issues of material fact. *Chester Water Auth. v. DEP*, EHB Docket No. 2015-064-L (Opinion, May 11, 2016).

Chester Water has now moved to amend its notice of appeal to include these two arguments. Specifically, Chester Water seeks to add language to two objections already contained in its notice of appeal. Those objections, with the new language in bold, read as follows:

11. The DEP failed to provide for adequate control of the discharge of bromides and DBPs in the Permit.

> f. The DEP recognized the importance of avoiding DBPs in the drinking water supply through the imposition of monitoring requirements in the Permit for Trihalomethanes (THMs) and Haloacetic Acids (HAA5s), both carcinogenic DBPs. However, the DEP assumed, without adequate support, that DBPs will not be present in ODEC's discharge. DEP failed to calculate or include a discharge limit for these chemicals to ensure that they are not discharged and/or are not discharged at levels that pose a threat to the CWA's use of the water for a drinking water supply. **In the alternative, in the event it is determined that Section C, Part II of the Permit does limit discharges of THMs, and specifically, prohibits detectable discharges of chloroform, dichlorobromomethane, chlorodibromomethane, and bromoform, ODEC will not be able to comply with such limits and therefore DEP erred by issuing a permit to a permittee who will not be able to comply with the limits in the Permit.**

12. The Permit fails to account for potential sources of TDS (total dissolved solids) in ODEC's discharge. DEP assumed that the only relevant source of TDS was TDS present in ODEC's intake water. DEP did not adequately quantify or consider the impact of TDS introduced into the wastewater stream by ODEC's use of the water and use of water additives or treatment chemicals, or impose requirements that would prevent any TDS from being introduced. DEP's assessment of the TDS loading and concentration of ODEC's discharge is thus inaccurate and fails to protect the Conowingo Pond or CWA's drinking water supply. **DEP also failed to apply the TDS limits of 25 Pa. Code § 95.10 by erroneously assuming that TDS contributions from chemicals added by ODEC would be negligible and would be less than the TDS contributions from ambient TDS in ODEC's intake water.**

Old Dominion and the Department argue in opposition to the motion to amend that they will be prejudiced by Chester Water's late amendment. Old Dominion and the Department primarily protest the timing of the amendment, pointing out that the hearing on the merits will

begin on July 18. Old Dominion says that it will now need to have its experts address the new objections while it simultaneously prepares its prehearing memorandum and prepares for the hearing on the merits.[1] The Department concurs with Old Dominion and adds that it will be prejudiced because its expert witness will be otherwise occupied providing assistance in another matter in litigation and taking a scheduled vacation. Interestingly, although both Old Dominion and the Department complain at length about what they perceive to be Chester Water's lack of due diligence, neither asserts that they are surprised by the new arguments.

On May 19, 2016, we issued an Order granting Chester Water's motion to amend. This Opinion is issued in support of that Order.

Our rule regarding amendment of appeals provides that,

> [a]fter the 20-day period for amendment as of right, the Board, upon motion by the appellant or the complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

[1] Old Dominion devotes some time in its response contesting the merits of the objections Chester Water seeks to add through amendment:

> [T]he material [Chester Water] relies on as the basis for amending its claims regarding total dissolved solids ("TDS") are expressions of the worst-case scenario as calculated by [Old Dominion's] expert. Expert opinion regarding the worst-case TDS scenario is not a statement of the "…anticipated… [or]…expected TDS concentrations…" that will actually occur once [Wildcat] is operational. Nor is [Old Dominion's] expert opinion of the worst-case TDS in the [Wildcat] discharge proof that the standards set forth at 25 Pa. Code § 95.10 "…should be applied to the Permit."

(Old Dominion Memo at 5 (footnotes omitted).) However, we are not concerned with the merits of the objections at this point. "A motion to amend does not provide an occasion for debating the underlying merits of the objections that are the subject of the proposed amendment. The merits of the new objections are not a factor in considering whether to allow an amendment." *Borough of St. Clair v. DEP*, 2013 EHB 171, 173-74. *See also Harvilchuck v. DEP*, 2013 EHB 670, 675 (same).

25 Pa. Code § 1021.53(b). The Board's "rule, with a heavy emphasis on a determination of prejudice, was intentionally selected as a more liberal standard to replace the Board's rigid former rule that made amendment more difficult." *Harvilchuck v. DEP*, 2013 EHB 670, 673 (citing *Groce v. DEP*, 2006 EHB 289, 291).

In assessing whether the parties opposing the amendment will suffer undue prejudice, we consider such factors as (1) the time when amendment is requested relative to other developments in the litigation (including but not limited to the hearing schedule); (2) the scope and size of the amendment; (3) whether the opposing party had actual notice of the issue (e.g. whether the issue was raised in other filings); (4) the reason for the amendment; and (5) the extent to which the amendment diverges from the original appeal. *Baker v. DEP*, 2015 EHB 535, 537-38; *Harvilchuck v. DEP*, 2013 EHB 670, 673; *Rhodes v. DEP*, 2009 EHB 325, 328-29; *Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Robachele v. DEP*, 2006 EHB 373, 379-80; *Tapler v. DEP*, 2006 EHB 463, 465.

The right to amend should be liberally granted to secure determination of cases on their merits whenever possible, but not at the expense of undue prejudice to the other parties. *See Wm. Penn Parking Garage v. Pgh.*, 346 A.2d 269, 279 (Pa. 1975)(quoting *Kilian v. Allegheny Cy. Distributors*, 185 A.2d 517, 519 (Pa. 1962)). Chester Water's appeal is an important case. No less than eleven attorneys have entered their appearances on behalf of the three parties. A small army of experts appear to be ready to testify. Chester Water is seeking to protect itself directly, of course, but it is also seeking to protect the interests of its thousands of users. Old Dominion is engaged in the construction of a major new plant. We are admittedly reluctant to leave potentially important issues in a case of this magnitude off the table for procedural reasons.

A common palliative for late amendments is an order reopening discovery or otherwise postponing proceedings. However, neither the Department nor Old Dominion asked for such relief in the event amendment was allowed. Nor do we expect that we would have been particularly receptive to such a request. The continuing uncertainty created by the pendency of this appeal is not in anybody's interest.

It must be said, as Chester Water correctly points out, that some of the alleged prejudice suffered by the Department with respect to Chester Water's first argument (inability to comply with permit) is of the Department's own making. As we stated in our Opinion denying the Department's motion for partial summary judgment, the Department wrote a confusing permit that virtually begs for future interpretation problems with respect to Old Dominion's obligations regarding the discharge of THMs. It is difficult to fault Chester Water for not enunciating a claim earlier that Old Dominion will not be able to comply with its permit limits when it is somewhat of a mystery what those permit limits are.

One factor that clearly weighs against Chester Water is the amount of time before the hearing on the merits is scheduled to begin—approximately two months from the date of our Order—with the parties' prehearing memoranda preceding the hearing. We are not without sympathy to the position of Old Dominion and the Department on this point. However, the timing of a motion to amend an appeal is an important consideration, but it is not the only one. As we stated in *Robachele, Inc. v. DEP*, 2006 EHB 373, soon after our rule on amending appeals was revised to its current form:

> Our new rule regarding amendments to appeals does not establish a deadline for filing motions to amend. Late pre-hearing amendments may be entirely appropriate or not, depending upon the circumstances of each individual case. The timing of a motion is certainly not dispositive.

Robachele, 2006 EHB at 379 (citations omitted).[2]

With respect to the scope and size of Chester Water's amendments, they are not really all that great. Although they are new, they are barely new. Chester Water's concerns regarding THMs and TDS have been at the forefront of the dispute since its inception. The issue of THM formation has been litigated extensively, even if the focus has been "there should be a limit" as opposed to "discharges will exceed the limit." The underlying factual issues are generally the same. The extent of THMs and TDS in Old Dominion's discharge have already been the subject of discovery. The proposed amendments neither diverge much from the original objections nor objectively should come as a big surprise.

Old Dominion and the Department say their experts will need to go back to the drawing board to deal with the amendments. We find this assertion hard to accept. It is somewhat belied by the extensive technical discussions presented in the context of the motions for summary judgment. (*See* DEP Brief at 9-16; Old Dominion Brief at 6-7.) It appears to us that much of the legwork has already been completed preparing argument against the objections and we think the parties will be able to address them with limited additional effort in future proceedings. Chester Water's TDS objection (that the Department should have imposed the requirements of 25 Pa. Code § 95.10), which was also extensively discussed in Chester Water's summary judgment papers, is primarily legal and does not appear to require much, if any, additional factual investigation.

[2] We note that in other civil and administrative contexts, at least conceptually, the rules governing the amendment of pleadings appear to be generally lenient in terms of at what point in a proceeding an amendment can be made and the breadth of the amendment. *See* Pa.R.C.P. No. 1033 (party, by leave of court or through consent of other parties, may at any time amend pleading even if the amendment raises a new cause of action or defense); 1 Pa. Code § 35.48 (GRAPP rule generally providing for amendment up to five days before the start of a hearing).

Since the factual questions underlying Chester Water's amendments primarily relate to Old Dominion's and the Department's application and review process and involve no facts related to Chester Water's operations, there is no apparent need to obtain additional factual discovery responses from Chester Water with respect to the amendments. We see no pressing need for additional discovery in this matter as a result of the amendments.

Chester Water is required to file the first prehearing memorandum, and in fact has now done so. Old Dominion and the Department will have the opportunity to respond in about three weeks. Given Chester Water's late amendment, Old Dominion and the Department may, but we hereby hold that they are not required to, supplement their expert reports to address the impossibility and Section 95.10 arguments. The expert witnesses of Old Dominion and the Department will not be limited to testifying to the four corners of their reports to the extent that the experts' testimony addresses issues raised in Chester Water's amendments to its appeal. These considerations should reduce any preparatory prejudice Old Dominion and the Department might have otherwise suffered due to the short time before the hearing and the Department's witness's vacation.

Based upon the totality of circumstances as discussed herein, we issued our May 19, 2016 Order allowing the amendments, which is appended to this Opinion for the convenience of the reader.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 7, 2016

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

For the Commonwealth of PA, DEP:
Beth L. Shuman, Esquire
Curtis C. Sullivan, Esquire
Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellant:
Francis G.X. Pileggi, Esquire
Tara L. Lattomus, Esquire
David Rockman, Esquire
(*via electronic filing system*)

For Permittee:
Eugene Dice, Esquire
Brian Wauhop, Esquire
James Patrick Guy, Esquire
John M. Robb, Esquire
Thomas M. Wolf, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTER WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2015-064-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLD DOMINION ELECTRIC COOPERATIVE, Permittee	:	

O R D E R

AND NOW, this 19th day of May, 2016, upon consideration of the Appellant's motion to amend its appeal, and the responses thereto, it is hereby ordered that the motion to amend is **granted**, and the Appellant's notice of appeal shall be amended in accordance with Exhibit A attached to the motion. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 19, 2016

c: **For the Commonwealth of PA, DEP:**
Beth L. Shuman, Esquire
Curtis C. Sullivan, Esquire
Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellant:
Francis G.X. Pileggi, Esquire
Tara L. Lattomus, Esquire
David Rockman, Esquire
(*via electronic filing system*)

For Permittee:
Eugene Dice, Esquire
Brian Wauhop, Esquire
James Patrick Guy, Esquire
John M. Robb, Esquire
Thomas M. Wolf, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2014-140-CP-L**
v.	:	**Issued: June 9, 2016**
EQT PRODUCTION COMPANY	:	

OPINION AND ORDER ON MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to compel production of documents because it was filed too late.

O P I N I O N

EQT Production Company ("EQT") owns and operates a natural gas well facility known as the Phoenix Pad S located in Duncan Township, Tioga County. EQT constructed a 6 million gallon pit nearby which was known as the S Pit. EQT stopped adding water to the pit on May 21, 2012 when it discovered that there were holes in the liner of the pit. EQT informed the Department on May 30, 2012 that the pit was possibly leaking, and it emptied out the pit. EQT then installed groundwater monitoring wells and groundwater collection systems designed to intercept water that could have been contaminated by what could have been the leaking pit. The pit was thereafter closed and the area reclaimed.

The Department of Environmental Protection's (the "Department's") Environmental Cleanup and Brownfields Program is overseeing the cleanup of the site. EQT submitted a Site Characterization Plan to the Department pursuant to the Land Recycling and Environmental

Remediation Standards Act, 35 P.S. § 6026.101 *et seq.* ("Act 2"), four years ago in June 2012. EQT committed in the plan to engage an experienced consultant to conduct an ecological assessment. EQT retained Civil & Ecological Consultants, Inc. ("CEC") to conduct the assessment. CEC prepared at least one version of what EQT has characterized as a "draft" report. EQT never turned that report (or reports) over to the Department.

EQT also engaged JLT Laboratories, Inc. ("JLT") on or around June 15, 2012 to evaluate liner damage in the area where holes had been discovered in the bottom of the S Pit after the water and sludge had been removed. In August 2012, JLT submitted what EQT has characterized as a "draft" forensic report to EQT. EQT has not turned that report over to the Department.

The Department has filed a complaint for civil penalties asking this Board to impose a civil penalty of at least $4,532,296 against EQT. During discovery the Department asked EQT to produce CEC's and JLT's reports. With the exception of some raw data included in the CEC report, EQT has refused to produce the reports. It claims that the reports are privileged and not open to discovery because they are the reports of experts who were retained in anticipation of litigation but who are not expected to be called as witnesses at the hearing on the merits. After legitimate but unsuccessful efforts to resolve the discovery dispute, the Department has filed a motion to compel the production of the CEC and JLT reports.

The problem with the Department's motion is that it has been filed too late. The Department filed its complaint in October 2014. The Department has known about EQT's objection to the production of the CEC report for more than a year and EQT's objection to the production of the JLT report for six months. The close of discovery was over two months ago, and that was after extensions granted by the Board. The original close of discovery was May 18,

2015, which was extended to September 28, 2015, and ultimately to January 26, 2016. Dispositive motions were due in February 2016. The Department offered no explanation for its delay in filing the motion to compel.

By Order issued on September 22, 2015, we established deadlines for the final prehearing deadlines and we scheduled the hearing on the merits on dates that were agreed to by the parties. The Department's prehearing memorandum (after we granted extensions) is due on June 10. EQT's prehearing memorandum is due on July 1. The hearing will begin on July 25. Yet, without any acknowledgment of the late filing, the Department asks for unspecified extensions to allow its experts to study the CEC and JLT reports and to allow it to amend its prehearing memorandum, which would in turn require an extension of EQT's prehearing deadlines, and in all likelihood result in a postponement of the hearing. It is difficult to imagine that postponing the hearing is the Department's true objective because the documents are not critical to the Department's presentation of its case and the Department has (successfully) resisted some of EQT's multiple and vigorous attempts to stay our proceedings.

The Board will entertain motions to compel, even after the close of discovery, when (1) the motion is filed soon enough that it will not delay a hearing, and (2) where there is no undue delay in filing the motion. *Brawand v. DEP*, 2014 EHB 31, 33; *Coalition of Religious and Civic Organizations v. DEP and Pfizer Pigments*, 1990 EHB 1376, 1379. Here, the Department's motion would undoubtedly delay the hearing if we granted the relief requested, and there was an unexplained, undue delay in the filing of the motion. Perhaps something like subterfuge or unwarranted cunctation on the part of EQT might have sufficed to explain the delay, but EQT appears to have been upfront about its position regarding the reports all along. In any event, as previously mentioned, the Department has made no attempt to explain its late filing. We would

add that the reports do not appear to be of critical importance to a fair resolution of this action on the merits, such that justice compels compels their disclosure.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 9th day of June, 2016, it is hereby ordered that the Department's motion to compel discovery is **denied** as untimely.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 9, 2016

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

For the Commonwealth of PA, DEP:
Geoffrey J. Ayers, Esquire
David M. Chuprinski, Esquire
Anne Shapiro, Esquire
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
v.	:	**EHB Docket No. 2015-163-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees	:	**Issued: June 10, 2016**

OPINION AND ORDER ON PERMITTEES' MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board pursuant to Pa.R.C.P. 1035.5 identifies a key fact that exists without controversy but otherwise denies a motion for partial summary judgment.

O P I N I O N

Donald E. Longenecker and Maria J. Kawulych filed this appeal from the Department of Environmental Protection's approval of the Joint Act 537 Official Sewage Facilities Plan Update of East Earl Township and Terre Hill Borough, Lancaster County. According to the Department's approval letter, the selected alternative in the plan (Alternative #2) is for the Borough and the Township to form a joint sewer authority to construct, own and operate a wastewater collection and treatment system that will discharge to the Conestoga River. The selected alternative will serve the Borough of Terre Hill and areas of East Earl Township currently served by the Terre Hill Borough public sewer, the Village of Goodville needs area, and needs areas identified along Route 625 in East Earl Township with a new sewage treatment plant located southwest of the intersection of Route 625 (Reading Road) and the Conestoga

River in East Earl Township. The new regional sewage treatment plant will allow for the removal of the Terre Hill sewage treatment plant, currently discharging to a high quality stream, and address malfunctioning on-lot systems in East Earl Township.

The Appellants included almost 90 objections to the plan update in their notice of appeal. Among many other objections, the Appellants have several objections that argue that the update should not have been approved because it contemplates the formation of a joint sewer authority and that authority has not been formed. For example, the notice of appeal says,

> 90. There is no evidence that a joint sewer authority exists or that an intergovernmental agreement exists to form such a joint authority.
>
> 91. The Department abused its discretion in approving a plan that does not have evidence of a formal cooperative relationship or the existence of a joint authority.

(*See also*, Objections 3(D), 4, 5, 6, 7, 89, and 92.)

The Permittees have filed a motion for partial summary judgment. They point out that the joint sewer authority contemplated by the plan update has now been formed. The Weaverland Valley Authority has been formed and approved by the Department of State. They contend that all of the objections in the notice of appeal that are premised on the uncertainty of whether a joint authority will be formed should be dismissed. The Department concurs with the Permittees' motion.

The Appellants in response do not dispute that the joint sewer authority now exists. However, they say there is a lot more to their appeal than that one issue, which we certainly understand. Although their response is not entirely clear, they seem to contend that, even if it is certain now that an authority has been formed, that is not good enough; it should have been certain *at the time that the plan was approved* that a joint authority would be formed. We are not

aware of any requirement for such certainty. *See Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L (Adjudication, Feb. 29, 2016) (plan need only have a reasonable likelihood of succeeding). Putting that aside, given this Board's *de novo* review, whether formation of the authority was historically certain at some point back in time seems to be of only academic interest at this point.

The Appellants go on to argue, we think, that the mere formation of the authority is not enough to justify approval of the update because the authority is something of an inchoate paper tiger that does not satisfy Act 537's "institutional requirements." They say it is unclear whether or how the authority will actually function. They say there is no evidence of the ability of "the authority to jointly implement and maintain planning options, have an infrastructure to establish fees, raise capital, negotiate agreements and take enforcement actions," and it is unclear how costs will be split, capacity will be allocated, or offices and general matters involving a municipal relationship will be handled.

We do not need to get into any of that in order to address the Permittees' motion for partial summary judgment. The Permittees' motion is limited to the Appellants' claim that a joint authority does not exist. Clearly, that factual claim is no longer valid. The existence of a joint authority is now beyond dispute. The long-term validity, significance, or meaning of that existence is not at issue at this point.

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a (incorporating Pa.R.C.P. Nos. 1035.1 – 1035.5); *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Opinion, June 6, 2016); *Sludge Free UMBT v. DEP*, 2015 EHB 469, 470-471. Pa.R.C.P. 1035.5 reads as follows:

> If judgment is denied or is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court when considering the motion may, if practicable, ascertain from the pleadings, the evidence and the parties which material facts relevant to the motion exist without controversy and which are actually controverted. It shall thereupon make an order specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

Here, the existence of a joint authority as contemplated by the plan update is without controversy. The Authority's existence shall be deemed established as we move forward with this appeal. Some of the objections in the notice of appeal that are the subject of the Permittees' motion for partial summary judgment mention the existence of a joint authority but also include other objections. For example, Objection 92 complains about the absence of an extant authority but also objects to the lack of documentation regarding the site of the new plant. Rather than parse through each objection, and because the relevance and significance of the authority's role remain open to debate, we will not actually dismiss all of the objections that refer to the lack of an authority in their entirety.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
	:	
v.	:	**EHB Docket No. 2015-163-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees PROTECTION	:	

O R D E R

AND NOW, this 10th day of June, 2016, in consideration of the Permittees' motion for partial summary judgment and the responses thereto, it is hereby ordered pursuant to Pa.R.C.P. 1035.5 that the existence of the joint authority contemplated by the Permittees' update is deemed established.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 10, 2016

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

For the Commonwealth of PA, DEP:
Nels J. Taber, Esquire
Janna E. Williams, Esquire
(via electronic filing system)

For Appellants:
Jill E. Nagy, Esquire
(via electronic filing system)

For Permittees:
Martin R. Siegel, Esquire
Sarah L. Doyle, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND J. SLATER, III	:	
	:	
v.	:	**EHB Docket No. 2015-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID WOOD, Permittee	:	**Issued: June 10, 2016**

OPINION AND ORDER
DISMISSING APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of Appellant, Raymond J. Slater, III, where Appellant has failed to file a pre-hearing memorandum and subsequently failed to respond to a Rule to Show Cause.

O P I N I O N

On July 13, 2015, Raymond J. Slater, III appealed the Pennsylvania Department of Environmental Protection's ("DEP" or "the Department") issuance of State Water Obstruction and Encroachment Permit No. E20-596 to David Wood. The deadlines for discovery and the filing of dispositive motions stated in Pre-hearing Order No. 1 passed without any interaction between the Board and the parties. After the deadline for dispositive motions, the Board held a conference call with the parties and a hearing schedule was agreed upon. Pre-hearing Order No. 2 was subsequently issued and pursuant to Pre-hearing Order No. 2, the hearing for this appeal was scheduled for July 20-21, 2016. Accordingly, Mr. Slater was required to file a pre-hearing memorandum on or before May 24, 2016. Mr. Slater failed to file a pre-hearing memorandum.

On May 25, 2016, the Board issued a Rule to Show Cause requiring him to either file a pre-hearing memorandum or to show cause why his appeal should not be dismissed. The Rule was returnable on or before June 3, 2016. As of the date of this opinion, Mr. Slater has failed to file a pre-hearing memorandum and has failed to respond to the Board's Rule to Show Cause.

The Board's rules authorize sanctions upon parties for failing to abide by Board orders and/or the Board's rules of practice and procedure. 25 Pa. Code § 1021.161. These sanctions include dismissal of an appeal. The Board has repeatedly held that where a party has evidenced a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *See Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862.

In this case, Mr. Slater has failed to comply with two separate Board orders. First, Mr. Slater did not file a pre-hearing memorandum as required by Pre-hearing Order No. 2. Because of Mr. Slater's failure to file a pre-hearing memorandum, the Board issued a Rule to Show Cause affording Mr. Slater more time to either file a pre-hearing memorandum or, in the alternative, to explain to the Board why his appeal should not be dismissed. Mr. Slater's pre-hearing memorandum was due on or before May 24, 2016 and the Rule to Show Cause was returnable on or before June 3, 2016. The Rule to Show Cause thus afforded Mr. Slater an additional 10 days beyond the original due date to file his pre-hearing memorandum.

As of the date of this opinion, Mr. Slater has failed to file a pre-hearing memorandum and he has also failed to file any response to the Rule to Show Cause explaining why his appeal should not be dismissed. The repeated lack of any response from Mr. Slater suggests that he is simply disinterested in moving forward with his appeal. Further, in accordance with 25 Pa. Code § 1021.161, the dismissal of this appeal is an appropriate sanction for failure to comply with two

Board orders. Based on the foregoing, the Board dismisses this appeal and issues the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND J. SLATER, III	:	
	:	
v.	:	**EHB Docket No. 2015-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID WOOD, Permittee	:	

O R D E R

AND NOW, this 10th day of June, 2016, following Appellant's apparent lack of interest in proceeding and repeated failure to comply with Board orders, and pursuant to 25 Pa. Code § 1021.161, it is hereby ordered that the appeal in the above-referenced matter is terminated. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 10, 2016

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

For the Commonwealth of PA, DEP:
Angela N. Erde, Esquire
Katherine Knickelbein, Esquire
(via electronic filing system)

For Appellant:
John C. Swick, Esquire
(via electronic filing system)

For Permittee:
Harry Faber White, II, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 16, 2016**

OPINION AND ORDER ON
PAUL LYNCH INVESTMENTS, INC.'S ABILITY
TO PREPAY CIVIL PENALTY OR POST APPEAL BOND

By Steven C. Beckman, Judge

Synopsis

Following a hearing on the Appellant's inability to prepay a $9,000 civil penalty assessed under the Storage Tank Act or post an appeal bond in the required amount, the Board finds that the Appellant failed to demonstrate that it is unable to prepay the penalty or post an appeal bond as required by statute and Board rules. Appellant is ordered to prepay the $9,000 civil penalty or post the appeal bond in the required amount.

O P I N I O N

Introduction

On December 30, 2015, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP") assessed a civil penalty of $9,000 against Paul Lynch Investments, Inc. ("Lynch Investments")[1] under Section 1307 of the Storage Tank Act. 35 P.S. § 6021.1307. Paul

[1] Paul Lynch Investments, Inc. is a Pennsylvania corporation that owns and leases out real estate and is engaged in property development. It was represented in this matter by Paul Lynch, Esquire. Mr. Lynch is the president of the company, and his two daughters are the owners and sole shareholders of the company. While Mr. Lynch does not have an ownership interest in the company, he testified that he is primarily in

Lynch ("Mr. Lynch"), on behalf of Lynch Investments, appealed the Assessment of Civil Penalty to the Board on January 27, 2016. Lynch Investments failed to either prepay the civil penalty or post an appeal bond as required under the Storage Tank Act and Board rules. 35 P.S. § 6021.1307; 25 Pa. Code § 1021.51(g); 25 Pa. Code § 1021.54a. Instead, the Notice of Appeal included a cover page that advised the Board that Lynch Investments did not have the economic ability to prepay the civil penalty or post a bond in this appeal. On February 25, 2016, the Department filed a Motion to Dismiss, citing Lynch Investments' failure to prepay the civil penalty, post a bond, or submit a verified statement that it was unable to pay. Lynch Investments did not file a response to the Department's Motion. In consideration of the claim on the cover page to the Notice of Appeal, the Board issued an order on March 30, 2016 requiring Lynch Investments to file a detailed verified statement supporting its claim that it lacked the ability to prepay the penalty or post the bond and to provide supporting financial documentation. On April 26, 2016, in response to the Board's March 30 order, Lynch Investments filed a document entitled "Appellant's Claim that it Lacks the Ability to Either Prepay the Civil Penalty or Post the Required Bond." The response sets forth Lynch Investments' argument that due to business issues, there was a decline in Appellant's cash flow and profitability that made it impossible to prepay the civil penalty or post a bond. Contrary to the Board's order, the response contained no financial documentation to support Lynch Investments' claims.

Despite Lynch Investments' failure to respond to the Department's Motion to Dismiss, and its subsequent lack of full compliance with the March 30 order, the Board scheduled a hearing on the issue of Lynch Investments' inability to prepay the civil penalty or post an appeal bond for June 2, 2016. In addition to scheduling the hearing, the Board once again required

---

charge of the day-to-day operations and financial management of the company. (Hearing Transcript ("T.") 9, 22-23).

Lynch Investments to provide the Department with all documentation or evidentiary materials it intended to use to support its claim, along with the names of potential hearing witnesses.

Lynch Investments filed a verified statement on May 17, 2016 asserting that it had provided the Department with copies of its 2013 and 2014 tax returns[2] and "[c]opies of all billing statements for outstanding notes and mortgages reflecting the current balance of said debt." The verified statement further averred that "[t]he appellant does not have in its possession any of the other documents that the Board has ordered to be turned over to the Department of Environmental Protection." On May 18, 2016, the Board issued an order requiring the parties to, in addition to exchanging their proposed witness lists and lists of documentation or evidentiary material intended to be introduced as exhibits at hearing, file said lists on or before May 26, 2016. The Department filed its lists on May 26 and Lynch Investments filed its lists on May 27. The parties participated in a pre-hearing conference call with the Board on May 27, 2016 and the hearing proceeded as scheduled on June 2, 2016.

Standard

When an appellant asserts an inability to prepay a civil penalty or post an appeal bond, the Board is to hold an evidentiary hearing on that question. *See Paul Lynch Investments, Inc. v. DEP*, 2011 EHB 8, 9; *see also Carl L. Kresge & Sons, Inc. v. DEP*, 2001 EHB 511, 515 (citing *Pilawa v. DEP*, 689 A.2d 141 (Pa. Cmwlth. 1997)); *Twelve Vein Coal v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989). The burden lies with the Appellant to prove that it is unable to prepay the civil penalty or post an appeal bond in the amount of the civil penalty. *See* 25 Pa. Code § 1021.54a(a); *see also Lynch*, 2011 EHB at 9-10; *Kresge*, 2001 EHB at 515; *Hrivnak Motor Company v. DEP*, 1999 EHB 437, 441; *Heston S. Swartley Transportation Co., Inc. v. DEP*,

[2] The verified statement averred that the 2015 tax return was "on extension."

1999 EHB 88, 89; *Goetz v. DEP*, 1998 EHB 955, 964-65. The Appellant's burden in such cases is considerable. As we have previously stated, in order to satisfy this burden, the Appellant must:

> Produce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant's assets and liabilities. In the absence of hard evidence, the Legislature's objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification.

Hrivnak, 1999 EHB at 441 (citing *Swartley*, 1999 EHB at 89).

The Board has previously listed the types of evidentiary materials necessary to support a claim of an inability to prepay, including:

1. Recent financial statements;
2. Income tax returns;
3. Information regarding accounts and notes receivable;
4. Information regarding marketable securities owned by appellant;
5. Information regarding interests appellant owns in closely held corporations or partnerships;
6. Information regarding intangible property owned by appellants;
7. Information regarding vehicles owned by appellant;
8. Information regarding real estate owned by appellant;
9. Information regarding oil, gas, or mineral rights owned by appellant;
10. Information regarding recent loan applications filed by appellant;
11. Information regarding insurance policies naming appellant as the insured or beneficiary; and
12. Information regarding property appellant recently sold for value or transferred as a gift.

Lynch, 2011 EHB at 10 (citing *Kresge*, 2001 EHB at 516). A finding of an inability to prepay a civil penalty or post an appeal bond will only be made where making the prepayment or obtaining an appeal bond would result in undue financial hardship. *Id.* (citing *Hrivnak*, 1999 EHB at 442). An undue financial hardship occurs where prepaying the civil penalty or obtaining an appeal bond would interfere with the appellant's ordinary and necessary expenses,

considering the appellant's current and reasonably anticipated needs. *Id*. at 10-11. It is not sufficient to show that it would be inconvenient or difficult to prepay the civil penalty or obtain an appeal bond. *Id*. at 14. Instead, the Appellant must clearly demonstrate that it does not have *any* means available to it that would not cause undue hardship. *Id.*

Discussion

The Storage Tank Act requires anyone who wishes to appeal a civil penalty under the Act to either prepay the civil penalty in full or post a bond in the amount of the penalty. 35 P.S. § 6021.1307. Additionally, Board Rule 25 Pa. Code § 1021.54a(a) provides that:

> When an appeal is from the assessment of a civil penalty for which the statute requires an appellant to prepay the penalty or post a bond with the Department, the appellant shall submit to the Office of Chief Counsel of the Department a check in the amount of the penalty or an appropriate bond securing payment of the penalty or a verified statement that the appellant is unable to pay.

Lynch Investments attached a letter to the Notice of Appeal stating: "Please be advised that Paul Lynch Investments, Inc. does not have the economic ability to pay or post a bond in the appeal being filed before to [sic] Board on this date as referenced above." Since Lynch Investments did not prepay the civil penalty or post a bond, we treated this letter as an initial attempt to provide a verified statement under 25 Pa. Code § 1021.54a.

The Department filed its Motion to Dismiss on the grounds that Lynch Investments had not prepaid the civil penalty, posted a bond, or provided an adequate verified statement. Lynch Investments did not file a response to the Department's Motion. At that stage in the proceedings, the Board could have properly dismissed the appeal on the grounds that an appellant's failure to respond to a Motion to Dismiss functionally deems all properly pleaded and supported facts in the motion to be true. 25 Pa. Code § 1021.91(f); *KH Real Estate, LLC*, 2012 EHB 319, 321. Rather than dismiss Lynch Investments' appeal at that time, the Board issued the March 30 order

affording Lynch Investments another opportunity to file a detailed verified statement. The March 30 order required Lynch Investments to submit a detailed verified statement regarding its inability to prepay the civil penalty or obtain an appeal bond complete with "financial records and information to support its claim. In particular, the statement, records and information shall demonstrate that Appellant's financial position has changed since the prior Opinion and Order of the Board, dated January 7, 2011 (EHB Docket No. 2010-151-M), such that Appellant is now unable to pre-pay the civil penalty or post the required bond." [3]

Lynch Investments responded to the Board's order by filing a document without any supporting information that asserted that the business had cash flow issues. The lack of supporting documentation was in clear violation of the March 30 order, but the Board *again* permitted Lynch Investments an opportunity to support its claim by issuing subsequent orders scheduling a hearing on Lynch Investments' inability to pay claim and again, ordering it to provide documentation to support that claim. Finally, on May 17, 2016, Lynch Investments provided the Board with a verification that it had provided the Department with copies of its 2013 and 2014 tax returns and "[c]opies of all billing statements for outstanding notes and mortgages reflecting the current balance of said debt." The May 17 filing did mention that the 2015 tax return was "on extension" and therefore unavailable; however, no documentation was provided to support that assertion.

Lynch Investments' verified statement, as well as the testimony and various exhibits submitted at hearing, fall well short of carrying the heavy burden of proof that it is unable to

[3] This is not the first time Lynch Investments has appeared before the Board on a claim of inability to pay a civil penalty. *See Paul Lynch Investments, Inc. v. DEP*, 2011 EHB 8. In that case, the Board found that Lynch Investments was able to prepay a $5,000 civil penalty due in large part to the large amount of equity in real estate possessed by the company.

prepay the civil penalty or post the bond as required by the Storage Tank Act. Mr. Lynch was the sole witness at the hearing and the following exhibits were admitted:

1. 2008 U.S. Income Tax Return and Schedules for Paul Lynch Investments, Inc.;
2. 2009 U.S. Income Tax Return and Schedules for Paul Lynch Investments, Inc.;
3. 2013 U.S. Income Tax Return and Schedules for Paul Lynch Investments, Inc.;
4. 2014 U.S. Income Tax Return and Schedules for Paul Lynch Investments, Inc.;
5. Tax Claims against properties owned by Paul Lynch Investments, Inc.;
6. List of Unpaid Real Estate Taxes as of 2014;
7. First National Bank checking account statements for an account owned by Paul Lynch Investments, Inc. from October 2015 – March 2016;
8. List of 38 Properties owned by Paul Lynch Investments, Inc.;
9. List of Commercial Real Estate Mortgages outstanding for Paul Lynch Investments, Inc.;
10. C & I Adjustable Loan Billing Statement dated April 21, 2016.

Mr. Lynch's direct testimony concerned the significant debts of the corporation as well as the cash flow and financing issues it was facing. Mr. Lynch stated that Lynch Investments had two ongoing projects that demanded "every dollar of cash that we have." (T. 11). He also noted that the company had put a lot of properties up for sale in an attempt to generate cash to reduce debt, but that the corporation had not been able to sell any properties recently. He also testified on direct that the 2013 and 2014 corporate tax returns showed losses of $177,000 and $182,000 respectively (T. 8; Exhibit ("Ex.") 1; Ex. 2). On cross-examination, the Department elicited testimony regarding the income of the company as well as its assets and expenses. Mr. Lynch testified on cross that the value of the property owned by Lynch Investments was between $7.5

and $10 million (T. 36) and the real estate mortgages on that property total just over $2 million. (T. 35; Ex. 10).

Overall, it was difficult for the Board to get an accurate picture of the current financial situation of Lynch Investments. Lynch Investments appears to be part of a series of interrelated corporations, LLCs and trusts, all of which are essentially run by Mr. Lynch and are either owned by his two daughters, Jennifer and Jessica, or in the case of the trusts, they are the beneficiaries. While there appear to be some cash flow issues, significant sums of money are routinely moved in and out of and between the various entities by Mr. Lynch to cover both business and personal expenses.[4] The most recent tax information was from tax year 2014 and although Mr. Lynch testified that the 2015 tax return for the company would look similar to past years, we have no documents that support that statement. Lynch Investments provided no recent financial statements and the documents regarding the real estate assets and mortgages consist of hand-typed lists rather than formal business documents. Given that the burden to prove the inability to pay rests with Lynch Investments, the lack of financial documentation was not helpful to its case.

Turning our attention to the documents that were admitted as exhibits and the associated testimony, we find that they are not sufficient to support Lynch Investments' claim of an inability to pay. Four tax returns for the years 2008, 2009, 2013 and 2014 were entered as exhibits and discussed in the testimony. The tax returns showed ordinary business losses between $70,785 and $182,774 on gross receipts ranging from a low of $367,775 in 2008 to a high of $465,539 in 2014. The testimony focused on the Line 19 deductions for 2013 and 2014 that contributed to the overall business losses. Among the business expenses claimed in those

[4] Personal expenses that appear to have been paid from Lynch Investments' checking account in recent months include charges at Macy's and JC Penney, car lease payments for both daughters and monthly residential rent in New York City for Jennifer Lynch.

years were Steelers and Pirates Tickets ($19,452 in 2013; $10,913 in 2014); Food ($11,711 in 2013; $9,636 in 2014) and Vehicle Leases ($12,641 in 2014) even though Mr. Lynch testified that the corporation had no employees and no vehicles during these tax years. The vehicle payments were for personal vehicles for the company owners, his daughters. (T. 47-48). We did not receive any testimony regarding these particular expenses during 2015 or the current year so we do not know whether these or other similar expenses continue in the current financial situation, but that lack of knowledge cuts against the burden of proof that rests with Lynch Investments. We are left to speculate whether these expenses continue and if so, what is the justification for them as against prepaying the $9,000 civil penalty. We can find none.

Lynch Investments provided the bank account statements for the first time at the hearing in response to a subpoena for documents issued by the Department.[5] The statements, dated October 2015 through March 2016, showed that the credits and debits for the account consistently resulted in tens of thousands of dollars being moved in and out of the account on a monthly basis, often in excess of $100,000. The statements also show that at the end of both February 2016 and March 2016, just two and three months after the $9,000 civil penalty in this case was assessed, the balance on the account was more than $9,000. Moreover, the average ledger balance for all the months provided was never less than $2,000. Finally, the statements and testimony thereon made clear that considerable amounts of money are being drawn from the account each month for the shareholders' personal expenses, sometimes thousands of dollars. (T. 46-47, 78). There were also tens of thousands of dollars of checks and other transfers each month that were unlabeled beyond the check number or the account number to which the money was being transferred. The Board is left to speculate as to the nature of these transfers, and

[5] These bank statements should have been provided in response to the earlier Board Orders requiring financial documents be provided to support the claim of an inability to prepay the civil penalty or post an appeal bond. *See* 25 Pa. Code 1021.55(a).

whether or not they constituted ordinary and necessary business expenses. Overall, our review of the information available on these bank statements does not convince us that Lynch Investments is unable to prepay the relatively small civil penalty in this case.

Lynch Investments also submitted several documents evidencing tax claims against its properties, often totaling several thousand dollars per parcel. While it is relevant that Lynch Investments owes a considerable amount of money in back property taxes, in light of the other evidence in this case, that fact alone is not sufficient to establish that Lynch Investments is unable to pay the $9,000 civil penalty. Lynch Investments also provided the Department with a list of the outstanding mortgages totaling over $2 million on the company's properties, and the Department entered that list as an exhibit. While Mr. Lynch testified as to the outstanding mortgages, this testimony was not enough to support Lynch Investments' inability to prepay claim particularly in light of his estimate that the properties owned by the company were worth between $7.5 and $10 million. In order to meet the heavy burden of proving an inability to prepay a civil penalty or obtain an appeal bond, the Appellant must provide the Board with *verified* statements and hard evidence to support its claim. The only verified, hard evidence Mr. Lynch produced were the bank statements, the 2013 and 2014 tax returns, and a single loan billing statement that shows a credit limit of $100,000 with a principal balance of $90,503.82. Mr. Lynch did not offer a clear reason why the available credit on this account was not available to prepay the $9,000 civil penalty.

While the evidence presented may exhibit a lean cash flow business model, the overall picture presented falls far short of convincing the Board that Lynch Investments is unable to pay a $9,000 civil penalty. Mr. Lynch testified that paying the $9,000 civil penalty would "be a burden" and it "would just add to our problem if we had to find $9,000." (T. 15). The

evidentiary burden on Lynch Investments in this case was heavy, and the case presented simply does not amount to the type of undue financial hardship where the Board deems it proper to make a finding of an inability to prepay a civil penalty or post an appeal bond, and it is far less dire a financial situation than in cases where the Board has made such a finding in the past. *See Hrivnak*, 1999 EHB at 445 (where the Appellant was assessed a $163,000 civil penalty, the Board was "not convinced that the appellants could generate $163,000 in thirty days even if they turned over every penny they have and fire-sold all of their other assets"). Mr. Lynch himself testified that "[a]ll we're paying is what we mandatorily have to," and we find that the $9,000 civil penalty that is the subject of this appeal falls directly into that category. (T. 64). As the Board has previously stated, allowing parties to avoid the statutory requirement of prepayment without proving that the party truly lacks the ability to prepay the penalty would too easily thwart the Legislature's objective. Our review of all of the filings, along with the hearing testimony and exhibits, suggest a number of possible avenues for Lynch Investments to come up with the money to prepay the civil penalty. While doing so may be inconvenient and/or a burden, the amount of money that is involved is relatively small and we do not think that it will be an undue financial hardship for Lynch Investments to comply with the statute and prepay the $9,000 civil penalty.

Accordingly, we issue the following order requiring Lynch Investments to prepay the civil penalty or post an appeal bond.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of June, 2016, it is hereby ordered that Paul Lynch Investments, Inc. shall prepay the civil penalty or post an appeal bond in accordance with 35 P.S. § 6021.1307 and 25 Pa. Code § 1021.54a by **July 18, 2016**, or this appeal will be dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 16, 2016

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

For the Commonwealth of PA, DEP:
Hope C. Campbell, Esquire
Douglas G. Moorhead, Esquire
(via electronic filing system)

For Appellant:
Paul Lynch, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2015-168-CP-C**
JACKSON GEOTHERMAL HVAC AND DRILLING, LLC AND GARTH C. JACKSON	:	**Issued: June 23, 2016**

OPINION AND ORDER ON
MOTION FOR DEFAULT JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion for default judgment where the defendants have not filed an answer to the Department's complaint and have not responded to the motion for default judgment. The Board assesses a civil penalty in the amount requested in the Department's complaint.

O P I N I O N

On November 5, 2015, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Jackson Geothermal HVAC and Drilling and Garth C. Jackson (hereinafter collectively "Jackson Geothermal") in the amount of $14,270, plus an unspecified amount for the alleged economic benefit Jackson Geothermal derived from its noncompliance. The Department alleges in its complaint that Jackson Geothermal failed to implement and maintain erosion and sedimentation controls and failed to comply with regulatory well drilling protocols for non-oil and gas wells, resulting in sediment pollution to an unnamed tributary to Black Ditch Creek. The Department tells us that Jackson Geothermal's violations arose from the partial installation of a residential geothermal heating and cooling system at a

property located in Levittown, Bucks County. The complaint contains five counts that allege violations of various provisions of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and Chapters 91 and 102 of the Department's regulations. The Department seeks civil penalties pursuant to Section 605(a) of the Clean Streams Law. 35 P.S. § 691.605(a).

To date, Jackson Geothermal has not filed an answer to the complaint. On May 18, 2016, having received no answer from Jackson Geothermal, and having received nothing from the Department since the filing of the complaint, we ordered the parties to submit status reports on or before June 10, 2016. The Department submitted a status report the following day accompanied by a motion for default judgment. Jackson Geothermal did not file a status report, and it has not responded to the motion for default judgment.

Our Rules provide that answers to complaints shall be filed with the Board within 30 days of service of the complaint. 25 Pa. Code § 1021.74(a). Where a defendant fails to file an answer to a complaint, the defendant is deemed to be in default. 25 Pa. Code § 1021.74(d). A plaintiff may then file a motion for default judgment pursuant to 25 Pa Code § 1021.76a, and the Board is authorized to assess civil penalties in the amount of the plaintiff's claim upon entry of default judgment, 25 Pa. Code § 1021.76a(d). *DEP v. Turnbaugh*, 2014 EHB 124, 125; *DEP v. Comp*, 2012 EHB 343, 344; *DEP v. White Oak Reserve Ltd. P'ship*, 2012 EHB 75, 76-77; *DEP v. Danfelt*, 2011 EHB 839, 842; *DEP v. Wolf*, 2010 EHB 611, 613-15.

The Department's motion for default judgment contains an affidavit from Thomas Buterbaugh averring that he hand delivered the complaint to Garth Jackson on November 16, 2015. (Motion, Ex. 1.) This is apparently in addition to the service executed by certified mail as reflected on the certificate of service attached to the complaint.[1] Accordingly, Jackson

[1] Per the Board's Rules, complaints are to be served on defendants personally or by certified or registered mail. 25 Pa. Code § 1021.71(b).

Geothermal's answer to the compliant was due on December 16, 2015 at the latest. The Department's motion contains a ten-day notice of intent to file for default judgment, as required by our rules, 25 Pa. Code 1021.76a(b), which was served on Jackson Geothermal via overnight mail and regular mail on February 5, 2016.[2] (Motion, Ex. 2.) Jackson Geothermal never responded to the ten-day notice, has not responded to the motion for default judgment, and it has not otherwise participated in these proceedings. Despite having had numerous opportunities, Jackson Geothermal has chosen not to defend itself against the compliant. We are left with no choice but to enter default judgment against the Defendants.

Accordingly, we enter the Order that follows.

[2] The Department does not explain the three month lapse between service of the ten-day notice and the filing of the motion for default judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2015-168-CP-C**
JACKSON GEOTHERMAL HVAC AND DRILLING, LLC AND GARTH C. JACKSON	:	

O R D E R

AND NOW, this 23rd day of June, 2016, it is hereby ordered that the Department's motion for default judgment is **granted**. The Board assesses a civil penalty against the Defendants in the amount of $14,270.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 23, 2016

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

For the Commonwealth of PA, DEP:
Gina M. Thomas, Esquire
Anderson L. Hartzell, Esquire
(*via electronic filing system*)

For Defendants, *Pro Se*:
Jackson Geothermal HVAC and Drilling, LLC and
Garth Jackson
608 Nolan Avenue
Morrisville, PA 19067

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ARLENE KALINOWSKI and JOSEPH KALINOWSKI	:	
v.	:	**EHB Docket No. 2016-032-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WESTMORELAND LAND, LLC, Permittee	:	**Issued: June 28, 2016**

OPINION AND ORDER ON
JOINT MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where a statute or regulation creates a mechanism for requesting review of a prior decision of the Department of Environmental Protection, the Department's response to that request is an appealable action and is not barred by administrative finality. Although the Board is not bound by the *Nanty-Glo* rule that prevents the granting of a dispositive motion based solely on affidavits, nor are we prohibited from applying it. Where there is a difference of opinion on whether information submitted with a request for modification or revocation is "new information," we prefer to hear testimony on this matter, rather than simply relying on affidavits.

O P I N I O N

Background

According to the documents filed by the parties, the facts of this case are as follows: The permittee, Westmoreland Land, LLC (Westmoreland) and its affiliate, Tenaska Pennsylvania Partners, LLC (Tenaska), are planning to build an approximately 930 megawatt natural gas-

fueled electrical generation plant in South Huntingdon Township, Westmoreland County. Tenaska applied for, and on May 7, 2013 received from the Westmoreland Conservation District, authorization for coverage under the NPDES General Permit for the discharge of stormwater associated with construction activities. Notice of the authorization was published in the June 1, 2013 issue of the *Pennsylvania Bulletin* at 43 Pa. B. 3039. The Appellants, Arlene Kalinowski and Joseph Kalinowski, did not appeal the approval of the General Permit.

On November 16, 2015, the Westmoreland Conservation District approved a minor modification to the General Permit. On December 16, 2015, the Appellants' counsel sent a letter to the Regional Director of the Southwest Regional Office of the Pennsylvania Department of Environmental Protection (Department), requesting the Department to modify or revoke the General Permit. On December 17, 2015, the Appellants' counsel sent the Regional Director a second letter enclosing two letters from the Appellants' consultant as support for modifying or revoking the permit.

By letter dated February 4, 2016, the Department notified the Appellants that a modification or revocation was not warranted, stating in relevant part as follows:

> Tenaska's approval of coverage under [the General Permit] was administratively final on or about July 1, 2013. The coverage was authorized following notice, robust public comment and participation, and consideration of the concerns that were raised. No new environmental concerns have been raised by your correspondence.

(Notice of Appeal and First Amended Notice of Appeal, Exhibit 1)

On March 4, 2016, the Appellants filed a notice of appeal with the Pennsylvania Environmental Hearing Board (Board) challenging the Department's denial of their request to modify or revoke the permit, and on March 23, 2016, they filed an amended notice of appeal

alleging violations of the Clean Streams Law and Article I, Section 27 of the Pennsylvania Constitution.

The Department and Westmoreland's Joint Motion to Dismiss

On April 11, 2016 the Department and Westmoreland filed a joint motion to dismiss the appeal, asserting that the Department's letter of February 4, 2016 is not an appealable action because it is imposes no new obligations on the Appellants and any attack on the General Permit is barred by administrative finality.

Section 4(a) of the Environmental Hearing Board Act gives the Board jurisdiction over "orders, permits, licenses or decisions of the [D]epartment." The Board's Rules of Practice and Procedure refer to these collectively as "actions" and define them as follows:

> 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 Section 1021.2(a); *Highridge Water Authority v. DEP*, 1999 EHB 1, 4.

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

The Department and Westmoreland argue, "The Board has repeatedly held that a letter from the Department that merely reaffirms or refuses to reconsider an earlier decision does not constitute an appealable action," and cite several Board decisions in support, including *Pickford v. DEP*, 2008 EHB 168, 170, *aff'd*, 967 A.2d 414 (Pa. Cmwlth. 2008), and *Franklin Twp.*

Municipal Sanitary Authority v. DEP, 1996 EHB 942. In *Pickford*, the Department responded by letter to a complaint from the appellant in which she asked the Department to withdraw permits for two drinking water facilities. The Department's letter declined to act on the appellant's request and reaffirmed its earlier decision. The Board found that the Department's letter was not an appealable action, stating "to hold otherwise would mean that any third party could appeal any Department action at any time by simply asking the Department to reconsider its earlier decision." 2008 EHB at 171. The Board went on to state that to allow the appeal to proceed would "completely eviscerate any semblance of administrative finality." *Id.* Likewise, *Franklin Township*, involved an appeal of a Department letter that merely reaffirmed and refused to consider a decision set forth in an earlier letter.

The Appellants argue, however, that this matter differs from *Pickford* and *Franklin Township* in that they are not simply "any third party…asking the Department to reconsider its earlier decision." They point to the Department's regulations on NPDES permits and specifically to 25 Pa. Code section 92a.72, entitled "Modification or revocation and reissuance of permits." Section 92a.72 incorporates by reference federal regulation 40 C.F.R. section 122.62(a) which provides for the modification or revocation and reissuance of a permit for cause when a request is received under 40 C.F.R. section 124.5. That section states that "[p]ermits (other than PSD permits) may be modified, revoked and reissued, or terminated either *at the request of any interested person* (including the permittee) or upon the Director's initiative." (emphasis added) "Cause" for modification or revocation includes the receipt of new information that was not available at the time the permit was issued.

The Appellants argue that when "[t]here is a law that expressly defines when the Department may exercise its authority, and provides persons like the Appellants with an

opportunity after a permitting decision has been made to request that the Department revisit that decision as a result of information that was not fully available in the application period," the Department's denial of that request is appealable and is not barred by administrative finality.

We agree with the Appellants. As we held in *Love v. DEP*, 2010 EHB 523, "administrative finality does not necessarily act as a complete bar where a statute creates a special process for re-examining a prior decision upon request if a party utilizes appropriate procedures." *Id*. at 529, *citing Perano v. DEP*, 2010 EHB 439. Where there is a statutory or regulatory mechanism, as there is here, for requesting that a prior decision of the Department be reviewed, the Department's response to that request is an appealable action. Whether the Department grants or denies the request, it is an action of the Department reviewable by the Board.

The Department and Westmoreland argue that this is true only where the Department is required to act. We find that when there is a formal procedure set forth by statute or regulation for requesting the Department to review a prior action, the Department's response to such a request is appealable. As we held in *Love*, "[b]oth discretionary and mandatory actions of the Department are reviewable by this Board." 2010 EHB at 527. Here, Section 92a.72 of the Department's regulations, through the incorporation of 40 C.F.R. sections 122.62(a) and 124.5, provides a regulatory mechanism for interested parties to request a modification, revocation and reissuance or termination of a permit, and the Department's action on that request, whether a grant or denial, is a reviewable act and is not barred by administrative finality.

Westmoreland and the Department acknowledge that the NPDES regulations provide the Department with the authority to modify, revoke or reissue a permit, but only when the requester is able to demonstrate that new information is available and the new information justifies a

different outcome. They assert that the "new information" put forth by the Appellants is nothing more than their consultant's opinion disagreeing with the determination made at the time the permit was approved. They contend that the information is not new and was available at the time of the permit issuance.

The Department's argument raises a question of fact, which cannot be resolved in the context of a motion to dismiss. The Board has the authority to grant a motion to dismiss only where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Steward v. DEP*, EHB Docket No. 2015-137-L (Opinion and Order issued April 5, 2016), *slip op*. at 2, *citing Boinovych v. DEP*, 2015 EHB 566, 566; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. When evaluating the merits of a motion to dismiss, we must view it in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915.

Westmoreland and the Department have provided the affidavits of three professional engineers, representing the Department, Westmoreland Conservation District, and a private consulting firm doing work for Westmoreland, in support of their position that no new information has been provided by the Appellants. Each of the affidavits discusses a location known as "Point of Interest 5" pertaining to the Tenaska power plant project and whether that location has changed. The location of Point of Interest 5 is a basis for the Appellant's request that the Department modify or revoke Westmoreland's permit. Each of the affidavits states that the location has not changed. Westmoreland and the Department argue that since the Appellants have put forth no new information in support of their request, they have not satisfied the criteria

set forth in 40 C.F.R. sections 122.62(a) and 124.5 for submitting a request for modification or revocation to the Department.

As we held in *Veolia ES Greentree Landfill, LLC v. DEP*, 2007 EHB 163:

> There is a difference of opinion on whether the Board may apply the rule in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), which prevents the entry of summary judgment where the moving party relies solely on affidavits or deposition testimony to establish the absence of a genuine issue of material fact. The Commonwealth Court's decision in *Snyder v. Department of Environmental Resources,* 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed,* 632 A.2d 308 (Pa. 1993), has been interpreted as saying that the *Nanty-Glo* rule does not apply to proceedings before the Board. *See, e.g., Solomon v. DEP,* 2000 EHB 227, 272-73 (Coleman, J., dissenting); *Gambler v. DEP,* 1997 EHB 914, 918; *Envyrobale v. DER,* 1994 EHB 1842, 1845. *But see, Solomon v. DEP,* 2000 EHB 227 (Krancer, C.J., dissenting) (expressing the opinion that *Snyder* does not affirmatively prohibit the Board from applying *Nanty-Glo.*).

Id. at 171-72, n. 1.[1] We are reluctant to make a ruling on this factual issue without hearing testimony from the parties. *Id*. at 171, citing *Angela Cres Trust of June 25, 1998 v. DEP,* 2007 EHB 111, 114 (finding that the Board would greatly benefit from the taking of testimony on certain issues raised in a motion for summary judgment).

Therefore, we deny the joint motion to dismiss filed by the Department and Westmoreland and allow this appeal to proceed.

[1] Although this case involves a motion to dismiss, rather than a summary judgment motion, we find that the same analysis applies.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ARLENE KALINOWSKI and JOSEPH KALINOWSKI	:	
	:	
v.	:	**EHB Docket No. 2016-032-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WESTMORELAND LAND, LLC, Permittee	:	

O R D E R

AND NOW, this 28th day of June, 2016, it is hereby ordered that the joint motion to dismiss filed by the Department and Westmoreland is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: June 28, 2016

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

For the Commonwealth of PA, DEP:
Gail Guenther, Esquire
(via electronic filing system)

For Appellant:
Oday Salim, Esquire
(via electronic filing system)

For Permittee:
Pamela Goodwin, Esquire
Caroline Tongarm, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-170-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 29, 2016**
	:	

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an appellant's motion for summary judgment where the Department has not disputed any of the appellant's facts and has advanced an incorrect interpretation of statutory and regulatory provisions governing reportable releases under the Storage Tank and Spill Prevention Act. The appellant's permit application is remanded for further consideration.

O P I N I O N

Merck Sharp & Dohme Corp. ("Merck") is a global healthcare company with a place of business in West Point, Montgomery County. The West Point Facility serves as Merck's principal location for pharmaceutical and vaccine research and development, and for the manufacturing of vaccines and other biologics.[1] In accordance with permits issued by the Pennsylvania Department of Environmental Protection (the "Department"), Merck constructed and currently operates multiple aboveground storage tanks ("ASTs") at its West Point Facility. Merck has constructed secondary containment structures around its ASTs at the West Point

[1] Our factual statement is based on Merck's Statement of Undisputed Material Facts in support of its motion for summary judgment. The Department has not disputed any of these facts, and indeed, failed to submit a response to Merck's statement as required by our rules. 25 Pa. Code § 1021.94a(g)(2).

Facility. Secondary containment structures are sized to hold the entire contents of the tank with additional freeboard to accommodate precipitation and/or fire water flow as applicable.

On February 12, 2015, Merck submitted an application to the Department for a Site Specific Installation Permit ("SSIP") authorizing Merck to construct a new 400,000 gallon aboveground storage tank to store diesel fuel at the West Point Facility. Merck's permit application included a proposal to install the tank in an existing secondary containment structure. The capacity of the secondary containment structure is designed to hold the entire contents of the storage tank system, 400,000 gallons, with additional freeboard to accommodate precipitation and/or fire water flow as applicable. Any potential spill from the proposed tank system would be captured by containment because all portions of the tank system are within the containment structure.

Merck's permit application also included a proposed spill prevention response plan ("SPRP"), as required by the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101 – 6021.2104, ("Storage Tank Act") and 25 Pa. Code Chapter 245. Merck's spill prevention response plan and Preparedness, Prevention and Contingency ("PPC") plan are combined in Merck's Environmental Emergency Response Plan ("EERP"). Merck's EERP includes a decision chart (Merck, Cavett Affidavit Ex. 3), which is attached to this Opinion as Appendix A. The Storage Tank Spill Evaluation subsection of Section 4.2 of Merck's EERP applies "when an accident or spill occurs on the portion of the West Point Facility containing storage tank systems."

Merck's decision tree starts with a determination of whether there has been a release from a storage tank system covered by the Storage Tank Act (referred to in Merck's plan as an Act 32 tank system). If not, other parts of the EERP not at issue here apply. If there has been such a

release, Merck personnel must determine whether the regulated substance was released to surface or groundwater, bedrock, soil, or sediment ("environmental media").[2] If so, the release must be reported to the Department. If not, e.g. if the release is fully contained in an intact containment structure, Merck personnel must decide whether the release poses an immediate threat of contamination to environmental media. If the release does not pose an immediate threat of contamination, it does not need to be reported. If the release does pose an immediate threat, it must be reported to the Department unless, even though it presumably poses an immediate threat, the release is under the control of Merck, it is completely contained and cleaned up within 24 hours, and it is (a) to an interstitial space of a double-wall tank, (b) a release of less than 25 gallons of petroleum to an aboveground surface, or (c) a release of a hazardous substance to an aboveground surface that is less than its reportable quantity (RQ) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§ 9601 – 9675, ("CERCLA"), and 40 CFR Part 302 (relating to designation, quantities, and notification)—what Merck terms as reporting exemptions.

The Department was not satisfied with two aspects of Merck's emergency response plan, so it denied Merck's tank permit. First, the Department believes that *any* release that occurs within a storage tank facility, even if it is not from the tank system itself, can be reportable, subject to the just mentioned exemptions (e.g. interstitial space of a double-walled tank, less than 25 gallons of petroleum, less than CERCLA reportable quantity).[3] Thus, if there is a release

[2] The Chapter 245 regulations define "environmental media" to also include air, but releases to the air are not particularly relevant to our immediate discussion. *See* 25 Pa. Code § 245.1.

[3] The Department's denial letter says that Merck did not revise a portion of its plan as previously requested by the Department. Merck's plan on this point reads as follows:

> **3. Accidents of Spills Occurring at a Storage Tank Facility but not from the Storage Tank System.**

from a tanker truck or paint is spilled inside the containment structure, it is reportable, or to be more precise, it is not excused from reporting simply because it did not come from the tank system. Secondly, the Department's view is that Merck has no business trying to determine whether spills that are not released to environmental media (e.g. fully contained in the containment structure) pose "an immediate threat of contamination." Instead, all releases must be reported unless the three just-mentioned exemptions apply. In the Department's words, "[t]he definition of 'reportable release' describes the three release situations that are not an 'immediate threat' and do not have to be reported provided the stated criteria are met. All other releases are an 'immediate threat' and are required to be reported to DEP."

Merck has filed a motion for summary judgment. It argues that the Department's statutory and regulatory interpretations are wrong. The Department opposes the motion. Although the motion was ripe for determination on March 8, 2016, the parties jointly asked us to refrain from ruling on the motion pending settlement discussions. We were recently informed that those discussions were unsuccessful.

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94a; *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion, Jun. 6, 2016). The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code §

> Reportable accidents or spills may also occur on the portions of the facility containing storage tank systems even though the spill is not from the tank system itself. For such accidents or spills, follow the protocols for evaluation of notice requirements under the Clean Streams Law and Solid Waste Management Act discussed elsewhere in this EERP.

The Department proposed the following change:

> **3. Accidents of Spills Occurring outside of a containment structure or facility.**
> For such accidents or spills, follow the protocols and notice requirements under the Clean Streams Law and Solid Waste Management Act.

1021.94a(a). There are two ways to obtain summary judgment on the substance of the motion.[4] First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). Second, summary judgment may be available

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

Pa.R.C.P. No. 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. The Board does not often grant summary judgment based on the second scenario, and it is not applicable here because Merck bears the burden of proof, but it is available.

Although the *standard* for granting summary judgment is set forth in the Pennsylvania Rules of Civil Procedure, the procedures that must be followed when seeking or opposing summary judgment are set forth in the Board's own rules. Merck complied with those rules; the Department did not. Merck submitted a statement of undisputed facts of less than five pages with citations to the record establishing the facts alleged, as well as an affidavit and the evidentiary materials relied upon. *See* 25 Pa. Code § 1021.94a(b) and (d).

A party opposing a motion, in this case the Department, is required to respond to the movant's statement of undisputed facts. Specifically, our rules require the following:

> A response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the movant's

[4] Summary judgment may also be granted if an adverse party does not respond at all to a motion. 25 Pa. Code §1021.94a(l).

> statement. Any response must include citation to the portion of the record controverting a material fact. The citation must identify the document and specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on demonstrating existence of a genuine issue as to the fact disputed. An opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue. Each fact shall be stated in separately numbered paragraphs and contain citations to the motion record. The response to the statement of undisputed material facts may not exceed five pages in length unless leave of the Board is granted.

25 Pa. Code § 1021.94a(g)(2). The Department did not file such a statement. The Department did not otherwise indicate that it disputes Merck's facts. Therefore, we take as undisputed all of the facts alleged by Merck.

Rather than disputing Merck's version of the facts, the Department says it needs time to develop new facts. It is true that it is ordinarily not an efficient or effective use of resources to pursue summary judgement before the close of discovery. *Milco Industries v. DEP*, 2001 EHB 995, 996. However, this case may prove to be the exception to the rule because the Department has not shown us that any new facts are necessary to resolve this appeal. The Department did not submit any affidavits or evidentiary materials in support of its response in opposition as required by 25 Pa. Code § 1021.94a(i). The Department does not adequately explain why any new facts need to be developed to resolve the statutory and regulatory interpretation issue before us, and in fact, concedes more than once that those facts are not really material. (See, e.g., DEP Brief at 2 (Department says Merck's interpretation fails a plain reading of the regulations); DEP Brief at 5 (Department says that there are open issues regarding Merck's analysis of an immediate threat but the Department disagrees that there is a need for any spill analysis); DEP Brief at 7 (Department argues facts are needed regarding Merck's proposed metric for measuring risk yet disagrees that any metric for measuring risk is necessary).) Thus, while arguing that the

effectiveness of Merck's containment system is not relevant to the appeal, the Department nevertheless contends that it is "a subject that needs to be examined further." In our view, facts about Merck's containment system are entirely immaterial to the Department's denial of Merck's permit application.

The Department says it needs to give us more background on the storage tank program. Putting aside that it could have done so if necessary in its response to the motion, the Department fails to explain why more "background" would be helpful. As discussed more fully below, this case involves the application of unambiguous statutory and regulatory provisions. Where a regulation is ambiguous, i.e., capable of being reasonably interpreted at least two different ways, we ordinarily must defer to the Department's interpretation. *Tire Jockey Serv. v. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1186 (Pa. 2007). The reasonableness of the Department's interpretation does not come into play where, as here, its interpretation is contrary to the plain language of the statute or regulation. *Id.*; *Eagle Envtl., L.P. v. Dep't of Envtl. Prot.*, 833 A.2d 805, 809 (Pa. Cmwlth. 2003); *Tri-State Transfer Co. v. Dep't of Envtl. Prot.*, 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999); *New Hanover Twp. v. DEP*, 2014 EHB 834, 881-82; *Seneca Landfill, Inc. v. DEP*, 2007 EHB 381, 388-89.

The Department says that facts are needed to show how the Department interprets the regulations. However, the Department's interpretation is quite clear and it is embodied in the denial letter. Again, if the Department's interpretation were somehow different than that which is clearly expressed in the denial letter, it could have submitted an affidavit or other evidence with its response, but it chose not to do so. The Department does not explain why it needs the opportunity to obtain discovery from Merck when the denial letter is based on the Department's own statutory and regulatory interpretation.

Finally, the Department says it needs to explore Merck's implementation of its reporting obligations, as opposed to what those obligations are. Specifically, it says it needs discovery and a hearing to lay out what steps Merck intends to take to determine whether a particular release is "from a storage tank" and/or whether it poses an "immediate threat." The problem with this argument is that the Department did not disapprove Merck's plan because these steps were not adequately or properly described. The Department's position is that *any* spill within a containment structure is covered, so it makes no difference whether the spill came "from a tank." *No* investigation is appropriate regarding whether a contained spill "poses an immediate threat," so the details of Merck's proposed investigation are irrelevant in the Department's view. The Department has taken an absolutist position in its denial letter, which renders Merck's other determinations meaningless. The Department cannot at once argue that the "immediate threat" language has no significance and then argue that how Merck defines immediate threat needs to be explored.

To the extent the Department is hinting or suggesting that the reasons for its denial might have changed, i.e., that the plan was denied because it is inconsistent with the law *and* it is inadequately detailed, we reject such an approach. Pointedly, the Department never details why Merck's plan is inadequately detailed, but putting that aside, the Department's summary judgment argument that there is not enough detail in Merck's plan is entirely inconsistent with its stated denial reason that all spills that do not fall under the three enumerated exceptions in the definition of reportable release are deemed immediate threats. Similarly, the Department's complaint that Merck fails to adequately detail how it will determine whether a release originated "from the tank" made its debut in its response to the summary judgment motion. The Department did not deny Merck's permit for that reason; it denied it because it believes that

reportable releases include any spills that occur within a storage tank facility's containment area, whether or not those spills originate from the storage tank, and even if, for example, a maintenance worker spills paint within the containment area. The two reasons are inconsistent.

Still further, it is unfair for the Department to deny Merck's permit for one reason, and then come up with wholly new justifications for its action in defense of a summary judgment motion. Regulated entities should not be forced to try to engage in a game of whack-a-mole to contend with the Department's previously unarticulated justifications as they arise, particularly when those justifications are at odds with the prior ones. Had the Department disapproved of the level of detail Merck provided or Merck's description of how it would assess a threat, the Department should have said so.

Thus, we agree with Merck that the Department is simply trying to create factual issues where none really exist. There are no disputed or missing material facts that stand in the way of our resolution of the legal issue presented in this appeal.

This case is all about what it means to be a "reportable release" from (or at least associated with) an aboveground storage tank. Under the storage tank program, owners and operators of storage tanks or storage tank facilities have a basic duty to report qualifying releases. 35 P.S. § 6021.904(a) and (e); 25 Pa. Code § 245.305(a) and (h). The first defect in Merck's plan according to the Department is that Merck is not entitled to determine whether a contained release poses an "immediate threat"; Merck must report *all* contained releases unless the three specified exceptions apply.

A "reportable release" is

> [a] quantity or an unknown quantity of regulated substance released to or posing an immediate threat to surface water, groundwater, bedrock, soil or sediment.

25 Pa. Code § 245.1. It is immediately apparent that a release is not reportable unless it either goes into or onto environmental media or poses an immediate threat of doing so. So far, Merck's plan appears to be entirely consistent with the regulatory definition of a reportable release. The regulatory definition goes on to provide:

> The term does not include the following, if the owner or operator has control over the release, the release is completely contained and, within 24 hours of the release, the total volume of the release is recovered or removed in the corrective action:
>
> (i) A release to the interstitial space of a double walled aboveground or underground storage tank.
>
> (ii) A release of petroleum to an aboveground surface that is less than 25 gallons.
>
> (iii) A release of a hazardous substance to an aboveground surface that is less than its reportable quantity under [CERCLA] and 40 CFR Part 302 (relating to designation, reportable quantities, and notification).

25 Pa. Code § 245.1. The Department's view is that these three conditional exceptions are the *only* releases that are not reportable. However, the regulation does not say that, and the Department's reading renders the first sentence of the regulation meaningless surplusage. In fact, if anything, the Department's reading would contradict the definition by requiring reporting of spills that neither enter the environmental media nor pose an immediate threat of doing so. Further, the second and third exceptions, by using the term "aboveground surface," clearly apply to both spills to environmental media and containment. (The first exception covers a scenario where the spill never reaches environmental media or containment.) Therefore, contrary to the Department's reading, the exceptions are not intended to delimit the scenarios of spills occurring within containment that do not need to be reported. Instead, the exceptions provide three nonexclusive examples of what is not considered a reportable release, irrespective of the threat to environmental media.

This case might have been closer had the regulatory definition of "reportable release" been the only thing we had to work with. However, something cannot be a "reportable release" unless it is first a "release." The Department's unsupported contention that a "reportable release" is not limited to "releases" is simply incorrect. Importantly, a "release" is defined in the Storage Tank Act, while "reportable release" is defined only in the regulations. The regulatory definition must necessarily follow from the statutory definition. A "release" is defined in the Act as

> [a]ny spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into surface waters and groundwaters of this Commonwealth or soils or subsurface soils in an amount equal to or greater than the reportable released quantity determined under section 102 of [CERCLA], and regulations promulgated thereunder, or an amount equal to or greater than a discharge as defined in section 311 of the Federal Water Pollution Control Act (62 Stat. 1155, 33 U.S.C. § 1321) and regulations promulgated thereunder. The term shall also include spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into a containment structure or facility that poses an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater.

35 P.S. § 6021.103. *See also* 25 Pa. Code § 245.1. The definition of "release" is clear and unambiguous. There is no "release" (and therefore, no reportable release) unless the spill is from a storage tank into environmental media or "into a containment structure or facility that poses an immediate threat of contamination of" environmental media. Under the definitions of both "release" and "reportable release," it is clear that fully contained spills that pose no immediate threat need not be reported. Merck's language in its plan tracks the statutory and regulatory language on this point quite well.[5]

[5] Merck's plan actually appears to go beyond the requirements by providing that *all* releases to environmental media must be reported, even if the reporting exemptions would otherwise exclude reporting. The way Merck's chart is set up, the exemptions only are considered if there is no release to environmental media, but there is an immediate threat. (See Appendix A.) (See also Merck's plan

The Department does not like the idea that Merck gets to decide in the first instance whether a spill poses an immediate threat. The Department says that its interpretation—reporting all releases whether or not they are from a tank and whether or not they pose an immediate threat—provides the regulated community with a simple reporting directive, and that it does not want tank owners spending valuable time parsing reporting obligations. This is a policy argument that the Department is certainly entitled to present to the Environmental Quality Board. If the Department believes that releases that do not enter the environment or pose an immediate threat of doing so should nevertheless be reported, it can ask the EQB to revise the regulations accordingly, if it thinks that such a course of action would be consistent with the Storage Tank Act, but this Board may not disregard statutes and regulations as they are currently written. *Hudson v. DEP*, 2015 EHB 719, 730.

The second defect in Merck's plan according to the Department is that Merck's reporting obligation under the Storage Tank Act only applies to releases "from" the tank. The Department's view is that *any* spill inside containment must be reported. Preliminarily, two aspects of Merck's plan regarding this issue are not in dispute. First, spills that are not from the tank and/or that originate outside of the tank's containment structure may still need to be reported under Merck's EERP under other authority, including the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.2104, even if they do not need to be reported via the procedures outlined in the EERP for spills from the tank. The Department did not deny the permit based on those spill reporting procedures. Second, Merck's reporting plan covers spills from its "storage tank system," not just spills from the tank itself. A storage tank system is defined as:

---

narrative: "Under Merck's protocols, you must report all releases from a storage tank system to environmental media even if regulatory exceptions might apply.")

> An underground or aboveground storage tank, associated underground or aboveground piping directly serving that storage tank, and one or more of the following which are directly associated with that storage tank: (i) Ancillary equipment. (ii) Foundation. (iii) Containment structure or facility. (iv) Corrosion protection system. (v) Release detection system. (vi) Spill and overfill protection system.

25 Pa. Code § 245.1. Thus, a spill from ancillary piping would be covered. We note in light of these two preliminary points that the universe of spills in contention appears to be exceedingly small and hardly worth fighting about, perhaps covering, e.g., spills of paint by maintenance workers or a spill directly from a delivery truck inside containment.

With those caveats in mind, we agree that Merck has put forth the only reasonable interpretation of the statutory and regulatory provisions. As quoted above, Section 103 of the Storage Tank Act, 35 P.S. § 6021.103, which defines a release, twice says that it covers any spills "from a storage tank." *See also* 35 P.S. § 6021.904(e) ("Releases from storage tanks"); 25 Pa. Code § 245.302 (regarding scope of corrective action subchapter) ("This subchapter applies to releases of regulated substances *from storage tanks* regulated under the act.") (emphasis added). It makes perfect sense that the Storage Tank Act would only relate to spills from tanks, not any spill that happens to be in the vicinity of tanks.

Accordingly, for the reasons set forth herein, we conclude that the Department erred in denying Merck's application because the denial was premised on an inadequate plan relating to release reporting.[6] Merck's plan is compliant with respect to reporting releases associated with its tank system. We, therefore, issue the Order that follows.

[6] This appeal is only concerned with the duty to report releases. The Department has not questioned Merck's spill prevention measures or how it intends to contain and otherwise address releases once they occur, whether they need to be reported to the Department or not.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-170-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of June, 2016, it is hereby ordered that the Appellant's motion for summary judgment is **granted**. The Appellant's permit application is remanded to the Department for further consideration in light of this Board's determination that the application may not be denied based upon Merck's description of reportable releases in its spill prevention response plan.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 29, 2016

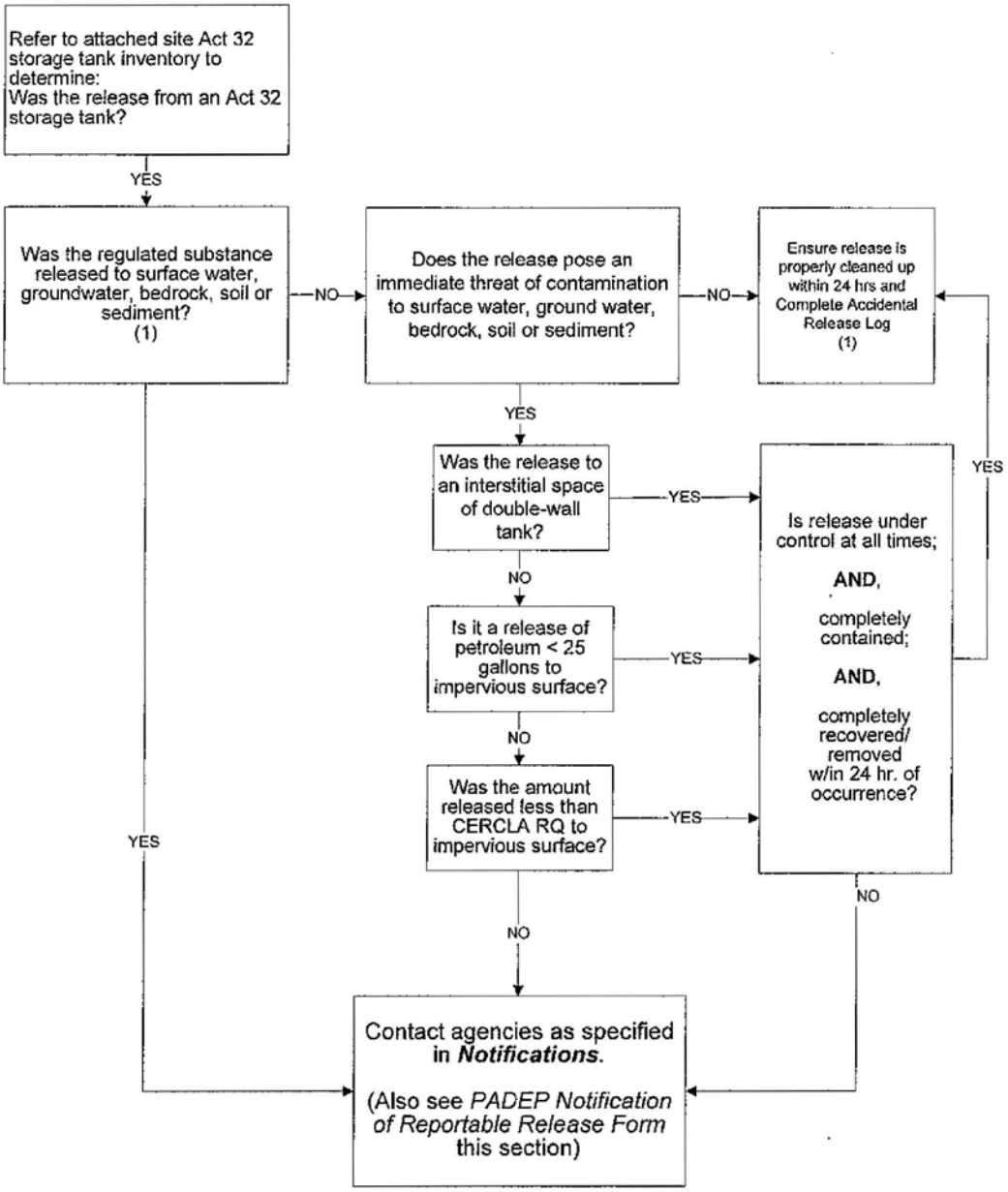
c: DEP, General Law Division:
Attention: Maria Tolentino
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Robert J. Schena, Esquire
(*via electronic filing system*)

For Appellant:
Kenneth J. Warren, Esquire
Alison Lecker, Esquire
(*via electronic filing system*)

Appendix A

RELEASE FROM ACT 32 STORAGE TANK SYSTEM



(1) If impacts are later discovered, notifications to applicable agencies (245.305(e)) may be required. Contact the Storage Tank COE.

Flowchart Storage Tanks vsd
Last Revised: 4/3/2015

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH W. SOKOL	:	
	:	
v.	:	**EHB Docket No. 2016-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROSEBUD MINING COMPANY, Permittee	:	**Issued: June 30, 2016**

OPINION AND ORDER ON APPELLANT'S
MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board grants Appellant's Motion for Leave to Amend Notice of Appeal where no new claims are raised and no undue prejudice will occur as a result of the Board allowing Appellant to amend his Notice of Appeal.

O P I N I O N

On February 19, 2016, the Board received a hand-written letter from Joseph W. Sokol ("Mr. Sokol") purporting to appeal a decision made by Jeffery H. Thomas of the Pennsylvania Department of Environmental Protection ("DEP" or "the Department"). In that hand-written letter, Mr. Sokol raised concerns regarding water loss and water quality (specifically mentioning an increase in iron levels), all of which he claimed were the result of mining conducted by Rosebud Mining Company ("Rosebud"). The initial letter did not include a telephone number, a copy of the Department action being appealed, information regarding the date that Mr. Sokol received notice of the Department action or proof of service on any of the required parties, so the Board ordered Mr. Sokol to provide the required information. After a series of attempts, Mr.

Sokol perfected his appeal on March 28, 2016. As part of his effort to perfect his appeal, Mr. Sokol filed a copy of a letter from Jeffery H. Thomas of the Department dated January 19, 2016 that Mr. Sokol stated he had received on January 23, 2016. Throughout his filings to perfect his appeal, Mr. Sokol repeated his concerns with issues of water loss and water quality.

On April 26, 2016, *pro bono* counsel entered an appearance on behalf of Mr. Sokol, and on June 8, 2016, counsel for Mr. Sokol filed the Motion for Leave to Amend Notice of Appeal ("Motion to Amend") that is the subject of this opinion. The Motion to Amend included a copy of a proposed amended Notice of Appeal that presumably will be filed if the Motion is granted. On June 9, 2016, the Department filed a letter with the Board confirming that it did not oppose the amendment to the Notice of Appeal. On June 23, 2016, Rosebud, the permittee, filed a response to the Motion to Amend stating that it objected to Mr. Sokol's request.

Upon motion by an appellant, the Board may grant leave to amend an appeal beyond the 20-day period for amendment as of right if no undue prejudice will result to the opposing parties. 25 Pa. Code § 1021.53(b). The rule, in conjunction with Board jurisprudence, is intended to establish a liberal standard for allowing amendments of appeals. *See Henry v. DEP*, 2012 EHB 324, 325 (citing *Groce v. DEP*, 2006 EHB 289, 291). The Board has discretion to allow the amendment of a notice of appeal regardless of when a motion to amend is submitted so long as no undue prejudice will result to opposing parties and the moving party is not seeking to extend the Board's jurisdiction. *Id.* (citing *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, 379). In assessing whether prejudice will result, the Board considers various factors including the timing of the amendment request relative to other developments in the litigation, the scope and size of the amendment, whether the opposing party had actual notice of the issue, the reason for the

amendment and the extent to which the amendment diverges from the original appeal. *Rhodes v. DEP*, 2009 EHB 325, 328-329.

We have reviewed all of the filings in this matter and, based on that review, the Board finds that it is appropriate to grant Mr. Sokol leave to amend his Notice of Appeal. We do not believe that granting the requested motion will cause undue prejudice to the opposing parties. The Department did not object to the proposed amendment so clearly it does not contend that it will suffer undue prejudice. Rosebud's main objection is that the amended Notice of Appeal expands the size and scope of the appeal[1]. We disagree. Mr. Sokol's proposed amended Notice of Appeal appears to simply be an attempt to take his original Notice of Appeal that was filed *pro se* and refine it in a manner that is more consistent with Notices of Appeal filed by counsel. We do not read the amended Notice of Appeal as adding any claims beyond the claims that were already raised in his original Notice of Appeal. As such, the proposed amended Notice of Appeal is not an attempt to extend the Board's jurisdiction and does not diverge significantly from the original Notice of Appeal.[2] Instead, the proposed amendment serves to frame Mr. Sokol's claims with correlating legal citations and present the already-existing claims in a more straightforward manner that will benefit all parties and the Board. Furthermore, since we find

[1] Rosebud also argues that the Motion to Amend should be dismissed because it fails to conform with the Board Rule found at 25 Pa. Code § 1021.53(c) that requires these types of motions be supported with affidavits. We do not condone parties failing to comply with our rules. However, given the liberal standard the Board applies to requests to amend, and because we do not see what purpose affidavits would serve in this matter, and in light of the fact that Rosebud offers no argument that it is somehow harmed by the lack of affidavits, we will not dismiss it on that basis. We do caution that parties should carefully review our rules and ensure that their filings comply with our requirements or they risk dismissal.

[2] While we are granting Mr. Sokol's motion to amend his Notice of Appeal, our decision to grant this motion should not be interpreted as the Board's asserting that it has jurisdiction over the claims in the amended Notice of Appeal or approval of the merits of any of Mr. Sokol's claims. We take no position on those issues at this time.

that the proposed amendment does not raise any new claims, the Department and Rosebud clearly have sufficient notice of the issues in this appeal and cannot claim prejudice on that basis.

The other main issue that we need to consider in determining whether there is undue prejudice if we grant Mr. Sokol's Motion to Amend is the timing of that request. This case is in the early stages of the litigation. The Board's Pre-Hearing Order No. 1 that sets the initial schedule was issued on March 28, 2016. The Motion to Amend was filed approximately two and a half months later and about a month and a half after pro-bono counsel entered an appearance for Mr. Sokol. The pre-hearing and hearing schedule has not been set and any hearing is likely many months away at this point. The case is still in the initial six-month discovery period and that period is routinely extended for good cause and we can do so in this case if it becomes necessary. We find that in light of the current status of the litigation, granting Mr. Sokol's request will not cause undue prejudice to any of the parties. In conclusion, given the liberal standard for amending appeals and the general lack of prejudice associated with granting this particular request, we can see no reason why we should not grant Mr. Sokol's Motion to Amend.

For the foregoing reasons, we issue the following order granting Appellant's Motion for Leave to Amend Notice of Appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH W. SOKOL	:	
	:	
v.	:	**EHB Docket No. 2016-025-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROSEBUD MINING COMPANY, Permittee	:	

O R D E R

AND NOW, this 30th day of June, 2015, it is hereby ordered that Appellant's Motion for Leave to Amend Notice of Appeal is **granted**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 30, 2016

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

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

For Appellant:
Emily A. Collins, Esquire
James Yskamp, Esquire
(via electronic filing system)

For Permittee:
Nathaniel C. Parker, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ORENCO SYSTEMS, INC., ELJEN CORPORATION, PREMIER TECH AQUA, AND ANUA INTERNATIONAL, LLC	:	
v.	:	**EHB Docket No. 2016-007-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORWECO, INC., Permittee	:	**Issued: July 6, 2016**

OPINION AND ORDER
ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Joint Motion to Dismiss filed by Norweco and the Department in this third-party appeal. The Board rejects their challenge to the Appellants' standing at this preliminary stage of the appeal because a motion to dismiss is not an appropriate vehicle for raising such claims. The Board also declines to grant their motion to dismiss asserting that the Department action under appeal, the approval of Norweco's system and the listing on the Department's website, is not a final appealable action. At this preliminary stage of litigation, the Board is not able to evaluate or decide whether the challenged action is a final appealable action.

O P I N I O N

The above captioned appeal was filed by Orenco Systems, Inc., Eljen Corporation, Premier Tech Aqua and Anua International, LLC ("Appellants") challenging a Department decision to list an onlot alternative technology of Norweco, Inc. ("Norweco") as an approved alternative onlot sewage disposal technology. Norweco and the Department filed a Joint Motion to Dismiss in which they identified two reasons to grant the Joint Motion. First, they asserted

that the Appellants lack standing to challenge the Department's decision because the Appellants are "merely economic competitors" of Norweco and economic competitors lack standing to challenge Department decisions where they only allege competitive disadvantage or harm to their economic interests. Second, Norweco and the Department assert that the Board lacks jurisdiction over the listing decision because the decision is not a final action of the Department that is appealable to the Board. They assert that the listing does not affect a person's rights, privileges or immunity, duties, liabilities or obligations, and therefore the Board lacks jurisdiction for the appeal under 35 P.S. § 7514(c) and 25 Pa. code § 1021.2(a).

The Appellants filed a Response to the Joint Motion to Dismiss in which they disagreed with both arguments in the Joint Motion. On the issue of lack of standing, the Appellants assert that a motion to dismiss is not the proper vehicle to challenge an appellant's standing. According to the Appellants, issues about standing cannot be resolved at the initial pleading stage of an appeal in the context of a motion to dismiss. On the issue of the nature of the Department's listing action, the Appellants asserted that it was a final action affecting their rights, privileges and immunities and therefore the Board has jurisdiction over a challenge to the listing under 35 P.S. § 7514(c).

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Applying this standard to the facts of the

appeal, the Board finds that Norweco and the Department are not entitled to judgment as a matter of law for the reasons set forth below.

First, the Board will address the issue of whether it is appropriate to decide the challenge to the Appellants' standing at this preliminary stage of the litigation in the context of a motion to dismiss. The record before the Board consists solely of the Appellants' Notice of Appeal ("NOA"). According to the Appellants' Response no discovery has been conducted and the only facts of record are those in the NOA. Norweco and the Department counter that the Board has all of the necessary facts to decide that the Appellants lack standing as mere economic competitors of Norweco. The Board disagrees and declines to consider the merits of the standing challenge in the context of a motion to dismiss for the reasons set forth below.

The Board has previously discussed whether a motion to dismiss is the proper vehicle to raise a standing challenge. *Robert B. Mayer v. DEP*, 2015 EHB 400, 401. In the single Judge opinion, Judge Labuskes described the issue and decided:

> 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 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.

Id. The Appellants in this Appeal want the Board to disregard the fact that Appellants filed a motion to dismiss, which is not the proper vehicle to raise a standing challenge, and to consider the merits of its standing claim. For the reasons set forth in *Robert B. Mayer*, the Board is not in a position to address the challenge to Appellants' standing at this time.[1]

The jurisdictional issue that Norweco and the Department make is more difficult to resolve for several reasons. Under the case law, the Board is able to consider facts beyond those stated in the NOA to address jurisdiction issues. *Hendryx* 2011 EHB at 129 citing *Flex Dam Preservation Ass'n*, 2000 EHB 409, 421 n.7. The Board is therefore able to look beyond the facts alleged in a notice of appeal to address jurisdictional concerns in the context of a motion to dismiss.[2] Norweco and the Department have not, however, identified any facts beyond those in the NOA that support their jurisdictional challenge.

In addition, the Department's action under appeal is its decision to approve and list a product of Norweco's on its website. The product the Department listed is Norweco's Singulair

[1] The Board has routinely considered the merits of a challenge to an appellant's standing in the context of a motion for summary judgment. *See, e.g., Mathews International Corp. v. DEP*, 2011 EHB 402, 404. Under the Board Rules governing motions for summary judgment, there are procedural and substantive requirements, beyond those for motions to dismiss, that better enable the Board to identify and resolve disputes between the parties. 25 Pa. Code § 1021.94a; *Robert B. Mayer*, 2015 EHB at 402 *citing Hendryx* 2011 EHB at 130. These additional requirements enable the Board to better address standing challenges in the context of motion for summary judgment.

[2] The typical jurisdictional issue that is addressed in the context of a motion to dismiss is a question of timeliness of the appeal. The Board lacks jurisdiction if the appeal is not filed in timely manner, and sometimes facts beyond those listed in the notice of appeal are necessary to evaluate whether the appeal is timely. *See, e.g., Hendryx* 2011 EHB at 130-132.

system, which is an alternative on-lot sewage disposal system. ("A-OLDS"). Pre-approved A-OLDS systems are listed on a Department website on a particular web page for listing pre-approved on-lot alternative technologies. Norweco asserts that the website listing, which directs no action by any entity, is not an action that affects a person's personal or property rights, privileges, immunities, duties, liabilities, or obligations and is therefore not appealable to the Board.

According to Norweco and the Department, the listing of the Singulair system will still require the issuance of a permit by a Sewage Enforcement Officer ("SEO") before the listed system is used at a particular site. This permit decision is not a Department decision, and an appeal of this permit decision is appealable to a local agency and not to the Environmental Hearing Board. 35 P.S. § 750.16(a). Thus, according to Norweco and the Department, the approval and listing of the Singulair system is not a final appealable action of the Department.

The Appellants disagree and assert that the Department's decision to generally pre-approve Norweco's request for approval of its Singulair A-OLDS and to list the pre-approved A-OLDS system on its website is a final appealable action. According to the Appellants, the Department has regulatory authority to approve A-OLDS under its regulations at 25 Pa. Code §§ 71.1 and 73.72. The Appellants also assert that the Department has also developed an ad hoc program, "which globally preapproves certain A-OLDSs so that the requirements of §73.72 need not be followed by SEO's for each installation." Appellant's Brief at 1. The Appellants assert that once an A-OLDS has been pre-approved and "listed" on the Department's website, a SEO need not submit individual plans for installation to the Department for approval. Once an A-OLDS is generally pre-approved and listed, no individual review and approval by the Department is necessary.

In its Reply, Norweco and the Department agreed with the Appellants that only pre-approved A-OLDS are listed on the website and that the Department's ad hoc program is not specifically authorized by the Department's regulation. Norweco also asserted that any use of its Singulair system in the future will still require the issuance of a permit by an SEO.

Norweco's and the Department's major argument in support of their claim that the pre-approval of Norweco's Singulair system as an A-OLDS and its subsequent listing on the Department's website is not a final appealable action is based upon the fact that neither the approval nor the listing direct anyone to do anything citing *Perkasie Borough Authority v. DEP*, 2008 EHB 483, 484. The Board disagrees that the *Perkasie Borough Authority* decision supports Norweco's argument. The Board has stated:

> A review of case law reveals certain principles guide the determination of whether a particular Department action is appealable. *Beaver v. DEP*, 2002 EHB 666. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. *Id*. These include: the specific wording of the communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB 1121-24.

Beaver v. DEP, 2002 EHB 666, 672-673. To decide whether there is a final appealable action, the Board needs to review "the nature of DEP's action in the context of the regulatory scheme and the circumstances." *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 422. To evaluate whether the Department's action to approve and list Norweco's Singulair system is appealable, the Board needs to review the nature of this action in the context of the regulatory scheme and the circumstances.

In *Perkasie Borough Authority*, the Board evaluated whether a particular Department letter was an appealable action. The Board concluded that the letter in question was not appealable "because the Department's letter directs no action from anyone and is merely an interpretation of law." *Perkasie Borough Authority*, 2008 EHB at 484. This type of situation involving a letter containing an interpretation of law is very different than the situation before the Board in this appeal, and the Board's *Perkasie Borough Authority* opinion, is therefore clearly distinguishable. In this appeal, the Department has a specific role in evaluating and approving A-OLDS under the regulations at 25 Pa. Code § 73.72. Under this regulation, it is alleged that the Department has created an ad hoc program to pre-approve A-OLDS and to publish notice of its pre-approval on its website. According to the Parties, the pre-approval eliminates the requirement for the Department to evaluate and approve the use of a particular A-OLDS on a case-by-case basis. In this third party appeal, the Appellants allege that the Department's action allows Norweco to avoid case-by-case approval of its Singulair system as a result of its general pre-approval and listing. This is very different than a situation in which an appellant alleges that a Department letter containing a legal interpretation is really an appealable Department action even though it does not direct a person to take any action.

At this preliminary stage of litigation and based upon the limited record before it, the Board is not able to resolve the issue whether the Department's pre-approval of Norweco's Singulair system and its related listing on its website constitutes a final appealable action. The Board does not yet fully understand the nature of the Department's action and how it relates to the regulatory program to review and approve the use of A-OLDS. If the Department's approval of the system is required before a person can seek a permit from an SEO, then does the pre-approval of the system and listing constitute a general approval like a general permit or an

umbrella-like water management plan? General approvals, like general permits, are often designed to provide regulatory flexibility and to streamline regulatory procedures. The Board supports such efforts to provide regulatory flexibility and to streamline procedures under appropriate circumstances, but the Board has observed that the use of such mechanisms to provide regulatory flexibility sometimes presents due process concerns. *Army For A Clean Environment*, 2006 EHB 698, 702 (General Permits are a valuable regulatory tool, but they should not be used as a tool for whittling down constitutional rights.); *Hendryx*, 2011 EHB at 141 (An umbrella-like water management plan may present due process concerns if certain persons do not have standing to challenge its approval.) In this appeal, the Appellants have raised constitutional claims in their challenge to the Department's approval and listing of Norweco's Singulair system.

Without a better understanding of the regulatory context of the Department's action to approve and list Norweco's Singulair system, the Board is not able to grant Norweco's motion to dismiss based upon lack of jurisdiction.[3] The limited record before the Board does not allow the Board to determine if the approval and listing are sufficiently general permit-like to allow the Board to resolve the jurisdiction issue that Norweco has raised in its motion to dismiss.

Accordingly the Board issues the following order.

[3] Under the regulatory language at 25 Pa. Code § 73.72(b), the "Department will determine if classification as an alternative system is appropriate and will provide review comments to the sewage enforcement officer." If an A-OLDS is preapproved and listed, then it appears that the Department's role under this regulation will be curtailed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ORENCO SYSTEMS, INC., ELJEN CORPORATION, PREMIER TECH AQUA, AND ANUA INTERNATIONAL, LLC	:	
v.	:	**EHB Docket No. 2016-007-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORWECO, INC., Permittee	:	

O R D E R

AND NOW, this 6th day of July, 2016, upon consideration of Norweco's and the Department's Joint Motion to Dismiss and the Appellants' Response, it is hereby ordered that the motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 6, 2016

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

For the Commonwealth of PA, DEP:
Aviva Horrow Reinfield, Esquire
(via electronic filing system)

For Appellants:
Randall G. Hurst, Esquire
(via electronic filing system)

For Permittee:
Scott Wyland, Esquire
Douglas B. Schnee, Esquire
(via electronic filing system)