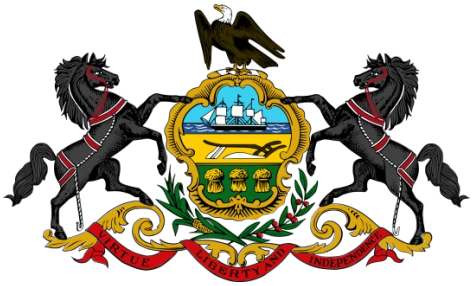
Environmental Hearing Board

Adjudications and Opinions



2022
VOLUME I

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

2022

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Steven C. Beckman
Judge	Sarah L. Clark
Secretary	Christine A. Walker

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2022 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2022.

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

2022 EHB DECISIONS INDEX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: January 13, 2022**

OPINION AND ORDER ON
MOTION TO STRIKE

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion to strike filed by the Department seeking to strike portions of a supplemental declaration from counsel attached to an appellant's reply brief in further support of an application for costs and fees. The Department has not provided a reasonable basis for why portions of the declaration providing some additional, largely incidental information related to the application should be stricken.

O P I N I O N

Lynda Williams appealed NPDES Permit No. PAD150046 issued by the Department of Environmental Protection (the "Department") to the Estate of Harry Simon (the "Estate") for the discharge of stormwater and earth disturbance activities associated with a subdivision project at the Estate's property at 1364 Grove Road in West Whiteland Township, Chester County. In her appeal, Ms. Williams raised issues about the lack of riparian forest buffers for the project in service of her overarching concern that the subdivision development would result in more

stormwater runoff on Grove Road and at her nearby home. On September 17, 2021, we issued an Adjudication remanding the permit back to the Department because we determined, among other things, that the Department and the Chester County Conservation District did not properly account for the regulatory riparian forest buffer requirements for both a previously unidentified stream on the project site and a stream across the road from the project site.

Following our Adjudication, Ms. Williams submitted an application for costs and fees pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).[1] The application contained a declaration executed by Ms. Williams's counsel, Kenneth Kristl, detailing his educational and employment background, identifying his hourly rate, and providing a log of the work he performed on the appeal with corresponding time entries. Ms. Williams seeks an award of $132,930 in attorney's fees, $12,074.01 in expert witness fees, and $3,022.20 in costs.[2] After receiving the application, we held a conference call with the parties to discuss logistics and scheduling moving forward. The parties agreed on a timeframe for the Department to respond to the fees application along with a memorandum of law, and for Ms. Williams to then file a reply brief. The parties agreed that no discovery or evidentiary hearing would be necessary for the resolution of the application. We issued an Order memorializing the schedule to which the parties had agreed. The Estate participated in the conference call but indicated that it did not intend to take part in the fees proceedings since Ms. Williams is only seeking to recover fees from the Department and not the Estate.

[1] Section 307(b) of the Clean Stream Law provides in pertinent part: "The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b).

[2] Ms. Williams has since amended her request for attorney's fees to include the time her counsel spent working on a reply brief to the Department's response to her application, and her work responding to the instant motion.

The Department has since filed its response to the application and a supporting memorandum of law. In those filings the Department has generally contested Ms. Williams's right to recover an award. Among other things, relying on the phrase "reasonably incurred" in Section 307(b) of the Clean Streams Law, the Department has asserted that Ms. Williams has not "actually incurred" any fees because the application did not include information about whether Ms. Williams has been billed by her counsel or expert witness or paid money to either of them. The Department has also taken issue with some specific entries in her counsel's work log, asserting that those entries show her counsel is trying to recover a relatively high rate for things like travelling and scanning documents. Ms. Williams has pushed back on these assertions in her reply brief. Her counsel also submitted a supplemental declaration appended to the reply brief providing some detail on the representation arrangement between Ms. Williams, her counsel, and her expert witness, and providing more detail on some of the time entries called out by the Department ("Supplemental Declaration").

The Department has now filed a motion to strike four paragraphs in the Supplemental Declaration and any portions of Ms. Williams's reply brief that rely on or reference those four paragraphs. The paragraphs subject to the Department's motion to strike read as follows:

> 3. In connection with my representation of Ms. Williams, I agreed that I (and the Environmental and Natural Resources Law Clinic at the Delaware Law School that I direct) would represent her in this matter as her attorney, and that Ms. Williams would allow me and the Clinic to seek reimbursement for attorney's fees she would otherwise have been charged for such work should she prevail and be entitled to an award of such fees. Neither I nor the Clinic have any agreement with anyone else concerning payment of fees and expenses incurred in connection with the representation of Ms. Williams.
>
> 4. On behalf of Ms. Williams, and in furtherance of my representation of her in this matter, I had the Clinic pay $8,000 of Dr. Schmid's fee in order to secure his services in connection with his preparing for and testifying at the hearing in this matter. Ms. Williams and I have agreed that the Clinic will be reimbursed for this $8,000 advance should she prevail on the Application for Fees and Costs.

> 5. In connection with the time entry for February 6, 2019, I listed both finalizing discovery responses and scanning documents for those responses as the tasks on which I spent 3.5 hours. The vast bulk of that time was spent finalizing the Appellant's discovery responses (which included the reference to the riparian forest buffer regulations). The scanning and Bates-numbering of the 207 pages of documents produced to DEP and the Estate referenced in that entry took no more than 1 hour of the 3.5 hours recorded for that day.
>
> 6. In connection with the travel time listed in entries for February 4, 2019, June 17, 2019, and June 18, 2019, travel was only a small component of the tasks listed in the entries for those dates. February 4, 2019 involved counsel meeting with Ms. Williams client [sic], attending a file review at DEP's Norristown office, and revising discovery responses. The travel time on February 4 was approximately 1.5 hour (from counsel's Wilmington office to Norristown and back). June 17, 2019 involved preparing Ms. Williams and Jack and Elaine Lawler for their depositions. The travel time for June 17 was 0.7 hours (from counsel's office to West Chester and back). June 18, 2019 involved attending and defending the depositions of Ms. Williams, Mr. Lawler, and Ms. Lawler. The travel time on June 18 was 1.5 hours (from counsel's office to Mr. Shiring's office Exton [sic] and back). Thus, the total amount of pure travel time was at the most 3.7 hours.

(Supp. Dec. at ¶¶ 3-6.)

The Department argues that all of the information necessary for a fees application needs to be contained in an application filed within 30 days of a final order of the Board or it is untimely. The Department says there is no allowance in the Board's Rules to provide the information in the Supplemental Declaration to, in its words, "remedy a deficient fees application." (DEP Memo at 4.) The Department relies on 25 Pa. Code § 1021.182, which provides that a fees application needs to set forth "sufficient grounds to justify the award, including the following:"

> (1) A copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees.
>
> (2) A statement of the basis upon which the applicant claims to be entitled to costs and attorney fees.
>
> (3) An affidavit setting forth in detail all reasonable costs and fees incurred for or in connection with the party's participation in the proceeding, including receipts or other evidence of such costs and fees.
>
> (4) Where attorney fees are claimed, evidence concerning the hours expended on the case, the customary commercial rate of payment for such services in the area

> and the experience, reputation and ability of the individual or individuals performing the services.
>
> (5) The name of the party from whom costs and fees are sought.

25 Pa. Code § 1021.182(b). The Department also relies on Subsection (d) of that Rule, which provides, "The Board may deny an application sua sponte if it fails to provide all the information required by this section in sufficient detail to enable the Board to grant the relief requested." 25 Pa. Code § 1021.182(d). The Department isolates the phrase "all the information" and says that Ms. Williams did not provide "all the information" in her application and we should disregard her attempt to provide "all the information" now.

In response, Ms. Williams argues that she only provided the information in the Supplemental Declaration to respond to what she calls the Department's "mischaracterization of the law and facts" in the Department's response to her application. (App. Memo at 1.) She says she could not have anticipated that the Department would contest the settled concept of whether the fees were "incurred." More specifically, she asserts that 25 Pa. Code § 1021.182(d) merely authorizes the Board to *sua sponte* deny an application if it does not contain "all the information *required by this section*." (Emphasis added.) Ms. Williams says she provided information for each of the five enumerated elements required by the Rule: (1) a copy of the Board's Adjudication; (2) a statement providing the basis for the fee claim; (3) an affidavit setting forth her counsel's costs and fees; (4) evidence of the hours expended, hourly rate, and experience of counsel; and (5) she identified the Department as the party from which the fees are being sought. She argues that the Board's Rules do not require an applicant to provide details on its fee arrangement or representation agreement between counsel and client, and Board caselaw holds that such information is not necessary for a fees application. We find ourselves in agreement with Ms. Williams.

With respect to Paragraphs 3 and 4, the Department wants to strike those paragraphs because they address the Department's argument that Ms. Williams did not "incur" any costs or fees in this appeal. The Department says Ms. Williams is trying to provide the information "to remedy her fatal defect of not including such information in the Fee Application." (DEP Memo at 12.) But as Ms. Williams points out, our Rules do not require a party to provide detailed information on its fee arrangement. Indeed, we have now repeatedly held that efforts to probe into the intricacies of the representation arrangement between an attorney and client are largely an unnecessary waste of time. Time and again parties try to parse the word "incurred" in Section 307(b) of the Clean Streams Law and ascribe a meaning to it that every dime must have been already paid by a client to her counsel in order to recoup anything under a fees application, and time and again we have flatly rejected that argument. We made this point rather recently in *Friends of Lackawanna v. DEP*, 2018 EHB 401, 409:

> We have held that, in order to incur fees and costs, "a party must become liable to or subject to those expenses." *Beth Energy Mining Co. v. DER*, 1995 EHB 148, 157. We have also held that these expenses "are incurred so long as the work to which they pertain has been performed. Whether the fees have been paid is not relevant to the question of whether they have been incurred." *Raymond Proffitt Found. v. DEP*, 1999 EHB 124, 143.

In *Friends of Lackawanna*, we denied a party's motion to conduct discovery and participate in an evidentiary hearing on whether the applicant "incurred" the fees it sought to recover. We found that "such an intrusion into representation agreements" was unwarranted. *Id.* at 410. Here, if we were to grant the Department's motion to strike, we would essentially be taking the position that every fees application needs to contain details of the attorney-client fee arrangement and representation agreement, which we have long held is unnecessary.

The Department claims it is prejudiced by these paragraphs because "the Department has no opportunity to cross-examine, rebut, or otherwise respond to the late-submitted information."

(DEP Memo at 6.) First, during our conference call to discuss scheduling as it pertained to the fees application, all the parties agreed that discovery and an evidentiary hearing were unnecessary. The Department had the fees application in-hand at the time of our conference call. The Department likely knew it would contest whether the fees were "incurred." Yet the Department did not contend that it needed to probe the topic through discovery or a hearing. Second, we do not think there is much prejudice to the Department because, as just stated, we are not very interested in parties' representation agreements with counsel. Because we do not believe that Paragraphs 3 and 4 of the Supplemental Declaration will be crucial to our resolution of the application, we see no need to strike them.

Paragraphs 5 and 6 provide clarification on the work performed in four of Mr. Kristl's time entries that were contested by the Department in its response to Ms. Williams's application. The Department has argued that Ms. Williams is seeking an excessive rate for things like scanning documents and traveling. (DEP Fees Memo at 37.) These four time entries make up 17.0 hours of the 432.6 total hours Mr. Kristl spent litigating this appeal through the Adjudication. Ms. Williams has pointed out in her reply brief that these time entries encompassed multiple tasks, such as a meeting between counsel and client, a file review, and travel to and from each; working on discovery responses and scanning the necessary documents; attending depositions and traveling to and from. (App. Fees Reply at 23.) Mr. Kristl avers in Paragraphs 5 and 6 that about 4.7 of the 17.0 hours was spent on travel or scanning and Bates-stamping documents as opposed to defending depositions, meeting with his client, or preparing discovery responses.[3]

[3] By way of comparison, Mr. Kristl in a second supplemental declaration avers he spent 5.0 hours for work involved with responding to the Department's motion to strike.

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). In employing that discretion we evaluate a number of factors to determine an appropriate award, if any. *See Gerhart v. DEP*, 2020 EHB 1, 5-6. We are fully capable of determining whether the fees claimed for tasks are reasonable in relation to the work performed and see no reason to strike these paragraphs, which actually marginally reduce the total amount of fees claimed by Ms. Williams. *Cf. Ainjar Trust v. DEP*, 2001 EHB 59 (citing *Harriman Coal Corp. v. DEP*, 2000 EHB 1295, 1305) (denying motion to strike paragraphs in a moving party's motion for summary judgment for allegedly inadequate factual support where the Board is fully capable of assessing the evidentiary support for a motion and finding it irrelevant whether the paragraphs were stricken).

Finally, the Department cites several cases in its motion where we struck new evidentiary matter that was appended to a party's post-hearing brief, (DEP Memo at 7-8), but those cases have little applicability here. The rationale for striking new evidentiary material attached to a post-hearing brief is that it is a backdoor attempt to reopen the record. In that instance, there *would* be a need to cross-examine witnesses and test the evidence. We are not dealing with the same situation here. It is not unheard of for a fee applicant to provide additional, clarifying information after the submission of its initial application. In *Friends of Lackawanna*, one of the fee applicants attached additional documentation to its brief filed three months after its application in accordance with the schedule agreed to by the parties. (EHB Docket No. 2015-063-L, Docket Entry # 174.) Further, the fact that our Rules contemplate the possibility of discovery or testimony related to the application *and the response*, 25 Pa. Code § 1021.184(b), suggests that the "record" we consider in evaluating a fees application is not set in stone at the

time the application is filed. We may be more receptive to a motion to strike information that fundamentally alters the original application or provides material actually required by our Rules that was completely absent from the application. But the matters before us here, which quibble at the detail of a few billing entries, or address things we do not find particularly relevant, do not warrant being stricken.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

O R D E R

AND NOW, this 13th day of January, 2022, it is hereby ordered that the Department's motion to strike is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: January 13, 2022

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Esquire
(*via electronic filing system*)

For Appellant:
Kenneth T. Kristl, Esquire
(*via electronic filing system*)

For Permittee:
Michael T. Shiring, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2021-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: January 19, 2022**

OPINION AND ORDER ON
PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a petition to intervene where the petitioner has demonstrated that three of its members have a direct, substantial, and immediate interest in an appeal of a major permit modification for a landfill. The Board rejects limits on intervention proposed by the permittee positing that intervention is restricted to parties who appear in proceedings before the Department, or that the petitioner, as a corporation, is precluded from relying on its members to establish standing.

O P I N I O N

Friends of Lackawanna ("FOL") has appealed the Department of Environmental Protection's (the "Department's") issuance of a major modification to Keystone Sanitary Landfill, Inc.'s ("Keystone's") solid waste disposal permit (Permit No. 101247) for its municipal waste landfill located in the boroughs of Dunmore and Throop, Lackawanna County. The major permit modification authorizes Keystone's Phase III Site Development at the landfill. FOL filed its appeal on July 5, 2021. Among other things, FOL contends that Keystone has continuing issues with its leachate generation and management, which is impacting groundwater, and with controlling odors

from the site, which FOL says will only get worse with Keystone's expanded operations. FOL also argues that the Department erred in concluding that the benefits of the landfill clearly outweigh the known and potential environmental harms, and that the Department failed to uphold its duties as a trustee of Pennsylvania's natural resources under Article I, Section 27 of the Pennsylvania Constitution.

Sierra Club has now petitioned to intervene in this appeal as an organization and on behalf of its members, who it says are being impacted by the landfill. Sierra Club says if granted leave to intervene it will offer evidence and testimony on the impacts of Keystone's leachate on surface and groundwater, the harms/benefits analysis, and whether Keystone affirmatively demonstrated its compliance with Article I, Section 27. (Petition at 7-12.) FOL has filed a letter expressing its support for Sierra Club's intervention. The Department has filed a response indicating that it does not oppose Sierra Club's intervention, but suggesting that the Board limit Sierra Club's intervention to the issues raised in FOL's notice of appeal. Keystone has filed an answer opposing Sierra Club's intervention, contending that Sierra Club's petition to intervene is really just a way to make up for the fact that Sierra Club did not file its own appeal of the permit modification. Keystone also advances a number of novel legal arguments, asserting, for instance, that the Environmental Hearing Board Act, 35 P.S. §§ 7511 – 7516, limits intervention to "parties" not just any "person," and that Sierra Club, as a nonprofit corporation, is ineligible to assert standing on behalf of its "purported members." For the reasons discussed below, we grant Sierra Club's petition to intervene.[1]

Section 4 of the Environmental Hearing Board Act (the "EHB Act") provides that "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). *See*

[1] Sierra Club filed a letter requesting leave to respond to Keystone's Answer. We denied Sierra Club's request in an Order issued on January 11, 2022.

also 25 Pa. Code § 1021.81 (person may petition to intervene in any matter prior to the initial presentation of evidence). We have held that Section 4(e) of the EHB Act "establishes a low burden for intervention in Board proceedings." *Pa. General Energy Co. v. DEP*, EHB Docket No. 2020-046-R, slip op. at 6 (Opinion and Order, Jan. 15, 2021) (quoting *PA Waste, LLC v. DEP*, 2015 EHB 350, 351 n.1). *See also Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606. The Commonwealth Court has instructed that a person seeking to intervene must have an interest that "will either gain or lose by direct operation of the Board's ultimate determination." *Browning-Ferris, Inc. v. Dep't of Envtl. Res.*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991).

We have held that the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance so an intervenor must have standing. *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434. A person has standing if they have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Wilson*, 2014 EHB at 2. Thus, a person must have an interest that is greater than the abstract interest of all citizens in having others comply with the law, and there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). In other words, the intervenor's interest must not be remote. *Id.* at 286; *Borough of Glendon v. Dep't of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992). When standing is challenged in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of

law.[2] *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3. *See also Pennsburg Housing Partnership, L.P. v. DEP*, 1999 EHB 1031, 1035.

Sierra Club's Members

Sierra Club asserts that it has standing as a representative of its members who are affected by the Keystone Landfill. "An organization has standing if at least one individual associated with the group has standing." *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)). *See also Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) ("an association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate."). Sierra Club identifies three members in support of its interest in this appeal, Sarah Helcoski, John Mellow, and Fawn Contreras, and attaches to its petition declarations executed by each of them.

Sarah Helcoski lives in Jessup, Pennsylvania near the landfill. (Helcoski Declaration at ¶ 2.) She avers that she and her children experience bad odors nearly every day. (*Id.* at ¶ 4.) She says she sees litter blowing around the property near the landfill. (*Id.* at ¶ 5.) She is concerned that leachate from the landfill is polluting groundwater and surface waters, including the Lackawanna River, which she and her family visit, wade in, and hike around regularly. (*Id.* at ¶¶ 8, 10.) She is also concerned that polluted groundwater and surface water may impact the wildlife she enjoys watching and the deer that her husband hunts for her family to eat. (*Id.* at ¶ 9.) Ms. Helcoski says she worries that, with the Department's approval of Keystone's permit modification, the landfill

[2] Sierra Club's petition neglected to include a verification as required by 25 Pa. Code § 1021.81(b), but Sierra Club has since refiled its petition with the missing verification.

will operate for another 40 years and continue to affect her children and future generations of her family. (*Id.* at ¶ 12.)

John Mellow lives in Archbald, Pennsylvania. (Mellow Declaration at ¶ 2.) He is a former employee of the Department and says that he cares deeply about the water, environment, and natural beauty of northeastern Pennsylvania. (*Id.* at ¶¶ 4, 5.) He says he is concerned about the water quality of the Lackawanna River and its tributaries and worries that leachate from the landfill is polluting these waters with Per- and Polyfluoroalkyl Substances ("PFAS"). (*Id.* at ¶¶ 6, 7.) Mr. Mellow says that he derives "great aesthetic value from the Lackawanna River and its tributaries" and it upsets him to think that the Keystone Landfill is degrading the water quality that is important to the region. (*Id.* at 8, 9.)

Fawn Contreras also lives in Archbald and grew up in northeastern Pennsylvania. (Contreras Declaration at ¶ 2, 6.) She avers that she has experienced negative impacts from the landfill, including smelling bad odors and seeing garbage blowing when she travels near the landfill. (*Id.* at ¶¶ 4, 5.) She says that she avoids areas near the landfill because of the odors and litter. (*Id.* at ¶ 5.) Ms. Contreras says she is involved in the community and has organized clean-up events with local schools and has also organized clean-up events through the Sierra Club near the landfill and around the Dunmore Reservoir. (*Id.* at ¶¶ 6, 7.) She hikes near the Dunmore Reservoir and is concerned that it is being polluted. (*Id.* at ¶ 8.) She also worries that the permit modification "will increase harmful emissions into the nearby valley." (*Id.* at ¶ 9.)

All three of Sierra Club's members identify the sort of direct, substantial, and immediate interests in their community and their local environment that we have long held give persons standing. They use and enjoy the Lackawanna River, its tributaries, the Dunmore Reservoir, and the surrounding land, and have expressed objectively reasonable concerns that the Keystone

Landfill will impact their use of those resources. *See Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 676-77 (members "all expressed what we conclude were objectively reasonable concerns that the Project would have an adverse effect on their property, daily life, and health"). Ms. Helcoski and Ms. Contreras have also averred that they routinely encounter odors and litter they attribute to the landfill.

In short, Sierra Club's members "live, work, and/or recreate in the vicinity of the proposed landfill. They have averred that a landfill would have a deleterious impact on their use and enjoyment of the area in the vicinity of the landfill site as well as their economic and environmental well-being." *Friends of Lackawanna v. DEP*, 2016 EHB 641, 644 (quoting *Tri-County Landfill*, 2014 EHB at 132). Their interests are precisely the kind that give rise to standing in environmental matters. *See Pa. Trout v. DEP*, 2004 EHB 310, 358 ("members have testified that they fish, walk and observe wildlife and nature in the area of the proposed development. The Board has long held that the enjoyment and recreational use of a natural setting is an interest that rises to a level that confers standing."); *Giordano v. DEP*, 2001 EHB 713, 729-30 (finding standing of persons who "have suffered increased malodors, and a slight increase in litter and noise at their property since the volume increase, all of which have reasonably interfered with their ability to enjoy their property.").

Further, focusing on the "gain or lose" language of *Browning-Ferris, supra*, all three Sierra Club members aver that a successful appeal of the permit modification would alleviate their concerns and, in their view, lessen potential pollution to their communities. (Helcoski Dec. at ¶¶ 13, 14; Mellow Dec. at ¶¶ 11, 12; Contreras Dec. at ¶ 11.) Thus, we have no hesitation concluding that Sierra Club's members have standing to support Sierra Club's intervention in this appeal.[3]

[3] Because we find that Sierra Club has standing as a representative of its members, we do not need to reach the question of whether Sierra Club has standing independently as an organization.

Keystone, for its part, never actually disputes that the interests of Sierra Club's members are sufficient for purposes of standing. Instead, Keystone says it "reserves the right to challenge the standing of those purported members at later stages of this appeal and following discovery." (Keystone Answer at 17.) While Keystone says it "expressly contests" their assertions, it never says which assertions or why.

Whether Intervention is Limited to "Parties"

In lieu of contesting the interests asserted by Sierra Club's members, Keystone argues that Sierra Club cannot legally be permitted to intervene for a variety of reasons. Keystone first focuses on the language in the EHB Act that allows "any interested party" to intervene in a matter pending before the Board. 35 P.S. § 7514(e). Keystone argues that a "party" is not the same as a "person," and therefore, intervention is not open to any "person" who might have an interest in an appeal. Instead, Keystone says it is much more restricted, arguing that only "parties" may intervene and that "interested persons" must file their own appeals of Departmental actions. Keystone contends that allowing "interested persons" to intervene in an appeal is nothing more than a circumvention of the Board's 30-day jurisdictional appeal window and amounts to an untimely attack on a Departmental action. *See* 25 Pa. Code § 1021.52 (timeliness of appeal).

The EHB Act contains no definition of "party." Keystone suggests we look to Section 101 of Pennsylvania's Administrative Agency Law, 2 Pa.C.S. § 101, which defines a party as "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding." Keystone then says the "agency" we should be looking to in this definition is not the Board but the Department. Keystone offers its own definition of "party"—"a person who appears in a proceeding before the Department who has a direct interest in the subject matter of such proceeding." (Answer at 7.) Keystone says this "party" could be a person who was issued

a permit by the Department or received some other favorable decision from the Department. Keystone says such persons could then intervene in appeals brought by other people, what are traditionally referred to as third-party appeals. In essence, Keystone believes that the only person or entity who should be permitted to intervene in a Board proceeding is a permittee in an appeal of a permit, license, authorization, or order issued to it by the Department; all other persons should be subject to the 30-day period for filing a notice of appeal from a Departmental action.

This issue was settled in *Browning-Ferris*, in which the Commonwealth Court overturned the Board's denial of Browning-Ferris' petition to intervene in *Clements Waste Services, Inc. v. DER*, 1991 EHB 712. We think it is helpful to quote the Commonwealth Court's full analysis of the issue:

> Because the [EHB] Act does not define the phrase "any interested party," as previously noted, we must apply the rules of statutory construction to discern its meaning. Section 1903(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1903(a), directs, in relevant part:
>
> > Words and phrases shall be construed…according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning…shall be construed according to such peculiar and appropriate meaning or definition.
>
> As set forth in Black's Law Dictionary, "'[p]arty' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought…the party plaintiff or defendant…" *Id.* at 1010 (5th ed. 1979). **Obviously, BFI [Browning-Ferris, Inc.] would not be a "party" to Clements' appeal before the Board if the technical definition of that term attached here.**
>
> We note, however, that "[i]n the construction of the statutes of this Commonwealth, the rules [of statutory construction] shall be observed, *unless* the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly." Section 1901 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1901 (emphasis added). **In the instant context, the term "party" cannot be reasonably construed as limited to the litigants; otherwise, there would be no need to intervene and no provision made therefor.**
>
> **To the contrary, here, in the context of intervention, the phrase "any interested party" actually means any person or entity interested, *i.e.*, concerned, in the proceedings before the Board**. The interest required, of course, must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's

> ultimate determination. *See* Black's Law Dictionary 730 (5th ed. 1979); *see also* 2 Pa.C.S. § 101 wherein a party is defined as "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding." **To interpret this phrase any differently, under these circumstances, would lead to an absurd and unreasonable result as well as render the Act's intervention provision ineffective**; presumably, neither of which the legislature intended here.

Browning-Ferris, 598 A.2d at 1060-61 (emphasis in bold added).

Keystone recognizes that *Browning-Ferris* is directly on point but argues that it and every Board decision on intervention after *Browning-Ferris* are all wrong. We are, of course, bound by the decisions of the Commonwealth Court. *Keystone Carbon and Oil, Inc. v. DER*, 1993 EHB 765, 769 ("the Board is bound by the relevant precedents of Pennsylvania's appellate courts and bound to apply the applicable law.") Importantly here, *Browning-Ferris* is not a decision issued pursuant to the Commonwealth Court's original jurisdiction but is a decision of the Court acting in its appellate capacity overturning the Board. More fundamentally, the Commonwealth Court recognized that reading the EHB Act in the way Keystone proposes would essentially render intervention a nullity. Accordingly, we choose to adhere to the 30-plus years of settled intervention jurisprudence in evaluating Sierra Club's petition.

Whether Corporations are Ineligible for Organizational Standing

Keystone next argues that Sierra Club cannot derive standing from its members because it is a nonprofit corporation and not "a traditional unincorporated association." (Answer at 13.) Indeed, Keystone claims that Sierra Club, as a corporation, has no members. Keystone implores us to look to federal law on standing and says that "Sierra Club, as a nonprofit ***corporation***, is not an organization or association that can borrow the standing of its members." (*Id.* at 13 (emphasis in original).) However, it would appear that federal law is squarely against Keystone's position. Several seminal cases from the United States Supreme Court on organizational standing have

involved corporations. *See, e.g.*, *NAACP, Inc. v. Button*, 371 U.S. 415 (1963) (finding the NAACP could bring suit "on its own behalf, because, **though a corporation**, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. We also think **petitioner has standing to assert the corresponding rights of its members**." (citations omitted) (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (finding that environmental organizations Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., *and Sierra Club* had standing on behalf of their members to file a citizens suit against the operator of a hazardous waste incinerator). *See also Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)) ("The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit **the association or corporation** in a single case to vindicate the interests of all." (emphasis added)).

Keystone does not cite a single case in support of its position that a nonprofit corporation cannot have members or have standing as a result of its members. Even *Warth v. Seldin*, 422 U.S. 490 (1975), which Keystone repeatedly cites, involved corporations. Keystone asserts that, "unlike the organizations that sought standing in *Warth*, Sierra Club is a nonprofit **corporation**." (Answer at 15 (emphasis in original).) But two of the organizations in *Warth* were in fact nonprofit corporations. Metro-Act of Rochester, Inc. was a "**not-for-profit New York corporation**, the purposes of which are 'to alert ordinary citizens to problems of social concern;… to inquire into the reasons for the critical housing shortage for low and moderate income persons in the Rochester area and to urge action on the part of citizens to alleviate the general housing shortage for low and moderate income persons.'" *Id.* at 494 (emphasis added). Housing Council in the Monroe County

Area, Inc. was a "**not-for-profit New York corporation**, its membership comprising some 71 public and private organizations interested in housing problems." *Id.* at 497 (emphasis added). We suspect the Supreme Court would have never even bothered to go through the organizational standing analysis, *id.* at 510-17, if corporations or nonprofit corporations were automatically disqualified from having standing on behalf of their members. Keystone's basic assertion—that every case in the Unites States, at all levels, that has found Sierra Club or any other corporate nonprofit to have standing as a representative of its members has been wrongly decided—is unsupported and unpersuasive.

Whether Sierra Club's Interests are Adequately Represented

Keystone says Sierra Club should not be permitted to intervene because its interests are already adequately represented by FOL. However, that is not a standard we have employed to deny intervention. In *Logan v. DEP*, 2016 EHB 531, we dispensed with the same argument when the appellants opposed the intervention of a township on the side of the Department and permittee:

> With respect to the Appellants' argument that we should not allow the Township's intervention because its interests are already adequately represented, we have previously held that such a reason, even if it were true, is not an appropriate basis to deny intervention in Board proceedings. The fact that other parties in the case are in a position to represent interests similar to the petitioner's interests is not a reason to deny them status as intervenors. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 132. *See also Pileggi v. DEP*, 2010 EHB 433 (granting the intervention of a wife whose husband was already a party to the case and finding it irrelevant whether her interests would be adequately protected by her husband); *Ashton Investment Group, LLC v. DEP*, 2010 EHB 221 (granting the intervention of a township despite arguments that its interests in the case were coextensive with the Department's).

Id. at 537-38. We affirm that holding here.

Somewhat relatedly, Keystone says that, if we grant Sierra Club's petition, we should limit its intervention to the issues already presented by FOL in its Notice of Appeal, a position echoed by the Department. We do not detect any attempt by Sierra Club to deviate from the established

issues, and indeed, Keystone admits that the issues on which Sierra Club seeks to offer evidence "are entirely duplicative" of what was raised in the original Notice of Appeal. (Answer at 2-3.) Therefore, we have no basis to conclude that Sierra Club will broaden the issues in this appeal.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2021-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 19th day of January, 2022, it is hereby ordered as follows:

1. Sierra Club's petition to intervene is **granted**.

2. The caption of this appeal is revised to read as follows:

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
	:	
v.	:	**EHB Docket No. 2021-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

3. Sierra Club's unopposed motion for admission of counsel *pro hac vice* of J. Michael Becher, Esquire and Elizabeth A. Bower, Esquire is **granted** and they are permitted to appear *pro hac vice* in this matter for Sierra Club.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 19, 2022

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

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

For Appellant:
Mark L. Freed, Esquire
Joanna A. Waldron, Esquire
Theresa M. Golding, Esquire
(*via electronic filing system*)

For Permittee:
Christopher R. Nestor, Esquire
David R. Overstreet, Esquire
Jeffrey Belardi, Esquire
(*via electronic filing system*)

For Sierra Club:
Benjamin M. Barczewski, Esquire
J. Michael Becher, Esquire
Elizabeth A. Bower, Esquire
(*via electronic filing system and electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARLISLE PIKE SELF STORAGE and REGENCY SOUTH MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 2021-072-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE L.P., Intervenor	:	**Issued: January 24, 2022**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss filed by the Department in an appeal involving an email from the Department that informed the Appellants that the Department would not be taking further enforcement action against a company whose activities were the subject of a complaint made by the Appellants under Section 604 of the Clean Streams Law. It is not clear as a matter of law on the basis of the record before the Board that a Departmental response to a Section 604 complaint is not an appealable action.

O P I N I O N

Carlisle Pike Self Storage and Regency South Mobile Home Park ("Carlisle Pike") has appealed an email from the Department of Environmental Protection (the "Department") sent to Carlisle Pike on July 1, 2021. Although the parties' filings have left us grasping for a coherent record, the facts leading up to the email, as we understand them, are as follows. On April 20, 2020, Carlisle Pike submitted a complaint to the Department requesting that the Department investigate Sunoco Pipeline, L.P.'s ("Sunoco's") horizonal directional drilling ("HDD") operations and

inadvertent returns ("IRs") of drilling fluids that allegedly damaged Carlisle Pike's property in Middlesex and Silver Spring Townships, Cumberland County. Sunoco's HDD operations were part of its work on its Mariner East 2 pipeline project.

Although no party has made the complaint a part of the record, according to Carlisle Pike's Notice of Appeal, its complaint alleged that drilling fluids containing bentonite had surfaced in and around its property and were a result of Sunoco's operations. (Notice of Appeal at ¶ 2.) The complaint allegedly further stated that the IRs were never cleaned up by Sunoco and caused damages to Carlisle Pike's property including cracking in building and residential foundations, the formation of sinkholes, and adverse effects to Carlisle Pike's NPDES-permitted stormwater basins and infiltration rates. (*Id.* at ¶¶ 2, 3.) The complaint allegedly requested that the Department conduct an investigation and require Sunoco to implement appropriate remedial actions.

On October 7, 2020, the Department issued a Notice of Violation ("NOV") to Sunoco stating that Sunoco was responsible for cleaning up and remediating all affected areas including the stormwater basin and the parking areas/driveways and returning the stormwater basin to "its previous functionality for the management of rate, volume and water quality of the runoff." (Carlisle Ex. 1 (at 2).) The NOV requested that Sunoco submit a remediation plan and implementation schedule to the Department by November 6, 2020. Carlisle Pike claims that Sunoco has not accepted responsibility for the IRs, has not submitted a remediation plan to the Department, and has not addressed the concerns described in Carlisle Pike's complaint. At some point it appears the Department requested that Carlisle Pike submit a "Response Package."[1] In any event, the final correspondence between Carlisle Pike and the Department was the email sent by the Department's Ronald Eberts, Jr. to Carlisle Pike on July 1, 2021, stating the following:

[1] Although no party explains it, we think this "Response Package" might be the more than 250-page document that is the only exhibit attached to the Department's motion.

> Mrs. Blymier,
>
> The Department has reviewed the attached Response Package. Based upon the currently available information, the Department will not be taking any further action at this time.
>
> Regards,

(Notice of Appeal at Ex. 1.) It is this email that Carlisle Pike has appealed.

The Department has filed a motion to dismiss arguing that the Board lacks jurisdiction over this appeal because the Department's July 1, 2021 email notifying Carlisle Pike of its decision not to take further action on Carlisle Pike's complaint is not an appealable action. The Department says the email is not a final, appealable action because it does not adversely affect Carlisle Pike's personal or property rights, privileges, duties, liabilities, or obligations and is simply a matter of the Department's discretion whether or not to pursue enforcement.

Carlisle Pike argues in response that the Department's July 1, 2021 email is a final, appealable action because the Department's decision to not take further action or enforce its NOV against Sunoco adversely affects Carlisle Pike's constitutional right to a clean environment under Article I, Section 27 of the Pennsylvania Constitution. Carlisle Pike further argues that the July 1, 2021 email constitutes the Department's final determination under its mandatory duty to review and investigate complaints under Section 604 of the Clean Streams Law, 35 P.S. § 691.604. Carlisle Pike concludes that the Board has jurisdiction hear this appeal for both of these reasons.[2]

Carlisle Pike requested leave to file a surreply to the Department's reply brief in support of its motion to dismiss, which we granted. We also afforded the Department the opportunity to

[2] Carlisle Pike's response to the Department's motion does not comply with our rules, which require a response to the motion *and* a memorandum of law. 25 Pa. Code § 1021.94(c). The Department filed its motion to dismiss and an accompanying memorandum of law. Carlisle Pike filed what it titled a response that is really only a memorandum of law on its own. There was no paragraph by paragraph response to the Department's motion. Nevertheless, we will address the motion and response on the merits and not deem Carlisle Pike to have admitted all the contentions in the Department's motion. *See* 25 Pa. Code § 1021.91(e).

file a response to Carlisle Pike's surreply. After briefing concluded, we *sua sponte* issued an Order designating Sunoco Pipeline, L.P. as an interested party pursuant to our Rule at 25 Pa. Code § 1021.51(h)(4) and directed the Appellants to serve Sunoco with a copy of their notice of appeal. We gave Sunoco 30 days from service of the notice of appeal to intervene in this appeal as of right by entering a notice of appearance. 25 Pa. Code § 1021.51(j). Shortly thereafter, Carlisle Pike served Sunoco with their notice of appeal and counsel for Sunoco entered an appearance. We waited thirty days to see if Sunoco cared to weigh in on the motion to dismiss. It has not.

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. *Lawson v. DEP*, 2018 EHB 513, 514; *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. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750; *Kennedy v. DEP*, 2007 EHB 511, 511-12. With respect to Departmental communications, there is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*,

949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In determining whether a Departmental letter or email constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Hordis v. DEP*, 2020 EHB 383, 388; *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59; *Kutztown*, 2001 EHB at 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Carlisle Pike says that its complaint was made pursuant to Section 604 of the Clean Streams Law. That section reads as follows:

> Upon complaint made in writing by any responsible person to the department, it shall be the duty of the department through its agents to investigate any alleged source of pollution of the waters of the Commonwealth, and to institute appropriate proceedings under the provisions of this act to discontinue any such pollution if the offense complained of constitutes a violation of the provisions of this act.

35 P.S. § 691.604.

We have held that, where the statute at issue imposes very explicit obligations on the Department to investigate a claim and make a determination one way or the other, the Board has jurisdiction to review the Department's determination, even when the determination is that no further action will be taken. *See Kiskadden v. DEP*, 2012 EHB 171 (involving a complaint of water supply contamination under the Oil and Gas Act, 58 Pa.C.S. § 3218); *Love v. DEP*, 2010 EHB 523

(involving a mine subsidence claim under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.5e).

There is no case law interpreting Section 604.[3] The Department attempts to distinguish *Kiskadden* and *Love* by arguing in its motion that Section 604 does not create any mandatory obligations and it does not require the Department to make any determinations. We are finding it difficult to accept either of the Department's points. Section 604 says "it **shall** be the **duty** of the Department" to act. That looks quite mandatory to us. It is true that the use of the word "shall" can sometimes be directory or aspirational as opposed to mandatory, but here it is used in close conjunction with "duty." We find it very difficult to interpret Section 604 as a mere suggestion.

Under Section 604, the Department is required to, first, investigate, just as in *Kiskadden* and *Love*. Next, it must determine whether the offense complained of constitutes a violation of the Clean Streams Law. Third, if there is a violation, it has a **duty** to "institute appropriate proceedings." The fact that the statute does not use the word "determination" as pointed out by the Department does not seem particularly significant because the Department cannot possibly decide what appropriate proceedings need to be launched if it has not first determined whether there has been a violation of the act. Thus, our holdings in *Kiskadden* and *Love* would seem to dictate that we have jurisdiction in this case as well.[4]

[3] In *Eremic v. DER*, 1976 EHB 249, the appellant sent letters to the Department, one of which cited Section 604, requesting that the Department revoke a permit for a solid waste disposal facility. The Department responded with a letter saying that it would not revoke the permit and informing Eremic that the Department's decision could be appealed to this Board. Eremic appealed and after the solid waste facility moved to quash we dismissed the appeal. The final letter that generated the Department's response did not cite Section 604, there was no discussion of Section 604 in the Department's letter or our Opinion, and the case was decided decades before *Kiskadden* and *Love*.

[4] *Contrast Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), where the Court did not reference any duty on the part of the Department to make a determination or institute appropriate proceedings under the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3311(g).

The Department correctly points out that Section 604 does not impose a penalty on the Department for failing to act, but neither do the statutes involved in *Kiskadden* and *Love*. The fact that there are time limits for the Department to act in the Oil and Gas Act and the Mine Subsidence Act but not in Section 604 seems of little moment since we have decided the time limit in the Oil and Gas Act is aspirational. *Kiskadden v. DEP*, 2015 EHB 377, 425-27. The key point is that the Department is statutorily required to decide something. Unlike the ordinary case involving prosecutorial discretion, the Department cannot ignore the complaint. The Department cannot ignore a water loss complaint or a subsidence claim, and Section 604 says it cannot ignore a Section 604 complaint either.

The Department argues that the existence of a private cause of action under Section 601 of the Clean Streams Law,[5] shows that Section 604 is window dressing, but without further explanation we do not see why Section 601 must logically or necessarily cancel out Section 604. It is not uncommon for an aggrieved person to have multiple avenues of redress under the environmental statutes. Indeed, the Mine Subsidence Act contains a provision that is identical to Section 601. *See* 52 P.S. § 1406.13(b). Simply because a private cause of action may be available under appropriate circumstances does not relieve the Department of its duty to investigate and "institute appropriate proceedings" on complaints made under Section 604.

What constitutes "appropriate proceedings" is certainly an interesting question, but that goes to the merits, not reviewability. For example, we are not foreclosing the possibility that there

[5] Section 601 provides in part that "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act which is not discretionary with the department or against any other person alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act." 35 P.S. § 691.601(c). Section 601 vests jurisdiction over those private actions with the courts of common pleas. *Id.*

may not be *any* "appropriate proceedings" in a particular case even if there is a violation. Similarly, the fact that the Department may have very broad discretion, perhaps even broader than usual, in deciding what proceedings are "appropriate," does not mean that the decision is not reviewable.[6]

The Department also says we may be limited in what relief we can ultimately award in this case. Defining those limits would be premature at this point. We are not willing to simply assume for purposes of ruling on the motion to dismiss that the Board is powerless to do *anything* if we find that the Department erred. We note that, unlike the case in *Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), Sunoco is a party in this appeal. Also regarding relief, the Department argues that Carlisle Pike is in reality seeking a mandamus, but a mandamus action typically seeks a ruling forcing the agency to do *something*. Here, the Department has done something, and it embodied its action in the email under appeal. *Contrast Glahn v. DEP*, EHB Docket No. 2021-049-L (Opinion and Order, Nov. 12, 2021) (Board lacks jurisdiction to review Department's prolonged inaction), *recon. denied*, (Opinion and Order, Dec. 9, 2021).

Our problem with taking this discussion any further is that we have virtually no record at this point in the proceedings. As noted above, no party has even attached Carlisle Pike's Section 604 complaint to their papers. The only exhibit attached to the Department's motion is a more than 250-page document a consultant for Carlisle Pike sent to the Department in April 2021, apparently in response to a Department email from December 2020, which is also not part of the record. The Department's motion only cites this exhibit once, quoting the email under appeal, which is presumably buried somewhere within the document. We typically approach motions to dismiss with caution when there are unresolved questions regarding the appealability of a

[6] We do not interpret Section 604 to dispense with the requirement that appellants must have standing.

Departmental communication, especially when the record is spotty. *Hordis, supra*, 2020 EHB 383; *Plainfield Township v. DEP*, 2019 EHB 157; *Diehl v. DEP*, 2016 EHB 853. Given the standard for a motion to dismiss and our lack of much of a record, we deny the motion but fully expect to revisit the issue once a more complete record has been developed.[7]

Accordingly, we issue the Order that follows.

[7] Because we have resolved the motion on the basis of Section 604, we do not need to discuss Carlisle Pike's arguments under Article I, Section 27.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARLISLE PIKE SELF STORAGE and REGENCY SOUTH MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 2021-072-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE L.P., Intervenor	:	

O R D E R

AND NOW, this 24th day of January, 2022, it is hereby ordered that the Department's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 24, 2022

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

For the Commonwealth of PA, DEP:
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For Appellants:
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For Intervenor:
Stephanie Carfley, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALVIN S. AND NAOMI S. KING & LEON J. AND BARBARA ANN KING	:	
v.	:	**EHB Docket No. 2021-102-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 24, 2022**

OPINION AND ORDER
DISMISSING APPEAL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal after the Appellants failed to perfect their appeal, respond fully to a rule to show cause, or respond to a follow-up Order asking them whether they intended to pursue their appeal. Where a party has demonstrated disinterest in proceeding with an appeal, dismissal is appropriate.

O P I N I O N

On October 26, 2021, we received in the mail the last page of what appears to be an order issued by the Department of Environmental Protection (the "Department"). There was a handwritten note on the bottom of the page that said, "We want to Appeal this order[.] The Kings would like to have a meeting with the Board Members." We were informed informally by the Department's counsel that the document was probably the last page of an order issued to Alvin, Naomi, Leon, and Barbara Ann King (the "Kings"). We docketed the submission as a notice of appeal but sent the Kings our standard failure-to-perfect order notifying them that their submission did not provide any of the information required to be contained in a notice of appeal pursuant to

our rule at 25 Pa. Code § 1021.51. We told the Kings they needed to file a compliant notice of appeal on or before November 15, 2021. The Kings did not respond.

On November 22, 2021, in accordance with our normal practice, we issued a Rule to Show Cause. The Kings were directed to show cause why their appeal should not be dismissed for failure to correct the deficiencies in their notice of appeal, if we may call it that. On December 16, 2021, we received a "Motion to Show Cause and Dismiss" signed by "the Kings." The submission contained a brief description of a stream crossing that they called the "Kings Crossing," and a brief argument that the Kings should not be required to remove the crossing. The end of the filing contained the following statement:

> In closing, we will not, and can not be expected to bear witness against ourselves and this matter is moot making the above captioned matter void and closed.

Not sure what the Kings intended, in an abundance of caution, we issued yet another Order on December 21, 2021. We acknowledged the Kings' response to the rule to show cause, but we noted that we had still not received all of the information required in a notice of appeal. We ordered that it be supplied by January 4, 2022. We added that the Kings' response "seems to say that the Appellants do not wish to pursue their appeal…. Failure to comply with this order will confirm that the Appellants wish to withdraw their appeal." The Kings have not responded to the Order.

Where a party evidences a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Rohanna v. DEP*, 2018 EHB 30, 32; *Astare v. DEP*, 2016 EHB 485, 486; *Hermer v. DEP*, 2015 EHB 758, 760; *Mann Realty Associates v. DEP*, 2015 EHB 110, 113. The Kings have now left us with no doubt that they have no interest in pursuing their appeal.

Accordingly, we issue the Order that follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALVIN S. AND NAOMI S. KING & LEON J. AND BARBARA ANN KING	:	
v.	:	**EHB Docket No. 2021-102-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 24th day of January, 2022, 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 24, 2022

c: For the Commonwealth of PA, DEP:
Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellants, *Pro Se*:
Alvin S. and Naomi S. King
Leon J. and Barbara Ann King
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(*via U.S. Mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: February 11, 2022**

OPINION AND ORDER ON
MOTION TO AMEND INTERLOCUTORY ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to amend an interlocutory order filed by a permittee seeking immediate appeal of an Opinion and Order granting Sierra Club's petition to intervene. There is no substantial ground for difference of opinion on Sierra Club's right to intervene, and an immediate appeal will not materially advance the ultimate termination of the matter.

O P I N I O N

Friends of Lackawanna ("FOL") has appealed the Department of Environmental Protection's (the "Department's") issuance of a major modification to Keystone Sanitary Landfill, Inc.'s ("Keystone's") solid waste disposal permit (Permit No. 101247) for its municipal waste landfill located in the boroughs of Dunmore and Throop, Lackawanna County. The major permit modification authorizes Keystone's Phase III Site Development at the landfill. Sierra Club petitioned to intervene in the appeal as an organization and on behalf of its members, who it says are being impacted by the landfill. Sierra Club said if granted leave to intervene it would offer evidence and testimony on the impacts of Keystone's leachate on surface and groundwater, the

harms/benefits analysis, and whether Keystone affirmatively demonstrated its compliance with Article I, Section 27. FOL filed a letter expressing its support for Sierra Club's intervention. The Department filed a response indicating that it did not oppose Sierra Club's intervention, but suggested that the Board limit Sierra Club's intervention to the issues raised in FOL's notice of appeal. Keystone filed an answer opposing Sierra Club's intervention, contending that Sierra Club's petition to intervene was really just a way to make up for the fact that Sierra Club did not file its own timely appeal of the permit modification.

In an Opinion and Order issued on January 19, 2022, we granted Sierra Club's petition to intervene. We relied on Section 4 of the Environmental Hearing Board Act (the "EHB Act"), which provides that "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). *See also* 25 Pa. Code § 1021.81 (person may petition to intervene in any matter prior to the initial presentation of evidence). We held that Section 4(e) of the EHB Act "establishes a low burden for intervention in Board proceedings." *Pa. General Energy Co. v. DEP*, 2021 EHB 7, 12 (quoting *PA Waste, LLC v. DEP*, 2015 EHB 350, 351 n.1). *See also Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606. We said that the Commonwealth Court has instructed that a person seeking to intervene must have an interest that "will either gain or lose by direct operation of the Board's ultimate determination." *Browning-Ferris, Inc. v. Dep't of Envtl. Res.*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). Relying on our precedent, we held that the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance so an intervenor must have standing. *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434.

We found that all three of Sierra Club's members identified in the filings had the sort of direct, substantial, and immediate interests in their community and their local environment that we

have long held give persons standing. They use and enjoy the Lackawanna River, its tributaries, the Dunmore Reservoir, and the surrounding land, and have expressed objectively reasonable concerns that the Keystone Landfill will impact their use of those resources. *See Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 676-77 (members "all expressed what we conclude were objectively reasonable concerns that the Project would have an adverse effect on their property, daily life, and health"). Two members also averred that they routinely encounter odors and litter they attribute to the landfill. We held that Sierra Club's members live, work, and/or recreate in the vicinity of the proposed landfill. They averred that a landfill would have a deleterious impact on their use and enjoyment of the area in the vicinity of the landfill site as well as their economic and environmental well-being. Their interests are precisely the kind of interests that give rise to standing in environmental matters. *See Pa. Trout v. DEP*, 2004 EHB 310, 358 ("members have testified that they fish, walk and observe wildlife and nature in the area of the proposed development. The Board has long held that the enjoyment and recreational use of a natural setting is an interest that rises to a level that confers standing."); *Giordano v. DEP*, 2001 EHB 713, 729-30 (finding standing of persons who "have suffered increased malodors, and a slight increase in litter and noise at their property since the volume increase, all of which have reasonably interfered with their ability to enjoy their property.").

Further, focusing on the "gain or lose" language of *Browning-Ferris, supra*, we found that all three Sierra Club members averred that a successful appeal of the permit modification would alleviate their concerns and, in their view, lessen potential pollution to their communities. Thus,

we had no hesitation concluding that Sierra Club's members have standing to support Sierra Club's intervention in this appeal.[1]

Keystone never actually disputed that the interests of Sierra Club's members are sufficient to establish standing for purposes of intervention. Instead, Keystone said it "reserve[d] the right to challenge the standing of those purported members at later stages of this appeal and following discovery." Thus, Keystone acknowledged that Sierra Club's standing remains an open issue in the appeal. There has been no discovery regarding the issue and the pertinent facts have not otherwise been fully developed. The question has not been fully adjudicated and it remains open for further consideration by the full Board.

In lieu of contesting the interests asserted by Sierra Club's members, Keystone argued that intervention should not be open to any "person" who might have an interest in an appeal. Instead, Keystone said the ability to intervene should be restricted to "parties" and that "interested persons" must file their own appeals of Departmental actions. Keystone contended that allowing "interested persons" to intervene in an appeal is nothing more than a circumvention of the Board's 30-day jurisdictional appeal window and amounts to an untimely attack on a Departmental action. Keystone believed that the only "party" who should be permitted to intervene in a Board proceeding is a permittee in an appeal of a permit, license, authorization, or the subject of an order issued to it by the Department; all other persons should be subject to the 30-day period for filing a notice of appeal from a Departmental action.

We found that this issue was settled in *Browning-Ferris*, in which the Commonwealth Court overturned the Board's denial of Browning-Ferris' petition to intervene in *Clements Waste*

[1] Keystone also argued, unsuccessfully, that Sierra Club cannot derive standing from the standing of its members, and that Sierra Club should be denied intervention because its interests are served by FOL. These issues do not appear to be the subject of its motion to amend our Order to allow an interlocutory appeal.

Services, Inc. v. DER, 1991 EHB 712. We quoted the Commonwealth Court's full analysis of the issue:

> Because the [EHB] Act does not define the phrase "any interested party," as previously noted, we must apply the rules of statutory construction to discern its meaning. Section 1903(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1903(a), directs, in relevant part:
>
> > Words and phrases shall be construed…according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning…shall be construed according to such peculiar and appropriate meaning or definition.
>
> As set forth in Black's Law Dictionary, "'[p]arty' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought…the party plaintiff or defendant…" *Id.* at 1010 (5th ed. 1979). **Obviously, BFI [Browning-Ferris, Inc.] would not be a "party" to Clements' appeal before the Board if the technical definition of that term attached here.**
>
> We note, however, that "[i]n the construction of the statutes of this Commonwealth, the rules [of statutory construction] shall be observed, *unless* the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly." Section 1901 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1901 (emphasis added). **In the instant context, the term "party" cannot be reasonably construed as limited to the litigants; otherwise, there would be no need to intervene and no provision made therefor.**
>
> **To the contrary, here, in the context of intervention, the phrase "any interested party" actually means any person or entity interested, *i.e.*, concerned, in the proceedings before the Board**. The interest required, of course, must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination. *See* Black's Law Dictionary 730 (5th ed. 1979); *see also* 2 Pa.C.S. § 101 wherein a party is defined as "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding." **To interpret this phrase any differently, under these circumstances, would lead to an absurd and unreasonable result as well as render the Act's intervention provision ineffective**; presumably, neither of which the legislature intended here.

Browning-Ferris, 598 A.2d at 1060-61 (emphasis in bold added).

The Commonwealth Court recognized that reading the EHB Act in the way Keystone proposes would essentially render intervention a nullity. Keystone acknowledged that *Browning-Ferris* is directly on point but argued that the Court's holding and myriad Board decisions on

intervention thereafter are all wrong. We noted that we are bound by the decisions of the Commonwealth Court. *Keystone Carbon and Oil, Inc. v. DER*, 1993 EHB 765, 769 ("the Board is bound by the relevant precedents of Pennsylvania's appellate courts and bound to apply the applicable law.") *Browning-Ferris* has provided the foundational standard for intervention in Board proceedings since it was decided more than 30 years ago, and a litany of Board decisions have followed its reasoning. Accordingly, we chose to adhere to the 30-plus years of settled intervention jurisprudence in granting Sierra Club's petition.

Keystone has now filed a motion asking us to amend our Order granting Sierra Club intervention status to include a statement that we believe an interlocutory appeal would be appropriate. It seeks the opportunity to have the Commonwealth Court revisit its decision in *Browning-Ferris*. It says that *Browning-Ferris* should be revisited because it allows persons who do not take timely appeals of Department actions, and therefore with respect to whom such actions have become final, to litigate the validity of those actions. It says that is an absurd result. Keystone appreciates that the *Browning-Ferris* decision has been the law since 1991 but submits that the doctrine of *stare decisis* was never intended to be used as a principle to perpetuate erroneous rules of law. Both Sierra Club and FOL oppose the motion, arguing that none of the criteria for an interlocutory appeal have been met.

Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312. Rule 1311(a)(1) states that an appeal may be taken by permission from an interlocutory order that has been certified for appeal 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). If the interlocutory order does not already contain the pertinent language of Section 702(b), a party must request that the trial court or government unit amend its order to include that language and certify one or more controlling questions of law for appeal. *Rausch Creek Land, LP v. DEP*, 2013 EHB 851, 855; Pa.R.A.P. 1311(b); 25 Pa. Code § 1021.153. Permission to appeal to an appellate court may also be sought when certification under 42 Pa.C.S. § 702(b) has been denied. Pa.R.A.P. 1311(a)(1). If a government unit, such as the Board, does not act on a motion to amend within 30 days, it is deemed denied. Pa.R.A.P. 1311(b); 25 Pa. Code § 1021.153(d).

In determining whether to amend an interlocutory order "we must assess whether the necessary standards are present: 1) the order involves a controlling question of law; 2) there is substantial ground for difference of opinion on that controlling question of law; and 3) an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter." *PennEnvironment v. DEP*, 2021 EHB 55, 58 (citing *Erie Coke Corp. v. DEP*, 2019 EHB 574, 576). If the party seeking amendment fails to satisfy one or more of these criteria, "their request necessarily fails." *Erie Coke*, 2019 EHB at 576. In essence, we are called upon to assess whether an immediate appeal to the Commonwealth Court would be a worthwhile use of everyone's time and resources. *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. The Board's decision on whether to amend an interlocutory order is discretionary. *Clean Air Council v. DEP*, 2019 EHB 685, 708; *Becker v. DEP*, 2016 EHB 65, 70.

Keystone has not referred us to any cases in which a court or this Board has ruled that an order granting intervention is appropriately the subject of interlocutory appellate review. As a

general matter, orders granting intervention during ongoing disputes are typically not immediately appealable. *In re Penn Treaty Network Am. Ins. Co.*, 2021 Pa. Commw. LEXIS 587 (citing *Step Plan Services, Inc. v. Koresko*, 12 A.3d 401, 417 n.4 (Pa. Super. 2010)); *Beltran v. Piersody*, 748 A.2d 715, 717-18 (Pa. Super. 2000). Keystone has given us no good reason to depart from this general rule.

The burden is on the movant in this setting to explain why an *interlocutory* appeal is warranted, and Keystone's motion falls well short. Keystone may believe that *Browning-Ferris* was wrongly decided, but it has failed to convince us that the issue needs to be addressed by an appeal in the middle of an active case. First, the controlling question of law in this case is not Sierra Club's intervention; it is whether the Department erred in issuing Keystone's permit modification. Sierra Club's intervention is beside the point of the decisive question in this appeal. It has no bearing on the substantive issues in the appeal concerning the landfill's leachate generation and management, groundwater contamination, or the regulatory harms-benefits analysis. This case cannot possibly turn on whether Sierra Club was properly permitted to intervene.

Second, Keystone complains in a conclusory fashion that Sierra Club's participation will require "lengthy, expensive, and ultimately unnecessary proceedings," but it fails to explain in any detail how that would be the case. It is certainly not obvious to us how Sierra Club's participation will materially complicate the appeal. Sierra Club is making basically the same arguments as FOL. Sierra Club takes the case as it finds it, so it is not clear why the litigation would be more protracted than it already is, especially with the parties having already agreed that dispositive motions need not be filed until November 2022. No hearing can realistically occur under that schedule until 2023. The Board is fully capable of controlling unduly burdensome discovery or unnecessarily

duplicative presentations. Keystone has not shown how allowing an interlocutory appeal could possibly, let alone probably, materially advance the ultimate termination of this appeal.

Third, Keystone also fails to convince that there is a substantial ground for difference of opinion regarding Sierra Club's right to intervene. Indeed, to be precise, there is actually *no* difference of opinion whether we ruled correctly on Sierra Club's intervention in light of *Browning-Ferris* and the dozens of Board cases decided thereafter. Our Opinion did not establish new law. It did not wade into unsettled waters, quite the contrary. The fact that Keystone would like to see *Browning-Ferris* and its progeny overturned does not equate to what can fairly be characterized as substantial grounds.

If Keystone wishes to pursue its effort to upend decades of well-settled case law, it is our opinion that it would best be done following an Adjudication, not in an interlocutory appeal. In short, we are not of the opinion that our intervention Order involves a controlling question of law as to which there is a substantial ground for difference of opinion or that an immediate appeal from our Order would materially advance the ultimate termination of the matter.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA, Appellant and SIERRA CLUB, Intervenor	:	
v.	:	**EHB Docket No. 2021-066-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	

O R D E R

AND NOW, this 11th day of February, 2022, it is hereby ordered that the Permittee's motion to amend the Board's January 19, 2022 Opinion and Order to state that an interlocutory appeal is warranted is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 11, 2022

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

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: February 17, 2022**

OPINION AND ORDER ON
MOTIONS IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants multiple motions in limine filed by a permittee concerning a pre-hearing memorandum filed by appellants. The appellants' pre-hearing memorandum did not identify any scientific tests, list or attach any exhibits, or name any expert witnesses. Accordingly, the appellants will be precluded from utilizing scientific tests, offering or introducing exhibits, and relying on expert testimony in their case-in-chief at the upcoming hearing on the merits. The appellants will also be limited to calling three fact witnesses who were identified in their pre-hearing memorandum and clarified as their only witnesses in two letters subsequently filed by the Appellants.

O P I N I O N

Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") have appealed a letter from the Department of Environmental Protection (the "Department") in which the Department, in response to a complaint made by the Appellants, determined that any water quality issues in the Appellants' water supply were not caused by gas drilling operations conducted by Coterra Energy

Inc. f/k/a Cabot Oil and Gas Corporation ("Coterra") in Bridgewater Township, Susquehanna County. The Appellants disagree with the Department's determination and contend that Coterra is responsible for pollution of their water supply.

The hearing on the merits in this matter is scheduled to begin on February 22, 2022. Pursuant to our Pre-Hearing Order No. 2, issued on November 23, 2021, the Appellants were to file their pre-hearing memorandum by December 30, 2021. The Appellants did not file their pre-hearing memorandum when it was due, and on January 3, 2022, we issued a Rule to Show Cause for the Appellants to show cause why the Board should not impose sanctions for the failure to file their pre-hearing memorandum. We gave the Appellants until January 10, 2022 to show cause or to discharge the Rule by filing their memorandum.

On January 7, 2022, the Appellants filed a motion to stay our proceedings or to extend the time to file their pre-hearing memorandum until January 19.[1] We issued an Order granting the Appellants until January 19 to file their pre-hearing memorandum, and the Appellants filed it on that date. In their pre-hearing memorandum, the Appellants do not identify any scientific tests on which they intend to rely. Nor do the Appellants list or attach any exhibits that they propose to utilize at the hearing. Their memorandum also does not identify any expert witnesses that the Appellants will call to testify on their behalf and they seem to say that expert testimony is not

[1] The justification for the stay request was that the Appellants were pursuing an interlocutory appeal of our Opinion and Order issued November 10, 2021 granting in part summary judgment on the issue of the distance of the Appellants' water supply to Coterra's gas wells. *Stanley v. DEP*, 2021 EHB 310. We otherwise denied the three parties' competing motions for summary judgment. The Appellants, erroneously believing that we determined in our Opinion that they waived certain issues, asked us to certify the matter for immediate appeal to the Commonwealth Court. We denied that motion in an Opinion and Order issued on December 15, 2021, finding that the Appellants did not identify a controlling question of law and that an immediate appeal would only delay, not advance, the ultimate termination of this matter. *Stanley v. DEP*, 2021 EHB 356. On February 10, 2022, the Commonwealth Court issued an Order denying the Appellants' petition for permission to appeal our interlocutory Order on summary judgment. *See* Cmwlth. Ct. Docket No. 1412 C.D. 2021.

necessary in this appeal that involves the disputed question of whether or not gas drilling operations polluted the Appellants' water supply.

Coterra has filed a series of motions in limine in response to the Appellants' pre-hearing memorandum. Coterra's motions seek orders from the Board (1) precluding the Appellants from calling any expert witnesses, (2) limiting the Appellants' fact witnesses to those listed in their memorandum, (3) preventing the Appellants from introducing evidence and testimony on issues that were not raised in their notice of appeal or amended notice of appeal, and (4) precluding the Appellants from introducing any exhibits or scientific tests since none were identified in their pre-hearing memorandum. On February 10, the Department filed a letter stating that it joins in Coterra's motions.

For their part, the Appellants filed a one-page letter on February 11 stating that they would not be responding to the motions in limine. The body of the letter provides in its entirety:

> Landowners Ms. Tonya Stanley, Mr. Jeffrey Dibble and Ms. Bonnie Dibble ("Landowners") have reviewed Intervenor Coterra Energy, Inc. f/k/a Cabot Oil and Gas Corporation's ("Coterra") following filings: (1) Motion in Limine to Preclude Appellants from Offering Expert Witness Testimony Not Identified in Appellants' Pre-Hearing Memorandum; (2) Motion in Limine to Exclude Fact Witnesses Not Identified in Appellants' Pre-Hearing Memorandum; (3) Motion in Limine to Exclude Issues Not Raised in Appellants' Notice of Appeal or Amended Notice of Appeal; (4) Motion in Limine to Exclude the Introduction of Exhibits and Scientific Tests Not Identified in Appellants' Pre-Hearing Memorandum; (5) the respective Memoranda of Law in Support of each Motion in Limine (collectively referred to as the "Cottera [sic] Motions").
>
> Please be advised that the Landowners will not be filing separate responses to the Cottera [sic] Motions but rather, objects to the Coterra Motions to limit evidence. As support for this position, Landowners are not filing their own motions in limine to limit Intervenor's or the Department's introduction of evidence. In addition, Landowners will be the only witnesses called at the hearing; all other witnesses in Landowners' pre-hearing memorandum will not be called by Landowners.
>
> Landowners respectfully request that the Board please notify Landowners in the event the Board requires that these notifications be filed with the Board in another format; Landowners will quickly respond to such requirements in accordance with the Board's directions. Each of the Landowners lives with disabilities and as such, on or before February 16, 2022, Landowners will, as directed by the Board, send

> the email addresses for Landowners together with any accommodations necessary for Landowners' full participation. Landowners look forward to a full and fair hearing on the merits on February 22, 2022.

Our Rules, of course, require responses in opposition to a motion to "set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code § 1021.91(e). Although the Appellants have once again submitted a filing that does not comport with our Rules, we will nevertheless address Coterra's motions on the merits.

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. *See also* 25 Pa. Code § 1021.121 ("party may obtain a ruling on evidentiary issues by filing a motion in limine"). For the reasons explained below, we largely grant Coterra's motions.

Exhibits and Scientific Tests

Coterra's motions mostly arise out of things that are not contained in the Appellants' pre-hearing memorandum—exhibits, scientific tests, experts. Our Rules plainly detail the required contents of a party's pre-hearing memorandum. 25 Pa. Code § 1021.104. Among other things, our Rules require that a pre-hearing memorandum include "[a] list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. A copy of each exhibit shall be attached." 25 Pa. Code § 1021.104(a)(7). Our Pre-Hearing Order No. 2, which schedules the hearing and sets the schedule for filing pre-hearing memoranda, essentially repeats this requirement, advising parties that their pre-hearing memoranda shall contain "[a] list of the exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. Copies of these

exhibits shall be attached. All documentary evidence shall be numbered and marked in order to allow for expeditious offering into evidence." (PHO-2 at ¶ 1.H.) In addition to exhibits, a party is required to provide "[a] description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use." 25 Pa. Code § 1021.104(a)(3). (*See also* PHO-2 at ¶ 1.C (same).) Our Rules include an admonition if a party disregards the requirements for a pre-hearing memorandum, authorizing the Board to impose sanctions that "may include the preclusion of testimony or documentary evidence and the cancellation of the hearing." 25 Pa. Code § 1021.104(b).

Under the Scientific Tests heading of their pre-hearing memorandum, the Appellants state, "None." (PHM at 8.) Under the Exhibits heading, the Appellants do not list any exhibits, nor are any attached to their memorandum.[2] Among the scientific tests we think would be relevant to the resolution of this appeal are the various water test and sample results of the Appellants' water supply that the parties have discussed and litigated in filings over the course of this appeal. *See Stanley v. DEP*, 2021 EHB 176 (denying Appellants' first motion for summary judgment on the issue of whether triethylene glycol was detected in different water samples taken by the Appellants and the Department). Indeed, both the Department and Coterra have in their pre-hearing memoranda identified water sample and analytical test results of the water supply as scientific tests they are likely to rely upon at the hearing. Further, we think at least some exhibits would be relevant, beginning with the Department determination letter that is the subject of this appeal. In any event, Coterra has moved to preclude the Appellants from offering or introducing any exhibits or scientific tests to prevent unfair surprise at the upcoming hearing.

[2] By way of comparison, the Department lists and attaches 20 exhibits to its pre-hearing memorandum, and Coterra lists and attaches 32 exhibits.

We have no hesitation granting Coterra's motion in limine on this issue. To hold otherwise would make a mockery of our Rules and would be highly prejudicial to the Department and Coterra. "The pre-hearing memorandum is an essential part of the preparation for a hearing. It advises both the Board and the opposing parties of the details of the evidence supporting the appellant's claim so that surprise at the hearing will be eliminated." *Zazo v. DEP*, 2006 EHB 650, 654. Parties have a right to rely on the information presented in opposing parties' pre-hearing memoranda as the final statement of a party's case before the hearing on the merits commences. Allowing the Appellants to utilize unidentified exhibits and scientific tests and spring them on the Department and Coterra at the hearing would be pure trial by ambush. *Midway Sewerage Auth. v. DER*, 1990 EHB 1554, 1560 ("It is a universally endorsed concept that justice in our trial courts is not served where lawyers use tactics designed for trial by ambush and unfair surprise.") Accordingly, no exhibits or scientific tests may be introduced or admitted by the Appellants' in their case-in-chief.

Fact and Expert Witnesses

Two of Coterra's motions seek to ensure the Appellants do not call any fact or expert witnesses not listed in their pre-hearing memorandum. The Appellants list 26 potential fact witnesses in their pre-hearing memorandum, including representatives of the Department and Coterra and the Appellants themselves. However, since filing their pre-hearing memorandum the Appellants have clarified in their February 11, 2022 letter quoted above that "Landowners will be the only witnesses called at the hearing; all other witnesses in Landowners' pre-hearing memorandum will not be called by Landowners." The letter specifies that "Landowners" are the Appellants Ms. Tonya Stanley, Mr. Jeffrey Dibble, and Ms. Bonnie Dibble. The Appellants filed another letter on February 14, 2022 making it clear that Tonya Stanley, Jeffrey Dibble, and Bonnie

Dibble will be the only three fact witnesses called at the hearing. Since all three of the Appellants are identified as fact witnesses in their pre-hearing memorandum, it appears there is no dispute on this issue. Accordingly, the Appellants will be limited to calling Tonya Stanley, Jeffrey Dibble, and Bonnie Dibble as fact witnesses at the hearing.

In terms of expert witnesses, the Appellants do not identify any experts in their pre-hearing memorandum. In fact, the Appellants actually disavow the use of expert testimony in their pre-hearing memorandum, saying that "such testimony is not required to prove pollution from oil and gas operations, particularly in the instant matter." (PHM at 9.) They go on to assert that:

> The notion that an "expert" could make any definitive finding without having all critical information, such as each of the chemicals used by an operator or the impact that prior and current drilling has on the subterranean landscape, is not credible. Further, the use of an expert without taking effects of the subject fracking in relation to the past fracking, including from adjacent wells, particularly given the length that horizontal laterals are drilled. [sic]

(*Id.*)

However, because "[a]n expert in a Board appeal can dramatically alter the orientation of the case," *Clean Air Council v. DEP*, 2019 EHB 685, 697, we want to make it clear that the Appellants will not be permitted to call any expert witnesses to testify on their behalf. Our Rules require parties to specifically identify any experts in their pre-hearing memorandum. 25 Pa. Code § 1021.104(a)(4)-(5). Both Coterra and the Department have identified experts in compliance with this rule. Although we have been told in various filings that no expert discovery was conducted by the parties, as we recently held in *Williams v. DEP*, 2021 EHB 232, 251-54, regardless of whether any expert discovery is conducted, the independent obligation persists to identify one's experts in a pre-hearing memorandum in accordance with our Rules. If any party does not comply with that obligation, they run the very real risk of being precluded from offering experts at the hearing. *Borough of Edinboro v. DEP*, 2003 EHB 725, 772. "The small burden placed on a party

to fully follow the rules does not compare to the significant disadvantage the other party faces in confronting an expert on the fly at a hearing. Allowing a party to flout our Rules and still present expert testimony threatens to undermine the integrity of our proceedings, and we must be adamant in preventing such tactics." *Williams*, 2021 EHB at 254. Allowing the Appellants to have any experts testify on their behalf at the hearing beginning just days from now would be extremely prejudicial to the Department and Coterra.

Issues Outside of the Notice of Appeal

Finally, Coterra argues that certain issues raised in the Appellants' pre-hearing memorandum go beyond the issues raised in their notice of appeal and amended notice of appeal. We have held that "[a]ny issues not raised in the notice of appeal (either the original notice of appeal or any amendments) are waived and cannot be raised for the first time in a party's pre-hearing memorandum." *Ringer v. DEP*, 2013 EHB 666, 667. *See also Morrison v. DEP*, 2021 EHB 211, 219. We will address this concern at the hearing if it becomes necessary.

As we near the hearing it is important to note that the Appellants have the burden of proof in this appeal and must show by a preponderance of the evidence that the Department erred in determining that Coterra's gas operations did not contaminate their water supply. *Kiskadden v. DEP*, 2015 EHB 377, 406. This means that the Appellants will present their case-in-chief first at the hearing on the merits. Despite the Appellants' claims in their pre-hearing memorandum to the contrary, (*see* PHM at ¶¶ 13, 24), the burden of proof has not shifted to the Department and/or Coterra.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 17th day of February, 2022, it is hereby ordered that Coterra's motions in limine are **granted** as follows:

1. The Appellants are precluded from offering or introducing any exhibits or scientific tests as part of their case-in-chief at the hearing on the merits.
2. The Appellants are precluded from calling any expert witnesses at the hearing on the merits.
3. The Appellants are limited to calling the three fact witnesses who were previously identified in their pre-hearing memorandum, as clarified by their letters of February 11, 2022 and February 14, 2022: Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble.
4. Rulings on whether testimony relates to issues that go beyond the scope of the Appellants' notice of appeal and amended notice of appeal will be addressed as necessary at the hearing.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 17, 2022

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

For the Commonwealth of PA, DEP:
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Kayla A. Despenes, Esquire
Paul Joseph Strobel, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Intervenor:
Amy L. Barrette, Esquire
Robert L. Burns, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 17, 2022**
	:	

OPINION AND ORDER ON
APPELLANT'S MOTION IN LIMINE TO EXCLUDE
FACT TESTIMONY FROM NON-PRODUCED WITNESSES

By Thomas W. Renwand, Chief Judge

Synopsis

The Board denies the Appellant's Motion in Limine to Exclude Fact Testimony by four individuals the Department has designated as expert witnesses. Pa.R.C.P. 4003.5 allows the discovery of expert witnesses' factual knowledge and opinions by interrogatories or the exchange of expert reports. Depositions of expert witnesses may be permitted in limited circumstances. The Appellant did not demonstrate that such circumstances were warranted here, where the parties have exchanged detailed and extensive expert reports. Because there were no circumstances warranting the deposition of the Department's experts, there is no basis for precluding their testimony based on the inability to depose them.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) challenging an order issued by the Pennsylvania Department of Environmental Protection (Department) contending that natural gas leaked from Range's Harman – Lewis Unit 1H gas well

and affected ground water and surface water in Lycoming County, Pennsylvania. The order directs Range to take a number of actions, including the restoration and replacement of affected water supplies, investigation of the migration of natural gas from the gas well, and submission of a remedial investigation plan and well plugging plan. A six-week hearing in this matter is scheduled to begin April 5, 2022, and the parties have filed numerous motions in limine.

The motion addressed in this Opinion is Range's Motion in Limine to Exclude Fact Testimony by Non-Produced Witnesses (Motion to Exclude), filed on January 14, 2022. Specifically, Range seeks to preclude the Department's expert witnesses from testifying as to personal factual knowledge since the experts were not produced for deposition. The Department filed a response in opposition to the motion on February 25, 2022.

The witnesses at issue are the following: William Kosmer, a licensed professional geologist employed by the Department; Bruce Jankura, Section Chief of the Department's Bureau of District Oil and Gas Operations, Subsurface and Operations Support Section; Seth Pelepko, Environmental Program Manager, Division of Subsurface Activities, Bureau of Oil and Gas Planning and Program Management; and Bryce McKee, an oil and gas professional geologist previously employed by the Department. The Department has named each of these individuals as expert witnesses. Range argues that because these individuals were involved at various stages in the creation and issuance of the order that is the subject of this appeal, it should have had the opportunity to depose them as to their personal factual knowledge of these subjects.

Discussion

Discovery of experts is governed by Pa.R.C.P. 4003.5 which states that "[d]iscovery of facts known and opinions held by an expert" may be obtained through interrogatories or the

exchange of expert reports. Pa.R.C.P. 4003.5 also states, "Upon cause shown, the court may order further discovery by other means…"

Range sought on two occasions to depose the aforenamed individuals. Those motions were denied, and Range has now filed a Motion in Limine to preclude the Department's experts from testifying as to their personal factual knowledge. Range argues that because it was not provided an opportunity to depose the aforementioned individuals, in addition to the exchange of expert reports, it has been deprived of its due process right to present a meaningful case.

Range's argument has been addressed in two prior opinions issued in this matter. In November 2020, Range sought to depose Mr. Jankura, Mr. Kosmer and Mr. McKee as to their factual knowledge. In an Opinion and Order issued on January 27, 2021, the Board relied on Pa.R.C.P. 4003.5 and previous Board case law in denying the Motion to Depose. The Board held:

> Over a period of many years the Board has overseen a practice that requires any individual who is identified as an expert to adhere to the requirement set forth in Rule 4003.5 regarding expert testimony. Therefore, a proposed expert must either answer expert interrogatories or in the alternative serve a detailed expert report…Although the Board has allowed partial depositions as the circumstances warranted in the past we continue to believe that such depositions should be the exception rather than the rule.

Range Resources – Appalachia, LLC v. DEP, 2021 EHB 37, 39-40 (*Range I*) (citing *Primrose Creek Watershed Assoc. v. DEP*, 2013 EHB 196, 200, and *Groce v. DEP*, 2005 EHB 951, 955). In denying Range's motion without prejudice, we noted that expert reports had not yet been exchanged by the parties and there appeared to be no cause for ordering the deposition of the expert witnesses at that time.

On April 30, 2021, after receiving the Department's initial expert reports, Range filed a second Motion to Depose, again seeking to depose Mr. Jankura, Mr. Kosmer and Mr. McKee, as well as Mr. Pelepko. In an Opinion and Order denying this second motion, we explained:

> The important trigger in most instances, as we said in our earlier Opinion, is, first, the exchange of expert reports. However, the mere exchange of reports is not the deciding factor. Instead, it is both a substantive and procedural hurdle. Stated another way, only after the expert states "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion" is the other side potentially entitled to "further discovery by other means." Pa. R.C.P. 4003.5(a)(1)(B) and 4003.5(a)(2). The analysis is focused on what is set forth in the expert reports and whether those reports comply with Rule 4003.5.
>
> ***
>
> Range's Second Motion to Depose does not analyze the initial expert reports filed by the Department. Instead, Range doubles down on the same arguments that we declined to adopt in its First Motion to Depose. The factual knowledge and opinions possessed by an expert witness are discoverable pursuant to Rule 4003.5 which provides for this information to be provided either in an expert report or by answers to expert interrogatories. "Discovery by other means," including depositions, is not permissible absent an agreement of counsel or in the Board's sound discretion after a showing of cause that the information set forth in the expert reports is not sufficient. By not providing us with the expert record including the reports, let alone an analysis of why the reports are inadequate, Range has given us nothing to conclude that additional discovery, including depositions of Department experts, is warranted.
>
> The Department not only provided us with its expert reports but also an analysis of why the expert reports satisfied the requirements of Rule 4003.5. The Department makes a strong argument that its initial expert reports extensively set forth each expert witness' detailed factual knowledge and how those facts serve as the basis of the respective expert's opinions. Indeed, our review leads us to conclude that "further discovery by other means" is not warranted.

Range Resources – Appalachia, LLC v. DEP, 2021 EHB 182, 185-86 (*Range II*).

Range now seeks to preclude the aforenamed expert witnesses from presenting factual testimony at the hearing based on its inability to depose them. For the same reasons we denied the motions to depose, we find no basis for precluding the experts' testimony. Pennsylvania Rule of Evidence 703 allows an expert to base his or her opinion "on facts or data in the case that the expert

has been made aware of or personally observed." Pursuant to Pa.R.C.P. 4003.5, the proper means for discovering this information is through interrogatories or the exchange of expert reports. There is no right to depose an expert witness. *Range II*, 2021 EHB at 186, 188-89; *Range I*, 2021 EHB at 39.

Pa. R.C.P. 4003.5 allows for "discovery by other means" "upon cause shown" as ordered by the court. In other words, the deposition of expert witnesses may be ordered, in addition to the production of expert reports or answers to expert interrogatories, where the court finds cause for doing so. However, as we held in our prior Opinion, we do not believe Range has provided sufficient cause as to why the Department's expert reports were inadequate to provide the information requested. On the contrary, the expert reports provided by the Department "extensively set forth each expert witness' detailed factual knowledge and how those facts serve as the basis of the respective expert's opinions." *Range II,* 2021 EHB at 186. We agree with the Department that "Range's Motion to Exclude asks the Board to preclude properly identified experts from testifying about factual knowledge that was properly disclosed in discovery. This does not make legal or practical sense." (Department's Memorandum of Law, p. 5.)

Nor do we accept Range's argument that allowing the Department's experts to testify will deprive Range of its due process rights. The Pennsylvania Rules of Civil Procedure are very clear that the discovery of experts is to be conducted through interrogatories or, in the alternative, the exchange of expert reports. Pa.R.C.P. 4003.5 allows the deposition of experts in limited circumstances, and as the Board explained in its two prior opinions, we do not believe Range has demonstrated that such circumstances exist here. As we held in *Range II*: "The detailed and extensive discovery that has been conducted by Range in this case refutes any argument that it has been denied due process. Stated simply, Range has not demonstrated good cause to take additional

discovery of the Department expert witnesses." *Id.* at 189. As we further held: "The fact that expert witness discovery does not normally include expert witness depositions is not a violation of due process because of the requirements of Pa.R.C.P. 4003.5." *Id.*

Therefore, we find no basis for excluding the factual testimony of the Department's expert witnesses.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of March, 2022, it is ordered that Range's Motion in Limine to Exclude Fact Testimony from Non-Produced Witnesses is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: March 17, 2022

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 18, 2022**
	:	

OPINION AND ORDER ON APPELLANT'S MOTIONS IN LIMINE TO EXCLUDE TESTIMONY AND OPINIONS OF THE DEPARTMENT'S EXPERT WITNESSES

By Thomas W. Renwand, Chief Judge

Synopsis

The Appellant's motions in limine to exclude the testimony of all of the Department's expert witnesses are denied. We believe that the Appellant's objections go to the weight to be accorded the testimony rather than the admissibility. With regard to the Appellant's allegation that the scientific methodology relied on by the Department's experts does not meet the *Frye* standard, we find that the credibility of the expert witnesses is best resolved by live testimony rather than in the context of a motion.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) challenging an order issued by the Pennsylvania Department of Environmental Protection (Department) contending that natural gas leaked from Range's Harman – Lewis Unit 1H gas well and affected ground water and surface water in Lycoming County, Pennsylvania. The order directs Range to take a number of actions, including the restoration and replacement of affected water

supplies, investigation of the migration of natural gas from the gas well, and submission of a remedial investigation plan and well plugging plan. A six-week hearing in this matter is scheduled to begin April 5, 2022, and the parties have filed numerous motions in limine.

This Opinion addresses six Motions in Limine filed by Range seeking to exclude the testimony and opinions of all six of the Department's expert witnesses in this matter.[1] Range seeks to exclude each of the Department's experts on all or some of the following grounds: 1) The data or sampling on which the expert relies is inadmissible; 2) the Department cannot meet its burden of demonstrating that the expert's testimony is based on generally accepted scientific methodology; 3) the testimony does not meet the standard of professional certainty; and 4) the testimony does not have a proper factual basis. The Department disputes each of Range's arguments and asserts that the only basis for Range's motions is that Range's experts simply disagree with the opinions of the Department's experts.

Discussion

Pennsylvania Rule of Evidence 702(c) states that an expert "may testify in the form of an opinion or otherwise" if "the expert's methodology is generally accepted in the relevant field." When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania courts have adopted the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), known as the *Frye* test. *Grady v. Frito Lay, Inc*., 839 A.2d 1038, 1045 (Pa. 2003); *Kiskadden v. DEP and Range Resources - Appalachia, LLC*, 2014 EHB 618, 619. Under *Frye*, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Grady, supra* at 1044-45 (citing *Commonwealth*

[1] The motions seek to exclude the testimony and opinions of June Black, William Kosmer, Seth Pelepko, Bruce Jankura, Bryce McKee and Thomas Darrah, Ph.D.

v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998). As we explained in *Kiskadden*, "The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." 2014 EHB at 619-20 (citing *Commonwealth v. Topa*, 369 A.2d 1277, 1282 (Pa. 1977) (quoting *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974)).

In *Pine Creek Valley Watershed Assn. v. DEP*, 2011 EHB 90, 93-94, we addressed the difficulty of applying a *Frye* analysis based solely on arguments presented in a motion and response:

> In a way, resolving a *Frye* dispute itself requires expert opinion. The experts need to tell us whether a method is generally accepted in their field. There is certainly no prohibition against the expert who is proposing the use of allegedly novel methods testifying that the methods are generally accepted. Opposing experts may of course disagree. We evaluate the credibility of the testimony just like any other expert testimony, and a meaningful evaluation of credibility is difficult without taking live testimony. Thus, where there are conflicting expert views, this is simply another version of a battle of the experts…While we do not wish to entirely rule out the possibility of a *Frye* motion in *limine* being an appropriate vehicle for resolving the question in an EHB appeal, we suspect that resolving such questions at the hearing itself will almost always be the better approach.

A *Frye* motion is rarely successful in a case before the Environmental Hearing Board. As we explained in *Kiskadden*, 2014 EHB at 623:

> The *Frye* test is designed to ensure that opinions based upon unaccepted science are not presented to impressionable jurors. *Blum v. Merrell Dow Pharm., Inc.*, 705 A.2d 1314, 1317 (Pa. Super. 1997), *aff'd,* 764 A.2d 1 (Pa. 2000). However, the Board "operates in a nonjury setting. We deal with scientific theories every day." *Pine Creek Watershed* Adjudication 2011 EHB [761] at 778-79. The judges of the Environmental Hearing Board have a level of expertise far above that of the average jury and can more easily determine how much credibility should be given to expert testimony presented at trial.

That is not to say that the Board will never entertain a *Frye* motion. As we stated in *Kiskadden,* "where opinions are founded upon scientific theories that amount to 'junk science' it wastes precious time at trial and does not aid us in our adjudication of a matter." 2014 EHB at 623. However, based on our review of Range's motions and the Department's responses, we do not find that to be the case here. There is clearly a great deal of dispute among the parties' experts in this matter. In this case, we believe that a determination of which expert testimony is more credible is best resolved at the hearing.

Range has also raised a number of other reasons why we should exclude the testimony of the Department's experts, including the admissibility of the underlying data, whether the opinion is supported by a proper factual basis, and whether the opinion is held to the requisite standard of professional certainty. We find that Range's arguments go to the weight that should be accorded the testimony and not its admissibility.

Range also argues that the rebuttal expert report provided by June Black retracts or disclaims opinions stated in her affirmative report. The Department disagrees with Range's characterization. We hold that Ms. Black may testify at trial within the fair scope of her affirmative and rebuttal expert reports. Range may attack the weight the Board should give her testimony at trial.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of March, 2022, it is hereby ordered that Range's Motions in Limine to Exclude the Testimony of June Black, William Kosmer, Thomas Darrah, Seth Pelepko, Bruce Jankura and Bryce McKee are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 18, 2022

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

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Benjamin T. Verney, Esquire
Leon DeJulius, Esquire
Eric P. Stephens, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LLC	:	
	:	
v.	:	**EHB Docket No. 2022-006-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 24, 2022**
	:	

OPINION AND ORDER ON
PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board grants the petition to intervene in an appeal of the Department of Environmental Protection's recission of its earlier correspondence acknowledging Appellant's Land Application System Plan. The petitioners have a substantial, immediate, and direct interest in this appeal.

O P I N I O N

Background

Barr Farms, LLC, ("Barr Farms" or "Appellant") has appealed the Department of Environmental Protection's ("the Department's") recission of an earlier email the Department sent addressing Barr Farms' Land Application System Plan ("LAS Plan"). The sequence of events leading up to this appeal are as follows: On December 10, 2021, the Department sent an email ("December 10 Email") that stated that it concurred with changes to Barr Farms' LAS Plan to apply Food Processing Residual ("FPR") waste and that "[L]and application of the FPR

present in the tank may proceed in accordance with 25 Pa. Code § 287.101(b)(2) …" On December 13, 2021, Thomas and Lori Clopper, Anthony and Stacie Grove, and Brad and Kayla Kershner (collectively, "the Petitioners"), filed a Notice of Appeal of the Department's December 10 Email, alleging, amongst other things, that the storage of FPR by Barr Farms had a negative impact on their property and drinking water and that allowing the land application of the FPR material endangered the safety of the Petitioners. That appeal is docketed at EHB No. 2021-124-B. Brian Barr is a party to that appeal. On January 5, 2022, the Department sent an email to Barr Farms ("Recission Email") rescinding the acknowledgement contained in the December 10 Email. The Recission Email detailed that a lab analysis of a sample taken from the material in the tanks located on Barr Farms' property detected human gene material. The Recission Email went on to explain that because human gene material was detected "the material currently contained in both tanks cannot be considered FPR under the FPR manual as this waste also contains human waste." (Appellant's Notice of Appeal, Ex. A). The Department further states that the material in the tanks is considered residual waste and Barr Farms would need to obtain a waste permit in order to spread the material.

Barr Farms appealed the Department's Recission Email on February 3, 2022. On February 25, 2022, the Petitioners filed their Petition to Intervene ("the Petition"). In a letter filed with the Board, the Department expressed that it does not oppose the Petition to Intervene. Barr Farms on the other hand, filed its Answer in Opposition to Petition to Intervene ("the Answer") on March 11, 2022.

Standard

Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "any interested party may intervene in any matter pending before the board." The

Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Clean Air Council v. DEP,* 2017 EHB 184, 191 (citing *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). The intervenor must have standing. *Pileggi v. DEP,* 2010 EHB 433, 434. Standing requires more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436.

A person or entity seeking to intervene has standing if its interests in the matter are substantial, direct, and immediate. *Lawson v. DEP,* 2017 EHB 968, 970; *Borough of Glendon v. DER*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Tortorice v. DEP*, 1998 EHB 1169, 1170. For an interest to be considered "substantial," the interest must "surpass the common interest of all citizens seeking obedience to the law." *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934, 935. "Direct" and "immediate" mean that there must be a sufficiently close causal connection between the person's interest and the actual and potential harm associated with the challenged action. In other words, the intervenor's interest must not be remote. *University Area Joint Authority v. DEP*, 2019 EHB 750, 752. When standing is challenged in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of law. *Lawson v. DEP,* 2017 EHB 968, 970 (citing *Logan v. DEP*, 2016 EHB 531, 533).

Analysis

The Petitioners assert that they have a substantial, direct, and immediate interest in this appeal because it is directly related to their separate appeal at EHB Docket No. 2021-124-B. In their Notice of Appeal in that case, the Petitioners assert that the FPR stored by Barr Farms caused odor issues and water contamination on their properties. They claim that the Department failed to properly investigate their concerns and failed to comply with the requirements of the FPR Manual. The Petitioners specifically objected to the contents of the December 10 Email that they characterize as an approval by the Department for the spreading of the FPR material on fields near their properties by Barr Farms. The Petitioners state that if they are permitted to intervene, they intend to present evidence relating to the impact of this appeal on their related appeal before the Board, including the impact the Board's decision in this appeal will have on their properties and drinking water.

Barr Farms objects to the Petition and asserts in its Answer that the Petitioners do not meet the standards for intervention because the Petitioners will neither gain nor lose as a direct result of the Board's decision in this appeal. According to Barr Farms, the sole subject of this appeal is the determination by the Department set forth in the Recission Email that the material in the tanks located at its farm do not qualify as FPR. Barr Farms argues that Petitioners should not be allowed to expand the appeal and state that any issues the Petitioners raise are already being addressed in their appeal docketed at 2021-124-B. Barr Farms relies on a Commonwealth Court case, *Jefferson County. v. DEP,* 703 A.2d 1063 (Pa. Cmwlth. 1997) in support of its position that the Petition should be denied because of the related appeal.

We find that the Petitioners have a substantial, direct, and immediate interest in this appeal and we reject Barr Farms' argument that the Petitioners will neither gain nor lose as a

result of the Board's decision in this appeal. The Petitioners live adjacent to or in close proximity to Barr Farms and the fields where the FPR would be allowed to be land applied in the absence of the Recession Email from the Department. While the Commonwealth Court and this Board have held on numerous occasions that mere ownership of property near a subject site is not enough by itself to confer standing or justify intervention, we remain mindful that it is a factor in our consideration. *Tessitor v. DER*, 682 A.2d 434, 437 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied*, 693A.2d 591 (Pa. 1997); *Darlington Township v. DEP*, 97 EHB 934, 935; *P.A.S.S. v. DEP*, 1995 EHB, 940, 942. In this case, the proximity of the Petitioners' property supports a finding that their interest is substantial because it results in their interest surpassing the common interest of the general citizenry in compliance with the relevant laws. They are more likely than members of the general public to suffer from any negative consequences caused by the land application of the material in the tanks in the event such an application creates a water contamination issue.

The Petitioners' interest in this appeal is also direct and immediate. So long as the Department's Recession Email remains in place, Barr Farms cannot land apply the material in the tanks as FPR without violating the waste regulations. The Petitioners contend that the contamination of the ground water that they use for drinking water is the result of tanks leaking or land application of the FPR by Barr Farms. The Petitioners clearly articulate that the harm they are asserting is caused by Barr Farms and, therefore, they have a direct and immediate interest in seeing that the Department's Recission Email remains in place and Barr Farms is prevented from spreading the FPR material on the fields in the vicinity of their wells and property. Assuming the facts set forth are true and accepting all inferences deducible from those facts as we are required to do, the Petitioners clearly gain if the Board denies Barr Farms' appeal

(no land application of the material in the tanks without additional permitting requirements) and lose if the appeal is granted (land application of the FPR that the Petitioners allege has the potential for groundwater and drinking water contamination).

We want to address Barr Farms' position that the Petition should be denied because the Petitioners are pursuing identical arguments in their related appeal. Barr Farms cites the Commonwealth Court's decision in *Jefferson County. v. DEP*, 703 A.2d 1063 (Pa. Cmwlth. 1997) in support of its position. In its Answer, Barr Farms describes the Court as affirming the Board's denial of a petition to intervene where the issues the intervenors sought to raise were already being addressed in a separate case before the Board that the intervenors filed. However, upon reviewing *Jefferson County*, the Court did not affirm the Board's decision based on that reasoning. In fact, the Court quashed the appeal of the petitioners in that case because they did not meet the requirements for an appeal under the collateral order doctrine and made no determination as to the soundness of the Board's reasoning in denying the petition to intervene in that case. Upon further investigation of the *Jefferson County* case, it appears the Board only issued an order without an accompanying opinion in denying the petition in that instance. The *Jefferson County* case does not support the position advocated by Barr Farms. In this instance, we see no reason to deny the Petition despite the Petitioners raising similar issues in their separate appeal.

Barr Farms also argues that if the Petitioners are permitted to intervene, that the Board should limit the issues the Petitioners are able to raise to those issues raised by Barr Farms in its appeal. Under our rule on intervention, the Board may specify the issues as to which intervention is allowed. 25 Pa. Code § 1021.81(f). Barr Farms contends that "the sole and exclusive subject of the appeal filed by Appellant is [the Department's] January 5, 2022,

determination that the material contained in the two tanks located at Appellant's farm does not qualify as FPRs" and that "[t]he evidence sought to be introduced by [the Petitioners] bears no connection to the instant appeal…" (Barr Farms' Answer at 5). In other words, Barr Farms argues that Petitioners should not be allowed to raise issues about water pollution concerns because such arguments are beyond the scope of this appeal. After considering Barr Farms' request, we conclude that the proper exercise of the discretion granted to us under our intervention rule is not to limit the Petitioners to the single issue of whether the material in the tanks qualify as FPR.

Our concern with Barr Farms' request that we limit the issues that Petitioners may raise is that our review of Department actions is de novo. *National Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 921, citing *Warren Sand & Gravel Company v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978). The Department action under appeal in this case is its recission of its earlier email that cleared the path for Barr Farms to land apply the FPR. The Department's reasons for its decision set forth in the Recission Email are certainly one focus of the appeal but the Board is not bound by the reasoning set forth by the Department and can consider other facts and legal reasoning for why Barr Farms should not be able to land apply the FPR stored in its tanks. *See Smedley v. DEP*, 2001 EHB 131, 156. We do not simply defer to and/or adopt the Department's findings of fact. *Id.* Rather, we make our own factual findings based on the presentation of the evidence of record, regardless of whether or not that information was considered or generated by the Department. *Id.* In order to aid in our de novo review of the Department's action, the Petitioners may present relevant facts and legal arguments in opposition to Barr Farms' plan, whether or not those arguments or facts served as a basis for the Department's action.

In summary, we find that the Petitioners have a substantial, direct, and immediate interest

in the outcome of this appeal. They stand to gain or lose as a result of the outcome of these proceedings, even withstanding a related appeal they have currently before the Board. Additionally, because our review is de novo and we can substitute our discretion for that of the Department's, we conclude that the issues the Petitioners can raise are not limited to those arguments presented by the original parties. The Board is satisfied that the threshold for intervention has been met by the Petitioners. Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARR FARMS, LCC	:	
	:	
v.	:	**EHB Docket No. 2022-006-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 24th day of March, 2022, it is hereby ORDERED that the Petition to Intervene is **granted**. The caption is amended as follows and shall be used on all future filings:

BARR FARMS, LCC	:	
	:	
v.	:	**EHB Docket No. 2022-006-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and CLOPPER, ET AL., INTERVENORS	:	

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 24, 2022

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

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Dawn M. Herb, Esquire
(*via electronic filing system*)

For Appellant:
Errin T. McCaulley, Esquire
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For Intervenors:
William G. Roark, Esquire
Steven A. Hann, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 25, 2022**
	:	

OPINION AND ORDER ON APPELLANT'S
MOTION IN LIMINE TO EXCLUDE ALL SAMPLING RESULTS AND DATA

By Thomas W. Renwand, Chief Judge

Synopsis

Appellant's motion in limine seeking to exclude all of the Department's sampling results and data on the basis of hearsay is denied where the Department has identified witnesses who are able to lay a foundation for a business records exception. Additionally, expert witnesses may base their opinions on hearsay pursuant to Pa.R.E. 703 if the information is of a type reasonably relied upon by experts in the field. With regard to Appellant's claim that certain data is unreliable, it will have an opportunity to attack the reliability of the data at the hearing.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) challenging an order issued by the Pennsylvania Department of Environmental Protection (Department) contending that natural gas leaked from Range's Harman – Lewis Unit 1H gas well and affected ground water and surface water in Lycoming County, Pennsylvania. The order directs Range to take a number of actions, including the restoration and replacement of affected water supplies, investigation of the migration of natural gas from the gas well, and submission of a

remedial investigation plan and well plugging plan. A six-week hearing has been scheduled in this matter. Range has filed nine motions in limine, and the Department has filed one.

This Opinion addresses Range's Motion in Limine to Exclude All Sampling Results and Data relied upon by the Department.[1] The Department has filed a response in opposition to the motion.

Motion in Limine

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of trial. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161. The purpose of a motion in limine is to provide the trial court an opportunity to consider potentially prejudicial and harmful evidence and preclude such evidence before it is referenced or offered at trial. *Commonwealth of Pennsylvania v. Padilla*, 923 A.2d 1189, 1194 (Pa. Super. 2007) (cited in *Kiskadden v. DEP and Range Resources – Appalachia, LLC*, 2014 EHB 634, 635). Motions in limine are better suited to address specific and narrow evidentiary matters that focus on particular exhibits or testimony. *See Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237 ("One clue to determining whether a motion [in limine] is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.") Motions in limine that contain sweeping claims aimed at eliminating an opposing party's case are rarely successful and generally not a productive use of the Board's resources on the eve of trial.

Discussion

[1]Range also filed motions in limine seeking to exclude fact and opinion testimony by the Department's expert witnesses. Those motions have been addressed in two Opinions issued by the Board at *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motion in Limine to Exclude Fact Testimony from Non-Produced Witnesses issued March 17, 2022) (*Range I*) and *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motions in Limine to Exclude Testimony and Opinions of the Department's Expert Witnesses issued March 18, 2022) (*Range II*).

Through its motion, Range seeks to exclude all sampling results and data on which the Department intends to rely in presenting its case. In effect, Range is seeking dismissal of the Department's case since the parties have indicated that they intend to rely heavily on the use of data, sampling results and expert testimony in this matter. We note that the parties have been aware of much of the evidence in this case for years. In addition, Range has conducted some of the most extensive discovery ever conducted in a case like this.

Range states as follows:

> The Department's and its experts' assertions depend on the purported results of geochemical laboratory analyses conducted over the past decade by various commercial laboratories and the Department's Bureau of Laboratories (the "BOL") on water and gas samples collected from the Green Valley area and beyond. Those sampling results and data are supposedly contained in data compilations, summaries, reports, figures, tables, and other records, as well as a purported "database" of sampling results supposedly compiled from unidentified documents submitted to the Department by unidentified third parties (collectively, the "Data at Issue"). None of the Data at Issue is admissible. All of the Department's experts' opinions and proposed exhibits that incorporate or otherwise rely on the Data at Issue, therefore, are also inadmissible. And, as a result, the Department is fundamentally unable to meet its burden of proof in this appeal.

(Range's Memorandum of Law in Support of Motion, p. 1-2.)

Range seeks to exclude the following, which it refers to as the "Data at Issue":

1) Sampling data generated by the Department's Bureau of Laboratories.
2) Field data sheets completed by Department inspectors.
3) Sampling data generated by commercial laboratories.
4) Isotopic sampling data.
5) Data referenced in two of the Department's expert reports.

Range's grounds for excluding the Data at Issue are as follows:

1) The Data at Issue constitutes hearsay.
2) None of the Department's witnesses can provide testimony to allow the Data at Issue to be admitted as a business record exception to the hearsay rule.
3) The Data at Issue is untrustworthy.

Finally, Range argues that all of the Department's exhibits that contain or rely upon the Data at Issue are inadmissible.

Business Records

Pennsylvania Rule of Evidence 803(6) provides an exception to the rule against hearsay for "records of a regularly conducted activity," provided that the following conditions are met: 1) the record was made at or near the time of the event by someone with knowledge or from information transmitted by someone with knowledge; 2) the record was kept in the course of a regularly conducted activity of a business; 3) making the record was a regular practice of that activity; 4) these conditions are shown by the testimony of the custodian of the records or other qualified witness; and 5) the opponent does not show that the source of the information indicates a lack of trustworthiness. Likewise, the Uniform Business Records as Evidence Act states:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

42 Pa.C.S. § 6108(b).

Due to the subject matter of appeals before the Environmental Hearing Board, hearings almost always involve the use of sampling results, laboratory reports and data. This information is generally introduced into evidence as a business record. In many cases, the parties stipulate to

the admission of this type of information as a business record. To the extent that Range is claiming that the Data at Issue is not the type of evidence that may be admissible as a business record, we reject that argument.

Bureau of Laboratories Reports and Field Data

Range argues that none of the Department's witnesses can provide the necessary testimony to demonstrate that the Data at Issue is admissible under the business records exception to the hearsay rule. In response, the Department identifies a number of witnesses in its prehearing memorandum as being able to establish the requirements of the business records exception. The Department provides the names of witnesses who will testify as to the identity of documents, how they are prepared and how they are maintained in the Department's records. It provides the names of witnesses who acted as sample collectors who will testify as to the mode and method of sample collection, how the samples are transported to the lab and how the lab reports are maintained. Some of those individuals have been identified as fact witnesses and others as expert witnesses. For example, the Department names a number of individuals who completed the field data sheets that are a subject of Range's motion; they are listed in the Department's prehearing memorandum as potential fact witnesses. The Department notes that Range is well aware of those witnesses, having deposed them. With regard to authenticating reports from the Department's Bureau of Laboratories, the Department has identified June Black, who, according to the Department's response, served as the Bureau's Organic Chemistry Section Chief from 2007 to 2021 and as the Bureau's Acting Technical Director in 2020.

Ms. Black has been identified by the Department as an expert witness, and Range argues that none of the Department's expert witnesses may authenticate the Department's business records because "the Department has never disclosed or identified that any of its expert witnesses

would provide factual testimony to prove the Data at Issue as trustworthy business records under Rule 803(6)." To the extent that Range is challenging the experts' ability to provide factual testimony, we considered and rejected this argument in our Opinion on Motion in Limine to Exclude Fact Testimony from Non-Produced Witnesses. *Range I.* Range further argues that "none of the Department's proffered experts has the actual, personal knowledge necessary to prove that the Data at Issue are trustworthy business records under the Rule 803(6) elements." As we explained in *Range I*, expert witnesses may base their opinions on facts they have "been made aware of or personally observed." *Id.* at 4-5 (quoting Pa.R.E. 703). According to the Department, this factual knowledge was disclosed in the expert reports and forms the basis of the experts' opinions.

Based on the parties' filings, we find that the Department has sufficiently identified witnesses who may establish the elements of a business record exception for the field reports and Bureau of Laboratory reports it intends to introduce at the hearing.

Data Provided by Commercial Laboratories

Range states that some of the data relied on by the Department in this case was generated by commercial laboratories other than the Department's Bureau of Laboratories. It is Range's argument that the Department has identified no witnesses who can authenticate this data as a business record exception and, further, that the data is inconsistent and unreliable. According to the Department's response, the data provided by commercial laboratories falls into two categories: 1) isotopic data and 2) data and reports submitted by Range during the investigation of this matter.

According to the Department, during the course of this investigation, it collected isotopic methane samples and sent them to a commercial laboratory called Isotech for analysis. Range argues that because the Department has not identified an employee of Isotech as a fact witness, it

has no means of authenticating this information as a business record exception to the hearsay rule and, therefore, this data must be excluded. The Department disputes Range's contention and argues that its experts may rely on this data, even if not admissible, as long as the facts and data are of a type reasonably relied upon by experts in the field.

We agree with the Department's statement of the law. Pennsylvania Rule of Evidence 703 states as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Thus, an expert may rely on hearsay facts or data if they are of a type reasonably relied upon by experts in the field. *Borough of St. Clair v. DEP*, 2015 EHB 764, 767 (citing Pa.R.E. 703). As we explained in *Borough of St Clair*, "This rule is not really an exception to the hearsay rule because the facts and data being cited are not evidence in and of themselves but merely describe the underlying basis for the expert's opinion." *Id*.

The Department further argues that, if it chooses to seek admission of the Isotech data at the hearing, it has the ability to lay an adequate foundation for admission of the data through the testimony of one of its experts, William Kosmer. The Department states that Mr. Kosmer is familiar with Isotech's process for recording and transmitting isotopic results and he has experience with relying on Isotech's reports. Rather than making a determination on the admissibility of the Isotech data at this time, we believe that it will be helpful to hear testimony to aid us in our decision. If the Department chooses to seek admission of the Isotech data, it will be required to lay an adequate foundation for admission of the data, and Range will have the

opportunity to challenge its admission. That said, we caution both parties that we expect this testimony to be short, concise and to the point.

In addition to the Isotech data, Range also challenges the trustworthiness of data and reports generated by other commercial laboratories during the investigation of the matter at issue here. Based on the parties' filings, it appears that data and reports were generated by commercial laboratories and submitted to the Department by Range. In support of its argument that the data and reports are unreliable, Range cites a number of Department sources discussing variability and discrepancies among commercial laboratories and the Department's Bureau of Laboratories. In particular, Range asserts that in the course of the investigation of this matter, the Department's Bureau of Laboratories and Range-contracted commercial laboratories "collected and analyzed split samples and arrived at very divergent results." (Range Memorandum of Law in Support of Motion, p. 21.) Based on the alleged unreliability and untrustworthiness of the data, Range argues that it cannot be admitted as a business record exception to the hearsay rule.

In response, the Department argues that the commercial laboratory data and reports submitted by Range during the course of the investigation are admissible, not as a business record exception, but as admissions of a party opponent. The Department points out that the sampling, data compilation and reports were all conducted and submitted at Range's direction. The Department also argues that because the data and reports were submitted to the Department by Range during the course of the Department's investigation, they constitute part of the Department's record in this matter. As such, the Department argues they "are admissible if for no other purpose than to explain why the Department acted the way it did." (Department's Memorandum in Support of Response, p. 25) (citing *Pine Creek Valley Watershed Assoc., Inc. v. DEP*, 2011 EHB 98, 101).

Rather than making a determination on the reliability of the aforesaid data and reports in the context of this motion, we believe we will benefit from hearing testimony on this matter at the hearing. As we noted earlier, we expect any such testimony to be short, concise and to the point.

Data Referenced in Pelepko Report, Tables Included in Kosmer Report, All Other Exhibits

Finally, Range argues that all of the Department's exhibits "containing hearsay within hearsay are inadmissible." In particular, Range points to a raw data spreadsheet referenced in the expert report of Seth Pelepko and three tables in the expert report of William Kosmer. According to the Department, the spreadsheet is a water quality database developed by Mr. Pelepko for comparison of the alleged impacted water supplies in this matter. According to Range, "[t]he Department must…prove that a distinct hearsay exception separately applies to each of the 1,506 rows of data [contained in the spreadsheet] because each row represents one or more assertions of fact by unidentified declarants from unidentified underlying documents." (Range Memorandum of Law in Support of Motion, p. 34.) Range goes on to state that "the Department must further independently prove that a valid hearsay exception applies also for each assertion of each data point in each unidentified 'pdf report' and 'Excel workbook' that predicates each row in its database tracing all the way back to the original laboratory reports – which likely comprises *at least* three layers of hearsay, if not more." (*Id*.) (emphasis in original). We disagree. Range's argument goes to the weight of the evidence rather than the admissibility. The same applies to the tables of samples and readings contained in Mr. Kosmer's report. Experts are free to extrapolate and render their opinions based on their review of the applicable data. Pa.R.E. 703.

Finally, Range argues that all of the Department's exhibits containing the aforesaid laboratory reports and data are inadmissible. Because we have rejected Range's arguments

regarding the admissibility of the reports and data in question, we find no basis, at this time, for excluding exhibits that rely on this information.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 25th day of March 2022, it is hereby ordered that Range's Motion in Limine to Exclude All Sampling Results and Data is **denied**. The parties shall have an opportunity to address the reliability and/or admissibility of certain data at the hearing, as set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 25, 2022

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREYHOUND ARAMINGO PETROLEUM CO., INC.	:	
v.	:	**EHB Docket No. 2021-070-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 28, 2022**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion to dismiss where the appellant has failed to respond to the motion and a subsequent rule to show cause. In addition, the subject of the appeal, a proposed, unsigned, undated Consent Assessment of Civil Penalty, is not a final, appealable action over which the Board has jurisdiction.

O P I N I O N

On July 16, 2021, Greyhound Aramingo Petroleum, Co., Inc. ("Greyhound") filed an appeal. Attached to the notice of appeal was an email from Ryan Sepsy of the Department of Environmental Protection (the "Department"), which informed Greyhound, in part,

> Please be advised that the Department of Environmental Protection is issuing an enforcement document to Greyhound Aramingo Petroleum CO, Inc. in the form of a Consent Assessment of Civil Penalty (CACP) for violations of the Storage Tank Act, which occurred at your facility located at 2750 Aramingo Ave., City of Philadelphia.
>
> Please review the attached CACP and contact me with any questions. If the attached document is acceptable, please sign (do not fill in the blank date fields on the first page) and return a signed copy to me by July 16, 2021 with your penalty payment made out to the "Commonwealth of Pennsylvania."

Attached to the email was a Consent Assessment of Civil Penalty (CACP), which contains blanks for the day and month on the first page, and blanks on the signature page for representatives of Greyhound and the Department. The CACP alleges that Greyhound operates a gas station and that, in August 2020, the Department received notification that Greyhound's tank top containment sumps for its underground storage tanks visually failed for tightness. The Department avers that it asked Greyhound in October 2020 for documentation showing that the sumps had been repaired and replaced. The Department says it did not receive that documentation until May 2021 and the CACP seeks a civil penalty assessment of $9,450 for violations of 25 Pa. Code § 245.432(c) of the Department's regulations, and Sections 1304 and 1310 of the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.1304, 6021.1310.

In its notice of appeal, Greyhound argues that it actively worked to fix the sumps after receiving notice from the Department, and that it was in contact with the Department as it worked to resolve the issues. Greyhound objects to the finding of violations and the assessment of the civil penalty.

On January 13, 2022, the Department filed a motion to dismiss, arguing that the CACP attached to the notice of appeal was merely a proposed CACP and that it did not constitute a final, appealable action of the Department. Greyhound's response to the motion to dismiss was due on February 14, 2022. 25 Pa. Code § 1021.94(c). Greyhound did not file a response, and on February 18, we issued a Rule to Show Cause for Greyhound to show cause why we should not dismiss this appeal. We gave Greyhound until March 1, 2022 to file its response, which would constitute a discharge of the Rule. To date, Greyhound has not responded to the Department's motion or our Rule to Show Cause.

Our rule governing dispositive motions provides that we may grant a motion to dismiss if an adverse party "fails to adequately respond" to the motion. 25 Pa. Code § 1021.94(f). As we have held before, "No response is clearly not an adequate response, and the Board may grant the motion 'if the adverse party fails to adequately respond.'" *Thomas v. DEP*, 2019 EHB 347, 349 (quoting *RES Coal, LLC v. DEP*, 2017 EHB 1239, 1244). When a party fails to respond to a motion to dismiss, and then fails to respond to a subsequent Rule to Show Cause, we have not hesitated to dismiss the appeal. *See Production Co. v. DEP*, 2021 EHB 91; *Nitzschke v. DEP*, 2013 EHB 861. Although dismissal is appropriate based on Greyhound's failure to respond alone, we will nevertheless briefly address the merits of 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. *Lawson v. DEP*, 2018 EHB 513, 514; *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. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Motions to dismiss will be granted only when a matter is free from doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Glahn v. DEP*, 2021 EHB 322, 325; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750. There is no bright line rule for what constitutes a final,

appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Departmental decisions needs to be assessed on a case-by-case basis. *Hordis v. DEP*, 2020 EHB 383, 388; *Northampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB at 1121.

We have previously addressed the appealability of proposed CACPs and found such documents not to be appealable actions. For instance, in *Kelly v. State Conservation Commission*, 2003 EHB 10, the Berks County Conservation District sent the appellant a proposed CACP to resolve alleged violations of the Clean Streams Law from the appellant's earth disturbance activity. As is the case here, the proposed CACP contained no date and was not signed by either party. We held that a proposed CACP is not an appealable action over which the Board has jurisdiction because it is essentially a settlement offer from the Department:

> The proposed Consent Assessment of Civil Penalty is nothing more than an offer of settlement sent by DEP to Mr. Kelly. The document is clearly not an "order, permit, license or decision" by the Department. 35 P.S. § 7514(a). Nor can the simple act of proposing a consent assessment of civil penalty reasonably be considered as an action by the Department which adversely affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of Mr. Kelly. 25 Pa. Code § 1021.2(a)…
>
> The document at issue here simply informs the recipient of alleged violations, and offers a means of settling any potential dispute through an agreement of the parties in lieu of litigation. There is no practical impact on Appellant from an unaccepted offer of settlement, no finality to DEP's action and, importantly, no relief whatsoever which the Board can provide in this appeal. We therefore conclude that the proposed, unsigned, Consent Assessment of Civil Penalty is not a final action over which this Board may lawfully exercise its jurisdiction….

Kelly, 2003 EHB at 12-13. *See also K.M.& K. Coal Co. v. DER*, 1986 EHB 692, 694 ("The consent assessment here has, as yet, no binding affect on the rights or property of Appellant. It is merely a proposed penalty amount, which Appellant is free to reject. As such, the

Board finds that no appealable action is present."); *Amerikohl Mining, Inc. v. DER*, 1986 EHB 1, 2 ("The proposed consent assessment is an indication that the Department would be willing to settle the matter in lieu of initiating a formal assessment under the regulations.").

We have also made similar holdings for proposed consent decrees and proposed consent order and agreements. In *Kennedy v. DEP*, 2007 EHB 511, we held that a draft consent decree was not an appealable action because "[t]he Department simply sent a settlement offer to Kennedy for his consideration. The Department did not require Kennedy to sign the consent decree, and Kennedy was free to reject it, which he ultimately did. The offer, by itself, does not bind Kennedy or the Department to do anything." *Kennedy*, 2007 EHB at 512. *See also RESCUE v. DER*, 1988 EHB 731 (dismissing appeal of proposed consent order and agreement).

We see nothing differentiating this case from our precedent. The cover email from the Department enclosing the proposed, unsigned CACP states that "if the document is acceptable" please sign and return it. If it were not a settlement offer, we suspect the word "consent" would not be there and the Department would have simply gone ahead and assessed a civil penalty. *See, e.g.*, *Paul Lynch Investments, Inc. v. DEP*, 2017 EHB 891 (upholding Department's assessment of civil penalty for appellant's violations of Section 1307 of the Storage Tank Act).

Accordingly, whether procedurally due to Greyhound's failure to respond, or on the merits of the appealability of a proposed CACP, we find that dismissal is appropriate. We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREYHOUND ARAMINGO PETROLEUM CO., INC.	:	
v.	:	**EHB Docket No. 2021-070-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of March, 2022, 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 28, 2022

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

For the Commonwealth of PA, DEP:
Anderson Lee Hartzell, Esquire
Jason Goodman, Esquire
(*via electronic filing system*)

For Appellant:
Dasha Gorlov, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC	:	
v.	:	**EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: April 1, 2022**

OPINION AND ORDER ON
PETITIONS FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies petitions for supersedeas filed by appellants seeking to supersede a water obstruction and encroachment permit issued by the Department for the removal of an existing bridge and the construction of a new bridge. The existing bridge, which has been closed for more than a decade, is more than 200 years old and is at imminent risk of failure due to its deterioration. The bridge is also affecting the natural regime of the stream it crosses and causing environmental degradation. The appellants have failed to show that they have a likelihood of achieving success on the merits, and granting a supersedeas petition would likely cause more actual and potential harm than denying it.

O P I N I O N

This case involves two consolidated appeals, one filed by Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum (hereinafter "the Riverkeeper"), and one filed

by Steven Gidumal and Virtus Capital Advisors, LLC ("Gidumal") (referred to collectively as the "Appellants"). Both appeals were filed on November 15, 2021. The Riverkeeper and Gidumal are appealing Water Obstruction and Encroachment Permit No. E0901120-026 issued by the Pennsylvania Department of Environmental Protection (the "Department") to the Pennsylvania Department of Transportation ("PennDOT") on September 29, 2021. The appealed permit authorizes PennDOT to remove the Headquarters Road Bridge in Tinicum Township, Bucks County, and construct a new replacement bridge. (PennDOT Exhibit No. ("DOT Ex.") 14.)

The existing Headquarters Road Bridge was built in 1812 and has since undergone various repairs, including the replacement of the superstructure in 1919, which remains there today. (Hearing Transcript Page No. ("T.") 261, 736; DOT Ex. 15.)[1] The bridge spans Tinicum Creek, an exceptional value water of the Commonwealth, at a point about five-and-a-half miles upstream of Tinicum Creek's confluence with the Delaware River. (T. 121, 260, 262.) Tinicum Creek has also been designated as a Wild and Scenic River by the National Park Service. (T. 185-87; DOT Ex. 15.) The bridge is approximately 78 feet long from its eastern abutment to its western abutment and it has a 16-foot-wide roadway. (T. 262, 571-72.) The bridge's substructure is comprised of two masonry abutments at either end and two masonry support piers within the Creek. (T. 571.) The bridge is a three-span structure, with each span being the distance between a support element. (T. 571.)

The Headquarters Road Bridge exhibits advanced deterioration and has been closed to vehicles and pedestrians since 2011 because of safety concerns with the bridge's overall structural integrity and because of a large hole in the bridge deck. PennDOT started thinking about possibly replacing the Headquarters Road Bridge in 2002, with design for a new bridge beginning in 2005.

[1] The superstructure of a bridge is the portion of the bridge that carries the deck and roadway surface that sits on top of the abutments and piers of the supporting substructure. (T. 261, 573-74, 599-600.)

(T. 611; DOT Ex. 10.) Extensive discussions with, among others, the Department, the National Park Service, the U.S. Army Corps of Engineers, the Pennsylvania Historical and Museum Commission, and various consultants led PennDOT to pursue a replacement bridge consisting of two spans with shifted abutments to span the natural waterway of Tinicum Creek and align with the flow of the stream. (T. 611-17, 844-45, 850; DOT Ex. 10.) The abutments will be shifted approximately 15 feet to the west, with the western abutment shifted out of the stream and into the streambank and the eastern abutment being shifted closer to the stream channel. (T. 280, 282.) The new bridge is essentially the same length as the existing bridge. (T. 280.) It will have a two-lane superstructure sitting on top of reinforced concrete abutments and a single reinforced concrete pier. (T. 573-74; DOT Ex. 9.) The width of the bridge will be 24 feet to match the width of the approach roadway and consist of two ten-foot travel lanes with two-foot shoulders. (T. 574; DOT Ex. 15.) Thus, there will be a two-lane instead of a one-lane bridge, which seems to at least partly explain the Appellants' opposition to the project. (T. 41 (project will install a "superhighway"), 81, 87 (project will allow tractor-trailer traffic), 217 (more traffic).) The concrete faces of the structure will be faced with stone salvaged from the existing bridge, to the extent that enough competent stone can be salvaged. (T. 574, 605, 740-41.)

PennDOT has already selected a contractor for the project. (T. 684-85.) It anticipates issuing a notice to proceed to its contractor for the bridge work on April 4, 2022. (T. 643.) A notice to proceed is the authorization PennDOT provides a contractor to begin construction work on the project. (T. 643.) The issuance of the notice to proceed will kick off the process of pre-construction coordination meetings, photo documentation, and vegetation clearing, as well as the mobilization of resources for the contractor. (T. 644-46.) PennDOT estimates that the new bridge will be completed in April or May 2023. (T. 646-47.)

Gidumal owns the property immediately around the bridge upstream and downstream. (T. 30-32; Gidumal Exhibit No. ("G. Ex.") 002.) The property consists of 47 acres and includes a manor house dating to 1741, a barn, horse stables, and pastures. (T. 30-31.) Gidumal purchased the property on June 30, 2020. (T. 34-35; G. Ex. 2.) He has renovated more than 130 homes. (T. 92.) Gidumal is concerned about the effect the project will have on the property, especially the portion of Headquarters Road that crosses the property and leads up to the west side of the bridge. The Riverkeeper Network is an organization with a mission to protect and restore the Delaware River, its tributaries, and the ecosystem within the Delaware River watershed, which includes Tinicum Creek. (T. 181-83.) The Riverkeeper Network and the Riverkeeper have advocated for the protection of Tinicum Creek for many years. (T. 196-203.) Neither the Department nor PennDOT have questioned the Appellants' standing in the proceedings.

The bridge project has been the subject of study and litigation for many years. Notably, among other things, in 2018 the Riverkeeper challenged PennDOT's and the Federal Highway Administration's ("FHWA's") issuance of a Final Categorical Exclusion Evaluation and a Final Individual Section 4(f) Evaluation approving the replacement bridge in federal district court. *Del. Riverkeeper Network v. Pa. Dep't of Transp.*, No. 18-4508, 2020 U.S. Dist. LEXIS 154233 (E.D. Pa. Aug. 20, 2020). (DOT Ex. 8.) The Riverkeeper claimed that the agency defendants' determinations were arbitrary and capricious under the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department of Transportation Act, and Section 106 of the National Historic Preservation Act, and they asked the Court to remand the matter for consideration of rehabilitation and repair. The Riverkeeper asked the Court to set aside the defendants' approval of a categorical exclusion for the project and the Final Section 4(f) Evaluation, claiming that both determinations were arbitrary and capricious. They contended that there were multiple

circumstances present that precluded the issuance of a categorical exclusion, and that the Riverkeeper's preferred alternative of rehabilitation was both prudent and feasible and would cause the least harm to historic resources.

The defendant agencies responded that they took the necessary hard look at the project's environmental impacts, mitigated the project's harms, and properly determined that no significant environmental impacts would occur, thereby making their approval of a categorical exclusion in accordance with law. They also argued that the administrative record supported their conclusion that the Riverkeeper's preferred rehabilitation alternative was not prudent, and, therefore, their selection of the replacement alternative was neither arbitrary nor capricious.

The Court in an 80-page opinion concluded based on the administrative record that PennDOT and FHWA were entitled to summary judgment in their favor. Contrary to PennDOT's contention here, the Court's decision does not collaterally estop the Riverkeeper from pursuing their claims in this appeal because the statutes and regulations at issue and the standard and manner of review in the federal case were too different than the statutes, regulations, and standard and manner of review applicable here.[2] Nevertheless, the Court's detailed treatment of the issues is certainly worthy of mention.

The Court noted that the administrative record that formed the basis for its review covered close to 15 years and filled approximately 14,000 pages. The Court described the truly exhaustive development process that the agencies had engaged in, which included extensive public input. The Court found that the record was filled with evidence of interagency coordination, public involvement, and the study and consideration of environmental impacts that went well beyond what is usually seen or required for a categorical exclusion.

[2] We are not aware that Gidumal was a party to the proceeding. Gidumal purchased the property out of foreclosure on or about June 30, 2020. (T. 34-35, 44-45.)

The Court found that the record was replete with evidence that PennDOT and FHWA carefully considered the replacement project's environmental impacts and performed appropriate studies and concluded that no significant environmental impacts would result. Some relevant takeaways from the agencies' studies included that the hydrologic and hydraulic analyses showed that increases to water surface elevations and velocities downstream would be insignificant and would not result in any downstream impacts, that no long-term impacts from sediment were anticipated, and that fish passage would actually be improved.

In response to the Riverkeeper's argument that rehabilitation of the existing bridge was a prudent and feasible alternative, the Court found that the agencies had provided multiple justifications, well supported by many supportive studies, for rejecting rehabilitation as an option, and their work and conclusions were neither arbitrary nor capricious. The rehabilitation option failed to meet industry standards and would not accommodate emergency vehicles or support modern loads. The Court found that the record supported the agencies' efforts to minimize the impact to historical resources to the fullest extent possible. The Court concluded,

> Unfortunately for all, the Bridge is decrepit and its function severely limited. Defendants determined that a need existed and sought to develop a Project to address that need. It is clear that the process has resulted in controversy and vigorous debate. Indeed, the Bridge and the Creek have been so beset with litigation and other machinations over the many years, it is a natural wonder that words have not dammed [sic] the Creek altogether, rendering a bridge unnecessary. However, the nearly 14,000-page record also demonstrates that Defendants have endeavored to research and respond to these areas of contention. Although the Bridge, which does have historic value as a contributing element to the Historic District, will be replaced, the agencies determined over the course of 15 years of studies, reports, comments, responses, and coordination, as well as their own expertise, that a categorical exclusion was appropriate because significant impacts to the human environment would not result. Considering the evidence presented, and emphasizing that agencies are entitled to substantial deference in interpreting their own regulations and determining the applicability of a categorical exclusion, the Court concludes that approving a categorical exclusion was not arbitrary, capricious, or otherwise not in accordance with law. The Court grants summary judgment in favor of Defendants.

(DOT Ex. 8, slip op. at 64 ("[sic]" in original).)

Now, after 20 years of planning, study, design, and litigation, we are faced with the latest chapter in the Headquarters Road Bridge saga. On the same day the Riverkeeper filed their notice of appeal, they also filed a petition for supersedeas. We scheduled a conference call with the parties in the Riverkeeper appeal to discuss moving forward on the supersedeas. On November 30, 2021, the day of the scheduled call, Gidumal filed a letter in his appeal indicating that they also intended to file a petition for supersedeas and that they were available to participate in the conference call. We held the call with the parties from both appeals and discussed the consolidation of the two appeals and a timeline for proceeding toward a hearing on the supersedeas. The parties asked to begin the hearing three months later on March 2, 2022. Following the call, we issued an Order consolidating the appeals and requiring the parties to submit a joint proposed schedule regarding the supersedeas. The parties filed a joint proposed pre-hearing schedule, which we adopted in an Order, providing for Gidumal to file their petition for supersedeas by December 8, for the Department and PennDOT to file responses to the Riverkeeper's petition by December 21, and for the Department and PennDOT to file supplemental responses to address Gidumal's petition by January 7, 2022. The scheduling Order also contained dates for serving answers to discovery requests and exchanging lists of witnesses and exhibits.

On February 18, 2022, due to the ongoing Covid-19 pandemic, we issued an Order changing the format of the supersedeas hearing from an in-person hearing at the Board's Norristown offices to a virtual hearing to be conducted via WebEx. No party objected. We held a pre-hearing conference call with the parties on February 25 to discuss final logistics in advance of the hearing. The supersedeas hearing was held on four days: March 2, 3, 4, and 7. The parties

agreed to brief the proceedings on the basis of expedited transcripts and filed simultaneous briefs on March 21, 2022.

Discussion

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The grant or denial of a supersedeas is 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); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485.

In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three statutory 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); *Lower Providence Twp. v. DER*, 1986 EHB 395, 397. In considering whether the criteria have been met we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals, Inc. v. DEP*, 2021 EHB 104, 106 (citing *Del. Riverkeeper Network v. DEP*, 2016 EHB, 41, 43). Importantly, "[a] supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." 35 P.S. § 7514(d)(2). *See also* 25 Pa. Code § 1021.63(b).

The Existing Bridge is a Hazard and is Beyond Repair

The Headquarters Road Bridge is a hazard and is in danger of imminent collapse. This alone should prevent a supersedeas from being issued. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b). Regardless, the Appellants are not likely to succeed in showing that the existing bridge is anything other than an imminent hazard or that it can remain in place with any amount of repair or rehabilitation. PennDOT presented the unrebutted and highly credible testimony of Michael McAtee, P.E., an engineer with Urban Engineers whose work for more than 26 years has focused on the design and structural engineering of bridges. (T. 809-12; DOT Ex. 25.) McAtee was the project manager for the engineering team on the Headquarters Road Bridge replacement and has worked on the project since 2006. (T. 827-28.) We fully credit his opinion that the existing bridge is in a state of imminent failure. (T. 828.) Even as far back as 2006, when McAtee and his firm prepared a report evaluating the structural condition of the Headquarters Road Bridge, "every component had evidence of deterioration. Severe deterioration in certain areas." (T. 829; DOT Ex. 26.)

In the intervening years the deterioration has only worsened. (T. 887.) Indeed, the bridge has been closed since 2011 because of its poor and worsening condition. (T. 572-73, 728.) As PennDOT's engineering project manager consultant, Ryan Whittington, P.E., testified, an inspection of the bridge in 2011 found a four-foot-wide hole in the bridge deck. (T. 572-73.) Efforts to cover the hole with a steel plate were unsuccessful because there was not any sound concrete in which to anchor the plate. (T. 573, 735-36.) The bridge was determined to be unsafe for use by the public because of the risk of imminent failure of the bridge and its structural inability to safely carry vehicular traffic. (T. 573, 887.) Although the existing bridge is also theoretically closed to pedestrians, there has been concern of pedestrians, cyclists, and motorcycles going

around the closure barriers and continuing to use the bridge, so stone was placed on the bridge to cordon off any gaps. (T. 664-65, 674-75.)

During McAtee's most recent inspection in September 2021, following widespread flooding caused by the remnants of Hurricane Ida, he noticed that the stone at the top of the western abutment supporting the superstructure is completely fractured and "a hundred percent crushed in certain areas." (T. 835-36.) He noted a large void or localized collapse in the eastern pier that could compromise the entire bridge structure. (T. 830-31.) McAtee previously noted that one of the wing walls of the bridge (an extension of the abutment going back into the approach roadway) exhibited step cracking, a sign of imminent failure, and that a section of the wing wall has since fallen into the creek bed, failing along the step cracking line. (T. 836.) There is now a large void in the western pier close to five feet in width, two to three feet high, and a foot deep. (T. 836-37.) This void surprised McAtee because it was not an area he had identified in previous inspections as an area of main concern. (T. 837.) He also credibly opined that it appears the foundation of the abutments is being undermined, with water getting underneath the base stones, and that water is also undermining grout bags that were installed as a temporary counter measure. (T. 842.)

McAtee credibly testified that the condition of the stone of the piers is cracked and crushed and even the high-quality stone toward the base of the pillars is completely fractured, indicating that loading is now concentrated in certain areas, which could precipitate further failure. (T. 829-30.) During core drilling of the bridge piers, McAtee found that some of the base stone was in fairly good condition, but other areas had large voids and more than a foot of unsupported area from material loss over time. (T. 834.) He noted that the lime mortar that was holding the masonry together was in poor condition and the grout joints in the masonry have deteriorated. (T. 834-35, 858; DOT Ex. 28.) Further, the superstructure of the bridge has holes in the deck, including the

four-foot hole that brought about the bridge's closure, and the frame is in very poor condition. (T. 829.) All of McAtee's observations were confirmed and corroborated with numerous photographs, (DOT Ex. 26, 28; G. Ex. 911, 913), and we fully credit his assessment of the bridge's condition and structural integrity.

Every indication is that the condition of the existing bridge will continue to decline. Stone from the bridge is already falling into the stream and other areas of stone and streambank are continuing to erode. (T. 862-63.) The collapse of stone near the tops of the supports could result in the loss of support in the western span, which would likely mean the superstructure would fall into the creek. (T. 887.) A collapse of the bridge would obviously result in harm to Tinicum Creek and we do not think it is in anyone's interest to allow that to happen.

It bears emphasis that the Riverkeeper and Gidumal produced nothing to contest this testimony.[3] No one testified on behalf of the Appellants that the current bridge is not at risk of imminent collapse or that the bridge is not deteriorating and presenting an unsafe and hazardous condition. There is no evidence anywhere in the record even suggesting that the existing bridge is anything but a hazard.[4]

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[3] The Board during the prehearing conferences suggested to the parties that environmental harm seemed to be the area of greatest concern for purposes of the supersedeas proceeding, but we also repeatedly told the parties that they were free to use their allotted time in any way they chose.

[4] Gidumal argues without any record support that PennDOT deliberately let the bridge fall apart just so it could support its case for tearing it down, (*see, e.g.*, Gidumal Brief at 3, 69, 72), but even if true, it does not change the fact that the bridge is, whatever the cause, (a) an imminent hazard to the public safety and the environment, and (b) beyond repair. Unfortunately, Gidumal spends much of their brief indulging in conspiracy theories, innuendo, and invective instead of the merits. In addition to claiming that PennDOT intentionally declined to make repairs to the existing bridge in 2011 as part of a nefarious plot to make its case for a bridge replacement a decade later, they accuse PennDOT of putting "political pressure" on the Department to issue the permit. They then allege PennDOT withheld witnesses that would testify on these apparently important topics. Gidumal accuses PennDOT of, among other things, being "biased," "self-serving," "shameless," "cynical," having a "lack of integrity," and exhibiting "arrogance," "hubris," and a "callous disregard" for the Commonwealth's natural resources. (Gidumal Brief at 3-5, 45, 72-73.) Gidumal inexcusably goes so far as to include innuendo about counsel for PennDOT and the Department. (Gidumal Brief at 4, 75-76.) These are distractions that unsuccessfully attempt to shift the focus from the fact that

The Appellants say that the existing bridge can be rehabilitated but they presented no evidence of how that would be possible. Again, there is *nothing* in the record to suggest that the bridge can be rehabilitated. The Riverkeeper even testified that they wanted to obtain a supersedeas in order to show later that rehabilitation is an option, all but conceding that the Riverkeeper did not have any evidence to that effect for purposes of the supersedeas. (T. 218-19.) The Appellants want the Department and PennDOT to give rehabilitation further study, but this project has been studied interminably for 20 years at this point. Gidumal, without any apparent sense of irony, calls this long, drawn-out process "racing with…break-neck speed." (Gidumal Brief at 78.)

The Appellants' allegation that the bridge could be rehabilitated goes against all of the persistent and credible testimony and photographic evidence presented at the hearing. PennDOT evaluated the possibility of rehabilitating the existing bridge and determined that it was not feasible. (DOT Ex. 7.) PennDOT evaluated two different rehabilitation options. The first was a one-lane superstructure with the replacement of the existing abutments with reinforced concrete abutments and a partial rehabilitation of the existing piers. (T. 601.) The second was a two-lane superstructure with the same work on the substructure. We credit McAtee's finding that rehabilitation is not feasible due to the significant deterioration of the Headquarters Road Bridge's substructure. (T. 921.) He credibly opined that the bridge has exceeded its intended life, poses a safety risk, and a full replacement is warranted. (*Id.*) (*See also* DOT Ex. 7 (at 47) ("The presence of significant structural deficiencies (base sliding, bulging, cracked stone courses) indicates internal distress within the substructures and overstress of the stone courses. The displacement of

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Gidumal and the Riverkeeper presented *no* evidence challenging the testimony of PennDOT's well-qualified expert witnesses that the existing bridge is at risk of imminent collapse and well beyond the point of any rehabilitative efforts.

stone courses and cracking of stones introduces new voids, allowing for water to infiltrate into the pier section further advancing deterioration as a result of freeze-thaw cycles. Without entire reconstruction of the substructure, it is not possible to determine the exact service life due to the condition and continued deterioration."), DOT Ex. 10 (at 2) ("Urban [Engineers] performed a detailed evaluation of the structure to evaluate the feasibility of its rehabilitation as part of the alternative analysis and found that the masonry structure has experienced significant distortion and localized failure which would be nearly impossible to remedy.").)

McAtee persuasively opined that there is good reason why bridges are no longer constructed out of stone, because modern materials are more homogeneous and have better, longer lasting material properties. (T. 830.) Unlike concrete and steel, which can redistribute force if an area of the structure has been compromised, stone masonry cannot perform that function. (T. 831.) Even maintenance patches of the stone masonry simply create new stress concentrations throughout the composition that result in overloading of certain areas, which can cause the stone to crush and crack. (T. 837.)

The Appellants have also failed to produce any evidence that no bridge is needed at all at this location. Nor would such a claim have been plausible. Among other things, the closure of the bridge in 2011 has necessitated a 15.6-mile detour to be in place. (T. 639.) The legitimate purpose of this project and the need for a bridge in this location are well supported in the record.

In lieu of evidence, Gidumal says that PennDOT rehabilitated another old bridge that crosses Tinicum Creek, the Geigel Hill Road Bridge, so therefore, PennDOT can rehabilitate the Headquarters Road Bridge. There is nothing in the record that supports Gidumal's extrapolation or why this is even a relevant comparison. Indeed, Gidumal argues that the Geigel Hill Road Bridge replacement project stands for various other factual propositions as well, such as the stream

protective measures built into the permit will not work for the project in this case, and that PennDOT does not care about the environment. There is no support for any of these propositions in the record either. We have no basis for making any reasoned comparisons between the engineering considerations regarding the two bridges or the environmental conditions surrounding the bridges. Comparisons to the Geigel Hill Road Bridge have not been shown to have any probative value here.

Gidumal relies in passing on our Opinion and Order in *Tinicum Township v. DEP*, 2008 EHB 123, which happened to involve the Geigel Hill Road Bridge. Gidumal cites the case for the proposition that PennDOT is not entitled to special treatment under the encroachment regulations, which is undoubtedly true, but there was no credible evidence of any special treatment here. Indeed, it is difficult to imagine a more painstaking review than the one PennDOT has gone through. Gidumal cites the case for the proposition that the regulations allowing for emergency permits should not be abused, but this case obviously does not involve an emergency permit. They cite the case for the proposition that historical values must be respected when considering an emergency permit application, but historical values were exhaustively considered in this case.

Actually, *Tinicum Township* was not even an appeal from a permit, it was an appeal from a letter notifying the municipality that an emergency permit would be issued. We superseded portions of the *letter* for procedural reasons, but specifically said that our ruling did not preclude a permit from being issued so long as proper notice was given under the regulations. *Tinicum Township* did not address any water quality concerns, other than a brief mention of the harm that would be caused if the bridge collapsed, which it was in danger of doing, not unlike one of the dangers presented here.[5]

[5] The Geigel Hill Road Bridge was a pony truss bridge built in 1887 and held up by steel trusses. In language perhaps reminiscent of this case, we said, "[a]lthough beauty is in the eye of the beholder, in its current

If we assume for purposes of argument that the Headquarters Road Bridge is not a hazard and can be "rehabilitated," it would still not justify issuance of a supersedeas. The existing bridge is causing harm to the stream as discussed below, but even if we put that aside as well, we have absolutely no record support for the proposition that "rehabilitation," whatever that means, is somehow a better alternative than replacing the bridge given the myriad factors that go into such a complicated decision. Gidumal insinuates that PennDOT's decision was all about money, (Gidumal Brief at 69), but even if that were true, we applaud PennDOT's reasoned stewardship of taxpayer dollars.

Not only is the existing bridge a safety hazard, it is causing environmental degradation. It is causing excess erosion and sedimentation (E&S) of the stream and it is interfering with the natural regime of the stream. As to the first point, Tinicum Creek currently experiences significant erosion, at some points down to bedrock on the western side near the bridge. (T. 856.) This is perhaps nowhere as evident as in the scour hole at the western abutment. The water of Tinicum Creek flows directly into the wing wall of the western abutment, and the stream then bends around that abutment. (T. 838, 855, 861, 886-87, 942; DOT Ex. 27 (at 8), 28.) We credit the testimony of the Department's aquatic biologist and permit reviewer, Christian Vlot, that the western abutment is taking the full force of the stream, which is directing energy downward and causing the scour. (T. 1141, 1147-48, 1152, 1170-72.) There are areas near the bridge where the depth of water is only a few inches deep to the stream bottom, yet the scour hole near the western abutment is at least five feet deep and has heavily eroded the stream bank. (T. 841; DOT Ex. 15.) The

condition, plastered as it is with warning signs, blocked by barriers, and generally falling apart, the Bridge is at least arguably detracting from, rather than contributing to, the historical ambience of the district." 2008 EHB at 124. Aesthetics are also in the eye of the beholder. (*See* G. Ex. 107 (pictorial comparison of old and new Headquarters Road Bridges).) The Riverkeeper's opinion that the new bridge is "ugly," (T. 195), is one person's opinion with which reasonable persons could disagree and to which we afford no weight.

Riverkeeper's hydrology expert conceded that the scour hole could be as much as six or seven feet deep. (T. 455.) Gidumal's expert, Dr. Clay Emerson, acknowledged that the scour hole is deep and has likely eroded down to bedrock. (T. 161-62.) The scour has continued to get worse, (T. 858; DOT Ex. 28), and more scour holes are developing in the middle span of the bridge, (T. 953).

The Riverkeeper's expert all but conceded that the existing bridge was having a negative impact on Tinicum Creek when she testified that she did not believe the same scouring would occur if the bridge had never been built. (T. 329-32, 339.) Although she testified that the existing abutment merely needed some "engineering interventions" to prevent the scour, (T. 467-48), she did not tell us what those successful interventions could be. We do not credit her suggestion that the scour may simply be due to poor maintenance of the existing bridge structure, (T. 489, 516-17), which nevertheless implicitly concedes that the structure is having an adverse impact on the stream.

In addition to the scour, erosion at the bridge has exposed the roots of trees in the banks, at least one tree has already fallen, and it is likely only a matter of time before more trees fall into the stream and create downstream obstructions. (T. 631-32, 858-59, 863-64, 883-84; DOT Ex. 13, 28, 36.) There is a significant amount of sediment deposition forming a point bar on the eastern side of the stream that has become vegetated and projects far into the watercourse. (T. 797, 855, 863, 938, 1142-43; DOT Ex. 9, 27 (at 8), 28.)

With respect to the bridge's infringement of the stream's natural regime, there can be no question that the goal of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, and the operative regulations is to preserve and protect the natural regime of watercourses. Indeed, the Dam Safety and Encroachments Act says exactly that, with one of its stated purposes being to "[p]rotect the natural resources, environmental rights and values secured by the Pennsylvania

Constitution and conserve the water quality, natural regime and carrying capacity of watercourses." 32 P.S. § 693.2(3). The regulations echo this point:

> The purposes of this chapter are to:
> ….
> (4) Protect the natural resources, environmental rights and values secured by PA. CONST. art. I, § 27 and conserve and protect the water quality, natural regime and carrying capacity of watercourses.

25 Pa. Code § 105.2(4). Another example is Section 105.16(d), which provides: "In reviewing permit applications, it will be the policy of the Department to encourage activities that protect the natural condition of the watercourses or other body of water." 25 Pa. Code § 105.16(d). Section 105.161(a)(3) provides:

> (a) Bridges and culverts shall be designed and constructed in accordance with the following criteria:
> ….
> (3) The structure may not materially alter the natural regimen of the stream.

25 Pa. Code § 105.161(a)(3).[6]

The Department reasonably interprets the "natural regime" of the stream to mean its equilibrium state, a stable state without excessive erosive force. (T. 1275, 1298.) It is a kind of neutral energy state. (*Id.*) It is not about how the stream looked 10 years ago or 100 years ago or 200 years ago. (T. 1274-76.) (*See also* T. 173 (permit based on stream as it exists or should exist now).) There is no particular time in history that necessarily represents what the stream would look like in its natural state. (T. 1335.)

Much attention has been devoted in this case to comparing the environmental impact of the existing bridge with the environmental impact of the new bridge. We have searched the regulations in vain for any indication that this is the pertinent inquiry. The pertinent inquiry centers on the

[6] The statute and regulations use the terms "regime," "regimen," and "condition" interchangeably. We do not detect any difference in the meaning of the terms.

project as a whole's impact on the natural regime, not its impact on an unnatural regime being artificially perpetuated by previously installed man-made obstructions. The Commonwealth is crammed with old dams, millraces, bridges, and other obstructions that have outlived their usefulness and may even be causing environmental harm. When these features are removed or replaced, the goal is to return the impacted watercourse to natural conditions to the extent possible. 25 Pa. Code §§ 105.2(4), 105.16(d), 105.161(a)(3). The goal is *not* to merely install a new obstruction that may be slightly less unsafe or may be slightly less environmentally harmful than the obstruction being replaced.

The standard in this case is not which obstruction is worse, the old bridge or the new bridge. The question that must be answered is whether removing the old bridge and installing the new bridge will materially alter the natural regime of the stream (in addition to the other relevant regulatory criteria). What constitutes the natural regime of the stream is a matter that the experts can help us define, and here, the preponderance of the testimony, especially that of Christian Vlot, is that the existing bridge is interfering with the natural regime of the stream, and the replacement project will ensure that the stream is restored to its natural free flowing condition. We reject the Appellants' unsupported legal argument that it is not necessary to strive to return a stream to a natural free-flowing condition simply because an existing obstruction has been there a long time.[7]

None of this is to suggest that the historic significance of the structure should be taken lightly. Clearly, it must be factored into the analysis. *See* 25 Pa. Code §§ 105.14(b)(5), 105.16(a).

[7] Indeed, if the Department determines that an existing obstruction or encroachment is unsafe or adversely affecting property or the environment, the regulations authorize the Department to require the owner to repair or remove the offending obstruction. 25 Pa. Code § 105.62(a).

By the same token, harm to the stream should not be ignored when considering the historic value of the obstruction. The record shows that the Department performed the proper balancing here.[8]

The existing bridge is a man-made obstruction that is not part of the stream's natural condition. Gidumal's expert acknowledged that the bridge is an unnatural alteration of Tinicum Creek's natural regime. (T. 150-52.) The stream is not flowing freely. (T. 149-55.) The Riverkeeper's expert similarly acknowledged that the western abutment cannot be considered part of the stream's natural regime. (T. 304.) It is also clear that the existing bridge is preventing Tinicum Creek from reaching its equilibrium state, i.e. its natural condition, largely because of the western abutment protruding directly into the stream channel. Rehabilitating the old bridge or otherwise leaving it in its current injurious location or perpetuating the problem by installing a new bridge in the same impeding location would not be consistent with the natural condition of the stream.

The western abutment is creating a shadow effect for a short distance on the western bank downstream of the bridge, (T. 163-64, 1080), meaning the projection of the western abutment into the stream channel is artificially protecting the western bank from natural erosion.[9] This is the area where the Appellants have expressed their greatest concern. The shadow effect is not natural; it is caused by the man-made structure that is the bridge. It is preventing Tinicum Creek from reestablishing a natural condition.

So at some risk of oversimplification, the dispute in this appeal boils down to the extent to which removing the old bridge will adversely affect the western shoreline below where the existing

[8] To the extent that we are wrong and comparing the two bridges is the appropriate standard, the stream with the new bridge will be in better shape than the stream with the old bridge.

[9] We do not find the Riverkeeper's expert's contention that the effect extends for nearly 1,000 feet to be credible.

western abutment currently is located, and whether that will result in excess sedimentation of the stream or will increase velocity or direct flow in a manner which results in erosion of stream beds and banks over and above what occurs when the stream is flowing in accordance with its natural regime. 25 Pa. Code § 105.161(a)(3) and (4). There might be some effect; the question is how much. This turns on an analysis of the hydraulics and hydrology (H&H) of the Tinicum Creek.

Several highly qualified experts provided their opinions in this case regarding hydrology and hydraulics, with the Appellants' experts opining that the bridge will increase excess sedimentation from erosion in the stream and the agencies' experts saying the exact opposite. Weighing competing expert testimony is one of the Board's core functions. *Gerhart v. DEP*, 2019 EHB 534, 558. *See also DEP v. EQT*, 2017 EHB 439, 497, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. "We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

We were treated to a surfeit of testimony based on H&H model results at the hearing. However, as we recently stated in *New Hanover Twp. v. DEP*, 2020 EHB 124, 179, *rev'd*, 258 A.3d 572 (Pa. Cmwlth. 2021), *allocator accepted*, No. 78 M.A.P. 2021, 266 A.3d 442 (Pa. 2021), the importance of modeling should not be exaggerated. "Modeling is obviously a valuable tool,

but as a computer-generated prediction based on many input decisions, there is plenty of opportunity for manipulation designed to achieve a desired result. Proper calibration of the model with actual field measurements… operates as a check on manipulation, but it cannot eliminate the possibility for mischief entirely." 2020 EHB at 179. Despite the use of sophisticated modeling, we must leave room for some common sense in the analysis. *Id.* at 182. *See also Solebury School v. DEP*, 2014 EHB 482 (model results not credited because model predicted wildly crenellated contour lines and lines that depicted "crazy flow paths" of groundwater); *M & M Stone Co. v. DEP*, 2008 EHB 24, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008) (model results rejected because they did not calibrate well with field results).

We tend to agree with the testimony of Dr. Clay Emerson that one does not need a "fancy model" to predict how removing the old bridge will affect flow. (T. 141-42.) We did not necessarily need a modeling expert to tell us that moving the western abutment out of the stream channel where it is now will eliminate the unnatural shadow effect it has been having on the western bank downstream of the current bridge. We credit the testimony of Christian Vlot that, based on his valuable and extensive real world experience in evaluating encroachments (as opposed to computer simulations), the removal of the western abutment is not going to result in any significant increased erosion of the downstream western bank over and above what would occur in the stream's natural condition. (T. 1323.)

Of course, modeling is helpful, especially where, as here, it confirms predictions based on real world experience. Although we do not doubt the sincerity of all of the experts and we appreciate their contributions to the debate, we find the opinions of PennDOT's witness, Benjamin Israel-Devadason, P.E., to be by far the most credible. Without intending to minimize the excellent qualifications of the other experts, we find Israel-Devadason to be exceptionally well qualified and

by far the most knowledgeable and experienced expert. He is recognized as a national authority on the precise issues that are the subject of our inquiries in this case. (T. 971-80, 1041; DOT Ex. 37.) He has conducted about 500 two-dimensional H&H analyses ("2D analyses") (as compared to the Riverkeeper's expert's five). (T. 250, 974-76.) Israel-Devadason is a Professional Engineer and a Certified Floodplain Manager and a recognized and award-winning expert in hydraulic and hydrologic engineering, including H&H modeling.

Israel-Devadason brought his outstanding qualifications to bear in presenting clear, well-organized opinions based on extensive preparation and state-of-the-art tools. We found his opinions to be coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case. We detected no tendency toward exaggeration, alarmism, or result-oriented conclusions in his presentation. And having viewed dozens of photographs, videos, and drawings of the site in various flow conditions, his opinions, frankly, make the most sense.

Israel-Devadason's bottom line, which we fully credit, is that the new bridge will be better for the natural regime of the stream than if the existing bridge were to remain in place. (T. 1037, 1040-41.) Removing the old bridge and replacing it with the new bridge is going to improve the condition of the stream. (T. 1041.) Hydraulics will improve both within the stream channel and in the floodplain as well. (T. 1041.) Israel-Devadason's analysis was consistent with Vlot's opinion that, even in the area along the downstream western bank that is of the greatest concern to the Appellants, there will be no significant increase in velocities. (T. 992-97, 1001-14, 1035-36, 1037, 1040-41; DOT Ex. 38, 57.) This means that there will be no new increase or excess sedimentation of the stream as a result of erosive forces. *See* 25 Pa. Code § 105.161(a)(4).

There was a tremendous amount of debate in this case about whether a two-dimensional model ("2D model") as opposed to a one-dimensional model ("1D model") was necessary and

appropriate for the project for the hydrologic and hydraulics analysis. Indeed, it was a primary, if not the primary, focus of the Appellants' cases, with Gidumal's expert testifying extensively on why he thought a 2D model was necessary for this project. A 1D model measures stream flow in a single direction as the water moves downstream. It relies on cross-sections taken at various points along the stream, running from bank to bank, that are intended to be representative of the geometry of the local terrain and the model averages the recorded flow velocity across the cross-section. In contrast, in a 2D model the modeler lays out a mesh of cells that account for the elevation and topography of the stream channel and surrounding features. (T. 981-82.)

In its permit application, PennDOT used a 1D model for its H&H analysis after consulting with an outside firm on whether its 1D analysis was appropriate for this project as opposed to a 2D analysis. (T. 853-54; DOT Ex. 27.) PennDOT's 1D analysis showed no real appreciable increase in flow velocity from what is happening now in Tinicum Creek. (T. 879-80, 890-91; DOT Ex. 32, 33.)

The debate whether a 2D model was necessary for this project seems largely academic because PennDOT, in an apparent response to the current appeals, performed a 2D analysis to see whether or not its 1D modeling held up.[10] PennDOT engaged Israel-Devadason to perform the 2D modeling, which confirmed the conclusion of the 1D modeling that the bridge replacement would overall slightly reduce flow velocity, or at most result in a negligible increase at some points during some storm events. (DOT Ex. 38, 39.) There is no evidence that E&S over and above what occurs under natural conditions is threatened. Our review is *de novo*, "and we can admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal." *Telegraphis v. DEP*, 2021 EHB 279, 288. *See*

[10] To the extent that the debate remains something other than academic, we credit Israel-Devadason's expert opinion that a 2D study was not necessary for the project. (T. 982-83, 1090-91, 1103-04.)

also Pequea Twp. v. Herr, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). The record that forms the basis of *our* analysis includes the 2D analysis performed by PennDOT's highly credible expert.[11]

The Appellants offer little critique of Israel-Devadason's work, other than saying he used a different 2D model than their own experts used and that, for some reason, is a "big red flag." (Gidumal Brief at 63, 71. *See also* DRN Brief at 30-31.)[12] We credit Israel-Devadason's opinion that he used a model that is preferred over the ones used by the Appellants' experts. (T. 983-85.) Gidumal faults PennDOT and Israel-Devadason for not including the guardrails that will be added to a relatively limited part of Headquarters Road as it raises toward the new bridge. Gidumal contends that guardrails can collect debris during floods and impede the downstream flow of water. Gidumal showed photos of unknown locations (including a watermarked stock photo from Getty Images (G. Ex. 927)) with apparent flood and storm events where guardrails had collected debris. To put this concern in context, Tinicum Creek would need to completely overflow its banks for water to reach the guardrails. At that point it would seem that water would already be flooding Gidumal's property, with or without any guardrails.

Although Gidumal's expert modeled the guardrails as impenetrable obstructions that redirect flow back into the stream channel at increased velocities, (T. 124-28, 131-32; G. Ex. 104), we credit Israel-Devadason's testimony that it was not necessary or appropriate to include the

[11] The experts tell us that 1D models are used in 95 percent of the cases. There is nothing particularly unique about the project in this case from an H&H perspective, a relatively small bridge in a relatively straight stream with a generous floodplain nearby. We would be hesitant to rule in the context of a supersedeas petition that a widely accepted practice used in the vast majority of cases is inadequate absent a more convincing case than the one presented here by the Appellants. The high regulatory protection afforded to Tinicum Creek does not in and of itself suggest that 2D modeling is necessary when 1D modeling accurately predicts flow.

[12] Gidumal's expert, Dr. Emerson, did not review Israel-Devadason's model before the hearing. (T. 140-41.) We are told that Israel-Devadason likewise did not have access to Dr. Emerson's model before the hearing, (PennDOT Brief at 13 n.3), only the Riverkeeper's expert's model.

guardrails in order to accurately predict flow conditions. (T. 986-87, 1096-98.) He said there is no standard way to model them right now, and in most cases water can still pass through. (T. 986-87.) Independent of modeling, he credibly opined that the guardrails are at least as likely to be a good thing, slowing down velocities and thereby reducing erosion. (T. 1100.) We are struggling to see why the altered flow paths modeled by Dr. Emerson as a result of the guardrails, even if they come to pass, would increase flooding or cause excess E&S.

We likewise credit the testimony of McAtee, who, based on his real world experience at the site, also did not believe the guardrails needed to be modeled. McAtee has been to the site during flood conditions and he has not observed any extensive drift accumulating outside of the banks of the stream. (T. 877-78, 901, 902-03.) He has also seen water flowing through the posts of the fencing along the banks, which have a narrower opening than the proposed guardrails. (T. 901.) We also credit McAtee's opinion that, even if the guardrails did accumulate debris, it would not increase any contraction scouring around the bridge supports because the water would be conveyed to the floodplain. (T. 893-93.) The Appellants did not present any evidence that the guardrails would extend the limits of flooding beyond the existing floodplain or any convincing evidence that we are able to credit that the guardrails or any other activities associated with Headquarters Road itself will increase damage to the floodplain. It is important not to lose sight of the fact that floodplains by definition are supposed to flood during high flow periods. They are an invaluable part of a stream's natural regime.

The culvert under the road that also commanded a great deal of Gidumal's attention will have a negligible impact on flow conditions. (T. 987, 1098-1101.) Running the model with and without the culvert factored in showed a negligible difference. (T. 987, 1104-05.) We credit Israel-Devadason's opinion that the benefits related to removing the existing pier in the middle of the

stream significantly overshadow any effect related to the guardrails, the culvert, or indeed any of the alleged project impacts in the floodplain in the modeled analysis. (T. 1101.) Further, any issues with the guardrails, culvert, or the work on Headquarters Road (which have not been proven) do not rise to the level of providing cause for superseding the permit or stopping the entire project.

We also credit Israel-Devadason's opinion that the modeling results of the Riverkeeper's expert had several serious telltale signs or anomalies that should have raised questions that were not adequately addressed. (T. 1015-21.) These anomalies are not unlike the anomalies that we found in *New Hanover Township*, *Solebury School*, and *M & M Stone*, that reduced the credibility of the sponsoring expert's opinions. Among other things, the Riverkeeper's expert's results showed an abrupt flow velocity change in the channel that simply cannot occur in nature. (T. 1015-21; DOT Ex. 40.)[13] There were also unnatural boundaries indicative of improperly constricted modeling, (T. 1020, 1023, 1073-75; DOT Ex. 40), and an unexplained increase in velocity in the floodplain that does not make sense, (T. 1022-23). The analysis inaccurately predicted that the roadway would be overtopped in a two-year storm. (T. 1024.) Further, the Riverkeeper's expert's velocity *trends* also do not hold up to close review. Water cannot behave in the ways shown, which were like a rollercoaster. (T. 1030-32, 1084; DOT Ex. 58.) Israel-Devadason's model used 5-by-5-foot cells, compared to the Riverkeeper's expert's 15-by-15 cells, which better matches the raw data available in Pennsylvania. (T. 1026.) Using the larger cells effectively dumbs down the data, meaning the modeler loses details that otherwise can be captured through the model. (T. 1026.) These are all serious problems that distort the whole analysis conducted by the Riverkeeper's expert. (T. 1074-75.)

[13] The Riverkeeper's counsel attempted at length on cross-examination and in their brief to show that Israel-Devadason's model also showed an abrupt, unexplained change of velocity in the stream channel, but examination of Israel-Devadason's *printed* results clearly shows that that is simply not the case. (*See* T. 1042-55, 1076-78; DOT Ex. 38.)

Putting these difficulties with the Riverkeeper's expert's work product aside, even taking the Riverkeeper's model at face value, Israel-Devadason credibly opined that it does not show that velocities in the stream will materially increase with the construction of the new bridge. (T. 1027-29.) The velocities involved are not cause for concern vis-à-vis erosion and excessive sedimentation. (T. 1032-35, 1037; DOT Ex. 56-58.)

We were also impressed with the expert testimony of Tiffany Landis, P.E., which, although brief, fully corroborated many of the credible opinions of Israel-Devadason. Although the issue is somewhat academic at this point given the fact that PennDOT performed a 2D analysis and our review is *de novo*, Landis credibly opined that 1D modeling was appropriate for this project.[14] We credit her testimony that a 1D analysis remains the standard, accepted practice in the industry and there was no reason to diverge from that practice for this project. (T. 1465-66.)

Landis credibly opined to a reasonable degree of professional certainty that, based on her independent review of Israel-Devadason's model results, as well as the results of the previous 1D studies and her own observations, installing the new bridge will actually reduce scour and erosion and return Tinicum Creek to a more natural free-flowing state. (T. 1468-72, 1479-80, 1500.) Among other things, the new bridge will not have the western abutment that is currently interfering with natural flow, and it will have a larger waterway opening, which will convey the flow a lot smoother. (T. 1468-69, 1480.) The western abutment constitutes an obstruction that is interfering with stream flow. (T. 1484.) Additionally, PennDOT within the bridge structure has angled riprap up along the sides to help to slow down the velocity and direct water toward the center of the channel, which again, will help improve downstream conditions. (T. 1468.) Minimizing

[14] Interestingly, this is consistent with the Riverkeeper's expert's testimony that Tinicum Creek is relatively straight. (T. 1465-67, 1469, 1471.)

interference by piers in the stream to the extent possible is very important in mimicking natural conditions and preventing debris and ice jams. (T. 1478.)

Landis also corroborated Israel-Devadason's testimony that including the guardrails on a limited portion of Headquarters Road in the modeling inputs was unnecessary. (T. 1469-70, 1494, 1497-98.) This issue amounts to a red herring. The new bridge will not increase the risk of flooding or the damage caused by inevitable flooding within the area studied. (T. 1461, 1472, 1473, 1480, 1493.) The majority of flow is contained within the stream channel and the flow that goes into the floodplain is relatively insignificant. (1497-98.) Landis's testimony shows that, despite any new points raised by the Appellants, the Department remains satisfied that the regulatory criteria for the replacement project have been met.

Let us assume that all of the compelling evidence above is wrong and there will be some additional significant erosion of the western bank as a result of the bridge removal. We would still not issue a supersedeas. First, we have no convincing evidence that any sedimentation caused by such erosion will result in any degradation of the stream over and above the erosion that naturally occurs to streambanks. Indeed, some erosion is part of the natural condition of a stream. (T. 149-50, 164, 488, 1080, 1170, 1227, 1236-37.) There is simply no convincing evidence that any E&S that might occur is inconsistent with the natural condition of Tinicum Creek. The assumed erosion is what would have been occurring all along had there not been a man-made impediment in place creating unnatural flow conditions, so the assumed erosion is a necessary short-term correction that will allow a return to the equilibrium state reflective of a natural regime.

Furthermore, and perhaps most importantly, focusing only on a short section of the downstream western bank is like the blind man who feels the tail of an elephant and thinks he has found a snake. Removing the old bridge will significantly *improve* erosive conditions now

occurring at, and immediately upstream from, the bridge. It should not be forgotten that, among other things, the project will result in the removal of the existing wide pier within the stream, which is substantially interfering with natural flow right in the middle of the stream channel. (T. 1037.) The stream channel matters much more than the flow in the floodplain because that is where the most flow and the highest velocities occur. (T. 1037-40.) By way of illustration, picture an object thrown into a stream's main flow channel versus one thrown into flow out in the floodplain. Even a child knows that a toy sailboat will flow faster in the main stream channel. Building the new bridge will increase flow conveyance in the channel by about 20 percent. (T. 1040.) This will benefit the entire natural regime of the stream in the bridge's locale. Any speculative harms associated with increased sedimentation that occurs to the western bank are outweighed by the dramatic improvement to the overall condition of the stream in the vicinity of the project.

In sum, the unrebutted evidence before us establishes that the risk of bridge collapse is real and imminent, the bridge is beyond repair, and the environmental degradation it is causing is persistent. The Appellants have fallen far short of showing that this hazardous condition should remain in place pursuant to a supersedeas. To the contrary, the evidence developed to date convinces us that more actual and potential harm actually results from issuing a supersedeas than from denying a supersedeas. Given the environmental degradation the Headquarters Road Bridge is causing to Tinicum Creek, coupled with the advanced and progressive deterioration of the bridge, the only realistic option is that the existing bridge should be taken down.

The New Bridge Will Preserve the Natural Regime of Tinicum Creek

The bulk of the parties' cases and arguments as a factual matter tend to relate more to the removal of the old bridge than the installation of the new bridge. Although the distinction is admittedly somewhat artificial, if we imagine that no bridge was currently in place, the Appellants

have not provided much in the way of objections to the new bridge *per se* (putting aside their concerns regarding increased traffic, *supra*, which have not been shown to be pertinent concerns in the immediate context). It is not the new bridge that will impede flow or interfere with the stream's natural condition. The Appellants did argue that the new bridge fails to comply with applicable regulations with respect to its design vis-à-vis the stream, but they are unlikely to succeed on the merits of that argument.

A person may not construct, operate, maintain, modify, enlarge, or abandon a dam, water obstruction, or encroachment without first obtaining a permit. 32 P.S. § 693.6(a); 25 Pa. Code § 105.11(a). A water obstruction is a structure located in, along, across, or projecting into a watercourse, floodway, or body of water. 32 P.S. § 693.3; 25 Pa. Code § 105.1. An encroachment is any structure or activity that changes, expands, or diminishes the course, current, or cross section of a watercourse, floodway, or body of water. *Id.* A watercourse is a channel or conveyance of surface water having a defined bed and banks. *Id.*

Ordinarily the location of a watercourse's regulatory bed and banks comes up if there is a dispute over whether a particular structure or activity is an "encroachment" that needs a permit, *see, e.g.*, *DEP v. Seligman*, 2014 EHB 755, or whether a particular feature is a regulated watercourse at all, *see, e.g.*, *Becker v. DEP*, 2017 EHB 227. Here, there is obviously no question that PennDOT needed a permit. However, the issue still has relevance because, for example, 25 Pa. Code § 105.161 refers to the natural regimen of the "stream" and a stream is a watercourse, 32 P.S. § 693.3; 25 Pa. Code § 105.1, and a watercourse is defined by its bed and banks, *id.*

The regulations require that a bridge's abutments be aligned with the flow of the stream channel and that they be well set into the stream banks in such a manner as to assure minimal increase in flood elevations. 25 Pa. Code § 105.164. The Riverkeeper argues at length and

unsuccessfully that the 15-foot shift of the eastern abutment will put it within the regulated streambanks of Tinicum Creek. The Department reasonably interprets the "banks" to be the ordinary water line of a watercourse. (T. 1179-81, 1183; Department Exhibit No. ("DEP Ex.") 55.) The ordinary water line tends to be where the vegetation lines the banks of a stream. (T. 1180, 1183-84, 1325.) The Riverkeeper's expert appears to have incorrectly delineated the stream banks as that term is used in the regulations. (T. 1182.) Among other things, there is a relatively large tree growing on the dry land within the eastern banks as mistakenly identified by the Riverkeeper. (DOT Ex. 13, 28.) Thus, we credit the testimony of Vlot and Whittington that the shifted eastern abutment will remain outside of the regulated stream. (T. 751-52, 761-64, 1209; DOT Ex. 13, 28; Riverkeeper Exhibit No. ("DRN Ex.") 3.)[15]

In any event, we find that the new bridge needs to be shifted exactly as proposed by PennDOT and approved by the Department. To have left the new bridge in the same location as the existing bridge would have failed to satisfy the regulatory criteria because the western abutment would have remained within the stream channel. As discussed above, the existing western abutment is clearly within the banks of Tinicum Creek. (T. 576, 1181, 1205; DEP Ex. 55.) This is obvious in some of the Riverkeeper's own photographs, where the western abutment is surrounded by the flow of the stream. (DRN Ex. 6.) The western abutment of the replacement bridge will be shifted back 15 feet west to better align with the channel of Tinicum Creek as it exists now. (T. 575-76.) Moving the eastern abutment over is necessary in order to move the offending western abutment and keep the support pier in the same location as the existing western pier, (DOT Ex. 7 (at 61, 63)), and still keep the abutment as far as possible outside the eastern side

[15] Assuming *arguendo* that the abutment will extend past the stream's east bank, there was no convincing evidence showing that the new location would interfere with stream flow or a stream's return to a natural condition.

of the stream. With the stream in its current condition, the existing bridge is very poorly placed not only from an engineering perspective but relative to environmental degradation as well. The new bridge will eliminate this serious ongoing problem by aligning the bridge structure where the stream is now.[16]

The regulations require bridges to be designed with the minimum number of piers and obstructions as possible. 25 Pa. Code § 105.163. The new bridge accomplishes that by utilizing only one pier within Tinicum Creek, as opposed to two piers with the existing bridge. PennDOT evaluated the option of constructing a bridge with a single span, meaning no support piers within Tinicum Creek, but it was determined to be unfeasible. (T. 766-67, 852.) A single span bridge would have required a deeper superstructure, the roadway would need to be elevated, and greater portions of the western floodplain would need to be filled in. (T. 955-57, 963-64.) The Appellants did not rebut this testimony. The single pier within the stream will be smaller than the existing piers, approximately three-and-a-half feet wide at the base, which will lessen the potential for debris accumulation during flood events. (T. 845, 852.) McAtee opined that, by only having a single obstruction, the bridge will have improved flow characteristics during flood events and less potential for the displacement of streambed material that could create new gravel bars and downstream sediment deposits. (T. 846.) The new bridge is designed to improve the flow characteristics of Tinicum Creek and more closely mimic its natural free flow. (T. 850, 852, 888-89.) By having an increased hydraulic area and fewer obstructions, the potential for debris accumulation, erosion, and scour are all reduced. (T. 887-90.) Gidumal's expert agreed that the removal of one of the piers would create a more natural flow regime, (T. 167-68), and the

[16] The shifted western abutment also has the ancillary benefit of accommodating the turning radius of emergency vehicles at the intersection of Headquarters Road and Sheep Hole road. (T. 848-49.)

Riverkeeper's expert said it would improve the conveyance capacity of water through the bridge, (T. 469).

The closest we come to believing there may have been an error in the permit is the requirement to place rip rap on the western bank downstream of the western abutment. The new western abutment will have a slope wall in front of it comprised of rip rap to absorb the flow energy coming into the newly exposed area, prevent bank erosion, protect the riparian buffer, and redirect the flow downstream. (T. 850-51, 865-66, 868; DOT Ex. 29.) The Department did not insist on this requirement and doing so adds what is, at least arguably, an unnecessary and unnatural obstruction. (T. 1332.) PennDOT has maintained throughout this litigation, including in its brief, that the rip rap was only added to "address public comments." (*See* DOT Brief at 19.) This is not by itself a reason to disregard substantial environmental concerns. Nevertheless, the Appellants have not argued that the rip rap should be deleted from the permit, merely that the rip rap does not justify an otherwise unworthy project. Accordingly, we will not supersede that permit requirement.

A permit application will not be approved by the Department for an exceptional value stream or designated Wild and Scenic River like Tinicum Creek unless the applicant demonstrates and the Department finds that the project will not have an adverse impact upon the public natural resources. 25 Pa. Code § 105.16(c). The Department correctly analyzed the effect of the water obstructions of the replacement bridge on the natural regime and ecology of Tinicum Creek. (T. 1301.) The Department reasonably concluded that the project would have very little impact on the public natural resources. To the contrary, this project is highly beneficial to the public natural resources and will not itself cause any environmental harm. The new bridge has been designed to meet the regulatory criteria relative to Tinicum Creek in terms of preserving the natural regime,

controlling flow velocity with respect to erosion of the stream bed and banks, reducing the number of piers within the stream, and aligning the abutments with the flow of the stream channel. The new bridge also comports with modern safety standards for motorists, improving site distances and the ability to see oncoming traffic as a driver approaches the bridge. (T. 881-82; DOT Ex. 34.) The Appellants, at this juncture, have failed to convince us that this is anything but a well-designed project that meets and satisfies the applicable legal requirements. Without repeating all of the reasons discussed above, it is unlikely the Appellants will prevail on the merits of their claims that the project will degrade the waters of the exceptional value Tinicum Creek or have any adverse impact upon the natural resources. All of the statutory and regulatory criteria that apply to the project have been satisfied.

Historical Values

The Headquarters Road Bridge is within the Ridge Valley Rural Historic District. (DOT Ex. 15.) The Appellants assert in general terms that removing the existing bridge will harm the historic value of the area. There are portions of the regulations that require the Department to assess an obstruction or encroachment's impact on cultural, archaeological, and historical landmarks. 25 Pa. Code § 105.14(b)(5). *See also* 25 Pa. Code §§ 105.13(x), 105.16(a). The Appellants in their briefs never really say that the Department violated the law in issuing the permit due to the historic nature of the bridge. That may be because the issue has truly been exhaustively evaluated. The Department's environmental assessment documented that several alternatives were evaluated to avoid or minimize the impact to the historic district, but the chosen replacement bridge was determined to cause the least overall harm. (DOT Ex. 15 (at 3).) (*See also* DOT Ex. 7, 10.) Further, although it is not binding on us, in *Delaware Riverkeeper Network v. Pa. Department of Transportation, supra*, the federal district court extensively discussed the effects of the project on

the area's historic resources, including the bridge itself, the historic district as a whole, and Tinicum Creek as it relates to the historic district, and concluded that PennDOT had demonstrated appropriate sensitivity to historical values. (DOT Ex. 8, slip op. at 50-60.)

PennDOT entered into a Memorandum of Agreement with the Federal Highway Administration, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation to ensure that the project's impacts to the historic resources of the area were mitigated to the greatest extent possible. (DOT Ex. 49.) The Memorandum also established a nine-member Design Advisory Committee consisting of people from the National Park Service, the Advisory Council on Historic Preservation, the Pennsylvania State Historic Preservation Office, Bucks County officials, and Tinicum Township supervisors, who would be involved during project development and also engaged towards the beginning of the construction process. (*Id.*) One of the permit's special conditions requires PennDOT to abide by the Memorandum. (DOT Ex. 14 (at 4).)

Having seen all of the photographs of the bridge in its highly dilapidated state, it is hard to understand how the bridge is still meaningfully contributing to the historic value of the area. Indeed, no one has argued that keeping the bridge in its current condition is an option. The Appellants are unlikely to be successful in showing that the historical considerations justify saving the existing bridge, if that were even possible given the extensive testimony that the bridge is not able to be rehabilitated. The agencies have appropriately mitigated the historical impact of the project to the fullest extent possible.

Gidumal's Property Concerns

Gidumal criticizes the Department for issuing a permit that Gidumal contends takes sections of their property without PennDOT having secured appropriate deeds or easements.

Gidumal contends that the Department erred in issuing the permit in the face of an unresolved property dispute between Gidumal and PennDOT. In their brief, Gidumal accuses PennDOT of committing fraud by not recording its deed for the right of way within 90 days of it being negotiated and acquired.

Gidumal cites *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, for the prospect that the Department has a duty to look beyond the face of a permit application to determine whether an applicant has a right of entry to property. But in *Rausch Creek* there were statutory and regulatory provisions requiring an applicant for a coal mining permit to demonstrate the legal right to enter the property to be mined. 52 P.S. § 1396.4(a)(2)(F); 25 Pa. Code § 86.64. There is nothing comparable in the Dam Safety and Encroachments Act or the regulations governing obstruction and encroachment permits for bridges.[17] Gidumal cites 25 Pa. Code § 105.161(a)(2), which provides that a bridge shall be designed so that the structure does not "create or constitute a hazard to life or property, or both," but the Department does not need to know who owns property in order to assess whether it will be damaged by a project.

Christian Vlot testified that the Department does not review property issues during its analysis of a permit application for a bridge. (T. 1268-70, 1337-38, 1340.) He testified that the Department is concerned with who owns the obstruction itself so it can assure that it has the proper permittee, but not with any property disputes that may arise out of the construction of the project. (T. 1337.) Indeed, an application may be submitted by the person who owns *or* has primary responsibility for the encroachment, so long as the owner understands that the owner retains legal responsibility for the encroachment. 25 Pa. Code § 105.13(h). Unlike in the case of mining that

[17] Proof of title or adequate flowage easements for land below the top of a dam elevation that is subject to inundation is necessary for dam permits, 25 Pa. Code § 105.81(a)(10), but Gidumal does not direct us to any similar requirement for bridges.

we addressed in *Rausch Creek, supra*, there are undoubtedly many dozens or hundreds of encroachment permits issued every year. We cannot conclude on the existing record that the Department's practice of not examining property disputes in connection with its issuance of most encroachment permits is unreasonable or in derogation of any statutory or regulatory requirement.

We also note that the permit explicitly states that it does not confer any property rights:

> This permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to, or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, nor any infringement of Federal, State, or Local laws or regulations; nor does it obviate the necessity of obtaining Federal assent when necessary.

(DOT Ex. 14.) Absent any legal basis for the proposition that the Department improperly issued the permit for the bridge project because it failed to investigate a property dispute between Gidumal and PennDOT, we detect no likelihood of success on this issue. Gidumal is not likely to succeed in showing that the Department needed to get into the ownership interests of the property around the bridge.

Article I, Section 27

Both the Appellants argue in the briefest of terms that the Department and PennDOT have not fulfilled their responsibilities under Article I, Section 27 of the Pennsylvania Constitution.[18] Although it is true that the agencies' duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations,

[18] Article I, Section 27 of the Pennsylvania Constitution provides:

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

PA. CONST. art I, § 27.

Friends of Lackawanna v. DEP, 2017 EHB 1123, 1161, neither of the Appellants say anything new in their Article I, Section 27 arguments. Rather, they merely restate their other arguments in the case and frame them as constitutional values—for example, that the Department failed in its obligations under Article I, Section 27 because it did not conduct a thorough enough review of the permit application. For all of the reasons discussed above, it is unlikely that the Appellants will convince us that any of the agencies' alleged shortcomings amounted to constitutional violations.

For all the reasons stated above, the Appellants have not prevailed in showing that a supersedeas is warranted here. The overwhelming evidence adduced over four days of hearing demonstrates that the existing Headquarters Road Bridge is both a safety hazard and an active cause of environmental degradation to Tinicum Creek. A supersedeas would only allow these conditions to persist. Any harm to the Appellants from the new bridge is highly speculative given the harm that currently is being caused by the existing bridge. Further, the Appellants have not shown a likelihood of succeeding in showing that the new bridge has not satisfied the applicable regulatory criteria as it relates to Tinicum Creek. To the contrary, 20 years of work have yielded a project that removes a hazardous condition, provides benefit to the environment and the natural regime of Tinicum Creek, and will give the community and emergency vehicles safe passage after more than a decade.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC	:	
v.	:	**EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

O R D E R

AND NOW, this 1st day of April, 2022, it is hereby ordered that the Appellants' petitions for supersedeas are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 1, 2022

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

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Jason Goodman, Esquire
(*via electronic filing system*)

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Daryl Grable, Esquire
Janine G. Bauer, Esquire
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For Appellants, Steven Gidumal and Virtus Capital Advisors, LLC:
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For Permittee:
Kenda Jo M. Gardner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREG HOPKINS	:	
	:	
v.	:	**EHB Docket No. 2021-067-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: April 1, 2022**

OPINION AND ORDER ON
MOTION FOR PARTIAL DISMISSAL OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board grants the Permittee's motion for partial dismissal where there is no factual dispute that the Appellant is not the landowner of three out of the four property parcels that he claims suffered the mine subsidence damage at issue in this appeal. The Bituminous Mine Subsidence Land Conservation Act designates specific categories of individuals and entities, including landowners, that can bring a claim for mine subsidence damage. Appellant is not within one of the listed categories and, therefore, the Appellant cannot sustain a challenge to the Department's decision denying a mine subsidence claim involving properties that he does not own.

O P I N I O N

Introduction

On February 3, 2021, Greg Hopkins ("Mr. Hopkins or "Appellant") submitted a mine subsidence damage claim ("the Claim") in his name with the Pennsylvania Department of Environmental Protection's ("the Department's") California District Mining Office. In his Claim, Mr. Hopkins alleged that seven separate structures located on multiple properties suffered

structural damage due to mine subsidence. In a letter dated June 1, 2021, the Department informed Mr. Hopkins that upon investigation into his Claim, the Department concluded that mining did not cause the damage alleged in the Claim. On July 8, 2021, Mr. Hopkins filed an appeal of the Department's rejection of his Claim with the Environmental Hearing Board ("the Board"). The Notice of Appeal listed the Appellant as Greg Hopkins and was filed pro se and signed by Mr. Hopkins. On November 15, 2021, counsel entered an appearance on behalf of Appellant Greg Hopkins.

On January 7, 2022, Consol Pennsylvania Coal Company, LLC, ("Consol" or "Permittee") filed a Motion for Partial Dismissal ("the Motion"). The Department filed a Memorandum of Law in Support of Consol's Motion on January 20, 2022. On February 17, 2022, Mr. Hopkins filed a Response in Opposition to Consol's Motion ("the Response") along with a Memorandum of Law in support of his Response ("the Response Memorandum"). Consol filed a Reply Brief in Support of its Motion on March 4, 2022. We are now prepared to rule on the Motion.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id.*, *See also Bernardi v. DEP, 2016* EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of

resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Id.*; *Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

The facts relevant to the Motion are not in dispute but, consistent with our standard, we accept Mr. Hopkins' version of events as true and recite them here. In his Response, he states the following: The Claim relates to seven structures on four parcels of land identified as 1804-200, 1804-202, 1804-225 and 1805-121. (Response ¶ 2.) Mr. Hopkins is the record owner of 1805-121 on which three of the structures are located. (Response ¶ 2.) The other three parcels, containing the remaining four structures, are owned by H&S Rental Properties LLC (1804-200), Hopkins' Laundromat LLC (1804-202) and Hopkins Store LLC (1804-225) (collectively, the "LLCs"). (Response ¶ 4 and Response Memorandum at 2.) Mr. Hopkins is a member and manager of two of the LLCs, H&S Rental Properties LLC and Hopkins' Laundromat, LLC. (Response Memorandum at 2.) Mr. Hopkins is a member of the third LLC, Hopkins Store LLC. *Id*.

In its Motion, Consol asserts that the Board lacks jurisdiction over Mr. Hopkin's appeal of the Department's rejection concerning the portion of his Claim associated with the three parcels of property owned by the LLCs. Consol cites the portion of the Bituminous Mine Subsidence Land Conservation Act ("BMSLCA" or "Act") that refers to the right to hearing and appeals and provides "…any landowner […] which shall be aggrieved or affected by any administrative rule, regulation or order of the department […] shall have the right to appear at any hearing before the Environmental Hearing Board…" 52 P.S. § 1406.16. Consol argues that because Mr. Hopkins is not the landowner of Parcels 1804-200, 1804-202, and 1804-225, he lacks standing to appeal damage to structures on these properties and may not appeal on behalf of or in lieu of the LLCs.

In its Memorandum of Law in Support of the Motion, the Department agrees with the position set forth by Consol and argues that the plain text of the BMSLCA and associated

regulations provide that only owners of structures are authorized to file claims and receive compensation for mine subsidence damages. In addition to the statutory/regulatory argument, the Department also sets forth a policy argument that allowing a non-landowner to bring a claim for mine subsidence damages has implications for the integrity and effectiveness of the mine subsidence remedial process. The Department argues that it assumes that the claimant is speaking as the owner of the property and that it relies on the information provided by that individual. The Department maintains that allowing non-landowners to bring claims compromises the Department's ability to investigate claims and make sound determinations.[1] The Department supports its position with an affidavit from a Department employee, J.D. Floris, P.E.

In his Response, Mr. Hopkins contends that the Board has standing[2] over claims associated with all of the parcels as they are the subject of an appeal from the Department's action and were filed pursuant to the Environmental Hearing Board Act (35 P.S. § 7514) and the Administrative Agency Law (2 Pa C.S. Chapter 5A). He also raises the argument that a motion to dismiss is not the proper legal vehicle to challenge an appellant's standing because standing is not a jurisdictional issue. Mr. Hopkins cites *Hendryx v. DEP*, 2010 EHB 144 and *Robert B. Mayer v. DEP*, 2012 EHB 400, in support of his argument. Mr. Hopkins further argues that while a standing challenge is not permissible through a motion to dismiss, if the Board looks at the issue of his standing, he satisfies standing requirements as his interests are substantial, direct, and immediate.

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[1] The Department's stated concern about non-landowners bringing claims could be easily addressed by a question about ownership on its claim form and/or asking about ownership as part of its claim investigation process. Based on the claim form completed by Mr. Hopkins and the Department's report of its investigation of Mr. Hopkins' claim (Motion, Exs. A and B), it appears that the Department did neither in this case. We trust the Department will take steps to address this shortcoming in the future so all parties, including the Board, can avoid the issues evident in this case.

[2] We presume Mr. Hopkins meant jurisdiction rather than standing since the Board is not a party and, therefore, standing is not a legal concept that applies to the Board. (See Response at 1.)

After reviewing the arguments of the parties, we find that this case is not a standing case in the way we typically think of and review issues of standing. Before we consider the question of whether Mr. Hopkins satisfies the traditional requirements for standing i.e., that his interests in this matter are substantial, direct, and immediate, we must first determine whether he is within one of the designated categories of individuals or entities that are provided a right to bring a claim under the relevant statute. This issue is rarely in play in our cases because many of the environmental laws are broadly written and allow any person to proceed with an action under the law with traditional standing serving as the only limiting requirement. *See* Clean Streams Law, 35 P.S. § 691.307(b), "Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board…", Coal Refuse Disposal Act, 52 P.S. § 30.55(i), "any person having an interest which is or may be adversely affected by any action of the department under this subsection, or by the failure of the department to act upon an application for a permit, he may proceed to lodge an appeal with the Environmental Hearing Board…" Air Pollution Control Act, 35 P.S. § 4010.2, "Any person aggrieved by an order or other administrative action of the department issued pursuant to this act or any person who participated in the public comment process for a plan approval or permit shall have the right […] to appeal the action to the hearing board …" The term "person" in these statutes is typically defined to include natural persons, partnerships, associations, corporations, political subdivisions and state and federal government agencies, etc. *See* Clean Streams Law, 35 P.S. § 691.1, and Air Pollution Control Act, 35 P.S. § 4003.

Consol and the Department in essence contend that the relevant statute in this case, the BMSCLA, is written more narrowly than the aforementioned environmental laws. They argue that the BMSLCA creates a statutory cause of action and that the plain language found in the Act

limits who can bring a claim for mine subsidence damage and who can challenge a Department decision addressing a claim. They contend that for the three parcels in question, Mr. Hopkins is not a party that can bring a claim or challenge a Department determination on that claim since he does not satisfy the requirements of the BMSLCA because he is not the landowner of those properties. Mr. Hopkins did not directly address this issue in his Response, but instead relied on a standing argument.

In order to reach a decision on the Motion, we turn our attention to the language of the BMSLCA and consider it using the principles of statutory construction. The purpose of statutory construction is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. §§ 1901 and 1921(a); *Brunner v. DEP*, 2004 EHB 684, 693 *Commonwealth v. Gilmour Manufacturing Company*, 822 A.2d 676, 679 (Pa. 2003); *Adams Sanitation Company v. DEP*, 715 A.2d 390, 393-394 (Pa. 1998). The plain language of a statute is the best indication of legislative intent. See, *Gilmour Manufacturing*, 822 A.2d at 679; *Bowser v. Blom*, 807 A.2d 830, 835 (Pa. 2002). *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020).

The Act, in relevant part, provides as follows:

> Any owner, operator, lessor, lessee, general manager, superintendent, or other person in charge of or having supervision over any bituminous coal mine or mining operation subject to the provisions of this act, **any landowner**, or any political subdivision or county **which shall be aggrieved or affected by any administrative rule, regulation or order of the department issued pursuant to the provisions of this act, shall have the right to appear at any hearing before the Environmental Hearing Board** at which the secretary shall reconsider said action. After such hearing the Environmental Hearing Board shall issue an adjudication from which the aggrieved or affected party may appeal in the manner provided by Title 2 of the Pa.C.S.

52 P.S. § 1406.16 (emphasis added).

We find that the plain language of the BMSLCA in this section limits who may bring appeals of Department actions under the BMSLCA to certain listed parties including landowners. The statute does not include the broader phrase "any person" seen in other environmental statutes. Had the General Assembly intended to provide a more expansive list of who could file appeals under the BMSLCA, it could have done so explicitly and plainly as it has done in other environmental statutes.

Reading further into the provisions of the BMSLCA, there are various references to "owners," making it clear that mine subsidence damage claims are limited to owners and landowners. The Act requires the operator of a coal mine to compensate the "owner" of a building that is damaged from the operator's underground mining operations. *See* 52 P.S. § 1406.5d(a)(4); 25 Pa. Code § 89.142(a)(f)(1). Under the Act, the "owner of any building" seeking compensation for damage to their property from underground mining must notify the mine operator, and if no agreement for compensation is reached, "the owner of the building" may file a claim with the Department. 52 P.S. § 1406.5e(a)-(b). Finally, if the Department issues an order in response to a mine subsidence damage claim, BMSLCA authorizes either the landowner or an operator to appeal the order to the Board. *See* 52 P.S. § 1406.5e(e). These portions of the BMSLCA make clear that the General Assembly intended through the exclusive use of the terms "owner" and "landowner" to limit who can assert a claim for mine subsidence damage. They further support our determination that the right to challenge a Department decision addressing a mine subsidence claim is limited to certain defined parties including landowners.

It is undisputed that Mr. Hopkins is not the landowner of the three properties in question in this Motion. They are owned by the LLCs and the right to bring the claim and challenge the Department's decision rests with the LLCs which are distinct legal entities from Mr. Hopkins. His

status as a member and manager of the LLCs does not permit him to stand in place of the LLCs in bringing this action. *See United Environmental Group, Inc. v. DEP*, 2019 EHB 253. Because Mr. Hopkins is not the landowner of the three properties in question and the BMSLCA makes clear that he is not authorized under the Act to bring the claims in his individual capacity on behalf of the LLCs, we hold that dismissal of the appeal as to those three parcels, 1804-200, 1804-202, 1804-225, is appropriate. Mr. Hopkins' appeal of the Department's determination regarding the parcel where he is the landowner, 1805-121, may proceed. Nothing in this Opinion and Order should be read to preclude the LLCs from filing their own mine subsidence claims with the Department with regards to the three properties to the extent those claims are permitted under the BMSLCA.

For the foregoing reasons, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREG HOPKINS	:	
	:	
v.	:	**EHB Docket No. 2021-067-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 1st day of April, 2022, it is hereby ORDERED that the Permittee's Motion for Partial Dismissal is **granted**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 1, 2022

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

DOWNINGTOWN AREA REGIONAL AUTHORITY	:	
v.	:	**EHB Docket No. 2021-127-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 5, 2022**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss an appeal from a Departmental letter on jurisdictional grounds because the matter is not free from doubt.

O P I N I O N

The Downingtown Area Regional Authority ("DARA") operates a sewage treatment plant in East Cain, Chester County, pursuant to an NPDES permit most recently renewed in 2018. DARA's permit contains the following provision:

> **Site-Specific Copper Criteria**
>
> DARA participated with a group that submitted a copper WER [water-effect ratios] study to the DEP. Site-Specific copper WER were public noticed in the Pennsylvania Bulletin on November 20, 1999. The EPA approved a dissolved Cu WER of 5.1 for DARA. Based on the Department's copper criteria equations, site-specific effluent hardness of 216 mg/l; background hardness of 110 mg/l, and a dissolved WER of 5.1; the site-specific copper criteria for DARA are:
>
> Criteria Continuous Criteria (total recoverable): 68 ug/l
> Criteria Maximum Criteria (total recoverable): 122 ug/l
>
> Since the WER was developed in 1999, the permittee shall submit an updated site-specific copper criteria study within the term of this permit.
>
> The permittee shall complete the required actions and milestones in accordance with the following schedule:

1. Submit a proposed plan of study for site-specific criteria [25 Pa Code 93.8d(d)] to the Department within 36 months of permit issuance.
2. Submit a scientific study progress report [25 Pa Code 93.8d(b)] to the Department within 48 months of permit issuance.
3. Submit a completed scientific study [25 Pa Code 93.8d(b)] to the Department with the permit renewal application due 6 months prior to permit expiration.

(Notice of Appeal Ex. A.)

After the permit was issued, 25 Pa. Code § 93.8d(c) was revised to read, in part: "The development of new or updated site-specific criteria for copper in freshwater systems shall be performed using the biotic ligand model (BLM)." DARA apparently does not like the BLM requirement and, on September 13, 2021, it sent the Department of Environmental Protection (the "Department") a letter requesting that, as an alternative to running a BLM study as the basis for a site-specific water quality criterion to be applied to the DARA discharge in its next permit renewal in 2023, DARA should be allowed to conduct a WER study. In a letter dated November 30, 2021, the Department said no. It said it could not agree to the WER-based alternative discussed in DARA's letter and said it looked forward to DARA submitting a completed BLM study to update the site-specific copper criterion for DARA's discharge.[1]

DARA filed this appeal from the Department's November 30, 2021 letter. The Department has now moved to dismiss the appeal, citing virtually every argument that has ever been made in Board cases for why the Board lacks jurisdiction to review the Department's letter (e.g. the letter

[1] "The basic idea behind the WER is to compare a water sample from the specific site to the laboratory water that is used to set the nationwide levels, generating a ratio that compares the two….If the water characteristics at the sample site suggest that the CWA's environmental goals can be achieved even when greater amounts of copper are discharged, a WER-based site-specific standard would be more lenient….In 2007, the EPA recommended the use of a new method for measuring the environmental harms of copper, known as the Biotic Ligand Model (BLM). Compared to the WER, which relies on expensive sampling, the BLM draws from a large set of available data to assess a wider range of water characteristics…. According to the EPA, the BLM method is the more cost-effective method, which allows for more frequent tests. The EPA is also of the view that the BLM model more accurately accounts for the effect of individual water quality parameters at a given site." *Sanitary Bd. Of City of Charleston*, 918 F.3d 324, 336 (internal citations and quotations omitted).

merely describes the state of the law; the letter does not respond to a formal application for relief; the letter is provisional; the letter comes too soon *and* too late to affect DARA's rights; the Board cannot grant effective relief, etc.) DARA vigorously opposes the motion.

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Burrows v. DEP*, 2009 EHB 20, 22. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, the Board accepts the non-moving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54 (citing *Ehmann v. DEP*, 2008 EHB 286, 390); *Lawson v. DEP*, 2018 EHB 513, 514-515. "Importantly, motions to dismiss will be granted only when a matter is free from doubt." *Bartholomew v. DEP*, 2019 EHB 515, 517. *See also Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mines Res., LP v. DEP*, 2007 EHB 611, 612. The requirement that the matter be free from doubt applies to jurisdictional disputes such as the one raised by the Department in this case. The Board is in most cases the only forum where aggrieved parties can find due process. We should hesitate to dismiss appeals on jurisdictional grounds when the matter is not free from doubt.

The Board's jurisdiction is defined by statute:

> The Board is authorized by the Environmental Hearing Board Act (Act) and the Environmental Hearing Board regulations to "hold hearings and issue adjudications …on orders, permits, licenses or *decisions* of the department" and review any "action" taken by the Department. *See* Section 4(a), (c) of the Act, 35 P.S. § 7514(a), (c) (emphasis added). "Action" is defined as:
>
> > an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.
>
> 25 Pa. Code § 1021.2.

HJL, LLC v. Dep't of Env't Prot., 949 A.2d 350, 352-53 (Pa. Cmwlth. 2008) (footnotes omitted) (emphasis in original).

"There is no bright line rule for what communication from the Department is an 'action' of the Department." *Id.* at 353.

> The appealability of Department decisions needs to be assessed on a case-by-case basis. *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB 1115, 1121. In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, an intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Merck*, 2015 EHB 543, 545-46; *Teska v.* DEP, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59; *Kutztown*, 2001 EHB at 1121. In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

Northampton Bucks Cty. Mun. Auth. v. DEP, 2017 EHB 84, 86.

The Board's role is necessarily circumscribed by the precise Departmental action that has been appealed. *Winegardner v. DEP*, 2002 EHB 790, 793. Here, the Department has only made one decision: If DARA wants a site-specific criterion for copper in its next permit, the study in support thereof must use BLM, not WER. If we have jurisdiction, it is only to review that one particular decision. Thus, the requirement that an updated site-specific water quality criterion will be needed if DARA does not want to comply with the statewide criteria is not open to challenge.

It is true that for prudential reasons we tend to avoid reviewing piecemeal the many interim decisions that make up part of the permit application review process. *United Refining Co. v. DEP*, 2000 EHB 132, 133. We also look askance at letters from permittees wholly outside of the proper regulatory application processes which appear calculated to manufacture an appealable issue. *Perano v. DEP*, 2011 EHB 587 and 2011 EHB 750. The Department's letter in this case does not fit neatly into either of these categories. There is no permit application currently pending, yet the study process is clearly contemplated by DARA's existing permit for application in future permit

renewals. The rather odd situation presented here is not exactly a request to modify DARA's existing permit, *see* 25 Pa. Code § 92a.72 incorporating 40 CFR 122.62, 122.64, although it does come quite close. In this hybrid situation, the Department's claim that the Board lacks jurisdiction is hardly free from doubt. Therefore, we must deny the Department's motion to dismiss.[2]

Accordingly, we issue the Order that follows.

[2] Just as DARA may not challenge the need to do some kind of study if it wants a site-specific permit limit, it also may not challenge the timeframe for performing the study set forth in its permit. As DARA itself has recognized in the workplan it has submitted since it filed this appeal, time is apparently already running short to complete a study. It may be that a Board appeal will not allow it, as a practical matter, to avoid the Hobson's choice described in its papers.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOWNINGTOWN AREA REGIONAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2021-127-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 5th day of April, 2022, it is hereby ordered that the Department's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 5, 2022

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

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

For Appellant:
Mark L. Freed, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 18, 2022**
	:	

OPINION AND ORDER ON
MOTION IN LIMINE TO PRECLUDE FACTS AND ISSUES NOT RAISED
IN THE DEPARTMENT'S PRE-HEARING MEMORANDUM

By Thomas W. Renwand, Chief Judge

Synopsis

Range's motion in limine is granted in part and denied in part. To the extent that the Department's prehearing memorandum does not address safety and risk assessment or protocols for inspecting the Gas Well, and the Department contends that those issues are not relevant to its case, those issues are deemed waived. The remainder of Range's motion is denied. To the extent that information about the sources of gas migration and the Department's investigation thereof are included in the Department's expert reports, those issues are not waived. Range's efforts to comply with the Department's order are not relevant to the Department's case-in-chief.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) challenging an order issued by the Pennsylvania Department of Environmental Protection (Department) contending that natural gas leaked from Range's Harman – Lewis Unit 1H gas well

(the Gas Well) and affected ground water and surface water in Lycoming County, Pennsylvania. The order directs Range to take a number of actions, including the restoration and replacement of affected water supplies, investigation of the migration of natural gas from the gas well, and submission of a remedial investigation plan and well plugging plan. A hearing has been scheduled in this matter from May 2 – June 3, 2022 and prehearing memoranda have been filed. Additionally, the parties have filed several motions in limine. This Opinion addresses Range's Motion in Limine to Preclude Facts and Issues Not Raised in the Department's Pre-Hearing Memorandum.

Motion in Limine

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of trial. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161. The purpose of a motion in limine is to provide the trial court an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at trial. *Commonwealth of Pennsylvania v. Padilla*, 923 A.2d 1189, 1194 (Pa. Super. 2007) (cited in *Kiskadden v. DEP and Range Resources – Appalachia, LLC*, 2014 EHB 634, 635).

Discussion

The Board's Rules of Practice and Procedure plainly set forth the required contents of a prehearing memorandum. 25 Pa. Code § 1021.104. *Stanley v. DEP and Coterra Energy, Inc*., EHB Docket No. 2021-013-L, *slip op.* at 4 (Opinion and Order on Motions in Limine issued February 17, 2022). A similar requirement is set forth in Prehearing Order No. 2, which schedules the hearing and sets forth the deadlines for filing prehearing memoranda. *Stanley, supra.* Prehearing Order No. 2 requires the following: 1) a statement of the facts in dispute;[1] 2) a statement of the legal issues in dispute, including citations to statutes, regulations and caselaw supporting

[1] 25 Pa. Code § 1021.104(a)(1) also requires a listing of the facts upon which the parties agree.

the party's position; 3) a description of scientific tests on which the party will rely; 4) a list of the expert witnesses on which the party intends to rely; 5) answers to expert interrogatories and/or expert reports;[2] 6) a list of fact witnesses; and 7) a list of the exhibits the party seeks to introduce into evidence.[3] Facts or contentions of law not set forth in a prehearing memorandum may be deemed waived. Prehearing Order No. 2, para. 7; *Oley Township v. DEP*, 1996 EHB 1098, 1126. Where a party does not comply with those requirements, the Board may impose sanctions, 25 Pa. Code § 1021.104(b).

As we understand Range's argument, it is not contending that the Department's prehearing memorandum fails to contain the information required by § 1021.104 or Prehearing Order No. 2, but that the Department's statement of facts and legal issues fails to cover certain topics. Range asserts that the Department's prehearing memorandum is deficient because it omits "facts and issues concerning topics critical to its allegations against Range and to demonstrating its actions were reasonable and necessary." (Range Memorandum of Law in Support of Motion, p. 3.) According to Range those topics are as follows:

> (1) the specific steps the Department followed to investigate the alleged gas migration; (2) Range's efforts to conduct the Department-ordered gas migration investigation and cooperate with the Department; (3) support for paragraph 1 of the [Department's] Order, which requires Range to 'confirm the restoration or replacement of seven of the 12 allegedly affected water supplies; (4) any pathway for the alleged gas migration; (5) any Department effort to rule out other sources of gas; (6) the specific actions the Order requires Range to take in order to address the Department's concerns; (7) any risk or safety assessment performed by the Department in the course of its investigation or its direction of remedial actions at the Gas Well;

[2] Where requested in discovery, answers to expert interrogatories and/or expert reports may not be produced for the first time in a party's prehearing memorandum. *Penn Township Municipal Authority v. DEP*, 2021 EHB 72, 77; *Rural Area Concerned Citizens v. DEP*, 2010 EHB 337, 341-43.

[3] 25 Pa. Code § 1021.104(a)(6) and (a)(8) also require the prehearing memorandum to list the proposed order of witnesses and to include copies of any signed stipulations reached by the parties.

> and (8) the protocols and procedures used to inspect the Gas Well or otherwise relied on in the Department's investigation, including (i) initiating or conducting a gas migration investigation or issuing Notices of Violation in connection with stray gas; (ii) well plugging; (iii) measuring surface expressions; (iv) evaluating the risks, including safety risks, of proposed well interventions; (vii) placement and removal of defective cement violations; and (viii) inspecting the Gas Well [footnote omitted].

(*Id*. at 3-4.) Range asserts that the Department's failure to address these topics in its prehearing memorandum is prejudicial to Range in the preparation of its case, and it asks the Board to deem waived any facts or issues not set forth in the prehearing memorandum.

Range correctly sets forth the purpose of a prehearing memorandum, which is "to 'flesh out' the appeal and to tell the Board what evidence will be presented." (Range's Memorandum of Law in Support of Motion, at 4) (quoting *Mustang Coal and Contracting Corp. v. DER*, 1990 EHB 720, 722). We have held that "[t]he pre-hearing memorandum is an essential part of the preparation for a hearing. It advises both the Board and the opposing parties of the details of the evidence supporting the appellant's claim so that surprise at the hearing will be eliminated." *Zazo v. DEP*, 2006 EHB 650, 654. As we have further explained, "Parties have a right to rely on the information presented in opposing parties' pre-hearing memoranda as the final statement of a party's case before the hearing on the merits commences." *Stanley, slip op*. at 6. We agree with Range that all aspects of a party's case should be addressed in its prehearing memorandum in order to prevent unfair surprise and undue prejudice to the opposing party. Where a party disregards the requirements of the Board's rules or Prehearing Order No. 2, the Board may impose sanctions, including the preclusion of testimony or documentary evidence. *Id.* at 5 (citing 25 Pa. Code § 1021.104(b)).

Here, Range does not contend that the Department failed to disclose witnesses or exhibits or abandoned any of the facts or legal authority cited in its order. Rather, Range asserts that the

Department has failed to address certain topics in its recitation of the facts and issues. Generally, in instances where the Board has found a prehearing memorandum to be deficient, it was because a party completely omitted all or some of the information required by Prehearing Order No. 2 and § 1021.104. See, e.g., *Stanley, supra* (Appellants' prehearing memorandum did not identify any scientific tests or expert witnesses, nor did it list or include exhibits they intended to use at the hearing); *Yourshaw v. DEP*, 1998 EHB 1063 (Appellants filed a document purporting to be a prehearing memorandum, but which failed to include a statement of the legal issues in dispute, a description of scientific tests, a list of exhibits and a summary of one expert's testimony); *Mustang Coal & Contracting Corp. v. DER*, 1990 EHB 614 (Appellant's prehearing memorandum failed to contain a statement of facts, contentions of law and exhibits); *Borough of Littlestown v. DER*, 1983 EHB 544 (Appellant's prehearing memorandum failed to set forth a statement of facts, contentions of law with detailed citations to authority, description of scientific tests, summary of expert testimony or exhibits). In *Borough of Littlestown*, 1983 EHB at 546, the Board found that the appellant had "assault[ed] the orderly processes of the Board's rules of practice and procedure by filing a document which is not responsive to the order of the Board." In each of those cases, the Board found a party's prehearing memorandum to be deficient, not because it lacked sufficient detail, but because of a wholesale omission of a particular requirement of 25 Pa. Code § 1021.104 and Prehearing Order No. 2. Here, the Department's prehearing memorandum sets forth its statement of facts, statement of legal issues, list of witnesses and exhibits and all other requirements of our rules and Prehearing Order No. 2.

In *DEP v. Seligman*, 2014 EHB 755, 779, cited by Range in its Memorandum of Law, the Department filed a complaint for civil penalty which alleged three counts against the defendant. The Department's prehearing memorandum made no mention of the issue covered by Count II of

the complaint, and, therefore, the Board found that it was waived. In *Jake v. DEP*, 2014 EHB 38, 60, also cited by Range, the Department did not raise the issue of the appellant's standing in its prehearing memorandum but waited until its post-hearing brief to do so. The Board found that by failing to raise the issue in its prehearing memorandum, the Department had waived its right to challenge the appellant's standing. In *Magnum Minerals, Inc. v. DER*, 1983 EHB 522, 525-26, after filing its prehearing memorandum, the Department filed a motion to dismiss, raising for the first time new grounds for its denial of the appellant's permit. The Board found that the Department had waived its right to raise the new grounds by virtue of its failure to include this information in its prehearing memorandum and amended prehearing memorandum. In each of these cases, the Board found that an issue was waived, not because it was not set forth in sufficient detail in the Department's prehearing memorandum, but because the Department subsequently attempted to rely upon a legal theory that was entirely absent from its prehearing memorandum (i.e., an entire count of a complaint, the issue of standing, new regulatory grounds for a permit denial.) These cases do not provide support for granting the relief requested by Range where the Department's prehearing memorandum, appears to fully comply with the Board's rules and Prehearing Order No.2. As the Department points out, Range "does not argue that the Department has abandoned key facts and theories underlying its Order" (Department's Memorandum of Law in Support of Response, p. 8-9); rather, its argument is that the Department has not set forth the facts and theories of its case with sufficient detail.

In response, the Department contends that much of the information sought by Range is set forth in the expert reports accompanying the Department's motion. It further states that where information has not been included, it is because that information is not relevant to its case. We will examine each of the topics addressed by Range in its motion:

Gas Migration and the Department's Investigation

Range asserts that the Department's prehearing memorandum fails to address the topics of gas migration and the Department's investigation of other potential sources of stray gas. In response, the Department points to numerous paragraphs in its prehearing memorandum setting forth factual information regarding the location and depth of the Gas Well, its casing and hydraulic fracturing stages. The Department asserts that "[t]he geological significance of those facts as they relate to the water supply impacts is the subject of expert opinion testimony that the Department has fully disclosed to Range and the Board." (Department's Memorandum of Law in Support of Response, p. 12.) The Department states that it has addressed the topics of gas migration and its investigation in great detail in its expert reports. Specifically, the Department asserts as follows:

> The Department disclosed its anticipated opinion evidence regarding how the drilling and hydraulic fracturing operations at the Gas Well contributed to the methane migration to the impacted water supplies and surface expressions through its expert reports, including that of Bryce McKee…Additionally the Department's evaluation of other sources of gas and why those sources of gas are not likely the cause of the impacts to natural resources is the subject of expert testimony that was properly disclosed through the expert reports of William Kosmer, Thomas Darrah, Bryce McKee and Seth Pelepko.

(Department's Memorandum of Law in Support of Response, p. 10.)

The Department asserts that much of what Range is arguing has been omitted from the Department's "factual statement" is, in fact, opinion. Since expert reports may be used in lieu of detailed summaries of expert testimony in a party's prehearing memorandum, *Pine Creek Valley Watershed Assn. v. DEP*, 2011 EHB 98, 99, we find no basis for precluding the Department from presenting this evidence at hearing. Range will have an opportunity to counter this information with testimony from its own witnesses at the hearing.

Range's Efforts to Comply with the Department's Order

Range asserts that the Department's prehearing memorandum improperly omits any discussion of Range's efforts to conduct and cooperate in the investigation ordered by the Department and, further, that this omission hinders Range's ability to prepare a rebuttal. In response, the Department argues that Range's efforts to comply with the order have no relevance to the Department's case.

We agree with the Department. We fail to see how a discussion of Range's compliance efforts bears on the Department's case. We concur with the Department that "[t]he validity of the Department's Order and the steps Range may take to comply with the Department's Order are two separate questions." (Department's Memorandum of Law in Support of Response, p. 14.) As we held in *M&M Stone Co. v. DEP*, 2008 EHB 24, in an appeal of a Department order, the Board's "role is to assess the validity and content of [the] order, not the recipient's efforts to comply with [the] order." *Id.* at 67 (citing, *inter alia, Ramey Borough v. Department of Environmental Resources*, 351 A.2d 613, 615 (Pa. 1976).

Other Topics Related to the Department's Investigation

Finally, Range asserts that the Department has not provided enough detail with regard to its investigation. For example, Range states that the Department has failed to address topics such as safety and risk assessment and protocols and procedures used to inspect the Gas Well. The Department states that it has not waived any topics that are critical to its case-in-chief. To the extent that the Department has not addressed the topics of safety and risk assessment and protocols and procedures for inspecting the Gas Well in its prehearing memorandum or expert reports, and states that those topics are not relevant to its case, Range's motion is granted.

Finally, we note that the parties have engaged in robust discovery in this case. Additionally, they have exchanged painstakingly detailed expert reports. We believe that each party has been given more than adequate notice of the opposing party's case.

In conclusion we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of April, 2022, it is hereby ordered Range's Motion in Limine to Preclude Facts and Issues Not Raised in the Department's Prehearing Memorandum is granted with respect to safety and risk assessment and protocols used to inspect the Gas Well, as set forth in this Opinion. It is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 18, 2022

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

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 19, 2022**
	:	

OPINION AND ORDER ON
DEPARTMENT'S MOTION IN LIMINE TO EXCLUDE IRRELEVANT AND/OR PREVIOUSLY UNIDENTIFIED FACT WITNESSES

By Thomas W. Renwand, Chief Judge

Synopsis

The Board grants the Department's Motion in Limine. Range failed to comply with the witness disclosure requirements of the Pennsylvania Rules of Civil Procedure. When asked in discovery to identify the fact witnesses it expects to call at a hearing, the answering party is required to answer the interrogatory in good faith. When this information is requested in discovery, it is not acceptable for a party to wait until the filing of its Prehearing Memorandum to list for the first time witnesses that it may call at the hearing.

O P I N I O N

Introduction

This matter involves an appeal filed by Range Resources – Appalachia, LLC (Range) challenging an order issued by the Pennsylvania Department of Environmental Protection (Department) contending that natural gas leaked from Range's Harman – Lewis Unit 1H gas well and affected ground water and surface water in Lycoming County, Pennsylvania. The order directs Range to take a number of actions, including the restoration and replacement of affected

water supplies, investigation of the migration of natural gas from the gas well, and submission of a remedial investigation plan and well plugging plan. A hearing has been scheduled in this matter from May 2, 2022 through June 3, 2022 before the Pennsylvania Environmental Hearing Board (Board). Range has filed nine motions in limine, and the Department has filed one.

This Opinion addresses the Department's Motion in Limine to Exclude fact witnesses.[1] Range has filed a response in opposition to the motion. Both parties have filed supporting Memoranda of Law.

Motion in Limine

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of trial. *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161. The purpose of a motion in limine is to provide the Board an opportunity to consider potentially prejudicial and harmful evidence and preclude such evidence before it is referenced or offered at trial. *Commonwealth of Pennsylvania v. Padilla*, 923 A.2d 1189, 1194 (Pa. Super. 2007) (cited in *Kiskadden v. DEP and Range Resources – Appalachia, LLC*, 2014 EHB 634, 635). *See also Angela Cres Trust v. DEP,* 2007 EHB 595, 596 and *RESCUE Wyoming v. DER,* 1994 EHB 1324, 1325-26. Motions in limine are better suited to address specific and narrow evidentiary matters that focus on particular exhibits

[1]Range filed motions in limine seeking to exclude fact and opinion testimony by the Department's expert witnesses. Those motions have been addressed in two Opinions issued by the Board at *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motion in Limine to Exclude Fact Testimony from Non-Produced Witnesses issued March 17, 2022) and *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motions in Limine to Exclude Testimony and Opinions of the Department's Expert Witnesses issued March 18, 2022). Range also sought to exclude all sampling results and data of the Department. That motion was addressed at *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motion in Limine to Exclude All Sampling Results and Data issued March 25, 2022). Finally, Range sought to preclude facts and issues not raised in the Department's prehearing memorandum. That motion was addressed at *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R (Opinion and Order on Range's Motion in Limine to Preclude Facts and Issues Not Raised in the Department's Prehearing Memorandum issued April 18, 2022).

or testimony. *See Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237 ("One clue to determining whether a motion [in limine] is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.")

Discussion

The Department seeks to preclude four fact witnesses that Range listed in its Prehearing Memorandum. These individuals are Mr. Travis Bennett (Vice President, former Operations Manager, Moody and Associates, Inc.); Mr. Barry Hill (Hill Well Drilling); Mr. Bryan Luden (Representative Tri-County Water, Inc.): and Mr. William Shaner (Local Resident) (Four Fact Witnesses). The Department served Range with its First Set of Interrogatories not quite two years ago on May 7, 2020. Range timely served its answers and objections to the Department's Interrogatories on June 8, 2020.

In response to the Department's first interrogatory requesting the identity of "any and all persons who have knowledge concerning the matters set forth by Range," Range filed numerous objections but did provide the Department with the identity of various individuals. It incorporated the Department's answers identifying individuals filed in response to Range's interrogatories and then specifically listed forty individuals. Except for approximately four individuals in this listing all were current or former employees of Range.

The third interrogatory requested Range to identify any and all persons known to have any knowledge concerning the Department's 2020 Order that Range appealed. Range raised numerous objections and then incorporated its answer to the first interrogatory.

The fifth interrogatory sought the "identity of all fact witnesses that Range expects to or may call at the hearing…." The fifth interrogatory requested further information regarding each

witness such as their knowledge of the facts in the matter. Range did not identify a single fact witness. It filed the following answer:

> In addition to its General Objections, which are specifically incorporated by reference, Range objects to this Interrogatory on the grounds that it is premature and that the Department, the party with the burden of proof, has failed to identify any fact witnesses it intends to call at trial. Range further objects to this Interrogatory as it seeks information that is protected by the attorney-client privilege and work-product doctrine. Range also objects to this Interrogatory on the grounds that it seeks the knowledge of witnesses, which is more appropriately obtained in depositions. Subject to, and without waiving its foregoing objections, Range has not determined which fact witnesses it will call at trial.

(Exhibit A to Department's Motion to Exclude.)

Range never supplemented its answers to interrogatories 1, 3, and 5. When Range filed its Prehearing Memorandum on December 8, 2021 it specifically listed the Four Fact Witnesses for the first time. Following the filing of its Prehearing Memorandum the Department contacted Range and asked for an offer of proof for the Four Fact Witnesses. Range refused the Department's request.

The Department then filed its Motion to Exclude the Four Fact Witnesses from testifying based on "Range's failure to identify the Fact Witnesses in discovery and Range's refusal to provide any offers of proof" in response to the Department's request. (Paragraph 18, Department's Motion to Exclude.) The Department contends that it has no knowledge of the subject matter or substance of the Four Fact Witnesses' testimony and that it would be prejudiced if they were permitted to testify at the hearing.

Range contends that its discovery responses are accurate and complete. It further contends that it identified the companies or organizations employing some of the Four Fact Witnesses and their names appear in some of the voluminous documents produced in the case. Therefore, Range

contends that the Department should have been aware of these individuals. In addition, Range argues that if the Department was not satisfied with Range's discovery responses it should have filed a Motion to Compel.

The question presented is the following: Where Range failed to specifically identify four fact witnesses in response to at least three Interrogatories, and filed no supplemental answers identifying such witnesses, should they be precluded from testifying at the hearing when they were first identified in Range's Prehearing Memorandum?

The Board's case law details a long history of providing a full, fair, and vigorous discovery process. Underlying this discovery process, and one that we have emphasized and explained on numerous occasions, is the requirement that parties must fully respond to discovery requests that seek discoverable information. Indeed, we would be hard pressed to excuse a party from identifying factual witnesses in a case when that information is requested in discovery. Pa. R.C.P. No. 4003.1(a). As the Department argues, and we agree, an interrogatory seeking the names of fact witnesses is the most basic and fundamental interrogatory a party can expect to receive in a case before the Board. Maybe even more important is an interrogatory asking a party to identify those witnesses a party "intends or may call" to testify at the hearing. As we have stated before and we will repeat here, some of the purposes of discovery are so both sides can gather information and evidence, plan trial strategy, and discover the strengths and weaknesses of their respective positions. *PDG Land Development, Inc. v. DEP & Citizens for Pennsylvania's Future,* 2008 EHB 254, 256. Full disclosure of a party's case underlies the discovery process. *Cecil Township Municipal Authority v. DEP*, 2010 EHB 551, 552. As Judge Miller stated in *Richmond Township v. DEP & Grande Land, L.P.,* 2008 EHB 262, 264, "the integrity of the discovery process is integral to the proper functioning of the Board."

Parties are entitled to discover the identity of fact witnesses including those that a party intends to call or may call at the hearing of the matter before the Board. A long list of Board cases affirms this principle: *See, e.g., McGinnis v. DEP*, 2010 EHB 489, 493-94 (Board struck fact witnesses not identified until Appellants' prehearing memorandum); *American Iron Oxide Co. v. DEP*, 2005 EHB 779, 784 ("One of the purposes of discovery is so that witnesses can be identified.")

The Board's 2016 decision in *DEP v. EQT Production Company*, 2016 EHB 489, is most instructive. EQT served interrogatories on the Department in which it requested the identity of all persons with knowledge of the facts alleged in the Department's Complaint; it further requested the names of all witnesses the Department expected to call at the hearing and the subject matter on which they would testify. The Department listed sixty people but omitted one fact witness that it identified when it filed its Prehearing Memorandum.

The Board found that "[t]here is no question that the Department was obligated to identify Brown [the fact witness] in response to EQT's interrogatories as a person possessing relevant knowledge who will testify at the hearing." 2016 EHB at 492 (citing *McGinnis v. DEP*, 2010 EHB at 493-94; *Rhodes v. DEP,* 2009 EHB 237, 244). Most importantly, the Board went on to hold:

> There is also no question that the Department had an obligation to timely supplement its response to EQT's interrogatories to add Brown in the event he was not known when the Department first responded in May 2015. While it may be difficult to foresee everyone who will be called to testify when interrogatories are served early in the discovery process, it does not excuse the obligation to promptly identify persons when they become known. Including new information in one's prehearing memorandum is not a proper way to supplement discovery responses. *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824, 829. The Department's supplemental response on July 1, 2016 [three weeks after filing its Prehearing Memorandum] was not seasonable.

2016 EHB at 492.

In its Memorandum of Law in Opposition to the Motion in Limine, Range advised the Board:

> Indeed, the Department itself objected to Range's interrogatory that sought a list of the Department's anticipated fact witnesses, explaining that the Department had "not yet determined who it will call at the hearing," and stated that "[a] list of witnesses that the Department intends to call will be provided in the Department's Pre-Hearing Memorandum in accordance with 25 Pa. Code Section 1021.104." Ex. C, Department Response to Range Interrogatory 53. **The Department maintained that objection through its supplemental Responses to Range's interrogatories. The Department thus cannot complain that Range's response to this interrogatory was improper when it asserted the same objection.**

(Range's Memorandum of Law, page 6, footnote 2) (emphasis by Board).

The Department served its Answers to Range's first set of interrogatories on April 24, 2020. Three weeks later, on May 14, 2020, approximately three weeks before Range served its Answers to the Department's first set of Interrogatories, the Department served Supplemental Responses to Range's first set of Interrogatories, including Interrogatory 53. Although the Department "incorporated its objections and responses to this interrogatory provided on April 24, 2020," it supplemented its original answer in a substantive and meaningful way. First, it incorporated its response to Range's first interrogatory where it specifically identified numerous individuals. It then identified fourteen current Department employees, five former Department employees, and seventeen current or former Range employees who it might call as trial witnesses.

In comparison, Range never supplemented its answers. It listed no fact witnesses it intended to call at the hearing until it filed its Prehearing Memorandum. The Department claims prejudice and we agree. The Four Fact Witnesses should have been specifically identified during discovery. We also agree with the Department that they were not aware that Range had not

identified all its fact witnesses until it filed its Prehearing Memorandum. Therefore, they had no reason to believe that they needed to file a Motion to Compel in discovery.

A party should not have to take its attention and resources away from preparing for the hearing because the opposing party has failed to adequately disclose and list its fact witnesses when specifically asked. Although it may be difficult to provide a complete list early in discovery, the interrogatories requesting this information were not served until the fourth month of discovery (normally discovery is for a six-month period but may be longer as it was in this case). A party is under a duty to answer interrogatories requesting the identity of fact witnesses and those fact witnesses it intends to call or may call at hearing. It is also under a duty to supplement its answers if it becomes aware of additional fact witnesses. Waiting until the filing of its Prehearing Memorandum to identify these fact witnesses is waiting too long in most cases.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANGE RESOURCES – APPALACHIA, LLC	:	
	:	
v.	:	**EHB Docket No. 2020-014-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this **19th** day of **April**, **2022**, following review of the Department's Motion in Limine to Exclude Four Fact Witnesses (Motion to Exclude), Range's Response, and the supporting Memoranda of Law, it is ordered as follows:

1) The Motion to Exclude is **granted.**

2) Those individuals named in the Department's Motion will not testify at the hearing.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 19, 2022

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

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

WHITE TAVERN	:	
	:	
v.	:	**EHB Docket No. 2022-009-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 20, 2022**
	:	

OPINION AND ORDER ON
DISMISSAL OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of Appellant, White Tavern, where Appellant has demonstrated an intent not to pursue the appeal and has otherwise failed to follow Board rules and orders.

O P I N I O N

White Tavern filed a pro se Notice of Appeal ("the Appeal") with the Environmental Hearing Board ("the Board") on February 24, 2022. The Appeal was filed on the Board's Notice of Appeal Form, was hand-written and difficult to read in places. It listed the appellant as White Tavern but also listed Kevin Warchol ("Mr. Warchol") in paragraph 1 where the form asks for name, address, etc., of the Appellant. (White Tavern Notice of Appeal at 1). In paragraph 2 of the Notice of Appeal Form that asks the appellant to describe the action of the Department of Environmental Protection ("the Department") for which the appellant is seeking review, White Tavern provided the following: "The use of my existing well[.] My setbacks are within guidelines[.] Never measured by DEP[…] I measured them, pipe can be extended the 18" additionally." (White Tavern Notice of Appeal at 1). White Tavern failed to attach a copy of the

Department action that it was seeking to challenge in the Appeal. On February 24, 2022, the Board issued its standard Prehearing Order No. 1. In an effort to better understand the nature of the appeal as well as who were the proper appellants, the Board also issued an Order to Perfect the Appeal, ordering White Tavern to file a copy of the Department action being appealed on or before March 16, 2022. White Tavern did not file any response to the Board's Order to Perfect by the scheduled deadline. After the deadline to perfect, the Board's Assistant Counsel, Alisha Hilfinger ("Ms. Hilfinger"), contacted Mr. Warchol to assist with any procedural questions that the pro se Appellant may have regarding its Appeal. During the call, Mr. Warchol indicated that White Tavern did not intend to pursue the Appeal any further. Ms. Hilfinger told Mr. Warchol that if White Tavern did not want to continue with the Appeal, the proper next step would be to submit a notice to withdraw to the Board. On March 28, 2022, after having not received any further filings from White Tavern, the Board issued a Rule to Show Cause, ordering White Tavern to explain why its Appeal should not be dismissed as a sanction for failing to comply with the Board's Order to Perfect, or alternatively, requiring him to file a copy of the Department action being appealed on or before April 11, 2022. As of the date of this Opinion and Order, White Tavern has failed to either respond to the Board's Rule to Show Cause or submit a copy of the Department action being appealed nor has it filed a notice to withdraw the Appeal.

The Board's rules authorize sanctions upon parties for failing to abide by Board orders and/or the Board's rules of practice and procedure. *Slater v. DEP*, 2016 EHB 380, 381, citing 25 Pa. Code § 1021.161. Included within these sanctions is the dismissal of an appeal. Further, the Board has consistently held that where a party has shown a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Slater*, 2016 EHB 381, citing *Mann Realty Associates,*

Inc. v. DEP, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862.

As is evident from the facts above, White Tavern has failed to comply with two Orders of the Board and seems to have lost interest in pursuing its case. Initially, White Tavern failed to file a copy of the Department action to Perfect its Appeal by March 16, 2022. Despite being afforded additional time by the Rule to Show Cause, White Tavern still has not filed a copy of the Department action or provided an explanation as to why the Board should not dismiss the Appeal. White Tavern did not file a response to the Board's Rule to Show Cause, nor did White Tavern file a request for more time following either the Order to Perfect, or the more recently issued Rule to Show Cause. An appellant's perfection of its appeal is an important step in proceeding in front of the Board. White Tavern's failure to file a copy of the Department's action as required by the Order to Perfect, or in response to the Rule to Show Cause, and in addition, the conversation Ms. Hilfinger conducted with Mr. Warchol, shows a clear intent not to proceed with the Appeal. When a party demonstrates an intent to no longer continue an appeal, we have found it is appropriate to consider the dismissal of the appeal. *Nitzschke*, 2013 EHB 861, 862. White Tavern's apparent lack of interest in proceeding with its case, along with its failure to follow the Board rules and two prior Orders make it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHTIE TAVERN	:	
	:	
v.	:	**EHB Docket No. 2022-009-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 20th day of April, 2022, it is hereby ordered that the Appeal is **dismissed** and the docket shall be marked as **closed**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 20, 2022

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: May 11, 2022**

OPINION AND ORDER ON
APPLICATION FOR FEES AND COSTS

By Michelle A. Coleman, Judge

Synopsis

The Board defers ruling on an appellant's application for attorney's fees and costs while a remand of the underlying NPDES permit is being conducted following a Board Adjudication and Order. The Board stays the application, but the appellant may move to lift the stay if the work on remand does not proceed with appropriate dispatch before the Department and the Conservation District.

O P I N I O N

Lynda Williams appealed NPDES Permit No. PAD150046 issued by the Department of Environmental Protection (the "Department") to the Estate of Harry Simon (the "Estate") for earth disturbance activities and the discharge of stormwater associated with a subdivision project at the Estate's property at 1364 Grove Road in West Whiteland Township, Chester County. In her appeal, Ms. Williams raised issues about the lack of riparian forest buffers for the project in service of her overarching concern that the subdivision development would result in more

Majority Opinion by Judge Coleman, joined by Judge Labuskes and Judge Beckman.
Dissenting Opinion by Chief Judge Renwand.

stormwater runoff on Grove Road and at her nearby home. On September 17, 2021, we issued an Adjudication and Order remanding the permit back to the Department because we determined, among other things, that the Department and the Chester County Conservation District did not properly account for the regulatory riparian forest buffer requirements for both a previously unidentified stream on the project site and a stream across the road from the project site. *Williams v. DEP*, 2021 EHB 232.

Within 30 days of the issuance of our Adjudication, Ms. Williams submitted an application for costs and fees seeking an award pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).[1] After receiving the application, we held a conference call with the parties to discuss logistical and scheduling issues moving forward on the application. The parties agreed on a timeframe for the Department to respond to the fees application along with a memorandum of law, and for Ms. Williams to then file a reply brief. The parties agreed that no discovery or evidentiary hearing would be necessary for the resolution of the application. The Estate participated in the conference call but indicated that it did not intend to take part in the fees proceedings since Ms. Williams is only seeking to recover fees from the Department and not the Estate. We issued an Order memorializing the schedule to which the parties had agreed. In her application, Ms. Williams sought an award of $132,930 in attorney's fees, $12,074.01 in expert witness fees, and $3,022.20 in costs. Ms. Williams has since amended her request for attorney's fees to include the time her counsel spent working on the reply brief to the

[1] Section 307(b) of the Clean Stream Law provides in pertinent part: "The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b).

Department's response to her application ($4,200) and her work responding to a motion to strike filed by the Department ($1,500), bringing the aggregate total to $153,726.21.[2]

In the Department's response to the application, in addition to generally contesting Ms. Williams's right to recover an award, it argues that deciding the application now would be premature because the Department asserts our Adjudication is not a "final order" for purposes of a fees application due to the remand. *See* 25 Pa. Code § 1021.182(c) (fees application shall be filed "within 30 days of the date of a final order of the Board"). The Department says that resolving the application now would result in piecemeal decisions on any fee award. Ms. Williams, on this point, contends that our Adjudication is a final order for purposes of a fees application, that there is nothing preventing the Board from deciding the fees application now, and that, regardless of what happens on remand, Ms. Williams has already prevailed in her appeal by obtaining that remand. Although we find ourselves in general agreement with Ms. Williams that we could decide the fees application now, we think prudence dictates that, at this juncture, we hold the application in abeyance while the remand is proceeding.

Part of the rationale for delaying ruling on an application for attorney's fees where we have remanded the matter back to the Department is that our decision still has the potential to be reversed or affected by a future appeal to the Commonwealth Court. An appeal to the Commonwealth Court typically is not yet available where the Board has remanded a matter back to the Department for additional work. *See* Pa. R.A.P. 311(f) (appeals to the Court only taken where remand does not require the agency to exercise any discretion or where the issue decided would evade appellate review if immediate appeal not allowed); *Sunoco Partners Mktg. & Terminals, L.P. v. Clean Air Council*, 219 A.3d 280 (Pa. Cmwlth. 2019) (quashing appeal of

[2] In an Opinion and Order issued on January 13, 2022, we denied the Department's motion to strike portions of a supplemental declaration submitted by counsel for Ms. Williams in her reply brief.

Board Adjudication remanding a plan approval back to the Department for further evaluation); *Sentinel Ridge Development, LLC v. Dep't of Envtl. Prot.*, 2 A.3d 1263, 1267 (Pa. Cmwlth. 2010) (quashing appeal of Board Adjudication remanding a stormwater permit because "it is not clear what will occur upon further evaluation by DEP. Thus, it is not clear what will happen with the permit, why it will happen, and which party, if any, will be aggrieved.").[3] However, the issues that are litigated in an original appeal before the Board are generally preserved if there are subsequent proceedings following the remand that eventually make their way to the Commonwealth Court. *See, e.g.*, *Borough of St. Clair v. DEP*, 2014 EHB 76 (remanding solid waste permit to the Department for further work on four issues); *Borough of St. Clair v. DEP*, 2017 EHB 299 (dismissing appeal of reissued permit following remand); *Borough of St. Clair v. Dep't of Envtl. Prot.*, No. 1026 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 481 (Pa. Cmwlth. July 7, 2017) (addressing issues raised in both appeals and affirming the Board).

Thus, for example, if the Department takes an action on remand and reissues the Estate's NPDES permit, Ms. Williams, or the Estate, may appeal the reissued permit to the Board. Any Adjudication in that appeal could then be appealed to the Commonwealth Court and include objections to our 2021 Adjudication as well. Therefore, it is conceivable that the Commonwealth Court could find that the Board's Adjudication remanding the Estate's NPDES permit back to the Department was wrongly decided, in whole or in part. That would, in turn, potentially affect the degree of success of Ms. Williams and the resultant amount of any award. *See Gerhart v. DEP*, 2020 EHB 1, 5-6 (listing factors to be considered in determining the amount of an award, including the applicant's degree of success and how the result of the appeal compares to the relief sought). Rather than facing a situation where awarded fees might need to

[3] We have previously held that what is a "final order" for purposes of an appeal to the Commonwealth Court is not necessarily the same as what constitutes a "final order" for resolving a fees application. *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 69-71.

be clawed back after they have already been paid, the more circumspect position is to defer a decision on the fees application for now.

Such considerations were in mind in *Rausch Creek Land, LP v. DEP*, 2017 EHB 1089, where we evaluated a motion to lift a previously imposed stay on appellant Rausch Creek's application for fees. In 2013, we issued an Adjudication suspending and remanding back to the Department a surface mining permit for further evaluation regarding the legal right to mine the site, the site's approximate original contour, and the appropriate erosion and sedimentation controls. *Rausch Creek Land, LP v. DEP*, 2013 EHB 587. Rausch Creek filed an application for costs and fees within 30 days of our Adjudication. Concurrently, both Rausch Creek and the permittee filed appeals of our Adjudication to the Commonwealth Court.[4] The Court quashed both appeals because of the Board's remand to the Department. *See* Cmwlth. Ct. Nos. 2007 C.D. 2013 and 2015 C.D. 2013. Soon thereafter, the Department moved to stay proceedings related to the fees application, which we granted by way of an Order over Rausch Creek's opposition.

In 2017, Rausch Creek filed an appeal of the renewed and reissued surface mining permit that followed from our remand. Rausch Creek then moved to lift the stay on the fees application in the earlier appeal, arguing that the new appeal was distinct and the fees application should be decided for the earlier appeal. We denied Rausch Creek's motion to lift the stay, reasoning that an Adjudication of the renewed and reissued permit, and any subsequent appellate proceedings, could conceivably impact the amount of an award to Rausch Creek:

> Any appeal to Commonwealth Court that Rausch Creek files from our Adjudication in the 2017 appeal may include any objections (that, presumably, are not otherwise moot) that it continues to have with our 2013 Adjudication. We must assume that those earlier concerns are still very much alive, particularly given the objections in the 2017 notice of appeal, which incorporates the

[4] Despite succeeding in other aspects of its appeal, Rausch Creek disagreed with the baseline year for determining what constituted the site's approximate original contour.

> objections in the 2011 appeal. Porter [the permittee] might be able to refile its earlier quashed appeal as well.
>
> There is no rule or requirement that expressly prevents the Board from ruling upon an application for fees before the opportunity for all appeals has expired, but we have traditionally deferred ruling on an application pending the exhaustion of all appeals on the merits, for good reason. *See, e.g., UMCO v. DEP*, 2009 EHB 24. For example, if the Court were to overturn our ruling that was largely in Rausch Creek's favor in 2013, it is difficult to imagine that we would still award fees to Rausch Creek. In addition, fees incurred on appeal can be recoverable. *See, e.g., Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764.

Rausch Creek, 2017 EHB 1089, 1091. Thus, our 2013 *Rausch Creek* Adjudication was not appealable to the Commonwealth Court at the time because it remanded the permit back to the Department, but those issues could have still been litigated at the appellate level in an appeal from our subsequent Adjudication in 2019. *Rausch Creek Land, LP v. DEP*, 2019 EHB 265, *appeal withdrawn*, No. 447 C.D. 2019. Accordingly, we recognized that a decision by the Commonwealth Court on those issues could have impacted Rausch Creek's degree of success, and therefore, the amount of any award, and we continued the stay of the 2013 fees application.

We exercised similar caution in *Crum Creek Neighbors v. DEP*, 2010 EHB 67. In *Crum Creek*, we had remanded an NPDES permit back to the Department so that the Department could evaluate discharges from a stormwater basin to an exceptional value stream under the antidegradation regulations and determine whether the stormwater controls of the residential development would diminish the flow of the stream. *Crum Creek Neighbors v. DEP*, 2009 EHB 548. Following our Adjudication's remand of the permit, the appellant, Crum Creek Neighbors, filed an application for fees and costs. We suspended our consideration of the application for two reasons: (1) because the permittee filed an appeal to the Commonwealth Court, and (2) because of our remand. With respect to the remand, we said:

> We do not wish to foreclose the *possibility* that the Department's actions on remand may, at least arguably, prove to be relevant in determining the amount of fees to be awarded. To date, CCN [Crum Creek Neighbors] has achieved a

> reexamination of the project. What happens next remains to be seen. Barring unreasonable delay on the part of the Department on remand, prudence suggests that we table CCN's petition for now.

Crum Creek, 2010 EHB 67, 71 (emphasis in original). There is no pending appeal to the Commonwealth Court here (perhaps because the Department and the Estate are aware that such appeals are usually premature given the remand), but we think the remand on its own is enough to justify waiting.

Although we are electing at this time to stay the application, we are nevertheless mindful of timing concerns. Important work remains to be done on remand, but we do not want consideration of the fees application to languish and drag on too long. So far, nearly eight months have passed since we issued our Adjudication remanding the Estate's permit. We do not want years to go by before action is taken on it. In *Crum Creek*, three years passed on remand before the fees application was decided. When we finally decided it, we noted our dissatisfaction with the length of time that had passed: "We could have acted on the application at any time. Had we known that three years would go by, we might have done so." *Crum Creek Neighbors v. DEP*, 2013 EHB 395, 400. We think the Estate also likely has an interest in seeing the work on remand completed expeditiously so it can potentially move forward on its project.

We are also cognizant of the fact that counsel for Ms. Williams has taken this case *pro bono* and litigated it through motions practice, hearing, and adjudication. We do not know whether her counsel will continue representation through the remand and whatever may follow. Fee-shifting provisions help encourage attorneys to represent indigent clients and act as private attorneys general in advancing the policies enshrined in legislation. *Lipton v. DEP*, 2008 EHB 691, 699 (quoting *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978)). Prolonged delays

in the recovery of fees could arguably discourage able counsel from taking *pro bono* appeals before the Board.

In its memorandum of law, the Department correctly notes that by way of remand we have retained jurisdiction over this matter. In making this point, the Department cites *Dauphin Meadows, Inc. v. DEP*, 2001 EHB 116, where we denied a Departmental motion to relinquish jurisdiction in a case where we previously remanded a solid waste permit denial back to the Department in *Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521. Interestingly, we expressed some concern in *Dauphin Meadows*, 2001 EHB 116, over the Department's handling of the remand: "The Department was given an opportunity to act and the question now is whether it has forfeited that opportunity entirely." 2001 EHB at 126. Accordingly, in light of the competing interests at play, and our own independent interest in "secur[ing] the just, speedy and inexpensive determination of every appeal," 25 Pa. Code § 1021.4, we will exercise our jurisdiction to continue to monitor the progress on remand and require periodic status reports. In addition, Ms. Williams may file a motion to lift the stay of the fees application and proceed with deciding it if appropriate circumstances warrant—for instance, if there is a substantial delay in the Department taking action on remand.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

O R D E R

AND NOW, this 11th day of May, 2022, it is hereby ordered as follows:

1. Consideration of the Appellant's application for costs and fees is **stayed** pending further order of the Board.
2. The Appellant may move to lift the stay if circumstances warrant consistent with the foregoing Opinion.
3. The parties shall inform the Board within 7 days of any action being taken on NPDES Permit No. PAD150046.
4. If action on the permit has not been taken beforehand, the Department shall file a status report on or before **September 30, 2022** with information regarding the status of its work on remand.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

*** Chief Judge Renwand files a Dissenting Opinion, which is attached.**

DATED: May 11, 2022

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

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For Permittee:
Michael T. Shiring, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	

DISSENTING OPINION OF CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND

By Thomas W. Renwand, Chief Judge and Chairman

The majority acknowledges that we can decide the Appellant's fee petition at this time, and I would do so. There is no dispute that the Board has issued a final order and that the Appellant has filed a timely petition. An Adjudication that remands a permit back to the Department for further analysis is no less a final order for purposes of a fee application than an Adjudication that does not require remand. *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 839 and 2013 EHB 395, 400.

Although I agree with the majority that it is within the Board's discretion when to rule on a fee petition after a final order, in this case I believe we should exercise our discretion and rule on the petition at this time. The Appellant should not have to wait for a ruling on her timely filed petition while the Department performs work that the Board has determined should have been done prior to issuing the permit and that could potentially take years to complete. For example, in *Crum Creek Neighbors v. DEP*, 2010 EHB 67, the Board suspended and deferred ruling on a petition for attorney's fees following the issuance of an Adjudication that remanded a permit

back to the Department for further fact-finding.[1] Three years later, the fee petition was still pending. Finally, on June 10, 2013, following the Department's renewal and modification of the permit, the appellant filed a motion to reopen consideration of its fee petition. EHB Docket No. 2007-287-L, Docket Entry No. 90. The motion to reopen the fee petition was granted, over the Department's opposition. *Crum Creek*, 2013 EHB 395. In reopening the matter, the Board noted that the fee petition could have been decided at the time it was filed and expressed concern over the three-year delay:

> Our Adjudication was clearly a final order. CCN [Crum Creek Neighbors] was obligated to file its application within 30 days of that order. 25 Pa. Code [§] 1021.172. We could have acted on the application at any time. Had we known that three years would go by, we might have done so.

Id. at 400.

My greater concern is that the parties may end up waiting years for a ruling that never comes. For example, in *Rausch Creek Land, L.P. v. DEP*, a fee application filed in 2013 was stayed following remand of a permit to the Department and appeal of the Board's Adjudication to the Commonwealth Court. EHB Docket No. 2011-137-L, Docket Entry No. 84 (Order issued on December 24, 2013). The fee petition was not addressed by the Board and was not resolved until December 2019 by means of a settlement reached between the appellant and the Department. *Id.* at Docket Entry No. 100.

In the cases cited above, the appellants' counsel were diligent and persistent in ensuring that their fee petitions were ultimately addressed, either by the Board or through the efforts of the parties. In the case of *Crum Creek*, the petition was addressed over the objection of the Department, who argued that there could be a future application to further amend the permit.

[1] Additionally, in *Crum Creek*, unlike here, the permittee filed an appeal with the Commonwealth Court.

Had we adopted the argument that the fee petition should be held in abeyance in the event of some future action, it might still be pending before the Board.

The majority recognizes the problem of delay and, to that end, has ordered periodic status reports. The majority also holds that the Appellant may move to lift the stay if circumstances warrant, including "a substantial delay in the Department taking action on remand." At a minimum, I would order the Department to complete the remand review and analysis by a date certain. If the work is not completed by that date, I would lift the stay and decide the fee petition. We stated in *Crum Creek*, 2010 EHB at 71, that "[t]he duty to file a fee application should be tied to a clear action of the Board, not some unknown, undefined, possible future action of some other party." Likewise, I believe that the timeframe for ruling on a fee application should not be tied to some unknown, undefined, possible future action of one of the parties.

I disagree with the majority's reasoning that a decision on the fee petition should be delayed because an appeal of the Department's action on remand could result in the Board having to walk back fees that may be awarded. The majority expresses concern that the Board's decision "still has the potential to be reversed or affected by a future appeal to the Commonwealth Court." If the Department's action on remand is appealed, by either the Appellant or the Permittee, the appeal will be from a new action of the Department and any appeal to the Commonwealth Court will be from the Board's decision on that action. Foregoing a decision on the fee application at this time in the event of a possible appeal of a Board decision on some future action of the Department that might include an attack on the Board's remand order seems speculative and unnecessary.

The parties have set forth their arguments regarding the awarding of fees, and this issue is ready for decision by the Board. I do not believe a delay serves the interests of the parties or the

Board. If the Appellant is entitled to fees, she deserves a timely ruling on her application, not a promise to decide at some indefinite point in the future.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 11, 2022

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC., Permittee	:	**Issued: June 3, 2022**

OPINION AND ORDER ON
PERMITTEE'S MOTION TO DISMISS

By Thomas W. Renwand, Chief Judge

Synopsis

The Permittee's Motion to Dismiss is granted in part and denied in part. A state senator does not have standing to bring an appeal of an NPDES permit on behalf of residents who live and work in the vicinity of a proposed oil and gas liquid waste treatment facility. Nor does the Environmental Rights Amendment of the Pennsylvania Constitution grant special standing to an individual legislator to appeal actions of the Department of Environmental Protection in her role as an elected official. As to the question of individual standing, the Board defers ruling on this issue until further discovery is conducted.

O P I N I O N

Introduction

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Pennsylvania Senator Katie J. Muth, challenging the issuance of Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. PA0276405 to Eureka Resources, LLC (Eureka) by the Department of Environmental Protection (Department). Eureka

has proposed the construction and operation of an oil and gas liquid waste treatment facility located in Dimock Township, Susquehanna County. The permit authorizes Eureka to discharge wastewater to Tributary 29418 to Burdick Creek, a tributary of the Susquehanna River, in Susquehanna County.

Senator Muth is a Pennsylvania State Senator who represents District 44, which includes parts of Berks, Montgomery and Chester Counties. (Amended Notice of Appeal, para. 1, 2.) On April 12, 2022, Eureka filed a Motion to Dismiss on the basis that Senator Muth does not have standing to bring this appeal. Senator Muth filed a Response opposing the motion on May 12, 2022, and Eureka filed a Reply on May 13, 2022. The Department filed no response to the motion.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party; a motion to dismiss may be granted only where the moving party is entitled to judgment as a matter of law. *Downingtown Area Regional Authority v. DEP*, EHB Docket No. 2021-127-L, *slip op*. at 3 (Opinion and Order on Motion to Dismiss issued April 5, 2022) (citing *Burrows v. DEP*, 2009 EHB 20, 22); *Hopkins v. DEP*, EHB Docket No. 2021-067-B, *slip op.* at 2 (Opinion and Order on Motion for Partial Dismissal of Appeal issued April 1, 2022) (citing, *inter alia, Consol PA Coal Co. v. DEP*, 2015 EHB 48, 54)). A motion to dismiss may only be granted when a matter is free from doubt. *Downingtown, slip op*. at 3 (quoting *Bartholomew v. DEP*, 2019 EHB 515, 517). Therefore, with these principles in mind, we evaluate Eureka's Motion to Dismiss and Senator Muth's Response.

Standing

In order to have standing to challenge an action of the Department, an appellant must be aggrieved by that action. *Wurth v. DEP*, 2000 EHB 155, 170 (citing *Florence Township v. DEP*,

1996 EHB 282). To be aggrieved, a party must have a substantial, immediate and direct interest in the subject matter and outcome of the appeal. *Del-AWARE, Unlimited, Inc. v. DER*, 1987 EHB 351, 361. The Pennsylvania Supreme Court has addressed what it means to be "aggrieved." In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), the Court set forth the elements that an appellant must demonstrate in order to have standing:

> [The party] must have a direct interest in the subject matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must also be substantial.
>
> *****
>
> The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not "aggrieved" thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law.

Id. at 280-81 (footnotes omitted) (quoting *Man O' War Racing Assn., Inc. v. State Horse Racing Commn,* 250 A.2d 172, 176-77 (Pa. 1969)).

An interest is "substantial" when it surpasses the common interest of all citizens in procuring obedience to the law. *Food and Water Watch*, 2019 EHB 459, 463 (citing *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016), *aff'd*, No. 565 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. April 12, 2021). In other words, "there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *William Penn*, 346 A.2d at 282. For an interest to be "direct" there must be a causal connection between the matter complained of and the harm alleged. *Id.*; *Food and Water Watch*, 2019 EHB at 463. Finally, an interest is "immediate" where the causal connection is sufficiently

close so as not to be remote or speculative. *Id.* The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to seek relief from the particular action of the Department that is being appealed. *Wurth v. DEP*, 2000 EHB at 170; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944.

Senator Muth claims standing on behalf of residents who live and work in the area of the proposed discharge, as a trustee under Article I, § 27 of the Pennsylvania Constitution, and in her own individual capacity.

Representational Standing

Senator Muth states that she has brought this appeal on behalf of individuals who live and work in Dimock Township and Susquehanna County and who use and enjoy the land and waterways in the vicinity of the proposed facility. (Amended Notice of Appeal, para. 28.) Included with her Notice of Appeal and Response to Motion to Dismiss are numerous affidavits signed by individuals who reside in the general area of the proposed facility who have set forth their objections to the granting of the NPDES permit. (Exhibit C to Notice of Appeal; Exhibit B to Amended Notice of Appeal; Exhibit A to Response to Motion to Dismiss.) Additionally, paragraphs 28 through 33 of the Amended Notice of Appeal detail the specific concerns of two residents of Dimock and Susquehanna County, Victoria Switzer and Matt Neenan. Neither Ms. Switzer nor Mr. Neenan have appealed the Department's issuance of the NPDES permit. Nor have any of the residents who provided affidavits to Senator Muth filed their own appeals. [1]

[1] Senator Muth's Amended Notice of Appeal states that Ms. Switzer and Mr. Neenan have not filed their own appeals due to "fear of harassment, retaliation, or from lack of resources." (Amended Notice of Appeal, para. 33.) We acknowledge that litigation can be costly and, at times, a difficult endeavor. Where a potential appellant does not have the financial means to litigate an appeal, the Pennsylvania Bar Association Environmental and Energy Law Section offers assistance in securing pro bono representation to qualifying individuals. Information regarding this program is contained in the Instructions for the Notice of Appeal form on the Board's website. As for allegations of harassment, any such matters that arise during the course of an appeal may be brought to the Board's attention where they will be addressed accordingly.

Senator Muth's district, Senate District 44, serves parts of Berks, Chester and Montgomery Counties. (Amended Notice of Appeal, para. 2.) It does not include Dimock Township or Susquehanna County; nor is the proposed oil and gas liquid waste treatment facility within Senator Muth's district. Her Notice of Appeal states, "As an elected member of the Pennsylvania State Senate, I have a duty to uphold the Pennsylvania Constitution, to ensure state government departments and agencies follow required laws and policies, and to serve and protect the residents of the Commonwealth of Pennsylvania." (Amended Notice of Appeal, Introduction.)

The Board has addressed the question of whether a legislator's role as an elected official provides them with standing to challenge Department actions within their district or within the Commonwealth. In *Levdansky v. DEP*, 1998 EHB 571, State Representative David Levdansky appealed the Department's issuance of a major permit modification for a landfill. He claimed standing both as a legislator whose legislative district included the landfill and as an individual who lived near the site. While the Board held that Representative Levdansky had standing to challenge the permit modification as an individual who lived in the neighborhood of the landfill, he did not have standing to challenge the action as a legislator. In reaching this conclusion, the Board relied on the Commonwealth Court's holding in *Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)[2] and stated as follows:

> The Commonwealth Court has applied the *William Penn* test to a legislator seeking to participate in a matter by virtue of his status as a legislator…The Court held that legislators, as legislators, are only granted standing when specific powers unique to their functions under the Constitution are diminished or interfered with. The Court

[2] In *Wilt*, a member of the General Assembly, as a taxpayer and in his role as legislator, sought to enjoin the Secretary of Public Welfare and State Treasurer from taking action to operate a mental health facility in his district. The Commonwealth Court dismissed the suit for lack of standing, finding that the plaintiff had no standing to bring the suit by virtue of his status as a legislator.

> determined that "[s]ome other nexus must then be found to challenge the allegedly unlawful action."

1998 EHB at 573-74 (citing *Wilt*, 363 A.2d at 881).

The Board went on to state:

> The Board has held that a legislator has no personal stake in the outcome of the appeal where he is seeking to intervene in his capacity as a state representative and his interest is not direct, immediate and substantial. *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563. While Representative Levdansky is permitted to participate as an *amicus curiae* in the capacity of a state legislator, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest.

Id. (citing *Wilt*, 363 A.2d at 881).

Similarly, in *Dauphin Meadows v. DEP*, 1999 EHB 928, State Senator Jeffrey Piccola sought to intervene in an appeal of a landfill expansion in his district. As in *Levdansky*, the senator was found to have standing in his personal capacity, as an individual whose office was located along the haul route of the landfill. However, his role as legislator did not afford him standing. As the Board explained, "The motion expresses the Senator's understandable interest in championing the rights of his constituents. In accordance with *Levdansky*, however, Senator Piccola may not intervene on that basis." *Id*. at 930-31.

Likewise, in *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563, State Representative David Wright sought to intervene in an appeal of the denial of an application to site a hazardous waste treatment and disposal facility in his district. Again, relying on the Commonwealth Court's holding in *Wilt*, the Board determined that Representative Wright's status as a legislator did not meet the *William Penn* test for substantial, direct and immediate interest. The Board held, "While it is commendable that he is seeking to protect his constituents' interests

before the Board, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest in assuring adherence to the [statutes involved in the appeal]." *Id.* at 1568 (footnote omitted).

The Commonwealth Court has also recently weighed in on the subject of legislative standing. In *Sunoco Pipeline, L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), the Court reviewed the question of whether State Senator Andrew Dinniman had standing to file a formal complaint with the Public Utility Commission (PUC) seeking to enjoin Sunoco's construction and operation of pipelines within his senatorial district. As with actions before the Environmental Hearing Board, in order for a complainant to have standing to pursue a complaint before the PUC he must be aggrieved, i.e., he must have a direct, immediate and substantial interest in the subject matter of the controversy. *Id.* at 1287 (quoting *Municipal Authority Borough of West View v. Public Utility Commission,* 41 A.3d 929, 933 (Pa. Cmwlth. 2012) (emphasis not included) (and further citing *William Penn, supra*)). In reviewing the senator's claim of legislative standing, the Court relied on its prior holding in *Wilt, supra*, in concluding, "Legislators have duties not shared with citizens, but their interest in legislation terminates with completion of their vote." *Id.* at 1290. The Court noted that Senator Dinniman based his legislative standing on a number of factors, including his representation of the community affected by the pipeline project and his participation on various Senate committees. Senator Dinniman stated that he filed the complaint "to force the PUC to 'review, elucidate and improve upon the safety of a public utility, as operated within his district, which affects the health, safety and economic stability of his constituents.'" *Id*. at 1291-92. The Court concluded that the senator's duties, as senator, did not confer legislative standing on him to bring an action with the PUC to challenge construction and operation of the pipelines.

Similarly, Senator Muth has stated that her interest in bringing this appeal is to protect the residents of the community where the discharge will occur and to ensure that the Department has complied with the law. While Senator Muth's work on behalf of the citizens of Pennsylvania is commendable, nonetheless her role as senator does not convey any special standing to bring this appeal on their behalf. The purpose behind the standing doctrine in the context of an appeal before the Board is to ensure that the appellant is the appropriate party to seek relief from a Department action. *Matthews International Corp. v. DEP*, 2011 EHB 402, 404; *Valley Creek Coalition*, 1999 EHB at 944. Requiring an appellant to have standing ensures that the litigant has a personal stake in the outcome of the controversy. *Raymond Proffitt v. DEP*, 1998 EHB 677, 681 (citing *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). In other words, the appellant must have a personal connection to the action on appeal beyond that of a legislator acting on behalf of the citizens of this Commonwealth.

We conclude that Senator Muth does not have representational standing as a state senator to bring this appeal on behalf of residents who live and work in the area of the proposed facility.

Standing Pursuant to Environmental Rights Amendment

Senator Muth asserts that she has not brought this appeal as a legislator, but as a trustee under Pennsylvania's Environmental Rights Amendment. (Sen. Muth Response, para. 13, 14.) Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, provides as follows:

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

The Pennsylvania Supreme Court has held that the third clause of Article I, § 27 "establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries." *Pennsylvania Environmental Defense Foundation (PEDF) v. Commonwealth*, 161 A.3d 911, 931-32 (Pa. 2017) (citing *Robinson Township v. Commonwealth*, 83 A.3d 901, 955-56 (Pa. 2013)).

Senator Muth states that she has brought this appeal, not as a legislator, but as a trustee on behalf of Pennsylvania residents "all of whom are beneficiaries under the Environmental Rights Amendment and all of whom allege impact." (Brief in Support of Sen. Muth Response, p. 7-8.) Although Senator Muth states that she has not filed this appeal as a legislator, her claim of trustee status under Article I, § 27 is based on and derivative of her position as a state senator. The Introduction to her Amended Notice of Appeal states as follows:

> I, Senator Katie J. Muth, submit this appeal to the Board for urgent review and consideration. As an elected member of the Pennsylvania State Senate, I have a duty to uphold the Pennsylvania Constitution, to ensure state government departments and agencies follow required laws and policies, and to serve and protect the residents of the Commonwealth of Pennsylvania.

(Amended Notice of Appeal, Introduction.) In addition, paragraphs 9-10 of her Amended Notice of Appeal, included under the heading of "Standing," state the basis of her appeal:

> 9. Senator Muth filed the instant appeal to defend the Constitution of Pennsylvania in accordance with her oath of office, which states "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity."
>
> 10. Senator Muth's oath of office ***obligates*** Senator Muth's support and defense of the United States Constitution and the Constitution of Pennsylvania to extend beyond a single geographical area or a single topic.

(Amended Notice of Appeal, para. 9-10) (emphasis in original.)

The Amended Notice of Appeal details her role as a senator and her responsibilities in that regard: Senator Muth represents Pennsylvania residents in District 44. (Amended Notice of Appeal, para. 2.) She is an elected member of the Senate Leadership, serving as the Policy Committee Chair for the Democratic Caucus. (Amended Notice of Appeal, para. 3.) She serves on the Senate Environmental Resources and Energy Committee, which is responsible for overseeing matters related to the Commonwealth's natural resources. (Amended Notice of Appeal, para. 4.)

As we have stated, the role of legislator does not automatically convey standing, whether as an individual or on behalf of constituents or other Pennsylvania citizens. The legal question we now must decide is whether the Environmental Rights Amendment confers standing on an individual state legislator as a trustee to challenge a Department action. Based on our review of the law, it does not. Article I, § 27 conveys no special standing on members of the General Assembly to bring an appeal as a trustee of the Commonwealth's natural resources. This question has been addressed by the District Court for the Eastern District of Pennsylvania in *Yaw v. Delaware River Basin Commission*, 2021 U.S. Dist. LEXIS 109601, 2021 WL 2400765, 51 ELR 20107 (E.D. Pa. June 11, 2021). In that matter, State Senators Gene Yaw and Lisa Baker, as well as other plaintiffs, sought a declaration that the Delaware River Basin Commission exceeded its authority by imposing a moratorium on fracking in the Delaware River Basin. One theory of standing raised by the senators was that they were trustees of the Commonwealth's public natural resources under Article 1, § 27 and, as trustees, they had a fiduciary duty to manage and oversee the trust.

In examining this theory of standing, the District Court referred to the Pennsylvania Supreme Court's opinion in *PEDF*, and, in particular, the following language:

> Trustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.

PEDF, 161 A.3d at 931-32. Relying on this language, the District Court held that the senators could not be designated as trustees under the Environmental Rights Amendment "because they are *individual legislators, not Commonwealth agencies or entities*." *Yaw*, 2021 U.S. Dist. LEXIS 109601 at *23 (emphasis added.)

The Board is not bound by the decision of the Federal District Court, but we agree with its logic. Article I, § 27 contains no authority for individual legislators to act as trustees of the Commonwealth's natural resources and provides no standing for them to challenge an action of the Department of Environmental Protection in their capacity as individual legislators. A member of the General Assembly has no special standing to bring an appeal under the Environmental Rights Amendment beyond that of any Pennsylvania citizen. Were that the case, it would greatly expand the traditional doctrine of standing. Indeed, it could lead to legislators acting as private attorneys general challenging actions across the state.

Further, such a ruling could lead to chaotic results. For example, it raises the following question: "If a State Senator has individual standing, then would the tens of thousands of other state employees also have standing? If not, what would be the cutoff as to individuals that would have Trustee standing and those individuals who do not?" (Brief in Support of Motion to Dismiss, p. 8.) The senator's theory would essentially eliminate the need for standing for any of those tens

of thousands of state employees who wish to challenge an action of the Department under Article I, § 27.

We do not believe this is what the drafters of Article I, § 27 intended. Rather, the trustee duties under Article I, § 27 are vested in the "agencies and entities of the Commonwealth government, both statewide and local." *PEDF*, 161 A.3d at 931-32. Unlike the Executive Branch, where the authority to act is vested in one individual, the Governor, the Legislative Branch consists of individual senators and representatives who must come together as one body to take official action on its behalf. Thus, an individual legislator may not act as trustee under Article I, § 27 on behalf of the entire Legislature without authorization to do so.

Here, Senator Muth has not claimed authority to act on behalf of the Senate or the entire General Assembly in bringing this action under Article I, § 27; rather, she states that she has brought this action in her capacity as an individual senator. As we have discussed, Article I, § 27 does not empower individual legislators to act as trustees. On that basis, the Environmental Rights Amendment does not provide her with standing to bring this appeal.[3]

Notably, in the *Yaw* case the District Court held that even if the senators had been found to have trustee obligations under the Environmental Rights Amendment, they would still lack standing because they had not made out a "cognizable injury." *Yaw*, 2021 U.S. Dist. LEXIS 109601 at *24 (citing *Erickson v. AmeriCold Logistics, LLC*, 311 F. Supp. 3d 1073, 1077 (D. Minn. 2018) ("The fact that plaintiffs are trustees does not excuse them from well-established standing requirements.")) Likewise, even if Senator Muth were found to have authority to act as a

[3] We express no opinion on whether Senator Muth would have standing to file this appeal if she were acting on behalf of the entire Senate or the General Assembly.

trustee under Article I, § 27, she would still be required to demonstrate the well-established elements of standing in order to proceed.

We conclude that Senator Muth does not have standing to bring this appeal as a trustee under the Environmental Rights Amendment of the Pennsylvania Constitution.

Individual Standing

Senator Muth contends that she has standing in her own right to appeal the issuance of the NPDES permit by the Department. She states that she has spent time personally and professionally in the township of Dimock where the proposed facility will be located. (Brief in Support of Sen. Muth Response, p. 6.) She further alleges that the issuance of the permit will harm her because it will allow the discharge of "radioactive and other wastes into the waters of the Commonwealth, that will flow into the Chesapeake Bay Watershed, the Delaware River Basin, and the Susquehanna River Basin and surrounding areas in which Senator Muth resides, works, and recreates." (Brief in Support of Sen. Muth Response, p. 7)

A majority of the Board at this stage of the litigation is not able to reach a consensus on the question of Senator Muth's individual standing. Discovery and additional motions directed to the issue of Senator Muth's standing to pursue this appeal would assist the Board in resolving this issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC., Permittee	:	

O R D E R

AND NOW, this 3rd day of June, 2022, it is ordered as follows:

1) The Motion to Dismiss is **granted** as to the question of representational standing.

2) The Motion to Dismiss is **granted** as to the question of trustee standing pursuant to Article I, § 27 of the Pennsylvania Constitution.

3) Because a majority of the Board was not able to reach a consensus on the question of individual standing, this portion of the Motion to Dismiss 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 3, 2022

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

For the Commonwealth of PA, DEP:
Ann Conserette, Esquire
Michael T. Ferrence, Esquire
(via electronic filing system)

For Appellant:
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For Permittee:
Paul J. Bruder, Jr., Esquire
Aaron D. Martin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARLISLE PIKE SELF STORAGE and REGENCY SOUTH MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 2021-072-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE L.P., Intervenor	:	**Issued: June 6, 2022**

OPINION IN SUPPORT OF
ORDER GRANTING MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion in limine and precludes two expert witnesses from testifying on behalf of appellant/private landowners against the Commonwealth and the permittee where the firm that employs those witnesses is also retained by the Commonwealth to work on the very project that is the subject of this appeal.

O P I N I O N

Carlisle Park Self Storage and Regency South Mobile Home Park (the "Appellants") filed a complaint with the Department of Environmental Protection (the "Department") alleging that Sunoco Pipeline L.P. ("Sunoco") damaged their property when it constructed its Mariner East pipelines. The Department rejected the complaint, saying it would not take further enforcement action against Sunoco. The Appellants filed this appeal from the Department's rejection of their complaint. Sunoco has intervened.

The Appellants have identified Andrew Reese and William Seaton as two of their proposed expert witnesses. Reese and Seaton are employees of ARM Group LLC ("ARM"). Sunoco has

filed a motion in limine asking us to preclude them from testifying. Their participation is worrying to Sunoco because since 2015 ARM has also provided extensive, ongoing confidential consulting services to the Commonwealth regarding the Commonwealth's oversight of the construction of the Mariner East pipelines. ARM continues in that role. Thus, ARM would simultaneously be providing consulting services *for* the Commonwealth regarding the Mariner East pipelines, and testifying *against* the Commonwealth on behalf of adverse landowners regarding the Mariner East pipelines, if we allowed its employees to testify. The Department, it seems rather belatedly, has joined in Sunoco's motion. Unperturbed by what would seem to be a glaring conflict of interest, the Appellants have opposed the motion. We granted the motion by Order dated May 18, 2022. This Opinion is issued in support of that Order.

ARM began working for the Commonwealth to help it with its regulatory oversight of pipeline construction as early as 2015.[1] It was then that the Public Utility Commission ("PUC") contracted with ARM for environmental consulting services to assist the PUC's Bureau of Investigation and Enforcement ("BI&E") with investigations of public utilities in the Commonwealth. The contract included a nondisclosure agreement in which ARM agreed it would hold proprietary information in confidence, restrict disclosure of the proprietary information only to those persons authorized under the contract with a need to know, would not disclose proprietary information to any third party in any manner, and would use the proprietary information solely in connection with ARM's work on the contract. ARM has in fact obtained extensive information from Sunoco related to the Mariner East pipelines and other pipeline assets in the Commonwealth, information that Sunoco tells us is subject to the protections of the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1 – 2141.6, and the PUC's

[1] We take our facts from Sunoco's motion and the Department's joinder, which the Appellants have not disputed in any material way.

regulations implementing such Act at 52 Pa. Code § 102.1-102.4, which requires the party obtaining such information—here ARM—to maintain strict confidentiality of that information, and subjects a party who discloses that information to criminal liability. *See, e.g.*, 35 P.S. § 2141.6 (identifying criminal penalties for disclosure of confidential security information or records).

The contract was amended at various times. Most pertinent here, ARM contracted to assist "the Department [of Environmental Protection] with administrative and field geotechnical support and evaluation necessary in the Department's permitting and compliance investigations of HDD [horizontal directional drilling] sites and activities throughout Pennsylvania," which included issues related to Sunoco's construction of the Mariner East pipelines, such as inadvertent returns (IRs), loss of returns (LORs), and identifying damages from that activity and how to remediate when damages were found.

As ARM started working for the Department, it provided staff training for the oversight of HDDs. It helped the Department develop Best Management Practices. The Department, as part of its confidential relationship with ARM, has provided ARM with specific Sunoco documents for review and comment by ARM including the Preparedness, Prevention, and Contingency Plan, the Water Supply Assessment, Preparedness, Prevention, and Contingency Plan; the HDD IR Assessment, Preparedness, Prevention, and Contingency Plan; and the Mitigation Plan for Karst Terrain and Underground Mining. ARM sent confidential review memoranda to Department counsel regarding those plans. ARM marked some memoranda over the years as "Confidential Prepared in Response to PaDEP's Request for Litigation Preparation Materials." ARM submitted a draft summary to at least eight Department attorneys, including its chief counsel, who were involved in litigation and potential enforcement matters regarding Mariner East.

ARM received confidential information from Department attorneys who shared their legal theories of liability and mental impressions of potential enforcement actions against Sunoco. Department lawyers have also disclosed the nature of the alleged violations committed by Sunoco and the need to develop plans to address those violations. ARM's confidential communications were directly related to litigation and other activities involving the Mariner East pipelines. ARM has provided confidential expert review to the Department on issues regarding Sunoco's HDD activities in Snitz Creek, Marsh Creek, and Raystown Lake. ARM has received extensive confidential information from the Department through its attorneys directly related to the construction, operation, and maintenance of the Mariner East pipelines, the violations committed and damages caused by Sunoco as a result of the construction, operation, and maintenance of the Mariner East pipelines, and how to identify and remedy the violations and damages caused by Sunoco. Most recently, ARM provided expert assistance to the Department in reviewing the emergency permit application for Sunoco's HDD S3-290 (Marsh Creek) site.

It is not just that ARM has assisted the Department generally with respect to the entire Mariner East project; it has worked with the Department on the very section of the pipeline that we are told is the subject of the instant appeal. ARM has apparently received confidential security information regarding the Appalachian Drive HDD (HDD 240) through ARM's representation of the PUC. In response to data requests for the Appalachian Drive (HDD 240) location and allegations of subsidence following construction activities, Sunoco provided responses to the PUC's BI&E with information that is considered confidential security sensitive information, and ARM, through Scott A. Wendling, P.G., ARM's supervising professional on these issues for the Commonwealth's contract with ARM, obtained and reviewed that information.

ARM has not only assisted the Department behind the scenes, but its employees have testified on behalf of the Department and have otherwise assisted the Department in other appeals related to the Mariner East pipelines. Environmental consultants from ARM—including Scott Wendling, who is Vice President and Chief Operating Officer of ARM, and Daniel W. Ombalski, P.G. and P.E., a Senior Consultant with ARM—have previously served as expert witnesses on behalf of the Department specifically regarding HDD issues on the Mariner East pipeline project before this Board at an October 2020 hearing on Sunoco's petition for supersedeas related to the HDD 290 work location in Chester County. *Sunoco Pipeline L.P. v. DEP*, EHB Docket No. 2020-085-L. In another appeal involving the Mariner East pipelines, the parties reached a settlement that required Sunoco to submit hydrogeological reevaluations for HDD locations where an IR had occurred. *Clean Air Council v. DEP and Sunoco*, EHB Docket No. 2017-009-L. ARM helped the Department evaluate those reevaluations.

Thus, the Department has had extensive interactions with ARM regarding the investigation of HDDs, IRs, and LORs pertaining to the Mariner East pipeline project. In the case at hand, the very same sorts of issues are involved. The Appellants allege that Sunoco's HDDs caused IRs and LORs that damaged their properties.

It is not the Board's job to arbitrate the Rules of Professional Conduct for attorneys, let alone the ethical rules that apply to geologists and engineers. *See Big Spring Watershed Ass'n v. DEP*, 2015 EHB 83, 89. Nor is it necessarily our responsibility to police the statutes related to utility security, or enforce the contract between ARM and the Commonwealth. However, we do have a duty to preserve the orderly and just disposition of the cases before us, and we have the power to disqualify expert witnesses if doing so is necessary to protect the integrity of the adversary process and to promote public confidence in the decisions of the Board. *See Ambrosia*

Coal & Const. Co. v. People's Bank of Western Pa., 62 Pa. D.&C. 4th 212, 216 (Pa. Ct. Com. Pl. 2002) (citing *Cordy v. The Sherwin Williams Co.*, 156 F.R.D. 575, 579 (D.N.J. 1994)). *See also Braverman v. Winig*, 2021 Phila. Ct. Com. Pl. LEXIS 6 at *7 (Pa. Ct. Com. Pl. Apr. 19, 2021) ("[w]hile there is a paucity of law on the issue of expert disqualification in the Commonwealth, the Pennsylvania Supreme Court has held in an analogous situation that a trial judge's 'inherent power to control litigation over which [s]he is presiding' includes the power to disqualify").

One situation where disqualification may be appropriate is when a party retains an expert witness who previously worked for an adversary and who acquired confidential information that is potentially relevant in the current litigation during the course of their employment. *Ambrosia Coal, supra*; *Connors v. Dawgert*, 38 Pa. D.&C. 4th 367, 367-68 (Pa. Ct. Com. Pl. 1998). *See also Avco Corp. v. Turn & Banik Holdings*, 2017 U.S. Dist. LEXIS 77480 at *20-21 (M.D. Pa. 2017); *Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C.*, 202 F.R.D. 426, 428 (E.D. Pa. 2001). We note that, while the courts speak of a *past* relationship causing a conflict, the situation is actually more troubling here because ARM continues to serve as the Commonwealth's consultant.

In the face of this rather obvious conflict of interest, the Appellants say the ARM employees will promise not to rely on confidential information "exclusively obtained" by ARM through its contracts with the Department and the PUC. We are not sure what that means. They say the would-be experts would endeavor not to rely on "statutorily protected" confidential information. They say, unconvincingly, that any confidential information that they obtained is not relevant in this case. None of these arguments are persuasive. Even if it were theoretically possible to parcel out what ARM has learned as a result of its confidential relationship, which we highly doubt, there is no way for us to know that it has in fact been successful in its attempt to do so. How

could we possibly tell that the testimony is not based in part on confidential information? In any event, the appearance of impropriety can be just as important as the reality of one.

We understand and regret the financial burden this ruling imposes on the Appellants, but one might argue that they reasonably should have seen this coming. We also do not applaud Sunoco's, or more especially the Department's, belated effort to bring this issue to the fore. And while our ruling results in further delay, the parties' multiple requests for prior extensions belie any sense of urgency.

In short, we are very concerned that any final adjudication by the Board of this appeal would be tainted by the fact that what ARM has effectively done is enter into a contract that has resulted in the firm being funded by the taxpayers to educate themselves for the last several years about the details and specifics of the Mariner East pipeline project, represent the Commonwealth as its duly authorized professional agent in a multitude of circumstances related to the Mariner pipelines, obtain confidential information from its Commonwealth agency clients, and then turn around and work for private party landowners and use that same knowledge and information to testify against the Commonwealth, all the while continuing to work for the Commonwealth. Whether this is appropriate under public utility confidential information laws, ARM's contractual obligations, or professional rules of conduct is not our concern; our concern is with the integrity and credibility of the Board's decisions. That is why we issued our Order precluding ARM from testifying against its own client in this appeal, which is attached to this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 6, 2022

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

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

For Appellants:
Martin R. Siegel, Esquire
Erica Townes, Esquire
(*via electronic filing system*)

For Intervenor:
Stephanie Carfley, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARLISLE PIKE SELF STORAGE and REGENCY SOUTH MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 2021-072-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of May, 2022, upon consideration of Sunoco Pipeline L.P.'s Motion in Limine to Exclude Appellants' Expert Witnesses Andrew Reese and William Seaton, in which the Department has joined, and the Appellants' response in opposition thereto, it is hereby ordered as follows:

1. The motion is **granted**. Andrew Reese and William Seaton are hereby disqualified and excluded from serving as expert witnesses in this litigation.
2. In accordance with our Order issued on May 5, 2022, the Appellants shall supplement their discovery by providing the names of their experts to Sunoco and the Department on or before **July 5, 2022**. The Appellants shall provide their expert reports to Sunoco and the Department on or before **August 16, 2022**. Any dispositive motions shall be filed on or before **September 15, 2022**.
3. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: May 18, 2022

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

For Appellants:
Martin R. Siegel, Esquire
Erica Townes, Esquire
(*via electronic filing system*)

For Intervenor:
Stephanie Carfley, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: June 7, 2022**

OPINION AND ORDER ON
MOTION FOR SANCTIONS IN THE FORM OF LEGAL FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an Intervenor's motion for sanctions in the form of legal fees seeking to recover reasonable fees incurred as a result of a baseless motion to stay proceedings filed by counsel for the Appellants. The motion was submitted in bad faith and for the improper purpose of causing unnecessary delay and a needless increase in the cost of litigation. The motion is also the latest example of counsel's pattern and practice of harassing opposing counsel. The motion also violated counsel's obligation to show candor to the Board by basing the request for relief on a demonstrably false statement.

O P I N I O N

The Environmental Hearing Board's Rules of Practice and Procedure require that every document filed with the Board be made in good faith and not for purposes of harassing another party, delaying the progress of the appeal, or unnecessarily increasing litigation costs:

> (a) Every document directed to the Board and every discovery request or response of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name or, if a party is not represented by an

> attorney, shall be signed by the party. Each document must state the signer's mailing address, e-mail address and telephone number.
>
> (b) The signature to a document described in subsection (a) constitutes a certification that the person signing, or otherwise presenting it to the Board, has read it, that to the best of his knowledge or information and belief there is good ground to support it, and that it is submitted in good faith and not for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. There is good ground to support the document if the signer or presenter has a reasonable belief that existing law supports the document or that there is a good faith argument for the extension, modification or reversal of existing law.
>
> (c) The Board may impose an appropriate sanction in accordance with § 1021.161 (relating to sanctions) for a bad faith violation of subsection (b).

25 Pa. Code § 1021.31. As the rule lays out, the Board is authorized to impose appropriate sanctions for a bad faith violation of the signing requirement. The Board's rule on sanctions, in turn, provides:

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

25 Pa. Code § 1021.161. The sanctions permitted under Pa.R.Civ.P. 4019 include, in a case of bad faith, the imposition of reasonable costs, including attorney's fees, actually incurred by the opposing party by reason of such bad faith. Pa.R.Civ.P. 4019(h).

Up until now, we have never imposed sanctions for a violation of 25 Pa. Code § 1021.31. However, counsel for the Appellants, Lisa Johnson's, egregious behavior unmistakably evincing bad faith, harassment, unwarranted delaying tactics, and outright lying to the Board and opposing counsel, not to mention highly disrespectful, unprofessional conduct in general, compels us to impose a sanction in this case.

This matter involves an appeal filed by Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") of a letter issued by the Department of Environmental Protection (the

"Department") in which the Department, in response to a complaint made by the Appellants, determined that any water quality issues in the Appellants' water supply were not caused by gas drilling operations conducted by Coterra Energy Inc. f/k/a Cabot Oil and Gas Corporation ("Coterra"). The Appellants disagree with the Department's determination and contend that Coterra is responsible for pollution of their water supply located in Bridgewater Township, Susquehanna County.

Coterra has filed a motion for sanctions in the form of legal fees. Coterra seeks to recover $18,614.70 in attorney's fees incurred in relation to responding to a motion to stay proceedings filed by the Appellants on February 3, 2022, less than three weeks before the hearing on the merits was scheduled to commence. Coterra says that the motion was the latest in a series of maneuvers by the Appellants' counsel, Lisa Johnson, Esquire and Lisa Johnson & Associates ("Johnson"), to protract the proceedings, harass opposing counsel, and increase the cost of litigation. In the motion, Coterra points out that the Appellants claimed that counsel for Coterra was going to have "conversations" with people from the Environmental Protection Agency ("EPA") and the Pennsylvania Office of Attorney General, and those "conversations" necessitated a stay of our proceedings. In reality, Johnson subsequently conceded that there were no such "conversations" scheduled and, in fact, none have ever taken place. Coterra argues that the motion to stay proceedings was premised on a falsehood and was not filed in good faith, and accordingly, sanctions are warranted. The Department has not spoken. Johnson has opposed the motion. The details of her opposition will be described below. We conclude that Coterra's motion must be granted in order to quell such contumacious conduct in the future.

In order to understand why we are granting sanctions for a bad faith motion for a stay, it is necessary for us to provide the background and context that predated its filing. We want to

emphasize that a motion for a stay or a request for an extension will not ordinarily warrant the imposition of sanctions in any but the most egregious circumstances. However, we believe those circumstances are present here, where the motion for a stay was merely the latest iteration in a series of filings from Lisa Johnson and the Appellants that appeared to have no purpose other than to delay our proceedings, increase litigation costs on the Department and Coterra, and avoid in any way possible going to the scheduled hearing on the merits. This appeal should have been a relatively straightforward water loss and contamination case. Whether the case had any merit will never be known because Johnson's conduct has precluded us from ever coming close to a decision on the merits, which is extremely unfortunate for her clients. The history that follows is by no means a complete recitation of the nearly 140 entries on our docket for an appeal that was filed 16 months ago, but it provides a flavor of the litigation orchestrated by Johnson and a necessary and appropriate context for our imposition of sanctions.

The Appellants filed their notice of appeal on February 15, 2021. (EHB Docket No. 2021-013-L, Docket Entry No. 1.) We issued our standard Pre-Hearing Order No. 1 in this matter, which set a discovery deadline of August 16, 2021 and a deadline for the filing of dispositive motions of September 14, 2021. (Docket Entry No. 2.) Our Pre-Hearing Order No. 1 states that the discovery period may be "extended for good cause upon written motion." On February 19, 2021, counsel for Coterra, Buchanan Ingersoll & Rooney PC, Amy L. Barrette, Esquire, and Robert L. Burns, Esquire (hereinafter "Buchanan"), entered their appearance in the appeal, thereby establishing Coterra as an intervenor pursuant to our Rules at 25 Pa. Code § 1021.51(j). (Docket Entry No. 4.)[1]

[1] When the appeal was filed, Coterra Energy Inc. was known as Cabot Oil and Gas Corporation. On October 21, 2021, in response to an unopposed motion from the Appellants, (Docket Entry No. 65), we issued an Order amending the caption in this matter to reflect Coterra's new corporate name, (Docket Entry No. 73). Quoted filings from before October 21, 2021 will refer to Coterra as Cabot, but in this Opinion we will generally use the name Coterra throughout.

One week after filing their appeal, and three days after Buchanan entered their appearance, the Appellants filed a two-page motion to disqualify counsel for Coterra. (Docket Entry No. 5.) This is the beginning of Johnson's unrelenting harassment of opposing counsel. The motion to disqualify was followed by a three-page "renewed motion to disqualify counsel" filed four days later on February 26. (Docket Entry No. 7.) The motions were premised on an allegation that Buchanan filed a lawsuit in an *unrelated* oil and gas matter and "sued another Susquehanna County landowner, an elderly man with cancer, and the landowner's attorneys for, among other claims, speaking publicly about similar matters surrounding ongoing water contamination." (Mot. to Disqualify at ¶ 3.) The Appellants claimed that disqualification of Buchanan was necessary because the "Appellants fear that further involvement in this investigation would result in the initiation of punitive legal proceedings against Appellants." (*Id.* at ¶ 5.) The two-page motion did not cite to any Rules of Professional Conduct or any statutory provisions in support of the request for disqualification. It is unclear how "further involvement in this investigation would result in the initiation of punitive legal proceedings."

In the renewed motion, the Appellants said that disqualification was further warranted because Buchanan had contacted Johnson requesting that the motion to disqualify be withdrawn or Coterra would be filing a motion to strike the filing. The Appellants said,

> The Buchanan Ingersoll parties have circumvented the Board's jurisdiction and process by delivering the Buchanan Ingersoll Letter to Appellants outside of the Board's purview. If it was the intent of the Buchanan Ingersoll Parties to intimidate and terrorize Appellants and Appellants' counsel in order to silence them, the Buchanan Ingersoll Parties have failed.

(Renewed Mot. at ¶ 7.) In the renewed motion, the Appellants requested that the Board, among other things, grant the motion to disqualify, sanction Buchanan, and refer Buchanan to the Disciplinary Board:

> (a) grant Appellants' Motion to Disqualify Amy L. Barrette, Esq., Robert L. Burns, Jr., Tara Klingensmith, Matthew Pilsner and Buchanan Ingersoll, & Rooney from representing Cabot Oil and Gas Corporation in the present action, (b) impose sanctions against Cabot Oil and Gas Corporation, Amy L. Barrette, Robert L. Burns, Jr., Tara Klingensmith, Matthew Pilsner and Buchanan Ingersoll & Rooney for circumventing the Board and attempting to silence Appellants and Appellants' counsel, (c) provide for a protective order to prevent the Buchanan Ingersoll Parties from contacting Appellants or Appellants' counsel directly and that all communications from the Buchanan Ingersoll Parties be submitted to the Board, (d) refer this matter to the Pennsylvania Supreme Court Disciplinary Board to open an investigation into the conduct of the Buchanan Ingersoll Parties, and (d) [sic] order the Buchanan Ingersoll Parties to pay attorneys' fees and expenses to Appellants' counsel.

(*Id.* at 3.) The renewed motion again did not cite any Rule of Professional Conduct or any provision of law that Buchanan was alleged to have violated. We note that Buchanan had done nothing more than what was required by our Rules, which is consult with opposing counsel before engaging the Board. On March 26, 2021, we denied both motions to disqualify, as well as Coterra's subsequent motion to strike the motion to disqualify and to impose sanctions. (Docket Entry No. 16.)

On April 7, 2021, about two months after filing the appeal and without having conducted any discovery, the Appellants filed a motion for summary judgment in which they argued that the undisputed material facts showed that Coterra had contaminated their water supply with triethylene glycol (TEG) and other substances. (Docket Entry No. 17.) The Appellants requested expansive relief in their motion, including issuing a notice of violation to Coterra, making a criminal referral to the Pennsylvania Office of Attorney General, and sanctioning Coterra, its counsel, and the Department for "bad faith negotiating tactics":

> Appellants respectfully request that the Board substitute its judgment and take, or order the Department to take, the following actions: (a) vacate the Determination Letter, (b) require Cabot to disclose all chemicals used at the subject well sites, (c) issue a of a notice of violation to Cabot for polluting Appellants' water supply with TEG and other potential constituents under the Oil and Gas Act and other applicable laws and statutes, (d) urgently notify all landowners under lease with Cabot or

> another operator that operates in the vicinity of Cabot, (e) require Cabot to deliver clean drinking water, not just potable, to all of Cabot's lessors, (f) make a criminal referral of this matter to the Pennsylvania Attorney General's Office, (g) request a site assessment be performed by the Agency for Substances and Disease Registry, (h) impose sanctions on Cabot, Attorney Barrette and the Department with respect to each of their bad faith negotiating tactics throughout this matter, and (i) any and all other actions and orders under the Board's authority and discretion.

(*Id.* at 3.)

Of course, very little of these requests for relief are within the Board's power to grant. In an Opinion and Order issued on June 11, 2021, we denied the Appellants' motion. (Docket Entry No. 24.) *Stanley v. DEP*, 2021 EHB 176. For one thing, the Appellants did not attach to their motion the sample results that they claimed showed contamination from Coterra's wells. Indeed, to date, the Board has never been presented with *any* credible evidence that would support a claim of TEG contamination. The Department asserted that TEG was not detected in its own sampling and Coterra maintained it never used it at its wells. We concluded that "[n]o party has come forward with any real analysis of the sample results in their briefs." *Stanley*, 2021 EHB at 178. We went on to state that a lack of discovery made the motion premature:

> Much of the problem is related to the fact that no discovery has been conducted yet by any party and we are working with a record in need of further development. This is generally a hallmark indication that summary judgment is premature, particularly in a case like this where there are contested and competing water sampling results.

Id.

Following the denial of summary judgment, the Appellants filed with the Board on June 22, 2021, 14 subpoenas on the following people: Governor Tom Wolf; Lieutenant Governor John Fetterman; DEP Secretary Patrick McDonnell; Former Pennsylvania Secretary of Health Dr. Rachel Levine; Acting Pennsylvania Secretary of Health Alison Beam; DEP employees Jennifer Means, Casey Baldwin, Brianna Cunningham, and Micheal O'Donnell; retired DEP counsel Anne Shapiro; active DEP counsel on this appeal Michael Braymer and Kayla Despenses; Coterra

counsel Amy Barrette; and then-Cabot CEO Dan Dinges. (Docket Entry Nos. 25-38.) The subpoenas were for the deposition within a matter of days of the named individuals and the production of numerous documents.

On June 24, Coterra filed an emergency motion to stay compliance with the subpoenas. (Docket Entry No. 39.) Coterra argued, among other things, that the subpoenas, which scheduled depositions seven days later, did not provide reasonable notice to the prospective deponents, that the subpoenas requested the production of voluminous, overbroad, irrelevant, and privileged documents, that the service of the subpoenas either through persons unauthorized to accept service or through the Board's electronic filing system do not comport with the Pennsylvania Rules of Civil Procedure and, therefore, service was not effective, and that using subpoenas to depose a party to an appeal was procedurally improper. (*Id.*) Coterra also stated in its motion that it intended to file by July 1 a motion to quash the subpoenas directed to Barrette and Dinges and for a protective order. Coterra's motion contained a certification in accordance with our Rules at 25 Pa. Code § 1021.93(b) that it attempted to confer with Johnson.[2] Coterra's certification statement provided that it reached out Johnson in accordance with our Rules, but the effort was rebuffed:

> Pursuant to 25 Pa. Code § 1021.93(b), counsel for Cabot herby certifies that Cabot made a good faith effort to confer with counsel for Appellant prior to filing Intervenor Cabot Oil & Gas Corporation's Emergency Motion to Stay Compliance with Subpoenas. In an email dated June 23, 2021, Appellants' counsel stated that Appellants have advised her not to negotiate or otherwise communicate with [Attorney Barrette] [or Buchanan Ingersoll Rooney, PC.]" [sic] Accordingly, Cabot's efforts to resolve the issue prior to seeking Board intervention were not successful.

[2] 25 Pa. Code § 1021.93(b) provides:

> A discovery motion may not be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action. Discovery motions must contain as exhibits the discovery requests and answers giving rise to the dispute.

(*Id.* at 11.)

The Appellants responded on June 25. (Docket Entry No. 41.) In their response, the Appellants "demanded" that all communication to them be made via filings on the Board's docket so that the Appellants "could be free from intimidation" from Coterra:

> Appellants continue to demand that all communications with Appellants be done through filings with the Board so that Appellants could be free from intimidation by Cabot and Attorney Barrette. The filings and documentation included in the docket sets forth this pattern by Cabot and Attorney Barrette. Attorney Barrette and Buchanan Ingersoll & Rooney continue to disregard Appellants [sic] need for transparency and the desire to pursue their rights free from obstruction, and thus, the only communications should be done through the Board. Attached as Exhibit A is an email from Attorney Barrette dated June 23, 2021 relating to the consequences Appellants and Appellants' counsel would face in the event that Appellants did not consent to Cabot's demands in such letter. Attorney Barrette cited the Board's prehearing order as the reason to communicate with Appellants and Appellants' counsel outside the Board's purview.

(*Id.* at ¶ 2.) The Appellants attached the email from Amy Barrette to their response. The "intimidating" email simply requested the Appellants' position on the motion in accordance with our Rules:

> Dear Attorney Johnson,
>
> In connection with the subpoenas you filed on June 22, 2012 [sic], directed to me and Mr. Dan Dinges, Cabot intends to file a Motion to Quash and Motion for Protective Order for various reasons, including but not limited to improper service, attorney-client privilege and Apex doctrine applicability. We also intend to file an Emergency Motion to Stay compliance with the subpoenas pending the Board's resolution of Cabot's motion. To that end, pursuant to 25 Pa. Code § 1021.93(b), Cabot must certify that it attempted to confer with you to: (1) obtain the stay; and (2) withdraw the subpoenas.
>
> We intend to file the Emergency Motion to Stay tomorrow. Please advise whether Appellants consent to the stay or the request that Appellants withdraw the subpoenas.
>
> Best regards,
>
> Amy Barrette

(*Id.* at Ex. A.)

The Appellants' response went on to state that they should be excused from any procedural requirements for the subpoenas:

> By way of further response, exigent circumstances, such as human beings being poisoned, should be enough of an exception for all parties to appear for depositions pursuant to the final schedule attached as **Schedule I**. Only irresponsible and mismanaged companies and law firms would have spent the last year and a half not preparing to sit for subpoenas or preparing a comprehensive file on the matter. Instructions to attend via videoconference and instructions to join to be circulated [sic] on Monday, June 28th.

(*Id.* at ¶ 7 (emphasis in original).) Regarding the requirement in our Rules that parties attempt to confer with the other parties to an appeal to obtain their position on a motion before it being filed with the Board, 25 Pa. Code § 1021.93(b), the Appellants essentially stated that they were not required to abide by such a rule:

> By way of further response, Appellants and Appellants' counsel are not surprised that the Department did not oppose Cabot's Motion. Appellants and Appellants' counsel are not required to negotiate or communicate with who [sic] continually act in good faith [sic], as such Appellants will not join in a statement Cabot or the Department [sic] regarding any "good faith" efforts on their part.

(*Id.* at ¶ 21.) Johnson has routinely refused to comply with our rule that she confer with opposing counsel before filing a motion. Nor has she accommodated or responded in any way when Buchanan or counsel for the Department have attempted to obtain her position on a filing as required by our Rules.

The Appellants also announced in their response that they had contacted various federal agencies and would be copying these agencies "on all correspondence and filings going forward":

> Appellants and Appellants' counsel hereby notifies the Board that Appellants contacted the Environmental Protection Agency to ask for assistance with this matter. Ms. Radhika Fox, Ms. Jennifer McClain and Ms. Helena Wooden-Aguilar will be copied on all correspondence and filings going forward. In addition, Appellants have filed requests with the Federal Energy Commission and the Pipeline and Hazardous Materials Safety Administration to undertake an investigation of the nearby midstream and transmission pipelines in which oil and

> gas operators, including Cabot, transport their gas to ensure pipeline safety due to the chemicals Appellants have identified.

(*Id.* at 7.) We issued an Order on June 25 granting Coterra's emergency motion to stay compliance with the subpoenas and directing Coterra to file its motion to quash and for a protective order by July 9, 2021. (Docket Entry No. 42.)

On June 28, 2021, the Department filed its own motion to quash subpoenas and for the entry of protective orders, seeking to quash the subpoenas directed at the Department and the other individuals employed by the Commonwealth. (Docket Entry No. 43.) The Department argued, among other things, that the subpoenas did not comply with the Pennsylvania Rules of Civil Procedure because they were purportedly served through the Board's electronic filing system instead of on the individuals themselves, and because the subpoenas were noticed only a week ahead of the scheduled depositions, which does not constitute reasonable notice under Pa.R.Civ.P. 4007.1(a). (*Id.* at 4.) The Department also argued that the subpoenas failed to provide any justification for why high-ranking government officials such as the Governor and Lieutenant Governor would have direct knowledge of the facts and circumstances of the appeal, or why that information could not be obtained by other individuals more closely involved in the Department action under appeal. (*Id.* at 5-7.) The Department argued that the subpoenas directed to Department counsel implicated attorney-client privilege. (*Id.* at 7-10.) Finally, while the Department objected on procedural grounds to the subpoenas concerning its program staff, it stated it was willing to work with the Appellants to come up with mutually agreeable dates and times for their depositions. (*Id.* at 11-12.)

The Appellants filed a letter on June 29, stating that they were postponing the depositions of Department personnel and requesting that the Department's motion to quash be denied as moot:

> Appellants have postponed all depositions of Department personnel in this matter. Appellants will confer with the Department with respect to future depositions and to discuss potential settlement. Appellants and the Department will apprise the Board in a timely fashion if settlement is reached.
>
> Therefore, the Department's Motion to Quash Subpoenas and for Entry of Protective Order should be denied as moot.

(Docket Entry No. 44.) We issued an Order on the same day dismissing the Department's motion without prejudice. (Docket Entry No. 45.) No depositions were ever conducted of any Department personnel.

Coterra filed its motion to quash subpoenas and for protective order on July 1, 2021, seeking to quash the subpoenas of Amy Barrette and Dan Dinges. (Docket Entry No. 46.) Coterra argued that the subpoenas sought information protected by attorney-client privilege and the work-product doctrine, and that there were less intrusive means of obtaining information than deposing the then-CEO of Cabot. On July 16, 2021, the Appellants filed their response in opposition to Coterra's motion. (Docket Entry No. 49.) Before addressing the merits of the motion, the Appellants asserted that they "discovered violations issued to Cabot on the *Abbott pad* by the Department on December 13, 2018." (*Id.*, Memo. at 2 (emphasis in original).) Although the Appellants conducted no discovery before the contested subpoenas, and they stated they "discovered" the violations on a public website, the Appellants accused Coterra and the Department of concealing violations from the Appellants:

> Attorney Barrette, Cabot and the Department knew about these violations during the pendency of this matter, which commenced in January 2020. Appellants' requests for information and documentation over the last 18 months have been largely ignored. Appellants and Appellants' counsel, among other things, have been delayed, denied, obstructed by the Department and Cabot with devastating effects. This entire proceeding has been, among other things, a waste of the Board's resources. To put it politely, Appellants and Appellants' counsel are still shocked about the gravity of the concealment of Cabot's Frack Fluid Spill and the Cabot Violations.

(*Id.*, Memo. at 3.)

With respect to the Barrette subpoena, the Appellants stated in part that they were filing complaints with the Disciplinary Board against Barrette for her "behavior and potential misconduct":

> Attached as Exhibit B are Appellants' Motion to Disqualify and Renewed Motion to Disqualify ("Disqualification Motions") that documents Attorney Barrette's behavior and potential misconduct from the commencement of this matter in January 2020. Appellants have filed ethical complaints with the Supreme Court Disciplinary Committee attempting to shield themselves and other landowners from Attorney Barrette's potential and egregious violations of the Rules of Professional Conduct. Each of the Motions set forth certain Rules of Professional Conduct that Attorney Barrette may have violated. Appellants renew the arguments set forth therein and such arguments should be reviewed taking the ongoing concealment of the Cabot Frack Fluid Spill and the Cabot Violations into consideration, as well as with respect to a fraud on the court.

(*Id.*, Memo. at 4.) The Appellants did not really address the attorney-client privilege issue, but instead seemed to assert that Barrette was involved in criminal activity that prevented the privilege from applying:

> In addition to the Disqualification Motions, Appellants hereby incorporate by reference the 43rd Grand Jury Report of the Attorney General, attached hereto as Exhibit C, in which the grand jurors went through years of investigation Cabot's [sic] conduct and found that Cabot violated, among other things, the Clean Streams Act [sic] and that criminal charges were warranted. Cabot has been charged with fifteen criminal charges, nine of which are felonies. Copies of the criminal charges are attached hereto as Exhibit D. Attorney Barrette advised Appellants and this Board that she has been counsel for Cabot since 2009. Attorney Barrette should be keenly aware of the potential criminality of Cabot's actions, which are substantially and materially consistent with facts of the instant matter.
>
> We request that the Board hold an in camera (private) hearing to hear Attorney Barrette's testimony so that application of the privilege can be decided. *See In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014)) [sic]. The court found that the party seeking the exception, a government agency, had upheld its burden to provide "an adequate factual basis to support a good-faith belief by a reasonable person" that the hearing could "reveal evidence to establish the claim that the crime-fraud exception applies." *Id.*

(*Id.*)

With respect to the Dinges subpoena, and in response to Coterra's argument that there were less intrusive means of obtaining relevant information than deposing its then-CEO, the Appellants merely asserted that his "knowledge is crucial to the matters at hand" and they were "confident that Mr. Dinges is well aware of this matter":

> Cabot's Chairman, President and Chief Executive Officer, Dan O. Dinges' knowledge is crucial to the matters at hand. As President and Chief Executive Officer, Mr. Dinges should be aware of the Cabot Frack Fluid Spill and the Cabot Violations due to the fact the actions of Cabot are substantially the same as set forth in Cabot's Criminal Charges. In addition, publicly available information on Cabot's website reports that Cabot has entered into an agreement with Cimarex Energy to "Combine in an All Stock Merger of Equals" with the resulting company having a value $17 billion with Mr. Dinges as Executive Chair of the Board of Directors. Appellants and Appellants' counsel are confident that Mr. Dinges is well aware of this matter and that this matter constitutes "extraordinary circumstances" under any analysis. With respect to less intrusive means of discovery, Appellants and Appellants' counsel restate the fact that Appellants and Appellants' counsel have been performing due diligence since January 2020. With respect to the hardship on Mr. Dinges' schedule, he can attend a deposition via video.

(*Id.*, Memo. at 5 (footnote omitted).)

In an Opinion and Order issued on July 21, 2021, we granted Coterra's motion to quash the subpoenas and for a protective order. (Docket Entry No. 52.) *Stanley v. DEP*, 2021 EHB 203. We determined that the Appellants had not provided adequate justification for the deposition of opposing counsel or deposing the then-CEO of Cabot. We stated in relevant part:

> Beginning with the subpoena directed to Attorney Amy Barrette, Cabot argues that deposing Attorney Barrette violates attorney-client privilege and that the Appellants have not met their burden to demonstrate why deposing Cabot's counsel is necessary. In response, the Appellants do not necessarily contest that deposing Attorney Barrette involves attorney-client privilege. Instead, they argue that Cabot has committed criminal violations of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, that Attorney Barrette is implicated in those crimes, and that Attorney Barrette can be deposed by reason of the crime-fraud exception to attorney-client privilege. In support of their assertion that Cabot may have committed crimes, the Appellants point to alleged environmental violations at the Abbott wells documented by Department inspectors in December 2018. (App. Ex. A.)
> ….

> Attorney Barrette avers in an affidavit attached to Cabot's motion that she has no personal or independent knowledge of the facts related to the Appellants' appeal or water supply complaint, and her knowledge of this case has come solely by way of her representation of Cabot as counsel. (Cabot Ex. D at ¶¶ 5, 6.) Thus, it appears that Attorney Barrette's entire relation to the current appeal, and the preceding investigation of the Appellants' water supply contamination claim, has been in her professional capacity as counsel employed by Cabot. The Appellants have not shown why deposing Attorney Barrette is necessary, or what non-privileged information she might have that would bear on the ultimate question in this appeal—whether Cabot's oil and gas operations at the Abbott wells caused the contamination of the Appellants' water supply. Nor have the Appellants made a prima facie showing as to why Attorney Barrette has been part of any fraudulent or criminal scheme within the ambit of the crime-fraud exception to the attorney-client privilege.
>
> Turning to the subpoena for Dan Dinges, Cabot argues that Mr. Dinges is Cabot's highest-ranking officer and he possesses no first-hand information related to this appeal. Cabot also contends that the Appellants have not attempted to obtain the information they seek through less intrusive means. In response, the Appellants assert that they are confident Mr. Dinges is aware of this matter and that his knowledge is crucial to their appeal.
>
> The Appellants do not say what relevant knowledge they believe Mr. Dinges possesses. It is not clear how Mr. Dinges's testimony might help the Board resolve the water supply contamination issue. We think it is likely that there are other employees or officials at Cabot who are more closely involved with the operations at the Abbott wells and the subsequent investigation of the Appellants' water well. If the Appellants are interested in the chemicals used by Cabot in fracking the Abbott wells, we have not been provided with enough reason why Cabot's Chief Executive Officer is the person in the best position to possess that information. The Appellants argue that Mr. Dinges's testimony is important for public health and safety. We do not disagree that Cabot may be in possession of information that is important to the Appellants, but we are not convinced that Mr. Dinges is the person best suited to provide that information.

Stanley, 2021 EHB at 205-06, 207-08 (footnotes omitted). Regarding the Dinges subpoena, we directed the Appellants to Pa.R.Civ.P. 4007.1(e), which allows for the deposition of a corporate designee who is in possession of relevant information. The Appellants never pursued this avenue.

In fact, at no time did the Appellants ever serve Coterra with a corporate deposition notice. Nor did they serve Coterra with document requests or interrogatories. Yet inexplicably, the day before the merits hearing was to commence, long after the close of discovery, the Appellants said that they would continue to pursue the depositions of the people named in the subpoenas:

> Landowners' subpoenas to the below individuals were issued in good faith, and given the documented evidence since that date, Landowners' [sic] will continue to pursue the depositions of the below individuals. Landowners need answers from these people under oath now more than ever….Landowners will be adding to such list to include others, among them, George Stark, Director of External Affairs for Coterra, Scott Perry, the former Deputy Secrtary [sic] of the Department, and the current executives and management of Coterra.

(Docket Entry No. 121, Resp. to Mot. for Sanctions at ¶ 9.)

On August 9, 2021, the Appellants filed a motion to extend discovery. (Docket Entry No. 54.) This was, perhaps, the first indication that they were only interested in delay, harassment, and increasing the cost of litigation instead of going to a hearing, because they had conducted no discovery at that point. Indeed, in their motion they acknowledge, "To date, the parties have not served any discovery." (*Id.* at ¶ 1.) The Appellants said that "Appellants believe that continuing negotiation of the terms of a consent order and agreement with the Department is the best use of Appellants' and the Board's resources while discovery continues." (*Id.* at ¶ 8.) This is also perhaps the first indication that Johnson did not intend to act with candor toward the Board because there was no such consent order and agreement in the works. Also, no discovery was "continuing." The Appellants requested an extension of the discovery period for 90 days. The Appellants' motion did not comply with our Rules in that the procedural motion did not "contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position." 25 Pa. Code § 1021.92(c). As previously noted, Johnson simply refused to comply with our rule to confer.

On August 19, Coterra filed its response in opposition to the motion to extend discovery. (Docket Entry No. 55.) In its response, Coterra stated that "Appellants failed to demonstrate what specific information they need and why that information is important to the appeal. They also failed to demonstrate requisite diligence or explain any legitimate reason for their failure to

diligently prosecute this appeal," and therefore, "Appellants have failed to demonstrate good cause to warrant the extension they seek." (*Id.* at ¶ 1.) Coterra also disagreed with the Appellants' rationale for seeking an extension—to negotiate a consent order and agreement—saying that no consent order and agreement existed:

> Cabot denies that Appellants have been negotiating the terms of a "consent order and agreement with the Department." First, the Department made it clear in their July 30, 2021 letter that the facts do not support Appellants' claims. *See* Dkt. No. 54, Exhibit A. Further, the Department has not issued any violations or orders in connection with Appellants' claims that would implicate a consent order and agreement. And, even if a consent order and agreement was in play, which it is not, Appellants would not be involved in the negotiation as the consent order and agreement would not be between Appellants and the Department. Appellants' blatant misrepresentation to the Board that they have been negotiating some non-existent consent order and agreement with the Department and "that continuing negotiation of the terms of a consent order and agreement with the Department is the best use of Appellants' and the Board's resources while discovery continues" demonstrates that Appellants are not seeking an extension of discovery in good faith to conduct actual discovery. As such, extending discovery will at best delay these proceedings, and more likely, will result in further unnecessary motions practice and waste of valuable resources.

(*Id.* at ¶ 8.)

The Department filed its response in opposition to the Appellants' motion on August 24. (Docket Entry No. 56.) Consistent with Coterra, the Department denied that any consent order and agreement was being negotiated by the parties:

> It is specifically denied that "continuing negotiation of the terms of a consent order and agreement with the Department is the best use of Appellants' and the Board's resources while discovery continues." By way of further answer, **there is no consent order and agreement being negotiated. The Department is not currently considering any consent order and agreement in this matter**. Based upon the filings in this appeal, it is evident that any settlement in this matter is very unlikely and extending discovery will not likely change the dynamic. The Department maintains that its determination that the subject of this appeal was lawful and appropriate. Accordingly, the best use of the parties and the Board's resources not to extend discovery but rather to move this appeal towards a hearing on the merits.

(*Id.* at ¶ 8 (emphasis added).) On August 24, we issued an Order denying the Appellants' motion to extend discovery

> due to the Appellants' failure to comply with the Board's Rules requiring that procedural motions "shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position." 25 Pa. Code § 1021.92(c).

(Docket Entry No. 57.)

On September 14, 2021, all three parties filed motions for summary judgment in full or in part. (Docket Entry Nos. 58-61.) Three days later, on September 17, the Appellants filed a motion to strike Coterra's and the Department's motions for summary judgment and "for sanctions for spoliation of evidence and under rule 4005." (Docket Entry No. 62.) Despite conducting no discovery in the appeal, in their motion the Appellants alleged that the Department and Coterra "knowingly and intentionally concealed" violations that occurred at a Coterra well pad:

> Each of the Department and Cabot knowingly and intentionally concealed the Violations to deprive Appellants of the ability to prove the source of the pollution, diminution and damages to the Appellants' Water Supply. Appellants move the Board to find that the Department and Cabot and the Department be prevented from disputing liability as to the cause of the diminution of the Appellants' Water Supply.

(*Id.* at ¶ 7.) The Appellants asserted that the opposing motions were filed for improper purposes to "tie up" the Appellants, and seemed to take the position that only the Appellants were entitled to file a motion for summary judgment:

> 15. Appellants filed its Motion for Summary Judgment on September 14, 2021, after which both Cabot and the Department rushed to file what are inappropriate motions for summary judgment.
>
> 16. Each of the issues raised by the Department and Cabot are covered in Appellants' Motion for Summary Judgment to which the Department and Cabot can respond as prescribed by the Board's rules.
>
> 17. The Board should strike each of Cabot's and the Department's motions for summary judgment as such filings would (a) not move this matter forward and (b) increase the burden on the Board and the parties to entertain three different

> summary judgment motions when Appellants' motion for summary judgment addresses those issues and revealing [sic] that there are no disputed issues of material fact.
>
> 18. Appellants further move the Board to deem that the Department and Cabot, through its filings and spoliate [sic], have admitted to the violations and breaches set forth in Appellants' filings and its Motion for Summary Judgment and use its discretion to enter a judgment on the pleadings in favor of Appellants.
>
> Appellants respectfully request that the Board to order [sic] sanctions in the Board's discretion, including Appellants' attorneys' fees and costs, against the Department and Cabot for the intentional concealment of the Violations from the Board and Appellants and for filing improper motions for summary judgment in order to tie up Appellants and the Board's resources. In addition, Appellants request that the Board issue sanctions against the Department for bad faith in abusing Rule 4005. Finally, Appellants respectfully request that the Board issue orders pursuant to the Board's rules and the Pennsylvania Constitution, specifically including the Environmental Rights Amendment.

(*Id.* at 4-5.) Coterra filed its response in opposition to the motion to strike and for sanctions on September 21, (Docket Entry No. 64), and the Department filed its response in opposition on October 4, (Docket Entry No. 66).

On October 5, we denied the Appellants' motion to strike for again failing to comply with our Rules:

> it is hereby ordered that the motion is **denied** due to the Appellants' failure to comply with the Board's rules at 25 Pa. Code §§ 1021.93, 1021.94, and/or 1021.95. The Appellants are hereby warned that a continuing failure to comply with the Board's rules may result in the imposition of sanctions, including but not limited to a dismissal of the appeal and/or the award of attorneys' fees to the opposing parties.

(Docket Entry No. 67.) To the extent the motion was a discovery motion seeking an evidentiary ruling for failing to disclose documents, the motion did not contain "a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action." 25 Pa. Code § 1021.93(b). To the extent the motion was a dispositive motion asking the Board "use its discretion to enter a judgment on the pleadings in favor of Appellants," (Mot. at ¶ 18), the motion did not contain "a supporting memorandum of law or brief." 25 Pa. Code § 1021.94(a). To the extent the

motion could be classified as a miscellaneous motion seeking to strike filings and impose sanctions, the motion did not comply with 25 Pa. Code § 1021.95(d), which provides: "A memorandum of law in support of a miscellaneous motion or response to a miscellaneous motion shall be filed with the miscellaneous motion or response."

Following the receipt of the responses and replies to the competing summary judgment motions, on November 10, 2021, we issued an Opinion and Order granting in part summary judgment solely on the issue of the distance of Coterra's gas wells to the Appellants' water supply. (Docket Entry No. 80.) *Stanley v. DEP*, 2021 EHB 310. In addressing the Appellants' claim in their summary judgment motion that the Department committed an unconstitutional taking, we found that the objection was not contained in the Appellants' notice of appeal or amended notice of appeal, and therefore, they could not prevail on it for purposes of summary judgment, where it was raised for the first time:

> Although we generally broadly construe the objections contained in a notice of appeal, *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637, there is nothing in the Appellants' notice of appeal or amended notice of appeal that comes close to capturing the genre of the issue of a takings claim. Although the Board clearly has jurisdiction to decide takings claims, *Marshall v. DEP*, 2019 EHB 352, 354, a takings claim is a very specific and unique claim that must be clearly set forth by a party. Simply stating that the appeal is governed by the Pennsylvania Constitution is not enough and it cannot "excuse a failure to include a more specific objection." *Chester Water Auth.* at 285 (citing *Sebastianelli v. DEP*, 2016 EHB 243; *Lower Mt. Bethel Twp. v. DEP*, 2004 EHB 126, 127; *Williams v. DEP*, 1999 EHB 708, 716). "Due process requires that parties be aware of the claims or defenses which are being raised against them." *Williams*, 1999 EHB at 720. Arguing an entirely new issue for the first time in a summary judgment motion is improper and all but certainly destined for denial.

Id. at 314.

The only issue where we granted summary judgment was on whether the Appellants' water supply fell within the 2,500-foot presumptive liability distance under Section 3218 of the Oil and

Gas Act, 58 Pa.C.S. § 3218.[3] With respect to this issue, we found that the Appellants explicitly conceded that their water supply was beyond the 2,500-foot distance:

> The Appellants do not appear to disagree that their water supply is outside of the presumption distance. In the statement of facts accompanying their own motion for summary judgment, they admit that the gas wells are greater than 2,500 feet from their water supply. With respect to the Abbott M wells, they state: "Abbott M is a well pad comprising seven active wells, with two of the surface holes located 3537.60 feet from the Water Supply, with the remaining five at a distance of 3484.80 feet." (Apps. Statement of Facts at ¶ H.) With respect to the Abbott D wells, they state: "The distance between the Water Supply and four of the five well locations as reported is 2692.80 feet, with just 2745.60 feet between the Water Supply and the reported location of ABBOTT D 11." (Apps. Statement of Facts at ¶ I.) They go on to say, "**Even though the distance between this surface well bore and the Water Supply exceeds 2500 feet on the surface**, the well and its lateral bores operate within 1500 feet of Appellants' Water Supply." (*Id.* (emphasis added).)
>
> Indeed, the Appellants try to get around the 2,500-foot presumption by claiming that the underground, horizontal well bores are only 1,500 or 1,900 feet from their water supply. (Apps. Resp. to DEP Brief at 4; Apps. Resp. to Coterra Brief at 5.) But the statute clearly speaks in terms of the distance from the "vertical well bore." Further, the Appellants cite no support in the record for their 1,500 and 1,900-foot measurements; they do not identify which wells' laterals allegedly comes within this distance; and they ignore the vertical depth of a horizontal well bore at that location, which according to Department is more than 5,000 feet below the surface. (DEP Ex. C at 36.)
>
> The Appellants point out that the Oil and Gas Act requires a permit applicant for an unconventional gas well to notify landowners with water supplies within *3,000 feet* of the vertical well bore of the plan to drill a gas well and to send the landowners a copy of the plat of the well to be drilled. 58 Pa.C.S. § 3211(b). The Act also requires gas operators to notify landowners of their rights under Section 3218 and "advise them of the advantages of taking their own predrilling or prealteration survey." *Id.* at § 3211(b.1). To the extent the Appellants are making arguments that

---

[3] That Section provides in relevant part:

> **Presumption. —** Unless rebutted by a defense established in subsection (d), it shall be presumed that a well operator is responsible for pollution of a water supply if:
>
> ….
>
> (2) in the case of an unconventional well:
>
> (i) the water supply is within 2,500 feet of the unconventional vertical well bore; and
>
> (ii) the pollution occurred within 12 months of the later of completion, drilling, stimulation or alteration of the unconventional well.

58 Pa.C.S. § 3218(c).

> the presumptive liability distance should be extended to 3,000 feet, or that the distance should be based on the distance from the horizontal well bore, these may be policy arguments to present to the Legislature, but our job is to apply the law as written and there is no ambiguity here.
> ….
> The statute here is very clear that the presumption distance is measured 2,500 feet from the "vertical well bore." 58 Pa.C.S. § 3218(c)(2)(i). "Vertical well bore" is certainly a term of art in the oil and gas industry in some respects, but the word "vertical" has not taken on a new meaning. Therefore, we interpret vertical according to its "common and approved usage," 1 Pa.C.S. § 1903(a), to mean "being in a position perpendicular to the plane of the horizon; placed or acting perpendicularly or in an upright position or direction; upright; straight up and down." *Webster's New Twentieth Century Dictionary, Unabridged* 2032 (2d ed. 1966). Thus, the distance portion of the presumption only applies if a water supply is within 2,500 feet of the "straight up and down" portion of the well bore, not the portion of the well bore after it has made its horizontal turn. Here, it is undisputed that the Appellants' water supply is more than 2,500 feet from the vertical well bore, and therefore, the presumption does not apply.
>
> The Appellants say that simply because the *presumption* does not apply does not mean that there was not pollution to their water supply. We agree, and so does the Department. (DEP Reply Brief at 9.) But that does not save the Appellants from an entry of summary judgment on the applicability of the presumption. It simply means that the Appellants bear the burden of proving in this appeal that their water supply was contaminated by Coterra's gas operations. *See Kiskadden v. DEP*, 2015 EHB 377.

Id. at 316-18.

With respect to the main issue of whether Coterra's operations contaminated the Appellants' water supply, we determined that the issue was best resolved at the hearing on the merits:

> While both the Appellants and Coterra seek summary judgment on aspects of this issue, we find that there are still outstanding disputes over material facts that are best resolved at a hearing on the merits where we will have the benefit of live testimony and the cross-examination of relevant witnesses.[4] *Miller v. DEP*, 2018 EHB 238, 243.
>
> [4] The Department agrees, stating in the brief in support of its motion: "The appropriateness of the Department's Determination that Appellants' Water Supply was not polluted is the primary subject of the objections set forth in Appellants' Notice of Appeal. That issue, which the Board's June 11, 2021 Opinion and Order denying Appellants' Summary Judgment Motion recognizes, implicates disputed material facts and is best resolved by the Board after an evidentiary hearing." (DEP Brief at 4.)

Id. at 318-19.

Following the issuance of our Opinion, in accordance with our normal practice, we reached out to the parties to schedule the hearing on the merits. All parties agreed to our suggested dates for a hearing. On November 23, 2021, we issued our Pre-Hearing Order No. 2, scheduling the hearing to begin on February 8, 2022. (Docket Entry No. 85.) The Appellants, bearing the burden of proof, were required to file their pre-hearing memorandum by December 30, 2021. Coterra and the Department were required to file their pre-hearing memoranda by January 19, 2022.

On November 19, 2021, the Appellants filed a motion to amend our Opinion and Order on summary judgment to certify it to the Commonwealth Court for immediate interlocutory appeal. (Docket Entry No. 84.) Among other things, the Appellants asserted that we denied them due process and waived their constitutional rights:

> There are multiple issues of whether the Board, among other things, failed to act as trustee under the Environmental Rights Amendment in reaching its decision and whether the Board denied Appellants due process when the Board waived Appellants' constitutional rights to pursue a takings claim against the Department. These matters involve jurisdictional, controlling questions of law, and not disputed issues of fact, as to which there is substantial ground for difference of opinion. An immediate appeal of this appeal-dispositive issue will materially advance the ultimate termination of this appeal. Moreover, Appellants' constitutional rights are at stake, Appellants continue to be actively harmed and deprived of pure water on a daily basis and the environment continues to be materially and adversely affected by the Board's own delays, errors of law and mistaken application of facts.

(*Id.* at 1-2 (footnotes omitted).) Coterra and the Department opposed the motion to amend. (Docket Entry Nos. 86, 87.)

On December 15, we issued an Opinion and Order denying the motion to amend. (Docket Entry No. 88.) *Stanley v. DEP*, 2021 EHB 356. In denying the motion, we found that the Appellants failed to address any of the factors governing interlocutory amendment:

> The Department and Coterra are correct that the Appellants never address any of the factors that govern amending an interlocutory order. Our rules require that a

request to amend an interlocutory order take the form of a motion and "must be accompanied by a memorandum of law setting forth the reasons why" the three elements are present. 25 Pa. Code § 1021.153(b). The Appellants' memorandum of law cites those elements, but it never addresses how any of them are met. Instead, much of the Appellants' motion is aimed at rearguing issues in the summary judgment papers, but that is not what a motion to amend an interlocutory order is for. For instance, the Appellants claim that they "have met their burden by a preponderance of the evidence many times over." (App. Memo at 7.) They say that "it is undisputed that Appellants' water supply has been and continues to be degraded." (*Id.* at 5.) We have no properly admitted record to support that contention, but even if we did, whether or not Coterra is responsible for any pollution of the Appellants' water supply is not at all undisputed.

The Appellants never explicitly identify a question of law, let alone explain a controlling question of law that justifies immediate appeal. *See UMCO Energy*, 2004 EHB at 836 ("A party seeking certification for interlocutory appeal of a controlling question of law typically sets the question apart to avoid any confusion about the precise question at issue."). Because of this, they also never explain why there is substantial ground for difference of opinion on a controlling question of law.

However, if we can parse out an issue in the Appellants' filing, it seems it would be their assertion that "the Board waived Appellants' constitutional rights to pursue a takings claim against the Department." (Motion at 1.) This assertion appears to rest on a misconception that our Opinion and Order decided that the Appellants' had waived their ability to pursue a claim that the Department has committed an unconstitutional taking. Our Opinion and Order did not decide that issue. We merely said that the Appellants were not entitled to summary judgment on a takings issues that was nowhere to be found in their notice of appeal and was raised for the first time in their motion for summary judgment. The Board never concluded that the issue was waived. There is no mention of waiver in our Opinion. Finding waiver was not necessary to reach our conclusion that the Appellants could not prevail on an issue raised for the first time during summary judgment. We made a similar finding in *Chester Water Authority v. DEP*, 2016 EHB 280, when an appellant sought summary judgment on issues that were not contained in its notice of appeal:

> 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.
>
> *Id.* at 285-86. The appellants could have moved to amend their notice of appeal, but they never did so. Whether it is too late to do so now in a proper motion was not the subject of our Opinion and Order and is beside the point of our immediate discussion. Because we made no conclusion regarding waiver of a takings claim in our Opinion and Order, there is no issue to certify for interlocutory appeal.

Id. at 359-61.[4]

Instead, we concluded that there was no controlling question of law, and that mostly factual issues needed to be resolved at a merits hearing:

> Indeed, the controlling question in this appeal is factual, not legal. Thus, even though the Appellants never say how an immediate appeal to the Commonwealth Court would advance the ultimate termination of this matter, it appears instead that it would do the opposite. We have scheduled the hearing on the merits to begin less than two months from now.[3] We suspect an appeal to the Commonwealth Court would not even be briefed by that time, and it still would not obviate the need for an evidentiary hearing. We see no reason why an immediate appeal to the Commonwealth Court would speed along the resolution of this appeal or facilitate the determination of the key factual issue. As we have said before, "Certification is inappropriate where factual rather than legal disputes predominate or at least play an important part." *Borough of Danville v. DEP*, 2008 EHB 399, 402. *See also Clean Air Council v. DEP*, 2018 EHB 120, 125 (same).
>
> [3] The Appellants seem to take issue with our scheduling the hearing, asserting in their memorandum of law that "the Board is requiring Appellants to participate in a hearing on the merits three months from now over 177.61 feet, yet Appellants are not provided a hearing before the Board unilaterally strips Appellants of their constitutional rights." (App. Memo at 8.) We think it is in the interest of all parties to have this matter adjudicated expeditiously.

Id. at 362.

On December 20, 2021, the Appellants filed a two-sentence letter notifying the Board that they had filed an appeal to the Commonwealth Court at Docket No. 1412 C.D. 2021 and informing us that our proceedings were therefore stayed:

> Judge Labuskes:

[4] The Appellants have never sought to amend their appeal to add a takings claim.

> Appellants filed a Petition for Review on the date hereof with the Commonwealth Court. Therefore, Appellants' appeal in front of the Board is stayed.
>
> Sincerely,
>
> /s/ Lisa Johnson

(Docket Entry No. 89.) Of course, there is no basis for the contention that the appeal before the Board was automatically stayed. On December 28, the Department filed a motion to strike the letter, (Docket Entry No. 90), and the following day Coterra filed a statement concurring and joining in the Department's motion, (Docket Entry No. 91).

When the Appellants did not file their pre-hearing memorandum that was due on December 30, 2021, we issued a Rule to Show Cause on January 3, 2022. (Docket Entry No. 92.) The Rule to Show Cause provided that the Appellants could file their memorandum by January 10 and it would discharge the Rule to Show Cause:

> in consideration of the Appellants' failure to comply with the Board's November 23, 2021 Order by not filing their pre-hearing memorandum, and in consideration of Pa.R.A.P. 1313, which provides that a petition for permission to appeal shall not stay the proceedings before a government unit unless ordered by the government unit or appellate court, a Rule is entered upon the Appellants to show cause why the Board should not impose sanctions pursuant to 25 Pa. Code § 1021.161 for failing to file a pre-hearing memorandum. Sanctions may include dismissal of the appeal. Receipt of the pre-hearing memorandum on or before **January 10, 2022** will constitute a discharge of this Rule.

(*Id.*) The Appellants have since alleged that our Rule to Show Cause was improper, punitive, and exhibited bias against the Appellants:

> the Board's issuance of its Rule to Show Cause *sua sponte* was, among other things, an improper use of the Board's authority and discretion….The Board's issuance of the Rule to Show Cause is another display of the Board's biases against Landowners and Landowners [sic] counsel. The Board's Rule to Show Cause was punitively issued by the Board because it is aggrieved by Landowners' and Landowners' counsel [sic] pursuit of their rightful claims and the documentation thereof, which may contradict what the Board feels, believes or finds. The Board should not take such pursuits personally.

(Docket Entry No. 121, Mot. at ¶ 47.) In reality, our Rule to Show Cause was issued because the Appellants failed to comply with our Pre-Hearing Order No. 2, failed to file their pre-hearing memorandum on the due date, and failed to explain why our proceedings should be automatically stayed by way of a filing to the Commonwealth Court.

On January 5, the Appellants filed a letter advising the Board that they had asked the Commonwealth Court to stay our proceedings, in an apparent effort to satisfy our Rule to Show Cause:

> Dear Honorable Chairman and Chief Judge Renwand and the Honorable Judges of the Environmental Hearing Board:
>
> Enclosed with this letter is a copy of Appellants' Emergency Application to Stay Board Proceedings filed with the Commonwealth Court and in response to the Board's issuance of its Rule to Show Cause.
>
> Sincerely,
>
> /s/ Lisa Johnson

(Docket Entry No. 94.) On January 7, the Commonwealth Court denied the Appellants' request to stay our proceedings with the following per curium Order:

> NOW, January 7, 2022, upon consideration of Petitioners' December 19, 2021 "Petition for Review," seeking review of the Environmental Hearing Board's December 15, 2019 Order that denied Petitioners' Motion To Amend Interlocutory Order, the Court shall treat the Petition for Review as a Petition for Permission to Appeal pursuant to Chapter 13 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 1301-1323.
>
> The Commonwealth of Pennsylvania, Department of Environmental Protection's (Department) Application for Extension of Time to File Answer to the Petition for Permission to Appeal is **GRANTED**. The Department shall file and serve its Answer to the Petition for Permission to Appeal no later than January 18, 2022. See Pa. R.A.P. 1314.
>
> Petitioners' Petition To Strike the Department's Application for Extension of Time to File Answer is **DENIED**.
>
> Petitioners' Emergency Application To Stay Board Proceedings is **DENIED**. Pa. R.A.P. 1701(b)(6). In the event that the Court grants the Petition for Permission to Appeal, the Court will stay the proceedings before the Environmental Hearing Board.

The Prothonotary shall amend the caption as reflected above.

(Docket Entry No. 96.)

On the same day the Commonwealth Court entered its Order, the Appellants filed a motion to stay our proceedings, or in the alternative, to extend the deadline for the filing of their pre-hearing memorandum. (Docket Entry No. 97.) The motion was filed "in response to the Commonwealth Court's Order at 1412 CD 2021 on this date with respect to Appellants' Petition for Review before the Court, and its holding that such Petition is a Permission to Appeal under the Pennsylvania Rules of Appellate Procedure." The Appellants requested that we

> (1) Stay the Board proceedings until a determination of the Commonwealth Court is entered; or, in the alternative,
>
> (2) Extend the time period for a short period for Appellants to file its pre-hearing brief on January 19, 2020, and thereafter scheduling Appellees and Department's pre-hearing briefs.

(*Id.*)

On January 7, we granted the Appellants' request for an extension of time in which to file their pre-hearing memorandum and we accordingly moved the pre-hearing memo date for the Department and Coterra and pushed the merits hearing back to February 22:

> 1. The Appellants' motion is **granted** and the Appellants' shall file their pre-hearing memorandum on or before **January 19, 2022**. The Appellants' duty to discharge the Board's January 3, 2022 Rule to Show Cause by filing their pre-hearing memorandum is extended to **January 19, 2022**.
>
> 2. The Department and Coterra shall file their pre-hearing memoranda on or before **February 8, 2022**.
>
> 3. The hearing on the merits previously scheduled to begin on February 8, 2022 shall now begin at **10:00 a.m.** on **February 22, 2022**.
>
> 4. The Department's motion to strike the Appellants' notice to the Board of the petition for review filed at the Commonwealth Court, joined in by Coterra, is **denied as moot**.
>
> 5. Coterra's motion for an extension of time to file its pre-hearing memorandum is **granted** as addressed herein.

(Docket Entry No. 98.)

On January 19, the Appellants filed their pre-hearing memorandum. (Docket Entry No. 99.) Their memo did not identify or attach any exhibits. For example, no sample results from the Appellants' water supply were attached. It is, of course, nearly inconceivable that an appellant could prove a claim of water contamination without any sample results to back up the claim.[5] The memo listed several fact witnesses, but no expert witnesses. With respect to expert witnesses, the Appellants asserted experts were not necessary:

> The Department and Coterra, in a clear waiver, failed to include the use of experts **as such testimony is not required to prove pollution from oil and gas operations, particularly in the instant matter**. At any rate, the burden to engage and utilize expert testimony is on the Department, however, such expert reports are a significant waste of taxpayer dollars. Moreover, Landowners requested that the discovery period be extended on August 7, 2021 and each of the Department and Coterra opposed such extension.
>
> The notion that an "expert" could make any definitive finding without having all critical information, such as each of the chemicals used by an operator or the impact that prior and current drilling has on the subterranean landscape, is not credible. Further, the use of an expert without taking effects of the subject fracking in relation to the past fracking, including from adjacent wells, particularly given the length that horizontal laterals are drilled. [sic]

(*Id.* at 8-9 (emphasis added).)

In response to the Appellants' pre-hearing memo, Coterra filed several motions in limine seeking orders from the Board (1) precluding the Appellants from calling any expert witnesses, (Docket Entry No. 100, 101), (2) limiting the Appellants' fact witnesses to those listed in their memorandum, (Docket Entry No. 102), (3) preventing the Appellants from introducing evidence and testimony on issues that were not raised in their notice of appeal or amended notice of appeal, (Docket Entry No. 104), and (4) precluding the Appellants from introducing any exhibits or

[5] The Department and Coterra have maintained throughout this litigation that there are no such credible sample results from a lab supporting a claim that Coterra's operations caused any contamination of the Appellants' water supply. This was a matter of active dispute during the course of this appeal.

scientific tests since none were identified in their prehearing memorandum, (Docket Entry No. 109). The Appellants did not file a response to Coterra's motions. Instead, the Appellants filed a letter saying they would not be filing a formal response to the motions. (Docket Entry No. 115.) In this letter and in another letter filed a few days later, the Appellants retracted their witness list and instead advised that only the Appellants themselves would be called to testify at the hearing, (Docket Entry No. 116). We issued an Opinion and Order granting three of the motions in limine regarding fact and expert witnesses and exhibits and scientific tests. (Docket Entry No. 119.)

All of that brings us to the Appellants' motion to stay proceedings, which is the impetus for Coterra's motion for sanctions. Johnson filed the motion to stay on February 3, 2022, less than three weeks before the rescheduled merits hearing was to begin on February 22. (Docket Entry No. 105.) The Appellants averred that the purpose of the motion was "to provide Intervenor's counsel, Attorney Barrette, an opportunity to have discussions with the Pennsylvania Attorney General and the Environmental Protection Agency." (*Id.* at 1.) The motion to stay contained only five paragraphs, which provide:

> 1. Appellants have filed complaints with the Pennsylvania Attorney General's Office ("AG's Office") and the Environmental Protection Agency ("EPA") with respect to this matter.
>
> 2. Appellants copied Attorneys Barrette and Burns on the email attached as Exhibit A, the purpose of which was to provide links to the AG's Office and the EPA to Intervenor's four motions in limine.
>
> 3. Attorney Barrette quickly responded by email, attached as Exhibit B, copying the AG's Office and the EPA.
>
> 4. Attorney Barrette's email states, in part:
>
> "That said, to the extent *that anyone from the AG's office or the EPA* would like to discuss your completely unsupported and false allegations against my client, Coterra Energy, Inc., *I would be happy to discuss*."
>
> 5. The conversations that Attorney Barrette will have with the AG's Office and the EPA have a direct bearing on this matter, and are grave enough, to warrant a stay of proceedings for sixty days to provide Attorney Barrette sufficient time to have such conversations with the AG's Office and the EPA.

(*Id.* (emphasis in original).) The Appellants requested that we "issue an order in the form attached hereto granting Appellants' Motion to Stay Proceedings for sixty (60) days pending Attorney Barrette's discussions with the Pennsylvania Attorney General and the Environmental Protection Agency." (*Id.* at 2.) The Appellants did not explain how any "conversations" Buchanan would have with the Pennsylvania Office of Attorney General or the EPA would "have a direct bearing on this matter," or why they would be "grave enough to warrant a stay." The motion once again did not comply with our Rules on procedural motions, which require that "[p]rocedural motions shall contain a statement indicating the nonmoving party's position on the relief requested or a statement that the moving party, after a reasonable effort, has been unable to determine the nonmoving party's position." 25 Pa. Code § 1021.92(c).

The Appellants attached to their motion an email from Johnson to persons the Appellants said were associated with the EPA and an email address for the Environmental Crimes section of the Pennsylvania Office of Attorney General. (*Id.*, Ex. A.) The body of the email merely said "FYI." and it appeared to attach email notifications of filings from the Board that the Appellants averred in their motion were the motions in limine previously filed by Coterra. Also attached was the email from Attorney Amy Barrette, addressed to Johnson, that was cited in the Appellants' motion:

> Dear Attorney Johnson,
>
> There is no need to copy me or Attorney Burns on your emails to the Attorney General's Office, the EPA, or to your clients. That said, to the extent that anyone from the AG's office or the EPA would like to discuss your completely unsupported and false allegations against my client, Coterra Energy, Inc., I would be happy to discuss.
>
> Best regards,
>
> Amy Barrette

(*Id.*, Ex. B.)

On February 7, 2022, Coterra filed a response in opposition to the motion to stay. (Docket Entry No. 106.) In its response, Coterra averred, "To date, neither the AG's office nor the EPA has reached out to Coterra's counsel, despite the fact that Appellants' counsel has been copying the AG's office and EPA on pleadings and other correspondence for months." (*Id.* at ¶ 5.) Coterra's motion attached several additional emails between Barrette and Johnson. An email from Johnson responding to Barrette on February 2 provides:

> Thanks very much. I am sure that the EPA and the AG's office appreciate your advanced, written commitment to cooperate and provide information in their investigations.
>
> Thanks - Lisa

(*Id.*, Ex. A.) Another email from Johnson on February 4 provides:

> Attorney Barrette,
>
> In the event you are not yet acquainted with Rebecca Franz from the AG's Office, I have copied her so that you may directly coordinate your discussions with the AG's Office. In addition, Attorney Gable is with the EPA.
>
> I am confident that they would like to hear from you.
>
> Regards,
>
> Lisa

(*Id.*) Another email sent a few minutes later states:

> Apologies for the multiple emails. Attorney Burns, I am sure they would welcome your input on my clients' matter as well, so feel free to contact them as well.
>
> Have a good weekend.
>
> Regards,
>
> Lisa

(*Id.*)

Johnson sent an email on February 7 that, among other things, said the Appellants were "disgusted" with Buchanan and requested that Coterra pay Johnson via wire transfer an amount of money equivalent to what Coterra had paid its counsel during this appeal:

> Attorneys Barrette and Burns,
>
> Tonya, Bonnie and Jeff are rightly disgusted that we have to keep dealing with you. As such, my clients will give you until Wednesday to withdraw your four motions in limine, which were filed for the sole purpose of abusing the legal process and harassing and intimidating my clients and me. You also have until Wednesday to substitute counsel; however, we would oppose until Coterra pays my legal fees and costs on or before Friday. We all know that Coterra can put a wire together that quickly. The amount that should be paid for attorneys' fees should be the amount equal to that Coterra has paid for its legal fees and costs.
>
> We will file motions to strike and to disqualify on Friday unless the motions are withdrawn, counsel is substituted, and a wire is prepared for my fees to be paid on Friday.
>
> Regards,
>
> Lisa

(*Id.*) The Appellants did not file with the Board any motion to strike Coterra's motions in limine or another motion to disqualify Coterra's counsel. The Appellants subsequently denied that they demanded Coterra to wire them money: "[T]o this date, Landowners have not made any monetary demands to Coterra." (Docket Entry No. 121, Resp. at ¶ 2(b).)

Barrette responded to Johnson within the hour on February 7 explaining the purpose of motions in limine:

> Dear Attorney Johnson,
>
> I write in regard to your email below. Motions in limine are common litigation tools necessary for focusing issues at trial and are part of the Board's Practice and Procedure. "A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing." *Morrison v. DEP*, 2020 EHB 404, 405 (citing *The Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161; *Kiskadden v. DEP*, 2014 EHB 634, 635. "Its purpose is to provide the Board with an opportunity to consider potentially prejudicial and harmful evidence and rule on the admissibility of such evidence before it is referenced or offered at trial." *Id.* (citing *Kiskadden*, 2014 EHB at 635). Contrary to your assertions, Coterra did not file the motions for the "purpose of abusing the legal process and harassing and intimidating" you and your clients. The motions were necessary as a result of the contents of the pre-hearing memorandum that you filed on January 19, 2022. Please be advised that Coterra intends to file at least one more motion in limine and will not withdraw the motions already filed. Also, there will be no substitution of counsel and no wire-transfer to you from Coterra.

> At this point, I must ask you again to stop copying us on your emails to the AG's office, the EPA and your clients. These emails are not productive. If, however, you have proposed stipulations that you would like us to review in advance of the February 22, 2022 hearing, we will be happy to review and provide you with feedback.
>
> Best regards,
>
> Amy Barrette

(Docket Entry No. 106, Ex. A.)

A short time later, Johnson responded:

> Attorney Barrette,
>
> Your willingness to continue providing evidence of our claims and your bad faith is awe inspiring. We will continue to copy the AG and EPA because this is also a criminal investigation due to the fact DA O'Malley gave the AG jurisdiction quite some time ago.
>
> It is also awe-inspiring if you and Coterra did not put this all together. Regardless, your willingness to proceed will be valuable in the days to come.
>
> Regards,
>
> Lisa

(*Id.*) Around the same time on February 7, Johnson sent a separate email to Barrette, copying her clients, persons from the EPA, and persons from the Pennsylvania Office of Attorney General:

> Be advised that each of my clients have filed SEC complaints against each of Coterra and CHK for multiple actions, specifically including executive sells during March 2020.
>
> Regards,
>
> Lisa

(*Id.*) Coterra's response to the Appellants' motion to stay also included a request to "award Coterra its legal fees incurred in connection with preparing this opposition." (*Id.*, Resp. at 3.)

The Department also opposed a stay of proceedings. (Docket Entry No. 110.) In its response to the motion, the Department took the position that, even if Coterra's counsel were to have any discussion with EPA or the Attorney General's Office, those discussions would be irrelevant to the appeal before the Board:

> By way of further answer, it is specifically denied that any conversation that either the AG's Office or the EPA may or may not have with any party to this appeal will have any effect whatsoever on the present appeal. The Board is the exclusive agency with the duty and jurisdiction to review the appropriateness of final Department actions. Therefore, even if the factual averments in Paragraph 5 were true, they do not provide any basis for staying the proceedings of the present appeal.

(*Id.* at ¶ 5.) On February 9, 2022, we issued an Order denying the Appellants' motion for a stay and denying without prejudice Coterra's request for an award of legal fees incurred in connection with responding to the motion. (Docket Entry No. 111.)

In the meantime, on February 10, 2022, we certified to the Commonwealth Court the record relevant to our Opinion and Order denying the Appellants' motion to amend our summary judgment Opinion and Order to certify it for immediate interlocutory appeal, which the Appellants had appealed. (Docket Entry No. 112.) On the very same day, the Commonwealth Court issued an Order denying the Appellants' petition for permission to appeal:

> NOW, February 10, 2022, upon review of Petitioners' "Petition for Review," which is in the nature of a Petition for Permission to Appeal (Petition) pursuant to Chapter 13 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 1301-1323, and the Commonwealth of Pennsylvania, Department of Environmental Protection's Answer thereto, the Petition is **DENIED**.

(Cmwlth Ct. Docket No. 1412 C.D. 2021.)

Motion for Sanctions

On February 15, 2022, Coterra filed the motion for sanctions in the form of legal fees related to the Appellants' motion to stay, seeking sanctions pursuant to our Rules at 25 Pa. Code §§ 1021.31(c) and 1021.161 that is now before us. (Docket Entry No. 117.) As previously noted, Coterra asserts that the motion to stay had no support in fact or in law and was not filed in good faith, and instead was filed for improper purposes, i.e., to harass, cause unnecessary delay or needlessly increase the cost of litigation, and to unduly delay these proceedings. Coterra argues that Lisa Johnson's emails to the EPA and the Pennsylvania Office of Attorney General, which

copied Buchanan, were designed to use the threat of criminal prosecution to intimidate Buchanan and pressure them into completing the wire transfer of money demanded by Johnson. (*Id.*, Mot. at ¶ 60.) Regarding the alleged "conversations" that Johnson suggested were to occur between Buchanan and the EPA and/or the Attorney General, which provided the justification for the stay request, Coterra says that neither the EPA nor the Attorney General requested any conversations with its counsel. Coterra goes on to assert that, even if conversations were requested, they would have no bearing on this appeal since only the Board is empowered to review final actions of the Department. Overall, Coterra argues that "Appellants' counsel's goal was to unduly delay these proceedings, increase Coterra's litigation costs, intimidate Coterra into making a substantial monetary payment to Appellants' counsel under the threat of criminal prosecution, and intimidate Coterra's counsel into withdrawing from these proceedings." (*Id.*, Memo. at 6.)

Late in the day on February 21, the day before the merits hearing, the Appellants filed their response in opposition to Coterra's motion for sanctions. (Docket Entry No. 121.) The response includes 11 exhibits that for the most part appear to have little relevance to the motion for sanctions. The exhibits include: a letter from former Pennsylvania Supreme Court Justice Ronald Castille apparently pertaining to a matter in the Court of Common Pleas of Susquehanna County (Ex. A)[6]; an Order in that matter where Judge Jason Legg ultimately recused himself (Ex. B); an Associated Press article regarding an unrelated contaminated water supply in Dimock, PA (Ex. D); an Opinion and Order from the Board in a different case, not involving Coterra, where Lisa

[6] The letter from former Justice Castille was prepared in relation to a case before the Court of Common Pleas of Susquehanna County, *Cabot Oil & Gas Corporation et. al., v. Charles F. Speer, et. al.*, Case No: 2017-936 C.P. Justice Castille was apparently seeking to be retained as an expert by the defendants to offer an opinion in support of a motion for recusal filed by the defendants seeking the recusal of Judge Jason Legg. The Court of Common Pleas determined that the advisory legal opinion was not admissible since the question of recusal is a question of law. The letter appears to offer some commentary on a response to the motion for recusal filed by Buchanan and Amy Barrette on behalf of Cabot. The letter has no connection of any kind with the case before us.

Johnson was counsel (Ex. E); water sample results from an apparently unrelated property (Ex. G); a filing by Johnson in the Commonwealth Court related to a different Board appeal where Johnson was counsel (Ex. H); a Right to Know Law request form submitted by Johnson to the Lieutenant Governor's office (Ex. I); and a letter from the Department regarding a water supply investigation in a different matter (Ex. J).

The Appellants do not so much address the merits of Coterra's motion regarding the basis for filing their previous motion for a stay, but instead their response contains a broad screed of grievances against, among others, Governor Tom Wolf, Lieutenant Governor John Fetterman, Former Department Deputy Secretary Scott Perry, Coterra, Coterra's counsel, and the Board. To wit:

> The Department, as publicly stated by Scott Perry and led by Governor Tom Wolf and Lieutenant Governor John Fetterman, is complicit in and has severally caused widespread irreversible harms, illness, death and environmental destruction by Coterra and other oil and gas operators. The Department and the Board seem to be in a hurry to absolve Coterra in this matter as the Board and the Department are focused on whether or not Coterra caused Landowners' water contamination, which it did, and not the Department's actions.

(*Id.*, Resp. at 3.)[7] And:

> The Department and Coterra have joint and severally retaliated against Landowners and their counsel, not just for pursuing the instant claim, but for discovering, reporting, reporting, [sic] and publicizing these issues. Governor Tom Wolf and Lietenant Governor John Fetterman have improperly, and potentially criminally, ignored and concealed these matters from not just the public, but from those subject to certain harms, including school children. There is no line that the Department and Coterra will not cross to conceal the reality of Coterra's inherently dangerous and deadly operations and the Department's associated complicity. What kind of person, what kind of governor and lieutenant governor, conceal and ignore these issues?

[7] The Appellants are correct that the Board has indeed been focused on whether or not Coterra caused any contamination to the Appellants' water supply, which, as we have stated repeatedly, should have been the crux of this appeal. Determining whether or not the Department correctly concluded that Coterra's operations were not responsible for any contamination of the Appellants' water supply in the action under appeal is precisely what this Board is charged with deciding.

(*Id.*, Resp. at 9.)

The Appellants accuse Coterra of improper motives for filing its motion for sanctions and argue that Coterra's counsel should be compelled to testify "and answer Landowners and Landowners' counsel's questions":

> These are the reasons why Coterra instructed its "***chosen counsel,"*** Attorney Amy Barrette, to intervene on Coterra's behalf in this matter and to file this Motion three business days before the hearing. The Motion ***was filed with the intent to retaliate against and intimidate Landowners from testifying freely at the hearing, and to deter Landowners' counsel from representing Landowners and cross-examining Department and Coterra witnesses***. These are the reasons why Attorneys Barrette and Burns and Buchanan Ingersoll & Rooney should be disqualified from this matter, why Attorneys Barrette and Burns' own conduct requires the designation of each as a necessary witness, to be placed under oath and answer Landowners and Landowners' counsel's questions. These are the reasons the Board should review its own conflicts and biases in accordance with Chief Justice Castille's opinion as the Chief Justice's words make certain ethical obligations of the judiciary clear.

(*Id.*, Resp. at 2-3 (emphases in original).) (*See also id.*, Memo. at 2.)

The Appellants' response contains several additional statements making accusations against Buchanan and Attorneys Barrette and Burns: "Coterra and Attorney Barrette's entire history and conduct with respect to the pollution, criminal acts and misconduct that took out the entire town of Dimock and the 9 square miles surrounding it, is infamous and well-publicized." (*Id.*, Resp. at ¶ 56);

> Further, for Attorney Barrette to continue representation of Coterra after Landowners filed their Motion to Disqualify and ethics complaints in good faith, much less after Chief Justice Castille made it clear that Attorney Barrette was unprofessional, unreasonable and took inappropriate actions in furtherance of Coterra's illegal attacks on poor people, people living with disabilities, and the elderly. [sic]

(*Id.*, Resp. at ¶ 60);

> Coterra's Motion was filed by Attorney Barrette to further their attacks on Landowners and Landowners' counsel, and to send a message to deter future complaints against Coterra. It is not enough for Coterra and Attorney Barrette that Landowners' [sic] lost their home, their health and suffered other serious harms,

> but Coterra, and the Department, have gone to extraordinary lengths to discredit, humiliate, bankrupt, intimidate, and retaliate against Landowners and Landowners' counsel by threatening punitive action from the commencement of this matter. The Department, the Board and the Wolf/Fetterman administration are knowingly and actively participating in such acts against Landowners and Landowners' counsel.

(*Id.*, Resp. at ¶ 63). The Appellants also filed a six-page memorandum of law, which similarly fails to make a substantive response to the motion for sanctions and instead continues with statements such as:

> If Coterra, Attorneys Barrette and Burns and Buchanan Ingersoll and Rooney did not want their actions and conduct scrutinized, Buchanan Ingersoll & Rooney, Attorneys Barrette and Burns should not have intervened on behalf of Coterra and they certainly should not have filed a motion accusing Landowners of extortion. This latest attempt to deter Landowners from appearing at a hearing and freely testifying, which is the natural evolution of Attorney Barrette's monstrous conduct towards Landowners [sic].

(*Id.*, Memo at 4.)

The Appellants also note in their response that they "remain before the Board under objection":

> Landowners remain before the Board under objection in order to pursue their rightful claims and document the ongoing failures of the Wolf/Fetterman administration, this Board, the Department of Health and the Department in connection with this matter and all oil and gas investigations. Landowners' [sic] have a constitutional right to be heard in a forum where Landowners are free from harassment. The Board has been nothing but a discriminatory and hostile forum for Landowners and Landowners' counsel since the date Landowners filed their appeal with the Board on February 15, 2021.

(*Id.*, Resp. at ¶ 42.)

In one of the few moments addressing the merits of the motion for sanctions, the Appellants actually admit that their motion to stay was not filed for the alleged "conversations" to occur between counsel for Coterra and the EPA or Attorney General, but instead, "Landowners filed its Motion to Stay in order to protect Landowners from the relentless abuses by Coterra, Attorney Barrette, and the Department." (*Id.*, Resp. at ¶ 58.) Thus, Johnson admits that she did not speak

truthfully to the Board. She admits the obvious, which is there have never been any "conversations" as alleged.

At the conclusion of their 21-page response, the Appellants request that we not only deny the motion for sanctions, but that we also disqualify Buchanan, make them testify under oath, and order Coterra to pay Johnson attorney's fees and expenses, not actually incurred by Johnson, but what Coterra's counsel has incurred through its representation:

> For the reasons set forth herein, Landowners request that the Board enter orders, in the form attached hereto, denying Coterra's Motion with prejudice, disqualifying Attorney Barrette, Attorney Burns, and Buchanan Ingersoll & Rooney, ordering that Coterra pay Landowners' counsel fees, costs, and expenses incurred in this matter, with fees being equal to the amount paid by Coterra to Buchanan Ingersoll & Rooney, and properly identifying Attorneys Barrette and Burns as necessary witnesses, to be placed under oath and answer Landowners and Landowners' counsel's questions.

(*Id.*, Resp. at 21.)

Cutting through all this noise, we went forward with the already delayed hearing on February 22. At the beginning of the hearing, Lisa Johnson demanded that, instead of proceeding with the hearing, "we argue the response to Coterra's motion for sanctions and legal fees." (Hearing Transcript Page No. ("T") 5.) When the presiding judge said he would not rule on the motion one way or the other that day, (T. 7), Johnson moved "to take a recess for the parties to read the response, and we can reconvene," (*Id.*). The presiding judge denied the motion to recess. (*Id.*) Johnson then requested a 15-minute break and, after returning, refused to put her clients on to testify (her only witnesses) and be subject to cross-examination, claiming that "the sole intent of the motion for sanction [sic] and legal fees that Buchanan and Coterra filed was to somehow deter my clients' free testimony today." (T. 8.) However, importantly, Johnson acknowledged that, even if the motion for sanctions were not on the table, she would not have put her clients on the stand subject to cross-examination. (T. 18.) Since the Appellants did not present any case-in-

chief, Coterra made a motion for a nonsuit, in which the Department concurred. (T. 19.) We recessed the hearing so that the motion could be briefed and ruled on. (T. 20.) That motion has since been briefed and is pending before the Board.

Meanwhile, litigation regarding the motion for sanctions continued. Buchanan again, in accordance with our Rules, sought Johnson's permission to file a further reply in support of its motion for sanctions. Instead, Johnson filed this letter with the Board:

> Dear Judge Labuskes:
>
> Landowners' counsel received an email from Attorney Barrette last evening requesting that Landowners' consent to Coterra to filing a sur-reply ("**Coterra Sur-Reply**") to Landowners' Response to Coterra's Motion for Sanctions in the Form of Legal Fees dated February 21, 2022, which is attached hereto as Exhibit A ("**Response**"). Coterra filed its motion a mere three business days prior to the hearing February 22, 2022, now on recess ("**Hearing**"). Landowners are filing this notification with the Board in response to Attorney Barrette's request to file the Coterra Sur-Reply.
>
> Landowners' Response attached an opinion of retired Pennsylvania Supreme Court Chief Justice Castille and attached as Exhibit B. In the opinion, Chief Justice Castille describes Attorney Barrette as "unprofessional" and "unreasonable," and worse, that Attorney Barrette asserts untrue ulterior motives to intimidate and harass the "little guy" out of pursuing just claims against Coterra. Attorney Barrette's conduct, as accurately described by Chief Justice Castille and documented in Landowners' filings, was on full display within an hour of the Hearing. Instead of assuring the Board that Attorneys Barrette and Burns and Coterra were proceeding in good faith, Attorney Barrette slandered Chief Justice Castille and continued her improper attacks on Landowners and Landowners' counsel.
>
> Coterra ***chose*** to intervene in this matter and ***chose*** to file the Motion. Landowners' counsel gave Coterra and Attorneys Barrette and Burns an opportunity to argue the Motion at the Hearing, which opportunity was squandered by Attorneys Barrette and Burns. There is no rule, and in fact there is strong precedent against, permitting Coterra to file the Sur-Reply for the precise reasons why Coterra and Attorneys Burns and Barrette are requesting to file one. Coterra and Attorneys Barrette and Burns should not be given another opportunity to harass, intimidate and retaliate against Landowners and Landowners' counsel, or to continue slandering members of the judiciary by being permitted to file the Coterra Sur-Reply.
>
> Sincerely,
>
> /s/ Lisa Johnson

(Docket Entry No. 122 (footnote omitted) (emphasis in original).)[8] On March 10, 2022, Coterra filed a response memorandum to Johnson's letter. (Docket Entry No. 126.) In the memorandum, Coterra pushes back on many of the allegations Johnson makes in her response to the motion for sanctions, and the statements contained in the letter of former Justice Castille that Johnson attached to the Appellants' response and again to the letter.

One of the elements common to rules on bad faith filings is affording some degree of process for the party facing a motion for sanctions. *See* Pa.R.Civ.P. 1023.1(d) (party subject to a motion for sanctions must be given "notice and a reasonable opportunity to respond"); Fed.R.Civ.P. 11(c)(1) (same). It is in this vein that we have attempted to afford the Appellants and Lisa Johnson full opportunity to respond to, argue, and contest Coterra's motion for sanctions. The Appellants were obviously provided with an opportunity to respond to Coterra's motion for sanctions and, as discussed above, filed an extensive response. (Docket Entry No. 121.) In addition, to provide the Appellants with an opportunity to argue the motion for sanctions and the amount of fees claimed by Coterra, we reached out to the parties on May 9, 2022 to ascertain availability for oral argument via conference call for the afternoon of May 25. Counsel for the Department and Coterra both provided their availability. However, in lieu of providing her own availability, Lisa Johnson on behalf of the Appellants filed a "demand for the Board's removal of Judge Labuskes." (Docket Entry No. 133.) Notably, the filing was not a motion that would move

[8] The Appellants frequently state in their filings that Coterra "chose" to intervene in this appeal. It is unclear whether they attribute some sort of nefarious motive to this, but a company routinely participates in an appeal that relates to its operations. In fact, our Rules specifically provide that a well operator in an appeal involving a claim of water loss or contamination can intervene in an appeal within 30 days of service of the notice of appeal without the necessity of filing a petition to intervene and by simply filing an entry of appearance. 25 Pa. Code § 1021.51(h)(3) and (j). The Appellants' notice of appeal reflects that it was served on "Cabot Oil and Gas Corporation's attorney, Amy Barrette at Buchanan Ingersoll & Rooney." (Docket Entry No. 1.) Any suggestion that Coterra came into this appeal merely to harass the Appellants has no basis in the record.

the Board to act. Despite this demand, and other similar threats to file "a motion demanding the recusal of Judge Labuskes," (*see, e.g.*, Docket Entry No. 132, Ex. O), no such motion for removal or recusal has ever been filed by the Appellants or Lisa Johnson. In the filing, Johnson asserted that

> Judge Labuskes' documented history and violations of Landowners' free speech and due process rights are the most serious violations of constitutional rights in this country and have no room in an American tribunal. Judge Labuskes' ongoing retaliatory misconduct reveals, among other things, that Judge Labuskes is punishing Landowners for exercising their First Amendment rights of free speech against the Department of Environmental Protection and the Environmental Hearing Board.

(*Id.* at 1.) Johnson appeared to take issue with the fact that we reached out regarding availability for oral argument on the motion for sanctions shortly after the Appellants filed their response to Coterra's motion for a nonsuit:

> Judge Labuskes' sudden and urgent desire to hold oral arguments over a phone call regarding Coterra's SLAPP Motion [motion for sanctions] that was filed three months ago within hours of Landowners' filing of the Brief is clearly meant to punish Landowners' and Landowners' counsel for exercising their free speech rights against the DEP and for continuing to seek Judge Labuskes' recusal. Landowners and I [Lisa Johnson] will not tolerate it. Oral arguments are not necessary for an impartial fact finder to determine that Coterra's SLAPP Motion was an improper use of these proceedings in an attempt to intimidate and deter Landowners and Landowners' counsel from pursuing this matter in accordance with the patterns and practices of the oil and gas industry to silence victims. In this matter, the government has joined those efforts to silence Landowners.

(*Id.* at 1-2.)

Johnson stated that she would only participate in an oral argument with certain conditions: the recusal of Judge Labuskes, the holding of oral argument in a "public forum," and, despite the fact that it was oral argument, the right to testify. Even so, Johnson stated that she and the Appellants "would simply continue to rely on [their] Response":

> Landowners continue to rely on Landowners' Response and object to Judge Labuskes' outrageous request to force Landowners and Landowners' counsel on a

> telephone call with Judge Labuskes and five lawyers from the industry and the DEP where Judge Labuskes can use his executive power to silence Landowners and for Coterra and the DEP to continue to use SLAPP tactics. Landowners would make themselves available for oral arguments of Coterra's SLAPP Motion in a public forum after Judge Labuskes' recuses himself and Landowners' constitutional rights to testify safely are otherwise protected, at which time Landowners would simply continue to rely on Landowners' Response.

(*Id.* at 2.)

Although oral argument on the motion for sanctions was an attempt to afford appropriate process before deciding the motion, the Appellants and Johnson construed it as the "latest attack on Landowners' free speech rights by Judge Labuskes" that "endanger[s] Landowners' rights and, in fact their lives." (*Id.*) Accordingly, the Appellants through their counsel have forfeited the chance to contest any of Coterra's fees or otherwise argue the motion for sanctions via oral argument beyond what is contained in their response.

Having received Johnson's "demand," and the rejection of oral argument, we issued an Order on May 10 that provided for Coterra to file an affidavit setting forth its reasonable costs and fees incurred by reason of the Appellants' motion to stay:

> 1. On or before **May 23, 2022**, counsel for Coterra shall file an affidavit setting forth the reasonable costs, including legal fees, actually incurred by Coterra by reason of the Appellants' February 3, 2022 Motion to Stay Proceedings, including costs and fees related to Coterra's motion for sanctions.
>
> 2. The parties were offered an opportunity for oral argument on Coterra's motion for sanctions but the Appellants declined the opportunity without the imposition of unreasonable conditions on oral argument.

(Docket Entry No. 134.) In accordance with our Order, Coterra filed its affidavit on May 22, seeking to recover $18,614.70 in fees for 34.10 hours of work expended by Buchanan and Attorneys Amy Barrette and Robert Burns. (Docket Entry No. 136.) We reiterate that we have nothing from the Appellants contesting anything in the affidavit, having refused the opportunity

to do so via oral argument. We have nothing from the Appellants contesting the amount or reasonableness of the fees or hours billed or questioning any of the work done by Buchanan.

We conclude that the motion to stay was not submitted in good faith. There were no grounds to file the motion to stay, to assert that conversations were occurring between Buchanan and anyone from EPA or the Attorney General's Office, or to claim that those conversations, even if they were occurring, which they were not, would have any bearing on this appeal or warrant any stay of our proceedings. Further, as noted above, Johnson and the Appellants *admitted* that they filed the motion to stay not for its stated purpose of these "conversations," but "to protect Landowners from" so-called "relentless abuses by Coterra, Attorney Barrette, and the Department." (Docket Entry No. 121, Resp. at ¶ 58.) The claim is reminiscent of Johnson's earlier untrue claim that a consent order and agreement was being negotiated. It is also in line with the various other inconsistencies in her filings as discussed above. Such falsehoods from an officer of the court simply cannot be tolerated or excused.

It is unclear whether the Appellants ever intended to actually proceed to a hearing on the merits. When viewed in conjunction with Johnson's actions over the course of this appeal—conducting no discovery, filing motions for summary judgment with no record support, failing to file a pre-hearing memorandum on time, baselessly claiming our appeal was stayed by reason of a filing to the Commonwealth Court, moving the Commonwealth Court to stay our proceedings (where the motion and attempted appeal were immediately denied), filing a pre-hearing memorandum (as supplemented) with no substance, failing to file an appropriate response to Coterra's motions in limine, and refusing to put on any evidence or testimony at the hearing on the merits—it seems obvious that the motion to stay was filed to avoid having to go to a hearing and thus to cause unnecessary delay in our proceedings.

We also believe that the motion was filed to cause a needless increase in the cost of litigation. The motion was filed just weeks before the hearing was to commence while the Department and Coterra were undoubtedly busy preparing for the hearing. They filed their pre-hearing memoranda on February 8, just days after the motion. The Department's pre-hearing memorandum complied with our Rules, identified fact and expert witnesses, and attached 20 exhibits. (Docket Entry No. 107.) Coterra's memorandum likewise complied with our Rules, identified fact and expert witnesses, and attached 32 exhibits and an expert report. (Docket Entry No. 108.) The Department and Coterra had to pivot away from hearing preparation to address a motion with no grounding in reality. Then, having undertaken the necessary preparation and accompanying expense of that preparation, they appeared at a hearing where the Appellants refused to put on any case-in-chief.

The Appellants' motion was not an isolated incident. Rather, it was merely the latest in a series of actions unquestionably designed in bad faith to harass, attempt to cause unnecessary delay, and needlessly increase the cost of litigation. By her words and deeds, Johnson's bad faith is palpable. Accordingly, we are compelled to find that Lisa Johnson's motion to stay was filed "for an improper purpose" to "cause unnecessary delay or needless increase in the cost of litigation" and she therefore committed a "bad faith violation" of 25 Pa. Code § 1021.31(b) that warrants the imposition of appropriate sanctions. Coterra's request for reasonable fees that are a result of having to respond to the improper motion is an appropriate sanction.

We want to dissuade any implication that the sanctions here are being imposed for an ordinary motion to stay our proceedings. There is certainly ample room in Board proceedings for zealous advocacy, creative legal theories, and spirited litigation. But there is no room for baseless filings, dishonesty toward the Board, and behavior that is clearly designed to unnecessarily delay

our proceedings and increase the costs for opposing parties. Awarding sanctions in the form of attorney's fees is warranted here to deter ongoing and future bad faith filings from Lisa Johnson and Lisa Johnson & Associates, and to preserve the integrity of proceedings before the Board for all litigants who practice before us.

We have carefully reviewed Coterra's fee affidavit. There is nothing apparent on the face of the affidavit that would suggest that any of the fees are anything other than the direct or proximate result of Johnson's improper request for a stay and Coterra's accompanying motion for sanctions. There is also nothing on the face of the affidavit to suggest that the hours worked, the attorneys' rates billed, or the fees requested are anything other than reasonable. Accordingly, we conclude that Coterra is entitled to recover all of the fees it seeks, and we award those fees to be paid jointly and severally by Lisa Johnson, Lisa Johnson & Associates, and the Appellants.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 7th day of June, 2022, in accordance with 25 Pa. Code §§ 1021.31(c) and 1021.161, it is hereby ordered that Coterra's motion for sanctions in the form of legal fees is **granted**. Lisa Johnson, Esquire, Lisa Johnson & Associates, and the Appellants are jointly and severally liable for reimbursing Coterra **$18,614.70** for the reasonable fees it incurred in responding to the Appellants' February 3, 2022 motion to stay proceedings. Payment shall be made on or before **July 7, 2022** to Amy L. Barrette, Esquire and/or Robert L. Burns, Esquire, of Buchanan Ingersoll & Rooney PC.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 7, 2022

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

For the Commonwealth of PA, DEP:
Michael A. Braymer, Esquire
Kayla A. Despenes, Esquire
Paul Joseph Strobel, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Intervenor:
Amy L. Barrette, Esquire
Robert L. Burns, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	**Issued: June 15, 2022**

OPINION AND ORDER ON
MOTION FOR NONSUIT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion for nonsuit made by an Intervenor and joined in by the Department following the Appellants' refusal to put any evidence or testimony on the record at the hearing on the merits.

O P I N I O N

This matter involves an appeal filed by Tonya Stanley, Bonnie Dibble, and Jeffrey Dibble (the "Appellants") of a letter issued by the Department of Environmental Protection (the "Department") in which the Department, in response to a complaint made by the Appellants, determined that any water quality issues in the Appellants' water supply were not caused by gas drilling operations conducted by Coterra Energy Inc. f/k/a Cabot Oil and Gas Corporation ("Coterra"). The Appellants disagree with the Department's determination and have claimed that Coterra is responsible for pollution of their water supply located in Bridgewater Township, Susquehanna County.

The Appellants bear the burden of proof in this appeal. 25 Pa. Code § 1021.122(a); *Kiskadden v. DEP*, 2014 EHB 667. In order to prevail they needed to prove by a preponderance of the evidence that the Department erred when it determined that Coterra's operations did not contaminate their water supply. In order to do that, they needed to show that contaminants entered their water supply as a result of Coterra's operations by way of, for example, a hydrogeologic connection between the gas wells and their water supply. *Kiskadden v. DEP*, 2015 EHB 377, 406-07, *aff'd*, 149 A.3d 380 (Pa. Cmwlth. 2016). Essentially, the Appellants needed to provide evidence of causation in order to prevail.

The hearing on the merits in this matter was scheduled to begin on February 22, 2022. The hearing was originally scheduled to commence on February 8, 2022. However, the hearing was postponed following the Appellants' failure to file their pre-hearing memorandum by the due date. When the Appellants did file their pre-hearing memorandum, it did not identify or attach any exhibits. (Docket Entry No. 99.) For example, even though this is an appeal involving alleged water supply contamination, the Appellants did not reference or attach any water sample results. Although the pre-hearing memorandum listed several potential fact witnesses, the Appellants subsequently in letters to the Board narrowed down their witness list to just the Appellants themselves: Tonya Stanley, Jeffrey Dibble, and Bonnie Dibble. (Docket Entry Nos. 115, 116.) The pre-hearing memorandum did not identify any expert witnesses, so it was unclear how the Appellants intended to prove that there was causal link between Coterra's operations and their water supply.

On February 3, 2022, the Appellants filed a motion to stay our proceedings. (Docket Entry No. 105.) In the two-page motion to stay, the Appellants asserted that they had filed complaints with the Environmental Protection Agency (EPA) and the Pennsylvania Office of Attorney

General, apparently against Coterra. The Appellants' motion averred that counsel for Coterra would have "conversations" with the EPA and the Attorney General's office that would "have a direct bearing on this matter, and are grave enough, to warrant a stay of proceedings." In reality, no conversations were scheduled to occur and there was no factual basis for the motion. The Board denied the motion to stay on February 9. (Docket Entry No. 111.) On February 15, Coterra filed a motion for sanctions to recover the fees it incurred in having to respond to the baseless motion to stay. (Docket Entry No. 117.) The Appellants filed their response to the motion for sanctions late in the day on February 21, the day before the hearing was to begin. (Docket Entry No. 121.)

On February 22, we held the hearing on the merits by videoconference via WebEx.[1] At the outset of the hearing, in lieu of proceeding with an opening statement, counsel for the Appellants requested that the Board rule on Coterra's motion for sanctions. (Hearing Transcript Page No. ("T.") 5.) Counsel for the Appellants stated that Coterra's motion for sanctions intimidated her clients and they would not be able to testify and be subject to cross-examination by counsel for Coterra before the motion for sanctions was resolved. (T. 6-7.) Appellants' counsel made an oral motion to recess the hearing so that the Board could rule on the motion for sanctions. (T. 7.) The presiding judge denied the Appellants' motion, reasoning that the motion for sanctions was separate and would be decided in due course, and elected to proceed with hearing the merits of the appeal. (T. 6-7.)[2] Counsel for the Appellants then asked for a 15-minute recess to confer with her clients. (T. 7.) Upon returning from the break, counsel stated that her clients would not

[1] The hearing was held via videoconference due to the Covid pandemic. No party objected to that procedure.

[2] On June 7, 2022, the Board issued an Opinion and Order granting Coterra's motion for sanctions in the form of legal fees because there was no factual basis for the Appellants' claim in their motion to stay that "conversations" were occurring between counsel for Coterra and the EPA or the Attorney General's office, and it followed a pattern of improper behavior by the Appellants' counsel. (Docket Entry No. 138.) The Opinion and Order on the motion for sanctions contains a more detailed recitation of the procedural history of this appeal.

proceed with the hearing until the motion for sanctions was resolved and that under no circumstances would she allow her clients to be cross-examined by Coterra's counsel. (T. 8-9.)

The presiding judge then asked counsel for the Appellants if it was only the motion for sanctions to recover fees that was preventing the Appellants from being subject to cross-examination. (T. 10.) Counsel responded that, no, it was "the entire conduct of Coterra and the Department," and that the Appellants would "not subject themselves to cross examination or the representation by counsel who have been harassing them and calling them liars and extortionists, abusing civil proceedings for two years." (T. 10, 11.)[3] The presiding judge asked counsel for the Appellants to confirm that, even if Coterra's motion for sanctions were withdrawn, the Appellants would still not testify and be subject to cross-examination. (T. 15.) Counsel confirmed that was the case and suggested that Coterra could obtain different representation and her clients might then sit for cross-examination. (T. 15-17.) The presiding judge ruled that the Appellants' witnesses could not be permitted to testify on direct since they refused to testify on cross-examination. (T. 17.) The Appellants refused to put on any other case. (T. 17-18.)

Coterra then made an oral motion for a nonsuit, in which the Department joined. (T. 19.) The presiding judge recessed the hearing to allow for briefing on the motion and the consideration of the motion by the full Board. Following the receipt of the transcript, we issued an Order requiring Coterra and the Department to file briefs in support of the nonsuit by April 7, the Appellants to file their brief in opposition by May 9, and permitting Coterra and the Department to file reply briefs by May 24. The matter is now fully briefed and ready for decision.

The Board may enter a nonsuit if the party with the burden of proof and initial burden of proceeding fails to present a *prima facie* case establishing a cause of action. *DEP v. Schultz*, 2015

[3] Although most of the Appellants' counsel's statements were related to Coterra's counsel, this statement suggests that the Appellants also refused to be cross-examined by Department counsel.

EHB 1, 3; *Decker v. DEP*, 2002 EHB 610, 612. *See also* 25 Pa. Code § 1021.117(b) (party bearing the burden of proof must make out a *prima facie* case by the close of its case-in-chief). For a nonsuit to prevail, the initial party's case must be clearly insufficient. *Fox v. DEP*, 2011 EHB 320, 323. In evaluating a motion for nonsuit, the Board must view all evidence and all reasonable factual inferences arising out of that evidence in a light most favorable to the nonmoving party, with all conflicts and doubts resolved in favor of the nonmoving party. *Schultz*, 2015 EHB at 4; *Decker*, 2002 EHB at 612.

Here, there is no evidence to review because the Appellants did not put on a case-in-chief. The Appellants offered no evidence that their water supply was contaminated, let alone contaminated as a result of anything associated with Coterra's operations. The Appellants simply did not put on any evidence at the hearing that they themselves had asked for by filing this appeal. Because they failed to make out a *prima facie* case, nonsuit is warranted.

In opposition to the nonsuit motion, the Appellants say they presented documents

> relevant to this matter, from water testing, well information, copies of violations, credible victims/witnesses, and other supporting evidence to the Board, the sum of which is clearly sufficient to surpass the preponderance of the evidence standard proving that the Department's actions were unlawful, unreasonable, and arbitrary and that the Department committed a taking of Landowners real property and personal interests.

(Resp. at ¶ 81.) However, this is simply not true. The Appellants did not present *anything* at the merits hearing. It is not clear what documents the Appellants are referring to. It may be that they are referring to documents that were submitted earlier on in the proceedings in support of, for example, their earlier motions for summary judgment, but those documents are obviously not part of the record upon which we must base our Adjudication in the appeal. As we explained in *Nottingham Network of Neighbors v. DER*, 1996 EHB 4:

> [W]e do not consider any exhibits attached to any party's Pre-Hearing Memorandum (attached thereto as a document which that party may seek to offer into evidence at the hearing) as part of the record.[4]…Documents not offered as evidence by a party and admitted by the presiding Board Member do not become part of the evidentiary record. The same is true of factual allegations appearing in any party's Briefs, Motions, Pre-Hearing Memoranda, Notice of Appeal, or similar filings. Facts also do not include allegations as to a fact's existence by a party's lawyer (or as to *pro se* NNN [Nottingham Network of Neighbors], its representatives). The facts before this Board come solely from the three groups of sources listed above [the parties' stipulated facts, the testimony of witness, and the exhibits admitted into evidence at the hearing]. To the extent any party relies upon other alleged facts to support its assertions, these "facts" do not exist within the factual record of this proceeding.

Id. at 7-8. Proposed findings of fact in a party's post-hearing brief must refer to admitted exhibits or pages of the transcript from the hearing on the merits. 25 Pa. Code § 1021.131(a). Our Adjudication cannot be based on documents that were only submitted by a party in support of earlier pre-hearing motions but not admitted at the hearing on the merits.

Rather than putting on a case-in-chief, the Appellants instead complained of phantom "harassment" and "intimidation." Interestingly, there is not even any evidence of that, unless we consider Coterra's well-justified motion for sanctions, which was pending at the time. Although Appellants' counsel initially attempted to use Coterra's pending motion for sanctions as an excuse for refusing to put on a case at the hearing, when pressed, she conceded that her only witnesses—the Appellants themselves—refused to testify under any circumstances if it meant they would be subject to cross-examination by Coterra's counsel. They offered that they might be willing to testify if Coterra hired new counsel, and they said the presiding judge could ask some questions, but under no circumstances would they submit to cross-examination by Coterra's counsel. (T. 9-11, 16-17.)

[4] We note again that the Appellants here declined to attach any documents or proposed exhibits to their pre-hearing memorandum.

We did not allow the Appellants to proceed in accordance with their offer. The Environmental Hearing Board is an independent quasi-judicial agency with the power and duty to hold hearings and issue adjudications. 35 P.S. §§ 7513(a), 7514(a). Our Rules explicitly provide parties with the right to cross-examination. 25 Pa. Code § 1021.117(a). *See also* 2 Pa.C.S. § 505 (Pennsylvania Administrative Agency Law providing that agency hearings shall permit reasonable cross-examination). To have allowed the Appellants to testify without being subject to cross-examination, assuming that was a sincere offer, would have, of course, violated Coterra's procedural due process rights, which generally require the confrontation and cross-examination of parties. *See Soja v. Pa. State Police*, 455 A.2d 613, 615-16 (Pa. 1982). *See also Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963). A party's right to cross-examine its opponent's witnesses goes back before even the Magna Carta to Roman law. *See Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988); *Greene v. McElroy*, 360 U.S. 474, 496 n.25 (1959). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Soja*, 455 A.2d at 615 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). Appellants' suggestion that they could be permitted to testify without being cross-examined is, in a word, absurd.[5]

In light of the fact that the Appellants elected to put on no case at all, let alone a *prima facie* case, we have no choice but to grant the motion for nonsuit. This course of action is consistent with our precedent. For instance, in *Decker, supra*, 2002 EHB 610, an appellant declined to present any testimonial evidence on her behalf and made her intention clear that she would not call any lay or expert witnesses to testify in her case. She instead chose to make her case through the

[5] Query what testimony could have been offered by the Appellants when no exhibits had been identified to show water contamination and no expert had been identified to show a hydrogeological connection between Coterra's activities and the Appellants' water source.

admission of a series of documents. The Department and permittee had contested the appellant's standing throughout the course of the appeal and moved for a nonsuit following the admission of the appellant's documents because they believed none of those documents established the appellant's standing. We elected to decide the nonsuit motion before the presentation of the other parties' cases-in-chief. We determined that the Department and the permittee were correct and none of the documents admitted into evidence shed any light on the appellant's interest or stake in the appeal:

> There is no record evidence to support any of the criteria prerequisite to standing. In fact, although there have been various representations along the way about Mrs. Decker's connection to this matter, we have no *record* evidence that in any way describes her interest. All that we know as a matter of record is that Mrs. Decker is an individual with a Dillsburg address.

Id. at 614 (emphasis in original) (footnote omitted). Therefore, we granted the motion for nonsuit and dismissed the appeal.

Similarly, in *Clabbatz v. DEP*, 2006 EHB 263, the appellant filed a pre-hearing memorandum in his appeal of a revision to an Act 537 plan wherein he stated he did not intend to call any witnesses. He then stated during the pre-hearing conference that he did not intend to offer the admission of any exhibits. At the hearing the appellant merely made an unsworn statement on the record and the Department and permittee moved for a nonsuit. The appellant bore the burden of proof to show by a preponderance of the evidence that the Department violated the Sewage Facilities Planning Act or some other provision of law, or that it acted unreasonably in approving the sewage planning revision. We noted that the appellant's "burden must be carried out by presenting the testimony of witnesses who either have personal knowledge of relevant events or can provide expert opinions regarding the Department's action, and by introducing properly authenticated documents that would be admissible at the hearing according to the Pennsylvania

Rules of Evidence." *Clabbatz*, 2006 EHB at 265. With the appellant's unsworn statement being the only thing in the record, we determined that he did not produce any evidence to make out a *prima facie* case and we granted the motion for nonsuit.

In contrast to *Decker*, where there was at least some evidence admitted into the record, and *Clabbatz*, where the Appellant presented an unsworn statement of his grievances, in this appeal there was not a word of testimony from any witness and not a single exhibit identified or offered into evidence. Despite the excuses of Appellants' counsel, when it came down to proving their case on the merits, the Appellants flatly refused. We have no choice but to grant the joint motion for a nonsuit.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TONYA STANLEY, BONNIE DIBBLE, AND JEFFREY DIBBLE	:	
v.	:	**EHB Docket No. 2021-013-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COTERRA ENERGY INC. f/k/a CABOT OIL AND GAS CORPORATION, Intervenor	:	

O R D E R

AND NOW, this 15th day of June, 2022, it is hereby ordered that Coterra's motion for a nonsuit, in which the Department has joined, 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 15, 2022

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

For the Commonwealth of PA, DEP:
Michael A. Braymer, Esquire
Kayla A. Despenes, Esquire
Paul Joseph Strobel, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Intervenor:
Amy L. Barrette, Esquire
Robert L. Burns, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETRUS HOLDINGS, INC.	:	
	:	
v.	:	**EHB Docket No. 2022-014-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 24, 2022**
	:	

OPINION AND ORDER ON
PETITION TO INTERVENE

By Michelle A. Coleman, Judge

Synopsis

The Board grants a petition to intervene filed by an organization that has an organizational interest in an appeal of the Department's denial of a revision to a township's Act 537 plan. The organization has demonstrated that it has standing in its own right to intervene in the appeal.

O P I N I O N

Petrus Holdings, Inc. ("Petrus") has appealed the denial by the Department of Environmental Protection (the "Department") of Petrus' application for a revision to Hamiltonban Township's Act 537 Plan for the installation of a drip micro-mound sewage system at a 17-acre site known as 335 Swamp Creek Lane in Hamiltonban, Adams County. The Department denied the application because of outstanding technical deficiencies regarding Petrus' hydrogeologic study for the project.

The Watershed Alliance of Adams County (the "Watershed Alliance") has now petitioned to intervene in this appeal. In its petition, the Watershed Alliance avers that it is a non-profit, member supported organization established to monitor, improve, and protect water

resources and to educate people within Adams County. (Petition at ¶ 2.) The organization asserts that, if the Department's denial of Petrus' plan revision is reversed in this appeal, Swamp Creek will be contaminated with nitrogen, phosphates, and other pollutants from Petrus' micro-mound sewage system. (*Id.* at ¶¶ 17, 18.) It maintains that discharges from the sewage system will degrade Swamp Creek, an Exceptional Value water of the Commonwealth, cause a loss of macroinvertebrates, and in turn undo the organization's work to protect the creek's water quality. (*Id.*) The Watershed Alliance also says it has members who regularly enjoy Swamp Creek for recreation and natural appreciation, (*id.* at ¶ 3), but conspicuously absent from the petition is any mention of who these members are.

Petrus has filed an answer in opposition to the petition to intervene. The overall thrust of Petrus' argument is that the Watershed Alliance, its staff, and its members are no different than anyone else in the greater population, and the organization does not possess any unique interests in this matter that rise above those of a member of the general public in a way that is sufficient to confer standing. The Department has not filed a response to the petition to intervene.

Section 4 of the Environmental Hearing Board Act (the "EHB Act") provides that "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). Similarly, our Rules provide that a person may petition to intervene in any matter prior to the initial presentation of evidence. 25 Pa. Code § 1021.81. We have held that Section 4(e) of the EHB Act "establishes a low burden for intervention in Board proceedings." *Pa. General Energy Co. v. DEP*, 2021 EHB 7, 12 (quoting *PA Waste, LLC v. DEP*, 2015 EHB 350, 351 n.1). *See also Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 606. The Commonwealth Court has instructed that a person seeking to intervene must have an interest that "will either gain or lose by direct operation of the Board's

ultimate determination." *Browning-Ferris, Inc. v. Dep't of Envtl. Res.*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991).

We have held that the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance so an intervenor must have standing. *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434. A person has standing if they have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Wilson*, 2014 EHB at 2. Thus, a person must have an interest that is greater than the abstract interest of all citizens in having others comply with the law, and there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). In other words, the intervenor's interest must not be remote. *Id.* at 286; *Borough of Glendon v. Dep't of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992). When standing is challenged in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of law. *Barr Farms, LLC v. DEP*, EHB Docket No. 2022-006-B, slip op. at 3 (Opinion and Order, Mar. 24, 2022); *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 131; *Ainjar Trust v. DEP*, 2000 EHB 75, 79-80 n.3.

An organization can have standing either in its own right or as a representative of its members. *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 751 (citing *Pa. Trout v. DEP*, 2004 EHB 310, 355, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004)). An environmental organization has standing in its own right if its mission includes protection or improvement of the environment in the area affected by the Department's action. *Friends of Lackawanna v. DEP*,

2016 EHB 641, 648 (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839).

To be sure, it is far more common for an organization to establish standing as a representative of one or more of its members, but we have found standing for organizations in their own right where their work, interests, and/or mission are sufficiently close to the subject matter of the appeal. For instance, in *Friends of Lackawanna v. DEP*, 2016 EHB 641, we concluded that an appellant organization had established standing as a representative of its members, but we also found that the organization had standing in its own right. The appeal involved a permit renewal for a municipal waste landfill. We found that the organization's mission of supporting the health, welfare, and education of persons in need in Northeast Pennsylvania, and its work aimed at improving the environment in the area surrounding the landfill justified standing in its own right. *Id.* at 648-49. Similarly, in *Groce v. DEP*, 2006 EHB 856, we found that the National Parks Conservation Association had standing to appeal a plan approval authorizing the construction of a waste coal-fired power plant because of its organizational focus on the protection and improvement of national parks. *Id.* at 895-96. In *RESCUE Wyoming v. DER*, 1993 EHB 839, we concluded that the Society of Pennsylvania Archaeology had standing in its own right to appeal a noncoal mining permit and pursue challenges regarding an alleged failure of the permit to protect historical, archaeological, and anthropological resources. We found standing after looking at the organization's bylaws, produced in discovery, that included stated objectives to study the archaeology of Pennsylvania and encourage the preservation and cataloguing of archaeological sites and artifacts. *Id.* at 843.

The organizational interests of the Watershed Alliance here are comparable to those of these other organizations where we have found standing. The Watershed Alliance was

established to monitor, protect, and improve water quality in Adams County and one of its stated goals is to encourage land use practices that will promote a sustainable watershed resource in the county. (Petition at ¶ 2.) It says that, through its members and Board of Directors, it has spent significant time over the last two years monitoring and studying Swamp Creek to protect its Exceptional Value designation for the benefit of its members, the broader public, and the natural environment. (*Id.* at ¶ 15.) The Watershed Alliance's staff have also worked to study Swamp Creek. Cliff Frost, the Watershed Alliance's director, measures Swamp Creek's levels of e. coli, coliform, and pathogens. (*Id.* at ¶ 14.) Patrick Naugle, president of the Watershed Alliance, spends time reviewing and monitoring planned development along Swamp Creek for its possible impact to the creek. (*Id.* at ¶ 13.)

As part of its review of developments along the creek, the Watershed Alliance submitted comments on Petrus' application for the 537 Plan revision for the 335 Swamp Creek Lane development. (*Id.* at ¶ 16.) In those comments, the Watershed Alliance stated that it regularly monitors Swamp Creek and conducts monthly water quality sampling and it expressed concern that the proposed micro-mound system will discharge nitrogen and other constituents to Swamp Creek and degrade its water quality. (Petition at Ex. A.) In short, like in *Friends of Lackawanna*, we find that "[a] clear nexus exists" between the Department's action on the 537 Plan revision, the Watershed Alliance's mission of protecting and improving water quality in Adams County, and its ongoing work in the area, particularly with respect to Swamp Creek. 2016 EHB at 648. Based on the verified averments in its petition, we conclude that the Watershed Alliance has shown that it has an organizational interest in this appeal sufficient to establish standing in its own right for purposes of intervention.

Petrus disputes that the Watershed Alliance would be harmed by a decision of the Board reversing the Department's denial of the 537 Plan revision. Petrus says the Watershed Alliance's assumption that Swamp Creek will become contaminated from the micro-mound sewage system is not based on any report or study. (Answer at ¶ 18.) However, the inquiry for standing is not a merits inquiry into a prospective intervenor's claims. *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 87. All that is needed is an objectively reasonable basis for the harm alleged. *See Pa. Waste Indus. Ass'n v. DEP*, 2016 EHB 590, 603 ("Appellants are not required to prove their case on the merits in order to have a right to appeal, but they must show that they have more than subjective apprehensions." (citing *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 566; *Giordano v. DEP*, 2000 EHB 1184, 1186)). In other words, an intervenor's claims just need to be more than merely speculative. *Orix-Woodmont*, 2001 EHB at 87. The Watershed Alliance's comment letter says that the groundwater table in the area of the development is particularly shallow, within one foot of the surface during some points of the year, and that Swamp Creek is only 500 feet from the proposed micro-mounds. (Petition at Ex. A.) It says that all of the sewage applied to the micro-mounds will eventually make its way to the creek. Without deciding the merits of these claims, we find the potential harm to Swamp Creek is more than speculative.

While the Watershed Alliance has demonstrated sufficient interests for standing in its own right, we cannot find on the basis of the petition that it has standing on behalf of its members. Indeed, there is a palpable thinness to the Watershed Alliance's petition in terms of its members. It says it has members "who regularly enjoy Swamp Creek for recreation and natural appreciation," (Petition at ¶ 3), but it never identifies who those members are and what their

recreational interests are in and around Swamp Creek.[1] There are no affidavits attached to the petition from members of the organization describing their relation to Swamp Creek, as is typical with a petition to intervene. As noted above, the Watershed Alliance identifies its president and its director as people who work on water quality issues related to Swamp Creek and appreciate the creek as a natural resource, but it is not clear if they are also members of the organization. The petition never explicitly says that they are members of the Watershed Alliance. We cannot simply assume that the president and director of an organization are also among its members. We have no reason to doubt that these members exist, but the petition does not bother to tell us who they are and the nature of their interests. All of this is somewhat beside the point since we have already concluded that the Watershed Alliance has standing as an organization in its own right to intervene in this appeal, but it is worthy of mention.[2]

Accordingly, we issue the Order that follows.

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[1] Petrus asserts "[i]f loss of the appreciation of natural resources were an appropriate standard, it would necessarily follow any person could intervene in any appeal alleging that the allowance of a permit will cause contamination and affect a person's appreciation for the environment and the earth's natural resources." (Answer at ¶ 13.) But that is almost precisely the standard for standing in environmental cases that has been used by this Board, Pennsylvania's courts, and the United States Supreme Court:

> We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area **and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity**….[T]he affidavits and testimony presented by [plaintiff] in this case assert that [defendant's] discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere general averments and conclusory allegations…

Funk v. Wolf, 144 A.3d 228, 245 (Pa. Cmwlth. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) (quotations omitted) (emphasis added in *Funk*)). If the Watershed Alliance does identify members with particular aesthetic or recreational interests, Petrus' argument in this regard is unavailing.

[2] Petrus, of course, is free to probe the standing of the Watershed Alliance through discovery as this appeal progresses. However, we have no interest in "details regarding every particular of an organization's incorporation, operation, hierarchy, and membership list." *Friends of Lackawanna v. DEP*, 2016 EHB 641, 647. *See also Borough of Roaring Spring v. DEP*, 2004 EHB 889, 906-07 (Board not interested in arguments "over the nature of practices an organization must follow before being considered a legitimate 'association' with actual 'members' and acceptable membership rituals").

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETRUS HOLDINGS, INC.	:	
	:	
v.	:	**EHB Docket No. 2022-014-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 24th day of June, 2022, it is hereby ordered that the Watershed Alliance of Adams County's petition to intervene is **granted**. The caption of this appeal is revised as follows:

PETRUS HOLDINGS, INC.	:	
	:	
v.	:	**EHB Docket No. 2022-014-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WATERSHED ALLIANCE OF ADAMS COUNTY, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: June 24, 2022

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

For the Commonwealth of PA, DEP:
Janna Elise Williams, Esquire
Angela S. Bransteitter Davis, Esquire
(*via electronic filing system*)

For Appellant:
Todd A. King, Esquire
(*via electronic filing system*)

For Intervenor:
Jennifer E. Clark, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 28, 2022**

OPINION AND ORDER ON
APPELLANT'S PETITION FOR AWARD OF LEGAL FEES AND COSTS

By Steven C. Beckman, Judge

Synopsis

The Board denies appellant's petition for attorney's fees and costs because it was not filed in time under the Costs for Mining Proceedings law, 27 Pa. C.S. § 7708.

O P I N I O N

Background

Brian Telegraphis ("Mr. Telegraphis") filed a Petition for Award of Legal Fees and Costs ("Fee Petition") under the Costs for Mining Proceedings law, 27 Pa. C.S. § 7708 ("Costs Law"). The litigation for which Mr. Telegraphis now seeks attorney's fees and costs involves his appeal of the Department of Environmental Protection's ("the Department's") denial of his mine subsidence claim. In February 2019, Mr. Telegraphis submitted a subsidence damage claim to the Department with respect to a commercial structure he owns and operates as part of his landscaping business. The Department determined that Mr. Telegraphis' structure was not eligible for repair or compensation under the Bituminous Mine Subsidence and Land

Conservation Act based on its finding that the structure was not in place at the time of relevant mining.

On February 4, 2020, Mr. Telegraphis filed a Notice of Appeal with the Environmental Hearing Board ("the Board") objecting to the Department's determination. The appeal went through discovery and dispositive motions before the Board held a one-day hearing on April 19, 2021. Following the submission of post-hearing briefs by the parties, the Board issued our Adjudication and Order on November 4, 2021 ("the Adjudication"). In the Adjudication, we granted Mr. Telegraphis' appeal and held that the Department's requirement that a commercial building be in place at the time of the closest mining in order to be eligible for coverage was not supported by the relevant statutory or regulatory language. The Board remanded the matter back to the Department to complete its investigation and to make a determination as to whether mine subsidence caused the alleged damage to Mr. Telegraphis' commercial building. The Board stated that its decision should not be read to pass any judgment on the issue of whether the commercial building sustained mine subsidence damage, whether any alleged damage resulted from mining in the Maple Creek Mine, and whether Maple Creek Mining, Inc. or any other party is liable for the alleged damage since those issues were not before the Board in the appeal. Neither party appealed the Adjudication to the Commonwealth Court.

On December 30, 2021, Mr. Telegraphis filed his Fee Petition under the Costs Law seeking $23,500.00 in attorney's fees incurred during the appeal. In support of his Fee Petition, Mr. Telegraphis attached an "Itemization of Legal Fees" (Exhibit 1), a "Certification of Customary Commercial Rate of Payment for Legal Services in this Area and of Experience, Reputation and Ability" (Exhibit 2), and the "Fee Agreement" (Exhibit 3) between him and his attorney. The Board held a conference call on January 4, 2022, and, following the conference,

issued an order establishing a briefing schedule that was agreed to by the parties. On January 31, 2022, the Department filed an Answer to the Fee Petition ("Answer"). On February 25, 2022, Mr. Telegraphis filed his Brief in Support of his Fee Petition ("Brief in Support")[1] and the Department filed its Brief in Opposition to the Fee Petition ("Brief in Opposition") on March 28, 2022. All the briefing in this matter is complete and the matter is now ripe for decision.

Discussion

The general rule that governs costs and attorney fees, commonly known as the American Rule, provides that parties are responsible for their own costs and fees unless a relevant statute provides otherwise. *In re Farnese*, 17 A.3d 357, 370 (Pa. 2011). In his Fee Petition, Mr. Telegraphis asserts that the Costs Law provides a statutory basis for the award of reasonable fees and costs that he incurred in pursuing his appeal against the Department. We begin our analysis of Mr. Telegraphis' Fee Petition in this matter by looking to the statutory language set forth in the Costs Law. Under the Costs Law, "Any party may file a petition for award of costs and fees reasonably incurred as a result of that party's participation in any proceeding involving coal mining activities which results in a final adjudication being issued by the Environmental Hearing Board or a final order being issued by an appellate court." 27 Pa. C.S. § 7708(b). The language of a following section of the Costs Law entitled "Time for filing" provides as follows: "The petition for an award of costs and fees shall be filed with the Environmental Hearing Board within 30 days of the date an adjudication of the Environmental Hearing Board becomes final." 27 Pa. C.S. § 7708(d). The Costs Law further states that, with certain exceptions not relevant in this matter, it is the exclusive remedy for the awarding of costs and fees in proceedings involving coal mining. 27 Pa. C.S. § 7708(g). In summary, the key provisions of the Costs Law in this

[1] The Brief in Support filed on February 25, 2022, was missing pages. The Board brought this fact to the attention of Mr. Telegraphis' attorney several times via email and phone messages before a complete copy of the Brief in Support was eventually filed on April 14, 2022.

matter require that there be a final adjudication by the Board and the fee petition must be filed within 30 days of the date the adjudication of the Board becomes final.

We issued the Adjudication in this matter on November 4, 2021. Mr. Telegraphis filed his Fee Petition 56 days later on December 30, 2021. The parties dispute whether the Fee Petition in this case was timely filed under the Costs Law. Mr. Telegraphis states that "[T]his Petition is timely filed within 30 days from the date that the determination became final pursuant to Section 7708(d)." (Fee Petition, ¶ 6). In its Answer, the Department denies Mr. Telegraphis' statement and asserts that the Fee Petition is untimely and, therefore, the Board lacks jurisdiction to entertain the Fee Petition and it must be dismissed. (Department's Answer, ¶ 6). In order to resolve the parties' dispute about whether the Fee Petition was timely filed or not, we must decide whether and/or when our Adjudication was final within the meaning of the Costs Law.

In his filings, Mr. Telegraphis sets forth various arguments in support of his position that the Fee Petition was filed on a timely basis. The first argument set forth in the Fee Petition states that since the Department did not file an appeal, the Adjudication became final on December 6, 2021. (Fee Petition, ¶ 3). If that is indeed the date on which the Adjudication became final, the filing of the Fee Petition would be timely since it was filed less than 30 days after December 6, 2021. Mr. Telegraphis does not provide any further discussion for this statement in his Brief in Support and, in fact, appears to withdraw this line of argument. He states "[A]lthough Appellant mistakenly states in the Petition that the Adjudication and Order is a final order, after additional research on this issue, it is evident that the Adjudication and Order is not a final order." (Mr. Telegraphis' Brief in Support at 4).[2]

[2] Even if Mr. Telegraphis had not abandoned his argument that the Adjudication did not become final until the 30-day appeal period expired on December 6, 2021, we would have rejected this position. This argument was previously considered and rejected under similar facts in our decision in *Svonavec, Inc. v. DEP* 1998 EHB 813.

In his Brief in Support, instead of pursuing his prior stated position, Mr. Telegraphis relies on the argument that the Adjudication is not final and is at best an interlocutory decision. He asserts that the Board's Adjudication is not a final determination of his rights because the Board remanded this matter to the Department in order for the Department to conduct an investigation as to whether mine subsidence is responsible for the damage to his commercial structure. He cites a Rule of Appellate Procedure, Pa. R.A.P. 341, that governs the right to appeal a Board decision to the Commonwealth Court in support of his position. He contends that until it is determined "whether the damage to the commercial structure has resulted from mine subsidence from MCMI's mining operations" and "whether MCMI is liable for the payment of damages to Appellant for mine subsidence" the Board's Adjudication is not final. (Mr. Telegraphis' Brief in Support at 3). Additionally, he asserts that because the Board did "not expressly relinquish jurisdiction" in its Adjudication, the order is not final. (*Id.* at 5). Mr. Telegraphis' position of course has an internal contradiction that he recognizes, but he asks the Board to consider the Fee Petition anyway. If our Adjudication is not final, as he asserts in his Brief in Support, there is no right to bring a claim for attorney fees since the Costs Law allows a fee petition to be filed for costs and fees resulting from "participation in any proceeding involving coal mining activities which results in a *final adjudication* being issued by the Environmental Hearing Board or a final order being issued by an appellate court." 27 Pa. C.S. § 7708(b) (emphasis added). He argues that because the Board has broad discretion with respect to the award of legal fees, we have the authority to entertain the Fee Petition on the merits or, in the alternative, to find that the Fee Petition is premature, and either stay the proceedings or dismiss the Fee Petition without prejudice.

In its Answer to the Fee Petition and in its Brief in Opposition, the Department states that the Adjudication was final when issued on November 4, 2021. Therefore, the 30-day period to file a fee petition under the Costs Law began on November 4, 2021, and expired on December 6, 2021, the first business day after the 30th day, December 4, 2021, which fell on a weekend. (Department's Answer, ¶ 6). The Department's position is that because the Fee Petition was filed well after December 6th, it is untimely and must be dismissed. The Department rejects Mr. Telegraphis' argument that the Adjudication is not final and states that the remand by the Board does not change that fact since the Adjudication disposed of all the issues in the appeal. The Department discusses several cases it contends support its position. The Department also contends that Mr. Telegraphis failed to submit sufficient evidence to support his claim that a $300 per hour rate is reasonable for the area.[3]

The Board has not previously had to decide the specific issue presented by this case. Most of the fee petitions we receive are brought pursuant to the Clean Streams Law ("CSL") which does not specifically set a time for filing the petition. See Section 307(b) of the CSL; 35 P.S. § 691.307(b)**.** In those CSL cases, we default to our own rule that provides that the fee applicant "shall file an application with the Board within 30 days of the date of a final order of the Board." 25 Pa. Code § 1021.182(c). The Costs Law contains a similar filing requirement but sets the 30-day clock running from the date "an adjudication of the Environmental Hearing Board becomes final." 27 Pa. C.S. § 7708(d). It does not speak to the issue of when an adjudication of the Board becomes final, and the Board has not directly addressed this question in any of our prior decisions under the Costs Law.[4] The Environmental Hearing Board Act

[3] The Board did not reach the issue of whether Mr. Telegraphis submitted sufficient evidence to support the requested hourly rate.

[4] Although the issue of timing for filing a fee petition under the Costs Law was not the central issue in front of the Board, the Board has made broad statements supporting the conclusion that a petition under the Costs Law should be

("Act") and our implementing regulations found at 25 Pa. Code § 1021.1 et seq. also do not directly answer the question of when a Board adjudication becomes final or the impact of a remand on that question. 25 Pa. Code § 1021.134 entitled "Adjudications" provides that at the conclusion of the proceedings, the Board will issue an adjudication containing a discussion, findings of fact, conclusions of law and an order and will serve a copy of the adjudication on all parties or their representatives. Under 25 Pa. Code § 1021.134(c), the prior sections supersede 1 Pa. Code § 35.226 which provides that adjudications of an agency head shall be final orders. The Board's regulations also state the following: "[A]djudications and orders of the Board will be effective as of the date of entry." 25 Pa. Code § 1021.11 The term "effective" is not necessarily synonymous with "final" as is evident by the fact that the Board issues numerous orders in our cases which are clearly interlocutory and not final. At the same time, we note that an appeal to the Commonwealth Court of an adjudication by the Board does not act as an automatic stay of our decision. See *DEP v. Angino*, et al., 2007 EHB 286; Pa. R.A.P. 1781.

In the absence of the remand in this case, there would be no question that our Adjudication was final when issued on November 4, 2021, and that Mr. Telegraphis' Fee Petition should be dismissed as untimely. The remand issued in this case makes this a more complicated question. The issue of finality of a Board adjudication where there has been a remand as part of our decision is specific to the facts of the case and the language and purpose of the applicable statute under consideration. We think that the specific facts of this case as well as the language and purpose of the Costs Law leads to the conclusion that our Adjudication was

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filed within 30 days of the adjudication. See *Wayne v. DEP*, 2002 EHB 14, 21, 23 ("Finally, Ms. Wayne requests the award of costs and counsel fees. Because it appears that this matter is governed by 27 Pa. C.S. § 7708 the Board will entertain a petition for attorney's fees filed under that provision within thirty days of the date of this adjudication.") ("If the Appellant wishes to have the Board entertain a petition for costs and attorney's fees under 27 Pa. C.S. § 7708, she may file said petition within thirty days of the date of this adjudication"); *Center for Coalfield Justice and Sierra Club v. DEP and Consol Pennsylvania Coal Company, LLC*, 2018 EHB 531, 537 (Allowing amendment of a fee petition and noting that it was timely filed within 30 days of the issuance of the adjudication).

final when it was issued November 4, 2021. The remand for further consideration of Mr. Telegraphis' underlying mine subsidence claim does not convince us that our Adjudication was not "final" within the meaning of that term in the Costs Law.

We begin with the particular facts of this case and the single issue that was before the Board in our hearing. When Mr. Telegraphis filed his original Notice of Appeal, he requested that the Board correctly interpret the Act to allow his claim to proceed, determine that mine subsidence damaged his commercial structure, and determine what mining operations were responsible for the damage. A year later, according to Mr. Telegraphis' Prehearing Memorandum, the case had narrowed to the single issue of whether or not the commercial structure was in place at the time of nearest mining. (Mr. Telegraphis' Prehearing Memorandum). The Department framed this issue by asserting that it had determined the structure was not within the scope of coverage under the Mine Subsidence Act because the structure was not in place at the time of nearest mining. (Department's Pre-hearing Memorandum). While the Board allowed testimony on the timing of the construction of Mr. Telegraphis' commercial building, our decision was based on our determination that the Department's requirement that a commercial building must be in place at the time of closest mining in order to be eligible for coverage was not supported by the statutory or regulatory language it relied on in denying Mr. Telegraphis' mine subsidence claim. We specifically noted that "[E]ligbility for coverage under the Act is a separate and distinct question from whether a commercial building has suffered actual mine subsidence damage." *Telegraphis v. DEP*, 2021 EHB 279, 305. No other issues were in front of the Board and our Adjudication disposed of that single legal issue. Our remand simply confirmed the appropriate next step that flowed from our determination, i.e., that the Department should complete the investigation it halted when it

improperly determined that there was no possibility of coverage for Mr. Telegraphis' commercial building.

Mr. Telegraphis' argument relies on Pa. R.A.P. 341, a rule that governs the right to appeal to the Commonwealth Court, for support of his position that the Adjudication was not final. Pa. R.A.P. 341(b)(1) provides that a final order is any order that disposes of all claims and of all parties. The Board has previously held that a final order for purposes of an appeal to the Commonwealth Court is not necessarily the same as what constitutes a final order for resolving a fees application. *Williams v. DEP*, EHB Docket No. 2018-067-C, *slip op.* at 4, fn. 3 (Opinion and Order on Application for Fees and Costs issued May 11, 2022) (citing *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 69-71). ("*Williams*"). We also note that the legislature used the term "final adjudication" in setting the time for filing in the Costs Law rather than "final order" which suggests that the legislature meant to tie it to Board actions and not necessarily to the rules governing an appeal to the Commonwealth Court. Putting that concern aside for now, we think there is a good chance that the Commonwealth Court would view our Adjudication in this case as final for purposes of appeal even with the remand. Pa. R.A.P. 341(c), which is titled *Determination of finality,* provides that when more than one claim for relief is presented in an action, the lower court or government unit may enter a final order as to fewer than all the claims and parties if it determines that doing so will aid in resolving the entire case but absent such a determination "any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order." Our Adjudication addressed all the parties in this proceeding and the only legal claim in front of the Board at the time of the hearing. The broader issues surrounding Mr. Telegraphis' mine subsidence claim regarding damages and the responsible party, if such damages were incurred, were not claims in front of the Board that we

could have decided. The parties had agreed to limit the hearing to the single issue and the Board was explicit that it was only deciding that issue in its Adjudication. One problem here is the Department's use of the term "claim" in its investigative process on mine subsidence and the use of that term in the appellate rules. However, as Pa. R.A.P. 341(c) makes clear, a claim in the appeal context is narrower and means a "claim for relief presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim". Our Adjudication determined the single claim for relief presented in our hearing by Mr. Telegraphis and, therefore, we think it would have been considered final even under the appellate rule cited by him in support of his argument that our Adjudication was interlocutory.

The Commonwealth Court has applied Pa. R.A.P. 341 in cases addressing Board adjudications that included remands to the Department. Neither Mr. Telegraphis nor the Department cited or analyzed any of these cases in their Briefs. The Commonwealth Court has quashed appeals of Board decisions where the matter is remanded to the Department, but the Court has not done so in all instances. See *Sunoco Partners Mktg. & Terminals, L.P. v. Clean Air Council*, 219 A.3d 280 (Pa. Cmwlth. 2019) (quashing appeal of Board Adjudication remanding a plan approval back to the Department for further evaluation); *Sentinel Ridge Development, LLC v. Dep't of Envtl. Prot*., 2 A.3d 1263, 1267 (Pa. Cmwlth. 2010)("*Sentinel Ridge*") (quashing appeal of Board Adjudication remanding a stormwater permit.); but see *Department of Environmental Resources v. Big B Mining Company*, 554 A.2d 1002, (Pa.Cmwlth. 1989)("*Big B Mining*"). We think the present case most closely resembles the Commonwealth Court's decision in *Big B Mining*. The Commonwealth Court in *Big B Mining* sua sponte raised the issue of whether the Board's adjudication was a final appealable order. It determined that it was final, stating that the decision determined compliance with the provisions of the regulation at issue. *Big*

B Mining 554 A.2d at 596, fn 5. In *Sentinel Ridge*, the Commonwealth Court contrasted its determination in *Big B Mining* with the facts and procedural setting in that case. It found that the Board's decision in *Sentinel Ridge* was not final as it did not address any aspect of the permit and simply remanded the permit for further evaluation under appropriate methodologies. By contrast, it stated that the Board's decision in *Big B Mining* was final for purposes of appeal because the Board determined that "the mining company satisfied the regulation requirements, and that determination would not change on remand." *Sentinel Ridge*, 2 A.3d at 1267. Our decision in the *Telegraphis* case, like the decision in *Big B Mining*, involved a determination of whether certain regulatory requirements were met rather than the terms and conditions of a permit and our determination that Mr. Telegraphis was eligible for coverage because his property met the statutory and regulatory requirements will not change on remand. Therefore, even if we look to the Commonwealth Court's interpretation of what is a final decision under Pa. R.A.P. 341, we do not find meaningful support for Mr. Telegraphis' position that our remand renders the Adjudication not final for determining when a fee petition must be filed under the Costs Law.

While neither party cited the Commonwealth Court case law on the appealability of final Board decisions, both parties cite our decision in *Crum Creek Neighbors v. DEP*, 2010 EHB 67, in support of their position and we find that it is instructive on the question of the finality of Board adjudications in the context of fee petitions. In *Crum Creek*, the appellant appealed the Department's issuance of an NPDES permit. Following a hearing of the appeal, the Board issued an adjudication and order that suspended the permit and remanded the matter to the Department to conduct further fact-finding and analysis. Within 30 days after the Board issued its adjudication and order, the appellant filed an application for fees and costs pursuant to the Clean Streams Law. The permittee separately appealed the Board's decision to the

Commonwealth Court. The Department opposed the application for fees as premature, arguing that the Board's adjudication and order was not a final order because of the Board's remand of certain issues back to the Department for further investigation and because of the pending appeal of the Board's decision in the Commonwealth Court.

In *Crum Creek*, the Board explicitly addressed the question of "whether our Adjudication and Order constitutes something other than a final order for purposes of processing a fee application because we remanded certain issues to the Department for further consideration." *Crum Creek Neighbors*, 2010 EHB at 69. Analogizing to the definition of "final order" in the Pennsylvania Rule of Appellate Procedure 341(b), the Board determined that the adjudication was final because it disposed of all the appellant's claims regarding the permit that was appealed. In explaining why remanding a matter to the Department for further action does not affect the finality of the Board's adjudication, we stated:

> Our Order in this case contemplated further work by the Department but it does not contemplate further proceedings before the Board in CCN's appeal. Indeed, we expressly relinquished jurisdiction in the Order. If CCN, Pulte, or any other party is unhappy with any future action that the Department may take with respect to Pulte's suspended permit, then that party will need to file a new appeal. There is no rule authorizing us to reopen CCN's original appeal. There is no possible basis for us to reexamine or reconsider any aspect of our holding on the record generated in CCN's original appeal. That record is closed. Any review of a future Department action will not only require a new appeal, it will require a new record and a new analysis that focuses upon the Department's new action, not anything that was resolved in CCN's appeal. […]
>
> Our Adjudication disposed of all of CCN's claims regarding the permit. CCN has no continuing rights in the case or with respect to the remand for that matter. In short, our Adjudication may fairly be said to end the litigation, put the litigants out of court, and prevent the parties from presenting any further evidence on the merits of the original permit issuance. *Cf. Pittsburgh Bd. of Public*

> *Education v. PHRC*, 820 A.2d 838, 841 (Pa. Cmwlth. 2003) (interpreting analogous rule of appellate procedure).

Crum Creek Neighbors, 2010 EHB at 70. We think that the Board's decision in *Crum Creek* is consistent with the Commonwealth Court's approach in *Big B Mining* and supports our decision in this case that our Adjudication was final when it was issued for purposes of filing a fee petition.

Finally, the Board recently addressed a fee petition in a case where we issued an adjudication that included a remand to the Department. *Williams v. DEP*, EHB Docket No. 2018-067-C, (Opinion and Order on Application for Fees and Costs issued May 11, 2022). The Board in *Williams* issued an adjudication and order that remanded an NPDES permit back to the Department upon determining that the Department did not properly account for the regulatory riparian forest buffer requirements. Despite the remand, Ms. Williams submitted her fee application within 30 days of the issuance of our adjudication. The Department opposed the fee petition in *Williams* and argued that, because of the remand, the underlying adjudication was not a final order of the Board. *Williams*, *slip op*. at 3.[5] Ms. Williams argued that the adjudication was final for purposes of the fee application and that she had already prevailed in her appeal by obtaining the remand. *Id*. The Board ultimately sided with Ms. Williams on the issue of whether our adjudication was final stating "we find ourselves in general agreement with Ms. Williams that we could decide the fee application now…" *Id*. The Board decided to hold the fee application in *Williams* in abeyance as a matter of judicial prudence. However, that decision does not change the underlying determination that the Board could have decided the fee petition since our adjudication was final for purposes of ruling on the fee petition.

[5] We note that the Department's position on the finality of the adjudication in *Williams* was the opposite of the position that the Department takes in this case.

The issue of when a fee petition must be filed under the Costs Law is an issue of first impression for the Board. When we review the arguments and case law cited above, we conclude that even with a remand, the best approach is to treat our adjudications as final when issued for purposes of determining when a fee petition must be filed under the Costs Law. This approach is consistent with the interest of all parties to have issues like a request for fees out on the table as early in the process as possible. As we have pointed out, remands often can take several months to years to resolve at the Department level. Even more time can pass if the remand decision leads to a new appeal to the Board. It strikes us that waiting until the end of that process before requiring the presentation of a fee petition could create issues surrounding evidence and its proper presentation and evaluation that can be avoided by requiring filing of the fee petition within 30-days of when we issue our adjudications. We think that treating our adjudications as final upon their issuance in the context of filing a fee petition is what the legislature intended in the language it used in the Costs Law and is the course of action that parties have routinely followed in past matters involving fee petitions in front of the Board under both the Costs Law and our own rule governing the filing of fee petitions.

We find that Mr. Telegraphis' filing of his Fee Petition in this case was well beyond the 30-day time period provided for in the Costs Law. He was required to file his Fee Petition by December 6, 2021, but waited to do so until December 30, 2021. Therefore, it was untimely, and we will not consider his untimely request.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of June, 2022, it is hereby ORDERED that the Appellant's Petition for Award of Legal 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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: June 28, 2022

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

For the Commonwealth of PA:
Brian Greenert, Esquire
Michael Heilman Esquire
(*via electronic filing system*)

For Appellant:
Frank Magone, Esquire
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2022-022-CP-C**
v.	:	
DANIEL C. FROEHLICH II	:	**Issued: July 8, 2022**

OPINION AND ORDER ON
MOTION FOR ENTRY OF DEFAULT JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion for entry of default judgment where a defendant has not responded to the Department's complaint, a ten-day notice informing the defendant of the Department's intent to seek default judgment, or the motion for default judgment. The Board assesses a penalty against the defendant in the amount set forth in the Department's complaint.

O P I N I O N

On March 24, 2022, the Department of Environmental Protection (the "Department") filed a Complaint for Assessment of Civil Penalties against Defendant Daniel C. Froehlich II alleging that Froehlich conducted earthmoving activities at his property in Plumstead Township, Bucks County without developing an erosion and sedimentation control plan or implementing adequate erosion and sediment control measures, and that he failed to stabilize the site. (Complaint at ¶ 1.) The Department claims that Frohlich's actions resulted in the potential pollution of waters of the Commonwealth, namely, Hickory Creek, a Trout Stock Fishery stream. (*Id.* at ¶¶ 1, 6.) The complaint seeks a penalty in the amount of $24,140.00 for alleged violations

of the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and the erosion and sediment control regulations promulgated thereunder at Chapter 102 of Title 25 of the Pennsylvania Code.

Our Rules provide that complaints filed by the Department shall be served on the defendant by personal service or by certified or registered mail, 25 Pa. Code § 1021.71(b), and contain a notice of a right to respond or defend against the claims in the complaint, 25 Pa. Code § 1021.71(a) and (d). Answers to complaints are to 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, upon entry of default judgment by the Board, the Board is authorized to assess civil penalties against the defendant in the amount of the plaintiff's claim. 25 Pa. Code § 1021.76a(d); *DEP v. Jackson Geothermal HVAC and Drilling, LLC*, 2016 EHB 397, 398; *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.

Following the docketing of the Department's complaint, we issued our Pre-Hearing Order No. 1-CP, which was mailed out to Froehlich and advised him that an answer to the complaint was to be filed with the Board within 30 days of service of the complaint. On April 1, the Department filed an amended certificate of service, wherein, through an attached affidavit, the Department averred that it personally served Froehlich with the complaint at his place of business on March 28, 2022. The amended certificate of service also contained a certified mail receipt showing that the complaint was left with an individual at Froehlich's home address on March 29. Accordingly, under our Rules, Froehlich's answer to the complaint was due by April 27, 2022. No answer was ever filed.

The Department has now filed a motion for the entry of default judgment seeking default judgment for Counts I – V in its complaint in the amount of $24,140.00. Under our Rules, such a motion must contain a certification that the Department served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least ten days prior to filing the motion. 25 Pa. Code § 1021.76a(b). Apparently wasting no time after Froehlich's answer was due, on April 28, 2022 the Department mailed to Froehlich a notice of intent to seek default judgment after ten days. (Motion, Ex. 2.) The ten-day notice was delivered at Froehlich's home the next day on April 29. (Motion, Ex. 4.) Froehlich did not respond to the notice or file his answer to the complaint within the ten-day time frame to correct the default. 25 Pa. Code § 1021.76a(c).

The certificate of service accompanying the Department's motion for default judgment says that the motion was personally served on Froehlich at his workplace on May 13. Another amended certificate of service filed by the Department on May 18 reflects that the motion was mailed out to Froehlich on May 16 and delivered to his home on May 17. It is unclear whether the service by mail was in addition to the earlier personal service or whether the original certificate of service was incorrect. Under our Rules, a document served by mail is deemed served three days after it is mailed, meaning here, May 19. 25 Pa. Code § 1021.35(b)(3). Giving Froehlich the full benefit of the 30-day time period to respond to a dispositive motion, 25 Pa. Code § 1021.94(c), and taking into consideration the weekend on which the 30-day response period ended, and the observation of Juneteenth, Froehlich had until June 21, 2022 to file a response to the motion.

To date, Froehlich has never answered the complaint, has not responded to the ten-day notice, has not responded to the motion for default judgment, and has not otherwise participated

in this proceeding. Despite having had numerous opportunities, Froehlich has chosen not to defend himself against the complaint. We are left with no choice but to enter default judgment against Froehlich. *Turnbaugh*, 2014 EHB at 125; *Comp*, 2012 EHB at 344; *White Oak Reserve*, 2012 EHB at 77.

We do, however, note a discrepancy in the penalty amount between the Department's top line request of $24,140.00 and the total derived from adding up the amounts in the five counts of the complaint. Counts I and II seek civil penalties of $325.00 and $13,250.00, respectively, for various alleged violations of 25 Pa. Code § 102.4(b). (Complaint at ¶¶ 30-41.) Count III seeks a penalty of $2,600.00 for alleged violations of 25 Pa. Code § 102.22. (*Id.* at ¶¶ 42-48.) Count IV seeks a penalty of $5,280.00 for alleged violations of Section 402 of the Clean Streams Law, 35 P.S. § 691.402. (*Id.* at 49-52.) Count V seeks to recover $1,110.00 pursuant to Section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a), for costs and administrative fees allegedly incurred by the Bucks County Conservation District during its inspections of the Froehlich property. (*Id.* at ¶¶ 51-53.) Based on our calculations, the penalty amounts sought in the individual counts total $22,565.00, not $24,140.00. Therefore, we will assess a penalty of $22,565.00 as set forth in the five counts of the Department's complaint.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2022-022-CP-C**
v.	:	
DANIEL C. FROEHLICH II	:	

O R D E R

AND NOW, this 8th day of July, 2022, it is hereby ordered that the Department's motion for entry of default judgment is **granted**. The Board assesses a civil penalty against the Defendant in the amount of **$22,565.00**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 8, 2022

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

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
Peter A. Herrick, Esquire
(*via electronic filing system*)

For Defendant:
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(*via first class U.S. Mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS J. MCAULIFFE	:	
	:	
v.	:	**EHB Docket No. 2021-101-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 13, 2022**
	:	

OPINION AND ORDER ON
DISMISSAL OF APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of Appellant, Thomas J. McAuliffe, where Appellant has demonstrated an intent not to pursue the appeal and has otherwise failed to follow Board rules and orders.

O P I N I O N

Thomas J. McAuliffe ("Mr. McAuliffe") filed a pro se Notice of Appeal ("the Appeal") with the Environmental Hearing Board ("the Board") on October 26, 2021. The Appeal was filed on the Board's Notice of Appeal Form, was hand-written and difficult to read in places. In paragraph 2 of the Notice of Appeal Form that asks the appellant to describe the action of the Department of Environmental Protection ("the Department") for which the appellant is seeking review, Mr. McAuliffe provided the following: "I do not agree with the decision by Maurice Gardner from the mine [i]nsurance that the subsidence that occurred in my yard and damaged my pool was not caused by the mine 10 feet below the surface." (Mr. McAuliffe's Notice of Appeal at 1). It appeared from the Appeal, that Mr. McAuliffe failed to serve the Department, the Department officer that took the action, and the mining company involved in Mr. McAuliffe's

claim of mine subsidence, as the corresponding boxes that indicate method of service to these interested parties were not checked. On October 26, 2021, the Board issued its standard Prehearing Order No. 1. ("PHO-1") and an Order to Perfect the Appeal, ordering Mr. McAuliffe to serve the Department and the relevant mining company on or before November 15, 2021. The Department's counsel entered their appearance on November 1, 2021. The involved mining company never entered an appearance. On December 15, 2021, the Department filed a letter describing a settlement discussion with Mr. McAuliffe per the Board's PHO-1. The letter stated that the Department conducted a telephone call with Mr. McAuliffe on November 9, 2021, where Mr. McAuliffe indicated that he did not intend to pursue his Appeal. On January 31, 2022, Board's Assistant Counsel, Alisha Hilfinger ("Ms. Hilfinger"), emailed Mr. McAuliffe to verify whether or not he intended to pursue his appeal any further. In a return email, Mr. McAuliffe responded that he did not intend to pursue the Appeal. Ms. Hilfinger informed Mr. McAuliffe that if he did not wish to continue with the Appeal, the proper next step would be to submit a notice to withdraw to the Board. Mr. McAuliffe did not respond to this email or file a notice to withdraw to the Board. On June 13, 2022, after the deadlines for discovery and dispositive motions had passed, the Board scheduled a conference call with the parties on June 21, 2022. On the day of the call, Mr. McAuliffe failed to participate. On June 22, 2022, the Board issued a Rule to Show Cause, ordering Mr. McAuliffe to explain why his Appeal should not be dismissed as a sanction for failing to comply with the Board's Order to Perfect and for failing to comply with the Board's Order to participate in a conference call, or alternatively, requiring him to perfect his appeal on or before June 30, 2022. As of the date of this Opinion and Order, Mr. McAuliffe has failed to respond to the Board's Rule to Show Cause, it appears he has not served the mining company, nor has he filed a notice to withdraw the Appeal.

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

As is evident from the facts above, Mr. McAuliffe has failed to comply with three Orders of the Board and seems to have lost interest in pursuing his case. Initially, Mr. McAuliffe failed to serve the Department and the interested mining company a copy of his Appeal by November 15, 2021. Despite being afforded additional time by the Rule to Show Cause, Mr. McAuliffe still has not served a copy of his appeal to the interested mining company or provided an explanation as to why the Board should not dismiss the Appeal. Mr. McAuliffe did not file a response to the Board's Rule to Show Cause, nor did he file a request for more time following either the Order to Perfect, or the more recently issued Rule to Show Cause. An appellant's perfection of its appeal is an important step in proceeding in front of the Board. Mr. McAuliffe's failure to serve the mining company as required by the Order to Perfect, or in response to the Rule to Show Cause, his failure to participate in the June 21 conference call, and in addition, the email exchange Ms. Hilfinger conducted with Mr. McAuliffe, shows a clear intent not to proceed with the Appeal. When a party demonstrates an intent to no longer continue an appeal, we have found it is appropriate to consider the dismissal of the appeal. *Nitzschke*, 2013 EHB 861, 862. Mr. McAuliffe's apparent lack of interest in proceeding with his case, along with his failure to follow

the Board rules and three prior Orders make it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS J. MCAULIFFE	:	
	:	
v.	:	**EHB Docket No. 2021-101-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 13th day of July, 2022, it is hereby ordered that the Appeal is **dismissed** and the docket shall be marked as **closed**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 13, 2022

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

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

For Appellant:
733 N. Sumner Avenue
Scranton, PA 18504
(via U.S. first class mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC, Permittee	:	**Issued: July 21, 2022**

OPINION AND ORDER
ON PERMITTEE'S RENEWED MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board denies the Permittee's Renewed Motion to Dismiss where the new information brought forth by the Permittee is not free from doubt and does not show that the Appellant lacks standing as an individual as a matter of law.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board ("the Board") by Pennsylvania Senator Katie J. Muth ("Senator Muth"), challenging the issuance of Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. PA0276405 to Eureka Resources, LLC ("Eureka") by the Department of Environmental Protection ("the Department"). Eureka has proposed the construction and operation of an oil and gas liquid waste treatment facility located in Dimock Township, Susquehanna County. The permit authorizes Eureka to discharge wastewater to Tributary 29418 to Burdick Creek, a tributary of the Susquehanna River, in Susquehanna County. Senator Muth is

a Pennsylvania State Senator who represents District 44, which includes parts of Berks, Montgomery and Chester Counties. (Amended Notice of Appeal, para. 1, 2.) On April 12, 2022, Eureka filed a Motion to Dismiss on the basis that Senator Muth did not have standing to bring this appeal. Senator Muth filed a Response opposing the motion on May 12, 2022, and Eureka filed a Reply on May 13, 2022. The Department filed no response to the motion. In an Opinion and Order issued June 3, 2022, the Board granted in part and denied in part Eureka's Motion to Dismiss. The Board held that Senator Muth did not have representational standing or standing as a trustee pursuant to the Environmental Rights Amendment. However, the Board deferred ruling on Senator Muth's individual standing until further discovery was conducted. On June 7, 2022, Eureka filed a Petition for Reconsideration that the Board denied on June 8, 2022.

On June 15, 2022, Eureka filed a Renewed Motion to Dismiss ("Renewed Motion") and a Brief in Support seeking again to dismiss the appeal. On June 16, 2022, Attorney Mark L. Freed entered his appearance on behalf of Senator Muth and the following day, Attorney Lisa Johnson withdrew her appearance as counsel on behalf of the Senator. On June 17, 2022, the Board held a conference call with the parties to discuss the substitution of counsel and how to proceed with the case. On the same day, June 17th, Eureka filed an Amended Brief in Support of Renewed Motion to Dismiss. The Board issued an Order on June 21, 2022, staying this matter with exceptions for conducting discovery and filing dispositive motions on the issue of Senator Muth's individual standing and to address Eureka's Renewed Motion. Senator Muth filed a Response opposing the Renewed Motion on July 15, 2022, and Eureka filed a Reply on July 18, 2022. The Department filed no response to the Renewed Motion.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party; a motion to dismiss may be granted only where the moving party is entitled to judgment as a matter of law. *Downingtown Area Regional Authority v. DEP*, EHB Docket No. 2021-127-L, slip op. at 3 (Opinion and Order on Motion to Dismiss issued April 5, 2022) (citing *Burrows v. DEP*, 2009 EHB 20, 22); *Hopkins v. DEP*, EHB Docket No. 2021-067-B, slip op. at 2 (Opinion and Order on Motion for Partial Dismissal of Appeal issued April 1, 2022) (citing, *inter alia, Consol PA Coal Co. v. DEP*, 2015 EHB 48, 54). A motion to dismiss may only be granted when a matter is free from doubt. *Downingtown*, slip op. at 3 (quoting *Bartholomew v. DEP*, 2019 EHB 515, 517). Therefore, with these principles in mind, we evaluate Eureka's Renewed Motion and Senator Muth's Response.

Analysis

In its Renewed Motion, Eureka asks us for the third time to dismiss this case based on a claim that Senator Muth lacks standing to proceed with this appeal. The Board previously granted Eureka's motion to dismiss on the questions of representational standing and trustee standing pursuant to Article I, §27 of the Pennsylvania Constitution but denied the motion on the issue of her individual standing. We next denied a Petition for Reconsideration of our decision on individual standing. In this third attempt to get the appeal dismissed over the issue of standing, Eureka relies on two emails from Senator Muth's former counsel, Attorney Lisa Johnson. Eureka claims that those two emails, written while Attorney Johnson was still attorney of record for Senator Muth, clearly demonstrate that this was never an appeal by Senator Muth in her individual capacity and that this is fatal to her appeal. In her response, Senator Muth argues that the two emails are not part of the record in this case at this point in the proceeding and, as discussions among counsel, they are not relevant to the issue of standing. She further points out that in her

brief in response to the original motion to dismiss, her former counsel, on her behalf, set forth the basis for her individual standing and that this was recognized by the Board in its June 3, 2022, Opinion and Order.

We evaluate the Renewed Motion in the light most favorable to Senator Muth. In that light, we find that the "new and critical and dispositive" information that Eureka claims demonstrates that Senator Muth lacks standing to proceed with this case is not free from doubt and does not show that she lacks standing as an individual as a matter of law. Therefore, we hold that this Renewed Motion is denied. We are uncertain whether we should even consider the emails between counsel as part of the record in this case. While the Board's Assistant Counsel, Ms. Hilfinger, was copied on one of the two emails, they were not directed to the Board. They are not part of a sworn affidavit or otherwise produced under oath as part of discovery. We do not question the authenticity of the emails but remain unsure what to make of them and whether we can treat them as an official part of the record on which we can base a decision on a motion to dismiss for lack of standing. In the absence of consideration of those emails, nothing has changed from the time we reached our prior decision on the issue of Senator Muth's standing and we stand by our prior decision.

Even if we did choose to consider them, we do not think they clearly stand for the argument that Eureka is attempting to make in its Renewed Motion. At the time the emails were written, the case was in flux and the parties, along with the Board, were working through how to move forward in the case. Eureka had filed a motion requesting a limited stay of proceedings to conduct discovery on the issue of Senator Muth's individual standing. Responses to that motion were due on June 15, 2022. The first email, apparently written early in the morning of June 15th, asks for a 30-day stay of proceedings to allow Senator Muth to find substitute counsel stating that "[M]y

representation does not include proceeding on an individual basis." (Eureka's Renewed Motion, Ex. A). We find this email ambiguous as to the nature of Attorney Johnson's past representation of Senator Muth. One plausible reading of the email is that it explains the reason for Attorney Johnson not continuing in the case moving forward but provides no information about the past attorney client relationship. It does not unambiguously say that the representation never included representing Senator Muth in her individual capacity as Eureka argues. It only states that she will not be doing so going forward. The second email, apparently written in the early morning of June 15th after the first email, is only addressed to Department counsel. It primarily appears to be intended to convey to Department counsel that Attorney Johnson is no longer representing Senator Muth and instead she has two new clients who are claiming to have been impacted by the permitted facility. The second email does not unambiguously say that Attorney Johnson did not represent Senator Muth as an individual in the past, but only that she does not do so at the time of the second email.

Neither of the emails relied on by Eureka clearly say what Eureka wishes them to say. In order to grant the Renewed Motion, we would need to find that the emails clearly show that Senator Muth never had individual standing to bring this case. We do not think that we can draw that conclusion from the statements made by her former counsel in these two emails. As we have stated on two prior occasions, discovery and additional motions directed at the issue of Senator Muth's standing to pursue this appeal will assist the Board in resolving this question. The parties should proceed forward on that basis so that the Board can determine that issue based on a clear factual record.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC, Permittee	:	

O R D E R

AND NOW, this 21st day of July, 2022, it is hereby ordered that the Permittee's Renewed Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 21, 2022

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

For the Commonwealth of PA, DEP:
Ann Conserette, Esquire
Michael T. Ferrence, Esquire
(via electronic filing system)

For Appellant:
Mark L. Freed, Esquire
(via electronic filing system)

For Permittee:
Paul J. Bruder, Jr., Esquire
Aaron D. Martin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 1, 2022**

OPINION AND ORDER ON
APPELLANT'S MOTION TO COMPEL APPELLEE/DEP TO COMPLY WITH 25 PA. CODE SECTION 89.143a

By Steven C. Beckman, Judge

Synopsis

The Board denies appellant's motion to compel where the Board finds that the Department's actions following remand by the Board are consistent with the remand.

O P I N I O N

The Board issued a final Adjudication and Order in this matter on November 4, 2021 ("Adjudication"). The Adjudication granted Mr. Telegraphis' appeal and remanded the matter to the Department to determine whether mine subsidence caused damage to Mr. Telegraphis' commercial structure and, if subsidence had occurred, a determination of liability for the damage. Both parties acknowledge in their recent filings that the Department has undertaken a further investigation of the mine subsidence claim in accordance with our remand instructions and that the investigation is ongoing at this time. Mr. Telegraphis is apparently not satisfied with the Department's investigation and has filed a Motion to Compel Appellee/DEP to Comply with 25 Pa. Code Section 89.143a. ("Motion") seeking to have us direct the Department to comply with certain claim procedures. The Board has reviewed the parties' filings addressing the Motion and

holds that the Motion is denied.

It is unclear whether the Board has continuing jurisdiction over this case and the remand activities following our issuance of the Adjudication back in November 2021 and we find that it is unnecessary for us to decide that question here. The actions taken by the Department following our Adjudication are consistent with the remand and appear to be reasonably aimed at determining the subsidence damage claim made by Mr. Telegraphis. The Board does not intend to micromanage that investigation and finds that the appropriate role for us at this point is to allow the process to play out until the Department has made a final determination on the claim. Any party that is aggrieved by the Department's eventual determination of whether mine subsidence caused damage to Mr. Telegraphis' commercial building may appeal that decision to the Board at the appropriate time in accordance with the Board's rules governing appeals of Department actions.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of August 2022, following review of Mr. Telegraphis' Motion to Compel the Department to Comply with 25 Pa. Code Section 89.143(a) and his Brief in Support and the Department's Response and Memorandum in Support thereto, the motion is hereby **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 1, 2022

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

For the Commonwealth of PA:
Brian Greenert, Esquire
Michael Heilman Esquire
(*via electronic filing system*)

For Appellant:
Frank Magone, Esquire
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARL F. GROVE, JR., ET AL.	:	
	:	
v.	:	**EHB Docket No. 2022-025-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RIDGE VIEW CAMPGROUND, Permittee	:	**Issued: August 2, 2022**

OPINION AND ORDER ON
RULE TO SHOW CAUSE

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses several appellants from an appeal where they have not provided the Board with a mailing address to effectuate service upon them and they have not indicated their interest in continuing with the appeal or otherwise participated in these proceedings.

O P I N I O N

On May 3, 2022, the Board received a notice of appeal on our notice of appeal form from a group of Appellants. On the appeal information page, which requests the name, address, and telephone number of the appellant, three names were listed: Carl F. Grove, Jr., Ken Stewart, and Andrew Grove, along with their phone numbers and email addresses, but without any mailing addresses. The appeal form was signed by Carl F. Grove, Jr. Although no action of the Department of Environmental Protection (the "Department") was attached to the appeal, the appeal form identified the action under appeal as an approval to construct a transient noncommunity water system in Juniata Township, Huntingdon County. However, two pages were attached to the form with the heading of "Juniata Township Residents Appealing DEP decision on New Transient Noncommunity Water System for Ridgeview Campground." The pages contained the printed

names and signatures of 22 additional people along with their phone numbers.[1] Seven of the people also included their email addresses. We docketed the appeal as having been filed by all 25 Appellants.

On May 9, 2022, we received another copy of the notice of appeal form, but this time it was submitted and signed by counsel, David A. Ody, Esquire, and it contained a cover letter and attached the action under appeal—an April 5, 2022 letter from the Department approving Ridge View Campground's application to construct a new transient noncommunity water system with certain special conditions, along with the Department's review memorandum. The notice of appeal form was otherwise identical to the one we received days earlier, with the same three Appellants listed on the first page of the form and the same additional sheets with the 22 other Appellants. We docketed the May 9 notice of appeal form as an amended notice of appeal and listed Mr. Ody as counsel for all 25 Appellants.

On May 13, 2022, Mr. Ody filed a praecipe to withdraw his appearance as to all of the Appellants. On May 20, the Department filed a response to the praecipe to withdraw. The Department noted that Mr. Ody's withdrawal would leave the 25 Appellants without counsel. The Department pointed to our Rule at 25 Pa. Code § 1021.23 governing a withdrawal of appearance and its requirement that a motion be filed to withdraw an appearance if the appearance of new counsel is not simultaneously entered. The Department noted that, in leaving the Appellants unrepresented, Mr. Ody did not provide the Board with a single contact person for future service as required by 25 Pa. Code § 1021.23(c). The Department stated that, without a single contact person, it would not be able to serve all 25 Appellants since none of them provided a mailing

[1] The 22 names were: Mary Alleman, Joseph Biddle, Harlan Byers, Patricia Byers, Rob Cresswell, Joe Dinardi, Ken Fouse, Brenda Grove, Kristen Grove, Randall Grove, Gloria Miller, McKenzie Miller, Richard Norris, Gisela Peace, Ralph Peace, Rachel Peters, Cheryl Prince, Peter Prince, Bill Shank, Doris Shank, John Shovlin, and Chad Snare.

address and only a handful provided an email address. The Department requested that the Board hold a conference call before deciding the praecipe to withdraw.

On May 26 we issued an Order scheduling a conference call on June 1. We served the Order on the Department via our electronic filing system, on Mr. Ody via e-mail, and on Ridge View Campground (which at that point was unrepresented) via first class mail. Staff from the Board then placed phone calls to all 25 of the Appellants to inform them of the conference call and provide them with the information to dial into the call. Board staff spoke with several of the appellants directly and left voice messages with the rest. One of the Appellants, Ken Fouse, informed the Board staff that he would not be participating in the call and no longer wished to be involved in the appeal. Another of the Appellants, Carl Grove, stated that he would walk around the community to make sure other Appellants had the information for the call.

We held the call on the afternoon of June 1. Participating in the call were Mr. Ody, counsel for the Department, counsel for Ridge View Campground, and the following Appellants: Carl Grove, Andrew Grove, Ken Stewart, Richard Norris, Peter Prince, Cheryl Prince, John Shovlin, Brenda Grove, Randall Grove, and Harlan Byers. The remaining 15 Appellants did not participate in the call. On the call, for the benefit of the Appellants, we explained how the Board functions and how the appeal process plays out. We also explained the representation rules and that appellants can proceed *pro se* and represent their own individual interests, but that a non-attorney could not individually represent the interests of an entire group of people.

Addressing the praecipe to withdraw, Mr. Ody explained that he only sent in the notice of appeal documents on behalf of Appellant Joseph Biddle, not the other Appellants. He stated that he only agreed to send in the notice of appeal form because the appeal deadline was approaching, and that it was his understanding that the Appellants would be obtaining counsel that had more

familiarity with environmental law. Mr. Ody said Appellant Carl Grove had advised him that the Appellants had obtained other counsel and Mr. Ody had requested that Mr. Grove have that person enter an appearance in the matter.

Mr. Grove, who signed the original notice of appeal form, stated on the call that some of the Appellants were in discussion with Attorney Paul Bruder and that documents were being finalized for the representation. Mr. Grove also stated that some people who signed the "petition" that was submitted with the notice of appeal form no longer wanted to continue with the appeal process because of financial reasons and concerns over legal liability. Mr. Grove further stated that he released Mr. Ody from representing him and any of the other Appellants, and that it was the intention of the Appellants to obtain the services of Paul Bruder. At the conclusion of the conference call, we obtained the mailing addresses of those Appellants participating in the call. However, some of the Appellants exited the call without providing their mailing address.

Following the call, we issued an Order requiring the Appellants to obtain new counsel, or to provide a list of the names of the Appellants who wished to proceed with the appeal and appear on their own behalf along with their mailing addresses and telephone numbers. We gave the Appellants until June 15, 2022 to comply. We served the Order on all of the Appellants whose addresses we obtained on the conference call.

On June 13, Paul J. Bruder, Jr., Esquire entered an appearance on behalf of the following Appellants: Carl F. Grove, Jr., Ken Stewart, Andrew Grove, John Shovlin, Kristen A. Grove, Brenda S. Grove, and Randall L. Grove. We did not receive any correspondence from any of the other Appellants by June 15 indicating a desire to proceed *pro se*. On June 17, we issued an Order granting Mr. Ody's withdrawal from the appeal.

On June 29, 2022, we issued a Rule to Show Cause wherein we noted that no individual Appellants had responded to our June 1 Order requiring them to inform us if they wished to proceed in this appeal *pro se*. We gave the unrepresented Appellants until July 20, 2022 to provide us with a statement indicating their intention to proceed with the appeal along with their mailing address. We warned the Appellants that they risked having the appeal dismissed as to them if they did not respond. We mailed out the Rule to Show Cause to the unrepresented Appellants whose addresses we had and we emailed it to those whose email addresses we had from the notice of appeal form. To date, none of the unrepresented Appellants has responded to our Order or Rule to Show Cause or has expressed any interest in continuing with the appeal.

Under our Rules, an appellant is required to provide their name, mailing address, e-mail address, and telephone number when they file their notice of appeal. 25 Pa. Code § 1021.51(c). Under 25 Pa. Code § 1021.52(b), a failure to provide this information provides grounds for dismissal: "The appellant shall, within 20 days of the mailing of a request from the Board, file missing information required under § 1021.51(c), (d) and (k) (relating to commencement, form and content) or suffer dismissal of the appeal." There is an obvious reason why our Rules require appellants to provide their contact information: without a mailing address we cannot serve our orders or opinions on the Appellants. Nor can the other parties to this appeal serve the Appellants with discovery or other communications. Having a means by which to serve a party with documents is foundational to any legal proceeding.

We have frequently dismissed appeals when an appellant has failed to perfect their appeal by providing all of the necessary information and then does not respond to subsequent orders of the Board requesting that information. *See McAuliffe v. DEP*, EHB Docket No. 2021-101-B (Opinion and Order, July 13, 2022) (dismissing appeal where appellant failed to perfect appeal by

serving it on the Department and a mining company and appellant seemed to lose interest in the appeal); *King v. DEP*, EHB Docket No. 2021-102-L (Opinion and Order, Jan. 24, 2022) (dismissing appeal where appellants failed to provide any information required for a notice of appeal under 25 Pa. Code § 1021.51 and indicated they were no longer interested in pursuing their appeal). We often find that an appellant does not express any interest in continuing to participate in the appeal process and we are forced to dismiss the appeal.

Here, many of the Appellants did not perfect their appeal by providing us with a mailing address. We have attempted to reach these Appellants by phone and email. Many chose to ignore our Order to participate in the conference call and have subsequently ignored our requests to provide us with a mailing address and a statement that they want to continue with this appeal. Of the two unrepresented Appellants who gave us their address, neither has responded to our June 1 Order or our Rule to Show Cause. We have no choice but to conclude that the 18 unrepresented Appellants no longer wish to be involved in the appeal. The overall appeal will continue with the represented Appellants, but it will not include the Appellants who have chosen not to engage in the process and/or perfect their appeal by providing the Board and the other parties with a means by which to effectuate service.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARL F. GROVE, JR., ET AL.	:	
	:	
v.	:	**EHB Docket No. 2022-025-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RIDGE VIEW CAMPGROUND, Permittee	:	

O R D E R

AND NOW, this 2nd day of August, 2022, it is hereby ordered that the following Appellants are dismissed from this appeal: Mary Alleman, Joseph Biddle, Harlan Byers, Patricia Byers, Rob Cresswell, Joe Dinardi, Ken Fouse, Gloria Miller, McKenzie Miller, Richard Norris, Gisela Peace, Ralph Peace, Rachel Peters, Cheryl Prince, Peter Prince, Bill Shank, Doris Shank, and Chad Snare. The caption of the appeal will remain the same.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 2, 2022

c: **For the Commonwealth of PA, DEP:**
Dennis Yuen, Esquire
David N. Smith, Esquire
(*via electronic filing system*)

For Appellants:
Carl F. Grove Jr., Ken Stewart, Andrew Grove, John Shovlin, Kristen A. Grove, Brenda S. Grove, and Randall L. Grove:
Paul J. Bruder, Jr. Esquire
(*via electronic filing system*)

Richard Norris
6205 Parks Road
Huntingdon, PA 16652
(*via first class U.S. mail*)

Peter Prince
3857 Green Valley Rd.
Seven Valleys, PA 17360
(*via first class U.S. mail*)

Gloria Miller
(*via electronic mail*)

Joseph Biddle
(*via electronic mail*)

Joe Dinardi
(*via electronic mail*)

For Permittee:
Mark Lingousky, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 9, 2022**

OPINION AND ORDER ON
APPELLANT'S MOTION TO COMPEL DRILLING

By Steven C. Beckman, Judge

Synopsis

The Board denies appellant's motion to compel where the Board finds that the Department's actions following remand by the Board are consistent with the remand and where the requested relief is now moot.

O P I N I O N

The Board issued a final Adjudication and Order in this matter on November 4, 2021 ("Adjudication"). The Adjudication granted Mr. Telegraphis' appeal and remanded the matter to the Department to determine whether mine subsidence caused damage to Mr. Telegraphis' commercial structure and, if subsidence had occurred, a determination of liability for the damage. Both parties acknowledge in their recent filings that the Department has undertaken a further investigation of the mine subsidence claim in accordance with our remand instructions and that the investigation is ongoing at this time. Mr. Telegraphis is clearly not satisfied with the way the Department's investigation is proceeding. We recently denied a motion from Mr. Telegraphis that requested that the Board direct the Department to comply with certain claim procedures.

Telegraphis v. DEP, EHB Docket No. 2020-012-B (Opinion and Order, August 1, 2022). While our ruling on that motion was pending, Mr. Telegraphis filed this new Motion to Compel Drilling ("Motion"). As we understand it, the Department planned to conduct a geotechnical exploration project on Mr. Telegraphis' property as part of the investigation. In order to access the property, the Department proposed that the parties execute a document entitled "Consent for Right of Entry" ("Entry Agreement"). Mr. Telegraphis and the Department have not been able to reach an agreement on the terms for the Entry Agreement. In his Motion, Mr. Telegraphis requests that the Board issue an order that "addresses the rights of the parties." Mr. Telegraphis' Motion at 3. While it is not entirely clear what Mr. Telegraphis wants in his Motion, the Board reads the Motion as requesting that the Board order the Department to conduct the proposed project and decide the specific terms of the right of entry agreement. The Board has reviewed the parties' filings addressing the Motion and holds that the Motion is denied.

As we said in our recent decision on the prior motion to compel, the actions taken by the Department following our Adjudication are consistent with the remand and appear to be reasonably aimed at determining the subsidence damage claim made by Mr. Telegraphis. *Telegraphis v. DEP*, EHB Docket No. 2020-012-B, slip op. at 2, (Opinion and Order, August 1, 2022). The Board does not intend to micromanage that investigation and does not think it appropriate or necessary to dictate the manner of that investigation or specific terms of any agreements between the parties that may be required to carry out the investigation. In this specific instance, our denial of the Motion is further supported by the fact that the Department has now decided not to pursue the geotechnical exploration project, rendering the issue concerning the terms of the Entry Agreement moot. Department's Response to Motion to Compel Drilling at 3. The appropriate role for us at this point is to allow the investigation process to play out until the Department has made a final

determination on the claim. Any party that is aggrieved by the Department's eventual determination of whether mine subsidence caused damage to Mr. Telegraphis' commercial building may appeal that decision to the Board at the appropriate time in accordance with the Board's rules governing appeals of Department actions.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2020-012-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 9th day of August 2022, following review of Mr. Telegraphis' Motion to Compel Drilling and his Brief in Support and the Department's Response and Memorandum in Support thereto, the motion is hereby **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 9, 2022

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

For the Commonwealth of PA:
Brian L. Greenert, Esquire
Michael J. Heilman Esquire
(*via electronic filing system*)

For Appellant:
Frank D. Magone, Esquire
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL RITSICK AND DONNA DUBICK, EXECUTOR OF THE ESTATE OF DAVID G. DUBICK	:	
v.	:	**EHB Docket No. 2022-036-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 22, 2022**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion to dismiss filed by the Department. The Department has not shown that one of the Appellants lacks standing or that the appeal should be dismissed due to a lack of counsel on behalf of the Appellants.

O P I N I O N

On May 20, 2022, the Board received a notice of appeal by fax filed by Paul Ritsick and Donna Dubick, Executor of the Estate of David G. Dubick (collectively, the "Appellants"), proceeding *pro se*. On May 26, we received by mail a notice of appeal with additional documentation that we docketed as an amended appeal. The Appellants have appealed a letter from the Department of Environmental Protection (the "Department") issued to Butler Township in Luzerne County, in which the Department determined that a subdivision proposed by the Appellants is not eligible for an exemption from full sewage facilities planning and a revision to Butler Township's Act 537 Plan. The letter denied the Appellants' application for the planning exemption. The Appellants argue in their appeal that the Department erred in denying the

application and they assert that the subdivision does qualify for a planning exemption under the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, and the sewage planning regulations, specifically 25 Pa. Code § 71.51.

The Appellants' notice of appeal and amended notice of appeal were signed by Paul Ritsick but not Donna Dubick. According to the notice of appeal, Mr. Ritsick and Ms. Dubick are cousins. At the beginning of the notice of appeal form is the following statement, where Mr. Ritsick says that he is filing the appeal "on behalf of" Ms. Dubick:

> I am filing this appeal on behalf of my cousin, Donna Dubick who is the Executor of the Estate of David G. Dubick. The property to be subdivided is currently owned by the Estate. Donna is undergoing treatment for cancer and had asked me to file this appeal on her behalf. Mr. Brutosky the engineer/surveyor who submitted the original "mailer" application to DEP is recovering from recent heart surgery. I am very familiar with all matters concerning the Estate and the subdivision proposal.

(Notice of Appeal at 1.) Almost exclusively based on this statement, the Department has now filed a motion to dismiss the appeal, arguing that Mr. Ritsick lacks standing to be an appellant and that he cannot represent Ms. Dubick since he is not an attorney. The Department asserts that the Appellants' lack of counsel requires dismissal of the appeal. The Appellants have filed a response opposing the Department's motion. The Appellants argue that Mr. Ritsick does have standing to pursue this appeal, that he is not representing Ms. Dubick, and that Ms. Dubick is representing herself. The Department elected not to file a reply brief in support of its motion as permitted under our Rules. *See* 25 Pa. Code § 1021.94(d). For the reasons explained below, we deny the Department's motion.

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Downingtown Area Regional Auth. v. DEP*, EHB Docket No. 2021-127-L, slip op. at 3 (Opinion and Order, Apr. 5, 2022); *Burrows v. DEP*, 2009 EHB 20, 22. For the purposes of

resolving motions to dismiss, the Board accepts the non-moving party's version of events as true. *Lawson v. DEP*, 2018 EHB 513, 514-515; *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54 (citing *Ehmann v. DEP*, 2008 EHB 286, 390). A motion to dismiss will be granted only when a matter is free from doubt. *Muth v. DEP*, EHB Docket No. 2022-015-B, slip op. at 2 (Opinion and Order, June 3, 2022); *Bartholomew v. DEP*, 2019 EHB 515, 517.

Standing

If the issue of standing "is raised in a motion to dismiss early in the case, we essentially accept all of the appellant's allegations as true and decide whether the opposing party is nevertheless entitled to judgment as a matter of law." *Giordano v. DEP*, 2000 EHB 1184, 1187. A person has standing if they have a substantial, direct, and immediate interest in the outcome of the appeal. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Wilson v. DEP*, 2014 EHB 1, 2. Thus, a person must have an interest that is greater than the abstract interest of all citizens in having others comply with the law, and there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016); *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). In other words, there must be "some discernable adverse effect" to a person's interest and that interest must not be remote. *William Penn Parking*, 346 A.2d at 282, 286; *Borough of Glendon v. Dep't of Envtl. Prot.*, 603 A.2d 226, 231 (Pa. Cmwlth. 1992). "The keystone to standing…is that the person must be negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

The Department asserts that, in the Appellants' notice of appeal, Mr. Ritsick does not "claim to be or show he is directly impacted by the Denial Letter." (DEP Memo. at 4.) Therefore,

the Department concludes, "Mr. Ritsick does not have standing to challenge this matter, and the appeal should be dismissed."[1] (*Id.*) In their response to the Motion to Dismiss, the Appellants say that Mr. Ritsick does have standing because he has lent the Estate of David G. Dubick tens of thousands of dollars. They say there is a promissory note between the Estate and Mr. Ritsick to provide funds to the Estate and that Mr. Ritsick will be paid back once the Estate property is sold. There is some suggestion in the response that the property will not be sold until the subdivision is completed, which is contingent on the sewage needs being addressed.

As we have said repeatedly now, an appellant is not required to plead standing in a notice of appeal. "There is no requirement in the Board's rules requiring an appellant to aver facts sufficient to show that it has standing in its notice of appeal." *Winner v. DEP*, 2014 EHB 135, 140 (quoting *Ziviello v. DEP*, 2000 EHB 999, 1003). In *Winner*, we denied a motion to dismiss filed by the Department seeking to dismiss an appeal due to an alleged lack of standing. We found that the Department was mistaken to simply rely on what was contained in a notice of appeal to make its standing challenge, and pointed out that no discovery had been conducted:

> It is additionally important to note the current procedural posture of this matter. The Department proceeded to file its Motion to Dismiss relying exclusively on the alleged shortcomings in Winner's Notice of Appeal. The Department did not attach any discovery responses from Appellant Winner regarding the issue of standing to its motion, and the Board has no indication whether the Department has conducted any discovery in the matter.

Winner, 2014 EHB at 140-41.

The same is true here. We have no indication that the Department conducted any discovery before filing its motion. The Department has not attached any exhibits to its motion or provided anything in support of its claim that Mr. Ritsick does not have standing beyond the above-quoted

[1] The Department appears to take the position that the entire appeal should be dismissed if Mr. Ritsick lacks standing, not that only Mr. Ritsick should be dismissed from the appeal.

statement from the notice of appeal. "A motion to dismiss made prior to any discovery even having been taken is obviously too early to dispositively determine the question of standing." *Cooley v. DEP*, 2004 EHB 554, 559. We do not need to decide here whether or not Mr. Ritsick has standing. It is enough to find that, viewing the motion in the light most favorable to the Appellants, as we are required to do, the Department has not met its burden to show that Mr. Ritsick does not have standing and this appeal should be dismissed for that reason.

Representation

Under our Rules, "[p]arties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint." 25 Pa. Code § 1021.21(a). The Department's contention that Ms. Dubick must obtain counsel consists of a single paragraph in its memorandum of law, the bulk of which is a quote of the above rule and a citation to another Board case without any analysis. The entirety of the Department's argument is essentially this one sentence: "Since Mr. Ritsick is not an attorney, Ms. Dubick is required to obtain counsel, or the appeal should be dismissed for a violation of Board Rule 1021.21(a)." (Memo. at 3.) We note that this argument is somewhat inconsistent with a statement in the Department's motion that "Ms. Dubick *must represent herself* or obtain counsel to proceed in this matter before the Board." (Mot. at ¶ 7 (emphasis added).)

The Appellants say that Mr. Ritsick is not representing Ms. Dubick as her attorney. The Appellants maintain that Ms. Dubick is appearing on her own behalf and representing herself. They say that Mr. Ritsick is "assisting" Ms. Dubick because Ms. Dubick was not physically or mentally capable of filing the appeal due to ongoing medical treatments and that Mr. Ritsick "will continue to assist Ms. Dubick." (Resp. at ¶¶ 6, 8.)

Other than relying on the statement from the notice of appeal, the Department has not shown that Ms. Dubick is not representing herself, or that Mr. Ritsick is effectively acting as her counsel. We are not convinced based on the notice of appeal statement alone that Mr. Ritsick is in fact "representing" Ms. Dubick. With that said, we are not sure what the Appellants mean when they say Mr. Ritsick is "assisting" Ms. Dubick. The Department has not provided any analysis in its motion of exactly what constitutes the unauthorized practice of law. *See generally Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162, 166-67 (Pa. 2007) (broadly discussing what may constitute the practice of law). While we are not unsympathetic to Ms. Dubick's medical condition, if she is representing herself, she needs to be engaged in these proceedings. For instance, in the settlement statement filed by the Department in accordance with Paragraph 5 of our Pre-Hearing Order No. 1 issued in this case, the Department's letter states, "Mr. Paul Ritsick, Appellant, confers [sic] with the above statement." (Docket Entry No. 6.) It does not reflect Ms. Dubick's participation in the settlement discussions or her concurrence in the statement filed by the Department on behalf of the parties.

However, even if we were, at this juncture, to find that Mr. Ritsick is "representing" Ms. Dubick in this matter, the likely immediate remedy would not be the outright dismissal of this appeal, but rather to tell him to stop, or to afford the Appellants a reasonable period of time in which to obtain legal counsel. *See Bisher v. Lehigh Valley Health Network, Inc.*, 265 A.3d 383, 409 (Pa. 2021) ("We adopt the view that any instance of unauthorized practice of law is curable in the court's discretion pursuant to the principles outlined herein.").[2]

[2] The Department's motion does not address anything regarding the Estate of David G. Dubick. The notice of appeal form does not appear to identify the Estate as an appellant. We do not know whether Mr. Ritsick and Ms. Dubick are advancing the interests of the Estate or their own, individual interests. *See, e.g.*, *Bisher*, 265 A.3d at 390 ("Conceptually, the estate itself is the plaintiff and, for largely the same reasons that corporate entities must be represented by a lawyer, an attorney must represent the estate."). Attachment E to a letter attached to the Appellants' amended notice of appeal appears to be the application for planning

Even if it has not been shown at this point that one or more of the Appellants is required to be represented by counsel, we think that the Appellants might nevertheless benefit from having counsel. *See* 25 Pa. Code § 1021.21(c) (individuals may appear on their own behalf but "are encouraged to appear through counsel"). The Pennsylvania Bar Association's Environmental and Energy Law Section offers assistance in securing pro bono representation to qualifying individuals. Information regarding the pro bono program is contained in the instructions appended to the Board's notice of appeal form. The pro bono program does have its restrictions:

> In order to initially qualify for consideration for pro bono representation under the PBA [Pennsylvania Bar Association] program, the pro se party must meet certain requirements, including having limited financial resources. Parties are usually asked to provide relevant financial information, including tax returns, from which the PBA pro bono coordinator can determine the eligibility of the party for consideration for pro bono representation. Many pro se parties fail to provide the relevant financial information or otherwise do not meet the program guidelines for representation and therefore, no referral is made. Even if the pro se party meets the program requirements, there is no guarantee that pro bono counsel willing to represent the party will be found to handle the matter.

Schlafke v. DEP, 2013 EHB 386, 388-89 (footnote omitted). However, it still may be worthy of the Appellants' exploration as this appeal moves forward.

In short, the Department's motion fails to meet the standard for a motion to dismiss to convince us that Mr. Ritsick lacks standing as an appellant, that Mr. Ritsick is acting to represent the interests of Ms. Dubick, or that either Ms. Dubick or Mr. Ritsick is required to obtain legal counsel.

Accordingly, we issue the Order that follows.

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exemption that was submitted to the Department. The "Name of Development" is listed as "Dubick Estate Minor Subdivision." However, the "Developer Name" is listed as Donna Dubick. This suggests that it might be Ms. Dubick and not the Estate itself seeking the planning exemption. Here again, discovery could potentially shed some valuable light.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL RITSICK AND DONNA DUBICK, EXECUTOR OF THE ESTATE OF DAVID G. DUBICK	:	
v.	:	**EHB Docket No. 2022-036-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 22nd day of August, 2022, it is hereby ordered that the Department's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: August 22, 2022

c: **For the Commonwealth of PA, DEP:**
Ann T. Conserette, Esquire
(*via electronic filing system*)

For Appellants:
Paul Ritsick
(*via electronic filing system*)

Donna Dubick
757 St. John's Road
Drums, PA 18222
(*via first class U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND CENTER FOR BIOLOGICAL DIVERSITY	:	
v.	:	**EHB Docket No. 2021-055-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENOVO ENERGY CENTER, LLC, Permittee	:	**Issued: August 29, 2022**

OPINION AND ORDER ON APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

Partial summary judgment is granted to the Appellants on the question of whether the sulfur dioxide and volatile organic compound limits in a plan approval fail to meet the requisite air quality standards. The Appellants have demonstrated that there are no material facts in dispute and they are entitled to summary judgment as a matter of law.

O P I N I O N

Introduction

This matter involves an appeal filed by Clean Air Council, Citizens for Pennsylvania's Future and Center for Biological Diversity (Appellants) challenging an air quality plan approval issued by the Department of Environmental Protection (Department) to Renovo Energy Center, LLC (Renovo Energy Center or Permittee). The plan approval allows the construction and operation of a 1,240 megawatt two-unit dual-fueled electric power plant in the Borough of Renovo, Clinton County, Pennsylvania. Each unit contains a combustion turbine and heat recovery steam

generator with natural gas fired duct burners. The facility is dual-fueled in that it can be fueled by either natural gas or ultra-low sulfur diesel. According to Renovo Energy Center, the facility will be powered by natural gas, but will also be capable of running on ultra-low sulfur dioxide for brief periods when there is an interruption in the natural gas supply. This plan approval is a modification of an earlier plan approval that authorized a 950 megawatt facility without duct burners.

Renovo Energy Center has filed a motion for summary judgment, while the Appellants and the Department have moved for partial summary judgment. The parties have filed responses and replies, and the motions are ripe for disposition. This Opinion addresses the Appellants' Motion for Partial Summary Judgment.

Summary Judgment Standard

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1-1035.2; *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43, 45 (citing *Williams v. DEP*, 2019 EHB 764, 765-66); *Camp Rattlesnake v. DEP,* 2020 EHB 375, 376. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sunoco Pipeline*, 2021 EHB at 45; *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406).

Required Control Technologies

The Appellants assert that there are two errors in emissions limits in the plan approval that are appropriate for resolution by summary judgment. They contend that, based on the applicable

law and evidence in the record, the plan approval sets the emissions limits too high for (1) sulfur dioxide from the combustion turbines and (2) volatile organic compounds from the auxiliary boilers.

Emissions rates set in air quality plan approvals are to be minimized in accordance with state and federal standards set forth in Pennsylvania's Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001 *et seq.*, and the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.[1] When a plan approval authorizes a new emissions source at a certain level, the federal New Source Review program applies. 25 Pa. Code §§ 127.81 *et seq*. and 127.201 *et seq*. If the new source is in an area that attains the National Ambient Air Quality Standards for a particular pollutant, the Prevention of Significant Deterioration program applies. 42 U.S.C. §§ 7470-7492; 40 CFR, Part 52; 25 Pa. Code, Chapter 127, Subchapter D. If the source is located in an area that does not attain those air pollution standards, the Nonattainment New Source Review program applies. 42 U.S.C. §§ 7501 *et seq*.; 25 Pa. Code, Chapter 127, Subchapter E.

Where the new source would emit a pollutant that is not too prevalent in the ambient air in the area, i.e., an attaining pollutant, the applicant must lower its emissions to a standard known as Best Available Control Technology. 42 U.S.C. § 7475(a)(4); 25 Pa. Code § 127.83. For nonattaining pollutants, a new pollution source must achieve the Lowest Achievable Emissions Rate. 42 U.S.C. §§ 7501(3); 7503(a)(2); 25 Pa. Code § 127.205(1). Additionally, Pennsylvania has its own standard, known as Best Available Technology. 25 Pa. Code § 121.1. All three standards require some form of minimization of pollution from proposed new facilities.

[1] The parties' briefs contain well-drafted summaries of the control technologies required by state and federal law and we borrow from them here. Additionally, the Board appreciates the parties' limited use of acronyms in their filings.

Waiver of Issues

Before turning to the specifics of the Appellants' motion, we first address Renovo Energy Center's contention that the Appellants have waived all arguments pertaining to Best Available Technology. Renovo Energy Center asserts that, while the Appellants' notice of appeal raises objections pertaining to Best Available Control Technology and Lowest Achievable Emissions Rate, it raises no objection pertaining to Best Available Technology.

As noted above, Best Available Control Technology and Lowest Achievable Emissions Rate are federal standards that have been incorporated into Pennsylvania's air program. Additionally, Pennsylvania's Air Pollution Control Act authorizes the Department "to require that new sources [of air pollution] demonstrate in the plan approval application that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, by using the best available technology." 35 P.S. § 4006.6(c). Pennsylvania's air regulations require that an application for plan approval must show that "the emissions from a new source will be the minimum attainable through the use of the best available technology." 25 Pa. Code § 127.12(a)(5). Best Available Technology is defined as "[e]quipment, devices, methods or techniques as determined by the Department which will prevent, reduce or control emissions of air contaminants to the maximum degree possible and which are available or may be made available." 25 Pa. Code § 121.1.

Renovo Energy Center is correct that objections not raised in a party's notice of appeal are waived. *Clean Air Council v. DEP*, 2019 EHB 417, 420. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367-68; *Rhodes v. DEP*, 2009 EHB 325, 327-28. However, objections raised in general terms are sufficient. *Croner, Inc. v. Department of Environmental Protection*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991). As we stated in *Clean Air Council*, 2019 EHB at 420, "notices of appeal

are to be read broadly, and we will be reluctant to find waiver so long as an objection falls within the 'genre of the issue' contained in the notice of appeal."

The Appellants argue that Best Available Technology, Best Available Control Technology and Lowest Achievable Emissions Rate, as applied to emissions limits, are all within the same "genre of issue," i.e., the regulatory analysis for determining appropriate air pollutant technology and emissions limitations under the New Source Review program. They point out that the Department often combines all three standards into one analysis, citing, e.g., the Department's Application Review Memo for Plan Approval where several sections combine the analysis for the three standards. (Ex. B to Appellants' Motion for Partial Summary Judgment). Moreover, Best Available Control Technology has been referred to as "the federal analog of [Best Available Technology]." *Residents Opposed to Black Ridge Incinerator* (*ROBBI) v. DER*, 1993 EHB 675, 724 (cited in *Snyder v. DEP*, 2015 EHB 857, 866-67).

Renovo Energy Center argues that the Appellants' inclusion of Best Available Control Technology in their notice of appeal does not automatically implicate arguments pertaining to Best Available Technology. Renovo Energy Center points out that the definitions of both standards are not identical and the analysis for determining whether each standard has been met is not necessarily the same. In support of its argument, Renovo Energy Center cites *Snyder*, 2015 EHB at 871, in which the Board noted that the Department's discretion in conducting an analysis under the Best Available Technology standard "is considerably broader than EPA's discretion to determine BACT [Best Available Control Technology]."

Snyder involved an in-depth analysis of whether Best Available Technology standards had been met. In support of their argument that such standards had been met, the Department and permittee relied on a federal case discussing EPA's application of Best Available Control

Technology. The Board questioned whether it should be relying on federal jurisprudence on Best Available Control Technology rather than the very clear standards on Best Available Technology set forth in Pennsylvania's air program. 2015 EHB at 866, 868-69.

Here, we are simply being asked to determine whether the Appellants' notice of appeal acts as a waiver to all arguments pertaining to Best Available Technology. We find that it does not. While it is true that the Appellants specifically mention Best Available Control Technology in their objection regarding greenhouse gas emissions (Notice of Appeal, Objection B), the notice of appeal generally challenges various emissions limits set forth in the plan approval as being "erroneous and improper pursuant to air quality standards." In our view, the Appellants have not limited themselves to one type of analysis, but, rather, their challenge is that the Department has improperly set the emissions limits in the plan approval based on the applicable air quality standards.

As former Chief Judge Krancer explained in *Ainjar Trust v. DEP*, 2001 EHB 59, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002):

> While it may be true that the Notice of Appeal does not contain the recitation of the issue in exactly the same words as set forth in the Motion for Summary Judgment, we think that this genre of issue was fairly raised in the Notice [of Appeal]. The Board has jurisdiction over issues not specifically recited in a notice of appeal if the issue falls within the scope of a broadly-worded objection found in the notice of appeal.

Id. at 66 (citing *Croner, supra, et al*.)

Likewise, in *Rhodes*, 2009 EHB at 327, we stated:

> [G]iven the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal.

We find that the various control technologies - Best Available Technology, Best Available Control Technology and Lowest Achievable Emissions Rate - fall within the same genre of issue raised in the Appellants' notice of appeal, i.e., the question of whether the emissions limits set forth in the plan approval comply with air quality requirements. We do not believe that the Appellants have limited themselves to a discussion of only Best Available Control Technology and Lowest Achievable Emissions Rate, to the exclusion of Best Available Technology.

The purpose of deeming non-stated objections waived "is to ensure that the party filing the appeal identifies the scope of the challenge to the Department's action to allow proper discovery and to prevent surprise at the time of hearing." *Center for Coalfield Justice v. DEP*, 2016 EHB 523, 526. According to the Appellants, the discovery conducted in this case included interrogatories and deposition questions regarding Best Available Technology as well as Best Available Control Technology and Lowest Achievable Emission Rate. Accordingly, there is no surprise to either the Department or Renovo Energy Center that this issue is a part of the appeal. We conclude that Appellants have not waived arguments pertaining to Best Available Technology.

We now turn to the Appellants' Motion for Partial Summary Judgment which seeks summary judgment on the following issues: The Appellants argue that the plan approval sets the emissions limits too high for 1) sulfur dioxide emissions from the combustion turbines and 2) volatile organic compounds from the auxiliary boilers.

Sulfur Dioxide Emissions Limit

The proposed facility's combustion turbines will emit sulfur dioxide which is generated by burning natural gas containing a small amount of sulfur. The sulfur content of the natural gas is limited to 0.4 grains per hundred standard cubic feet of gas. (Ex. C to Appellants' Motion for

Partial Summary Judgment, p. 7816, 7826.)[2] The plan approval sets the limit for emissions of sulfur dioxide from the combustion turbines at 0.001336 pounds per million British thermal units (lb/MMBtu) (corresponding to 5.94 pounds per hour). The Appellants assert that this emissions limit does not properly reflect Best Available Technology and should have been set at 0.00112 lb/MMBtu.

The Appellants point to various Department sources indicating that 0.00112 or 0.0012 lb/MMBtu was the appropriate emissions limit for sulfur dioxide from the combustion turbines. Noteworthy is the Department's Application Review Memo for the Plan Approval (Plan Approval Review Memo) which states, "Based on a natural gas sulfur content of 0.4 [grains per hundred standard cubic feet], the potential [sulfur dioxide] emission rate as proposed by [Renovo Energy Center] will be 0.0012 lb/MMBtu assuming that all of the sulfur will convert to [sulfur dioxide]." (Ex. B to Appellants' Motion for Partial Summary Judgment, p. 10321.) Additionally, in an email thread among the Department's reviewing engineers, David Shimmel, Chief of the New Source Review Section of the Department's Air Quality Program, stated on September 2, 2020: "The 0.4 [grains per hundred standard cubic feet] translates into around 0.00112 lb/MMBtu." (Ex. I to Appellants' Motion for Partial Summary Judgment, p. 613.)

Mr. Shimmel confirmed his calculation of 0.00112 lb/MMBtu as Best Available Technology in his deposition testimony. (Ex. L to Appellants' Reply, Tr. 46:25-47:2.) He then rounded that figure up to 0.0012 and stated he could "live with" the rounded-up figure of 0.0012 if "LHV" were used (*Id*. at Tr. 46:7-9), i.e., "low heating value" of the fuel. (*Id*. at Tr. 46:10-13.) At no point did he arrive at a calculation of 0.001336, the limit ultimately included in the plan approval. Given Mr. Shimmel's calculation of 0.00112 lb/MMBtu, rounded up to 0.0012, he was

[2] Citations to pages of exhibits are to the parties' Bates stamped numbering where applicable.

asked in his deposition how the plan approval ended up with the higher limit of 0.001336 lb/MMBtu. Mr. Shimmel did not explain the higher number and stated that he did not recall how it ended up in the plan approval. (*Id*. at 43:18-23; 47:23-48:1.) Air Quality Program Engineer Paul Waldman was also asked to explain how the higher number ended up in the plan approval. He too stated that he did not know. (Ex. M to Appellants' Reply, Tr. 40:20-41:5.)

Indeed, neither the Department nor Renovo Energy Center could point to any testimony or other evidence in the record that explained how the limit of 0.001336 lb/MMBtu was arrived at in the plan approval. Nor have they provided a satisfactory answer in their responses to the Appellants' motion as to why the plan approval set a limit of 0.001336 lb/MMBtu for sulfur dioxide despite all indications to the contrary that the Department's calculations showed a limit of 0.00112 lb/MMBtu meeting Best Available Technology. The Department explains why it believes a rounding up of 0.00112 to 0.0012 is appropriate, but never explains how the plan approval ended up with a higher limit of 0.001336. Indeed, the Department states in its response to the Appellants' motion that "it can be argued that [a limit of] 0.0012 should have been used." (Department's Brief in Support of Response, p. 3.)

Instead of explaining how or why the sulfur dioxide emission limit was set at 0.001336, both the Department and Renovo Energy Center make the argument that it doesn't matter because setting the limit at 0.00112 (or 0.0012) [3] will achieve no real difference in the facility's actual emissions. They assert that a limit of 0.001336 increases the facility's potential to emit by only a small amount – the Department's calculations say by slightly over two tons per year, while Renovo Energy Center's calculations say by slightly under nine tons per year. Moreover, both parties

[3] Renovo Energy Center uses the calculated rate of 0.00112 in its discussion of this matter, while the Department uses the "rounded up" figure of 0.0012.

assert that even this small increase in emissions is unlikely to occur as long as Renovo Energy Center is required to comply with a sulfur content limit of 0.4 grains per hundred standard cubic feet of gas for its fuel.

In response, the Appellants argue that even if the Department and Renovo Energy Center's claims are true, i.e., that the difference in emissions is relatively small, those excess emissions are nonetheless illegal and can amount to significant harm on the public when emitted year after year, for decades. Additionally, they assert that using the correct limit in the plan approval is necessary to ensure that Renovo Energy Center is properly employing the requisite control technologies.

Renovo Energy Center and the Department appear to argue that setting the sulfur dioxide emissions limit at 0.00112 or 0.0012 is pointless because it cannot or will not be monitored. The Department states, "while it can be argued that 0.0012 should have been used, that emission rate is artificial in that, while a stack test will eventually confirm compliance, it will only be the fuel sulfur limit that yields that compliance." (Department's Brief in Support of Response to Appellants' Motion for Partial Summary Judgment, p. 3.) Renovo Energy Center states that the plan approval does not require the testing of sulfur dioxide through continuous emissions monitoring but only through periodic stack testing. (Permittee's Brief in Support of Response to Appellants' Motion for Partial Summary Judgment, p. 4.) The Appellants counter this by pointing to the plan approval which requires "the monthly emissions of sulfur oxides (SO2)…to demonstrate compliance with the emission limitations." (Ex. C to Appellants' Motion for Partial Summary Judgment, p. 7820, 7829.) The Appellants also assert that sulfur dioxide emissions are to be monitored on a continuous basis pursuant to federal regulations, citing 40 C.F.R. § 97.630-835 (as set forth in the Department's Plan Approval Review Memo, Ex. B to Appellants' Motion for Partial Summary Judgment, p. 10299.) Moreover, if the argument being put forward by the

Department and Renovo Energy Center is that the plan approval does not require sufficient testing to demonstrate that the Renovo facility is meeting its sulfur dioxide emissions limit from the combustion turbines, that is not a compelling argument.

Based on our review of the summary judgment record and the parties' motions, briefs and supporting documents, we find that the Appellants have adequately demonstrated that the Department erred in setting an emissions limit of 0.001336 lb/MMBtu for sulfur dioxide in the plan approval. The Appellants have demonstrated that the Department's technical staff who reviewed Renovo Energy Center's plan approval application determined that an emissions limit of 0.00112 represented Best Available Technology, and neither the Department nor Renovo Energy Center has adequately countered that evidence or presented a persuasive argument to the contrary.

Moreover, if the Department and Renovo Energy Center are correct in their assertion that lowering the sulfur dioxide emissions limit from 0.001336 to 0.00112 (or 0.0012) results in no real change in emissions, then the reverse is also true – raising the limit from 0.00112 to 0.001336 brings no real benefit to Renovo Energy Center. As the Appellants point out, "…the inverse is equally applicable: if Renovo Energy Center will comply with the lower number either way, then it can easily accept that number, and the Department can easily change the plan approval to match." (Brief in Support of Appellants' Motion for Partial Summary Judgment, p. 6.) In that case, we question why the plan approval was issued with the higher number. No one from the Department has been able to answer that question. Nor have Renovo Energy Center or the Department provided a convincing argument in support of the higher emissions limit. Where the goal is to achieve compliance with state and federal air emission standards, we question why the Department would choose an emissions limit that is higher than what the Department has determined is both achievable and calculated to comply with the applicable air quality standards.

Finally, Renovo Energy Center argues that even if the Department's selection of 0.001336 as the emissions limit was an error, it is not a material error justifying a remand or revision to the permit. It cites *Shuey v. DEP*, 2005 EHB 657, in support of its argument. In *Shuey*, we held:

> [I]t is not enough to argue there were minor errors in the permitting process. A trial before the Board should not be a giant game of "gotcha." If there are errors in the permit, such errors must be material in order to warrant a revocation or remand of the permit. *Giordano v. DEP*, 2001 EHB 713, 736 ("With regard to all of the alleged procedural defects, no purpose would be served by nullifying or remanding the permit modification on such grounds…it is generally not enough for an appellant to prevail to pick at errors that the Department might have made along the way if the Department's final action is nevertheless appropriate." Citing *O'Reilly v. DEP*, 2001 EHB 19, 39-40).

Id. at 712-13.

We agree that it is not enough for an appellant to simply argue that there were minor errors in the permitting process; in order to prevail, the appellant must demonstrate that the errors were material. *Id.* at 712. Here, the error alleged by the Appellants does not involve the permit application process but, rather, the substance of the permit itself. Where an emissions limit in a plan approval is subject to Best Available Technology and fails to meet that standard, the appellant has alleged a material error.

The only question left is whether the sulfur dioxide emissions limit should be 0.00112 or the rounded-up figure of 0.0012. We find that the Department has presented no justification for rounding up the emissions limit. In setting the current limit of 0.001336 the Department chose not to round that number up (or down). If the Department were in the practice of rounding up (or rounding down) the permit limits, we believe it would have done so with the 0.001336 figure. Instead, it kept that number intact out to several digits. On that basis we find that the Appellants have demonstrated that 0.00112 lb/MMBtu is the emissions limit for sulfur dioxide from the

combustion turbines that represents Best Available Technology and is the emissions limit that should have been set forth in the plan approval.

Pursuant to the Board's rules, when a motion for summary judgment is made and supported, the opposing party may not rest on mere allegations or denials, but by its response must show why summary judgment is not warranted. 25 Pa. Code § 1021.94a(l). We find that neither the Department nor Renovo Energy Center has met this standard. Therefore, summary judgment is granted to the Appellants on this issue.

Volatile Organic Compounds Emissions Limit

The plan approval sets the emissions limit for volatile organic compounds from the auxiliary boilers at 0.002 lb/MMBtu and 0.15 tons per year. According to Renovo Energy Center, the auxiliary boilers are used only during cold startups to provide sealing steam to the steam turbine generator and to warm the steam turbine generator rotor; they are not used to generate electricity. (Ex. 3 to Renovo Energy Center's Response, Sec. 1, p. 7-8.) The Appellants assert that the proper emissions limit for volatile organic compounds from the auxiliary boilers is 0.0015 lb/MMBtu (and the corresponding annual limit), as this number represents the Lowest Achievable Emissions Rate.

The parties do not dispute that volatile organic compound emissions from the Renovo Energy Center facility are subject to the Lowest Achievable Emissions Rate standard, which is required for major sources of pollution in non-attainment areas. 42 U.S.C. § 7503. The Lowest Achievable Emissions Rate is defined as:

> (i) The rate of emissions based on the following, whichever is more stringent:
>
> (A) The most stringent emission limitation which is contained in the implementation plan of a state for the class or category of source

unless the owner or operator of the proposed source demonstrates that the limitations are not achievable.

(B) The most stringent emission limitation which is achieved in practice by the class or category of source.

25 Pa. Code § 121.1. Thus, the Lowest Achievable Emissions Rate is the more stringent of either the most stringent emission limitation contained in the state implementation plan or which is achieved in practice.

When the Appellants submitted public comments on the plan approval application, they asserted that the proposed emissions factor of 0.002 lb/MMBtu and 0.15 tons per year did not meet New Source Review requirements because another power plant in operation – Hickory Run Energy Station – was subject to lower limits. (Ex. G to Appellants' Motion for Partial Summary Judgment, p. 4608-09.) The plan approval for the Hickory Run Energy Station facility sets a limit for volatile organic compound emissions from the auxiliary boilers at 0.0015 lb/MMBtu and 0.14 tons per year. (Ex. J to Appellants' Motion for Partial Summary Judgment, p. REC-3080; Department's Response to Appellants' Statement of Undisputed Material Facts, para. 13.)

In its Comment Response document, the Department seemed to agree with the Appellants, stating that "with respect to the [Best Available Technology] limits proposed for the auxiliary boiler at the Hickory Run facility, the Department has established the same [carbon monoxide] and [volatile organic compound] limits for Renovo Energy Center." (Ex. D to Appellants' Motion for Partial Summary Judgment, p. 7701.) Despite that statement, Renovo Energy Center's plan approval ended up with higher limits: 0.002 lb/MMBtu and 0.15 tons per year for volatile organic compounds. (Ex. C to Appellants' Motion for Partial Summary Judgment, p. 7808.)

The Appellants conducted discovery on this issue. In response to an interrogatory asking "whether the Department intends for the carbon monoxide and volatile organic compound

emissions limits of the [Renovo Energy Center] auxiliary boilers in the Plan Approval to match those of the Hickory Run power plant facility," the Department responded "Yes, the Department did intend for those limits to match." (Ex. H to Appellants' Motion for Partial Summary Judgment, para. 18.)

The Department's New Source Review Section Chief, David Shimmel, was asked about the discrepancy between the Hickory Run numbers and the Renovo Energy Center numbers, and he responded, "we just rounded it [the emissions limit in the Renovo Energy Center plan approval] to three significant digits." (Ex. L to Appellants' Reply, Tr. 24:5-22.) When asked whether there was "anything stopping the Department from putting the volatile organic compound limit at 0.0015 instead of 0.002," he responded, "Not really." (*Id.* at Tr. 25:6-9.)

Both the Department and Renovo Energy Center challenge the Appellants' contention that the figures of 0.0015 lb/MMBtu and 0.014 tons per year represent the Lowest Achievable Emissions Rate. They contend that the Appellants have not established the material facts necessary to support their argument. The Department argues that the Appellants have not demonstrated that the Hickory Run facility's auxiliary boilers were in operation before the Department issued the plan approval for the Renovo Energy Center. The Department contends that the Appellants' only support for this assertion is an article in *The Business Journal*, dated June 17, 2020, entitled "Hickory Run Power Station Begins Generating Electricity." Without adequate factual support for this material fact, argues the Department, the Appellants are not entitled to summary judgment on this issue. Notably, the Department does not dispute that the Hickory Run facility was in operation at the time of the issuance of Renovo Energy Center's plan approval, nor does the Department come forth with any evidence that the Hickory Run facility was not in operation at that time. It simply challenges the document cited by the Appellants in support of their statement

that the Hickory Run facility was in operation prior to issuance of the plan approval to Renovo Energy Center. (Department's Response to Appellants' Statement of Undisputed Material Facts, para. 14.)

The Appellants counter that it is enough for them to show that the Department set another comparable facility's volatile organic compound emissions limit at 0.0015 in order to demonstrate Lowest Achievable Emissions Rate. The Appellants also point to Renovo Energy Center's response to their Statement of Undisputed Material Facts in which Renovo Energy Center agrees that the Hickory Run facility's auxiliary boilers became operational before the Department issued the plan approval to Renovo Energy Center. (Permittee's Response to Appellants' Statement of Undisputed Material Facts, para. 14.) Additionally, Mr. Shimmel in his deposition acknowledged that the Hickory Run power plant is an "existing" facility. (Ex. L to Appellants' Reply, Tr. 19:24-20:15.)

We believe there is adequate support in the record for finding that the Hickory Run facility was operational prior to the issuance of the plan approval for the Renovo Energy Center, and the Department has not come forward with anything in the record to dispute this statement, as required by 25 Pa. Code § 1021.94a(l).

Renovo Energy Center argues, first, that the Hickory Run plan approval also rounds the 0.0015 figure to 0.002 and, second, that even if we accept the 0.0015 figure as the emissions limit set forth in Hickory Run's plan approval, there is no evidence in the record that Hickory Run has actually been able to achieve that limit. As to the first argument, Renovo Energy Center points to a table in the Hickory Run plan approval setting forth a volatile organic compound limit of 0.002 lb/MMBtu. The section referenced by Renovo Energy Center is a table in the Hickory Run plan approval entitled "Emission Restriction Summary." (Ex. J to Appellants' Motion for Partial

Summary Judgment, p. REC 3112-14). The summary lists the volatile organic compound limit as 0.002 lb/MMBtu. However, in the section entitled "Emission Restrictions," the plan approval sets the limit for volatile organic compound emissions at 0.0015 lb/MMBtu. (*Id.* at p. REC 3080.) Further, in its Response to Appellants' Statement of Undisputed Material Facts, the Department does not dispute the 0.0015 figure. (Department's Response to Appellants' Statement of Undisputed Material Facts, para. 13.)

Renovo Energy Center argues that even if the emissions limit for Hickory Run is 0.0015, the Appellants have not demonstrated that the rate of 0.0015 has actually been achieved *in practice* at the Hickory Run facility. Renovo Energy Center goes on to state that it is impossible for the Appellants to produce any data showing that the Hickory Run facility has actually achieved volatile organic compound emissions from its boilers no higher than 0.0015 lb/MMBtu because the plan approval does not require any emissions monitoring or stack testing for volatile organic compounds in the auxiliary boiler emissions. Due to this nonexistence of data, argues Renovo Energy Center, it is impossible for the Appellants to meet their burden – in other words, simply because the Department placed the 0.0015 emissions limit in Hickory Run's permit does not mean that limit is achievable, and there is no way to tell if it is being achieved because no testing is required.

In *Groce v. Department of Environmental Protection*, 921 A.2d 567, 574 (Pa. Cmwlth. 2007), the Commonwealth Court explained that in order to be a source of Lowest Achievable Emissions Rate, an emissions rate must meet various criteria, including that "it must be achievable or achieved in practice." It is difficult to fathom that the Department would have placed an emissions limit in a permit that it did not believe was achievable. We believe that the Department's

selection of 0.0015 lb/MMBtu for the Hickory Run power plant supports the finding that the Department believes this emissions rate *is* achievable.

As further support for their assertion that the Hickory Run emissions limit of 0.0015 is an indication of the Lowest Achievable Emission Rate, the Appellants cite the Environmental Protection Agency's (EPA) Draft 1990 New Source Review Manual (the Draft Manual), which states that "a permit requiring the application of a certain technology or emission limit to be achieved for such technology usually is sufficient justification to assume the technical feasibility of that technology or emission limit." (Ex. K to Appellants' Motion for Partial Summary Judgment, p. B.7.) Renovo Energy Center argues that the Appellants assign too much weight to the Draft Manual, which states that it "does not establish binding regulatory requirements." (*Id*. at 1 (Preface).) Renovo Energy Center further cites cases holding that strict application of the Draft Manual is not mandatory. [4] We agree that the Draft Manual is not binding. *Snyder*, 2015 EHB at 872. Nonetheless, we find the language persuasive. Additionally, while the cases cited by Renovo Energy Center do not require a strict application of the Draft Manual, they nevertheless acknowledge that it is relevant in evaluating Best Available Control Technology and Lowest Achievable Emissions Rate analyses.

Secondly, Renovo Energy Center argues that the Appellants have misapplied the Draft Manual by referring to the section on Best Available Control Technology analysis rather than Lowest Achievable Emissions Rate analysis. In response, the Appellants point to the section of the Manual dedicated to Lowest Achievable Emissions Rate which provides guidance on determining

[4] The cases cited by Renovo Energy Center are *In re General Motors*, PSD Appeal No. 01-30, 10 E.A.D. 360, 2002 WL373982 (EAB March 6, 2002); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *United States v. Ameren Missouri*, No. 4:11 CV 77 RWS, 2019 WL 1384580, at *3 (E.D. Mo. Mar. 27, 2019).

Lowest Achievable Emissions Rate. One recommended source for determining the Lowest Achievable Emissions Rate is "preconstruction or operating permits issued in other nonattainment areas." (Ex. K to Appellants' Response, p. G.3.)

The EPA Environmental Appeals Board has addressed this issue in *Pio Pico Energy Center*, 16 E.A.D. 56 (EAB 2013), cited by the Appellants in their brief in support of their reply. One of the issues examined in that case was an emissions limit that was higher in the issued permit than in the draft permit. The Appeals Board held:

> [P]ermit writers retain discretion to set Best Available Control Technology levels that "do not necessarily reflect the highest possible control efficiencies but, rather will allow permittees to achieve compliance on a consistent basis.". . .At the same time, the permit issuer has an obligation "to adequately explain its rationale for selecting a less stringent emission limit, and that rationale must be appropriate in light of *all* the evidence in the record."

Id. at 131 (quoting *In re Newmont Nevada Energy Investment, LLC*, 12 E.A.D. 429, 440 (EAB 2005)) (emphasis in original). The Appeals Board went on to say:

> The existence of a similar facility with a lower emissions limit creates an obligation for the permit applicant and permit issuer to consider and document whether the same emission level can be achieved at the proposed facility.

16 E.A.D. at 133. Significantly, a permit issuer must "justify the selection of an emission limit that is higher than that achieved by. . .*or permitted at*" a similar source. *Id.* at 134 (Emphasis added.)

The only basis provided by Renovo Energy Center for the selection of a higher emissions limit for volatile organic compounds is its assertion that its auxiliary boilers will emit less of other pollutants if the emissions limit for volatile organic compounds is higher. Renovo Energy Center states that "a facility with the best emissions performance for one pollutant typically cannot meet the lowest emission level for another pollutant." (Permittee's Brief in Support of Response, p. 8.)

It points out that although the Hickory Run boiler has a lower volatile organic compound limit than the Renovo facility (0.0015 vs. 0.0020 lb/MMBtu), it has a higher limit for nitrogen oxide (0.011 vs. 0.006 lb/MMBtu). (Permittee's Brief in Support of Response, p. 8) (citing David Shotts' Expert Report, Ex. 30 to Permittee's Motion for Summary Judgment, p. 5.) In response, the Appellants assert that Renovo Energy Center has not demonstrated that Hickory Run's higher nitrogen oxide limit is due to its lower volatile organic compound limit. Moreover, argue the Appellants, even if true, it does not negate the fact that a lower limit can be achieved for volatile organic compound emissions and, where such limit is achievable, it should be adopted as the Lowest Achievable Emissions Rate. In support of this argument, the Appellants again cite *Pio Pico, supra*, in which the EPA Environmental Appeals Board stated, "[S]imply stating that PM [particulate matter] emissions vary even on identical turbine models…is not sufficient to satisfy this obligation [to document whether a lower emission level can be achieved at the proposed facility.]" 16 E.A.D. at 133-34.

The Department has provided no basis for selecting a higher volatile organic compound emissions limit for the Renovo Energy Center facility than for the Hickory Run facility other than its explanation that it rounded up the number in Renovo Energy Center's plan approval. The Department has provided no support for its assertion that it is proper to round up an emissions limit, particularly one that is subject to the Lowest Achievable Emissions Rate standard.

In conclusion, we find that the Appellants have established that the Renovo Energy Center facility is subject to the Lowest Achievable Emissions Rate for volatile organic compounds and the record supports a finding that 0.0015 lb/MMBtu is the Lowest Achievable Emissions Rate. The Department and Renovo Energy Center have not come forward with any convincing evidence

to the contrary. Therefore, we find that the Appellants have demonstrated that they are entitled to summary judgment on this issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND CENTER FOR BIOLOGICAL DIVERSITY	:	
v.	:	**EHB Docket No. 2021-055-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENOVO ENERGY CENTER, LLC, Permittee	:	

O R D E R

AND NOW, this 29th day of August, 2022, it is ordered that the Appellants' Motion for Partial Summary Judgment is *granted*.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 29, 2022

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

For the Commonwealth of PA, DEP:
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(via electronic filing system)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARJORIE HUDSON, DAVID LIPPERT, and JAMES H. MELLOTT	:	
v.	:	**EHB Docket No. 2022-055-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, FULTON COUNTY CONSERVATION DISTRICT, and STATE CONSERVATION COMMISSION; and COUNTRY VIEW FAMILY FARMS, LLC, Permittee	:	

O R D E R

AND NOW, this 27th day of September, 2022, it is hereby ordered as follows:

1. The Environmental Hearing Board could not reach a majority opinion on the Petitioners' Petition for Leave to File Appeal Nunc Pro Tunc.
2. Therefore, by operation of law, the status quo is maintained and the Petition is **denied**.
3. The Opinions in support of denying and granting the Petition are attached.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 27, 2022

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARJORIE HUDSON, DAVID LIPPERT, and JAMES H. MELLOTT	:	
v.	:	**EHB Docket No. 2022-055-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, FULTON COUNTY CONSERVATION DISTRICT, and STATE CONSERVATION COMMISSION; and COUNTRY VIEW FAMILY FARMS, LLC, Permittee	:	**Issued: September 27, 2022**

OPINION IN SUPPORT OF
DENYING PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

By Bernard A. Labuskes, Jr., Judge

On June 9, 2022 the Fulton County Conservation District (the "Conservation District") approved a renewed nutrient management plan for a concentrated animal feeding operation (CAFO) located in Big Cove Tannery, PA to be operated by Country View Family Farms, LLC ("Country View"). The approval of the renewed nutrient management plan was the latest action taken in a series of permits and approvals for this facility, which have been the subject of numerous appeals before the Environmental Hearing Board and are consolidated at EHB Docket No. 2015-116-L (Consolidated with 2014-037-L, 2015-096-L, 2015-115-L, 2016-115-L, 2018-039-L, 2019-095-L, and 2019-110-L).[1] Notice of the approval was published in the *Pennsylvania Bulletin* on

[1] In addition to the nutrient management plan, the appeals have involved a PAG-02 permit, PAG-12 permit, water quality management permit, and their various renewals. On August 27, 2015, we issued an Order granting a petition for supersedeas filed by a group of appellants that included two of the current Petitioners—Marjorie Hudson and David Lippert—of the PAG-02 authorization issued to Country View by the Department of Environmental Protection for the stormwater discharges associated with this facility. *See* EHB Docket No. 2015-096-L. An Opinion in support of that Order followed on September 1, 2015.

June 25, 2022. Therefore, the deadline for filing an appeal from the approval was July 25, 2022. *See* 3 Pa.C.S.A. § 517 (30 days to file an appeal of action on a nutrient management plan); 25 Pa. Code § 1021.52(a)(2)(i) (Board rule requiring aggrieved persons to file appeals within 30 days of publication of notice in the *Pennsylvania Bulletin*). Marjorie Hudson, David Lippert, and James H. Mellot (the "Petitioners") did not file a timely appeal before July 25, 2022. Instead, on August 8, 2022, two weeks after the appeal deadline, they filed the petition for leave to file an appeal nunc pro tunc that is now before us. The Appellees and the Permittee oppose the petition. For the reasons that follow, we would deny the petition.

Of course, the untimeliness of an appeal generally deprives the Board of jurisdiction. *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Mon View Mining Corp. v. DEP*, 2003 EHB 542; *Ziccardi v. DEP*, 1997 EHB 1, 3. *See also* 25 Pa. Code § 1021.52(a) ("jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner"). Nevertheless, in very limited circumstances we may grant permission to appeal nunc pro tunc upon written request and for good cause shown. 25 Pa. Code § 1021.53a. What constitutes good cause is determined in accordance with "the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." *Id*.

To prevail on a nunc pro tunc petition,

> The party seeking nunc pro tunc filing must show 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay.

Hudson v. DEP, 2015 EHB 719. Country View's overall CAFO project has been on hold since that time more than seven years ago.

Feudale v. DEP, 2016 EHB 774, 776 (quoting *Bureau Veritas N. Am., Inc. v. DOT*, 127 A.3d 871, 879 (Pa. Cmwlth. 2015)). *See also Bass v. Cmwlth.*, 401 A.2d 1133 (Pa. 1979); *Grimaud v. Dep't of Envtl. Res.*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Barchik v. DEP*, 2010 EHB 739, 742; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391. An administrative breakdown occurs when an administrative board or body is negligent, acts improperly, or unintentionally misleads a party. *Union Elec. Corp. v. Bd. of Prop. Assessment*, 746 A.2d 581, 584 (Pa. 2000); *Harris v. Unemployment Comp. Bd. of Review*, 247 A.3d 1223, 1229 (Pa. Cmwlth. 2021). Non-negligent circumstances are found "only in unique and compelling cases" where a person has attempted to file an appeal "but unforeseeable and unavoidable events precluded her from actually doing so." *Criss v. Wise*, 781 A.2d 1156, 1160 (Pa. 2001).

We must be mindful that we cannot extend the time for taking an appeal as a matter of grace or indulgence. *Ametek, Inc. v. DEP*, 2014 EHB 65, 68; *Rostosky*, 364 A.2d at 763. "Allowing an appeal nunc pro tunc is a recognized exception to the general rule prohibiting the extension of an appeal deadline." *Union Elec. Corp.*, 746 A.2d at 584. "[A]n appeal nunc pro tunc is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." *Id.* (quoting *Commonwealth v. Stock*, 679 A.2d 760, 764 (Pa. 1996)). It is a heavy burden to justify an untimely appeal. *Suber v. Unemployment Comp. Bd. of Review*, 126 A.3d 410, 412 (Pa. Cmwlth. 2015).

The Petitioners have not alleged that this Board has done anything wrong or that there has been a breakdown in *our* administrative process. Rather, they argue that the "fraud or breakdown in the administrative process or non-negligent circumstances" that entitle them to file an appeal nunc pro tunc is that the notice of the nutrient management plan renewal that was published in the *Pennsylvania Bulletin* did not contain the words "Bivouac" or "Bivouac Sow Farm." As the

Petitioners monitored the ongoing developments at the site, they only performed a word search of the *Bulletin* for "Bivouac" or "Bivouac Sow Farm." Oddly, they did not search for any other terms, not even the name of the operator, Country View Family Farms, LLC. As a result, they did not pick up the notice and they missed the appeal deadline.[2]

The Petitioners say they were entitled to design a word search relying exclusively on "Bivouac" and "Bivouac Sow Farm" because the nutrient management plan itself identified the site as the Bivouac Sow Farm and every prior *Pennsylvania Bulletin* notice regarding the site mentioned that name. For example, the notice of the application for approval of the nutrient management plan (as opposed to the later approval) identified the "Agricultural Operation Name and Address" as follows:

> Country View
> Family Farms, LLC
> Bivouac Sow Farm
> 15197 Great Cove Rd
> Big Cove Tannery, PA 17212

52 Pa.B. 2018 (Apr. 2, 2022). (Pet. Ex. J.) The notice also identified the county of the operation (Fulton), the total acres (224), the animal equivalent units (3,271.50), the animal types (sows, sows with litters, gilts and boars), whether any special protection waters were involved (NA), and whether it was a new or renewed plan (Renewal). The Country View facility was the only facility listed in the *Bulletin* under the section entitled "PROPOSED NUTRIENT MANAGEMENT PLANS RELATED TO APPLICATIONS FOR NPDES PERMITS FOR CAFOs."

In contrast, they complain that the notice published for the approval of the nutrient management plan identified the Agricultural Operation without the term "Bivouac Sow Farm":

> Country View
> Family Farms, LLC

[2] They learned about the approval some weeks later during a conference call in the related appeals mentioned above.

15197 Great Cove Road
Big Cove Tannery, PA 17212

52 Pa.B. 3620 (June 25, 2022). (Pet. Ex. L.) We note that the notice still identified County View Family Farms, LLC as the permittee. It contained the same address of the operation. The notice also contained the same information regarding the county of the operation, the total acres, the animal equivalent units, the types of animals, and the special protection waters. It also informed people how to appeal an action taken on the plan to the Board. Country View's facility was the only one listed under the section entitled "NUTRIENT MANAGEMENT PLANS RELATED TO APPLICATIONS FOR NPDES PERMITS FOR CAFOs." In a nutshell, the Petitioners argue that they should be allowed to file a late appeal because, despite their intense interest in this site, they did not read the *Bulletin* and instead chose to rely upon a poorly designed word search.

Initially, we are not entirely satisfied that the sufficiency of public notice in the *Bulletin* is a relevant inquiry for justifying nunc pro tunc relief. For purposes of a nunc pro tunc appeal, it is not a breakdown in the administrative process concerning the notice published in the *Bulletin* by a different agency that matters, but a breakdown in the *Board's* operations that appears to be the appropriate criterion. *See Spencer v. DEP*, 2008 EHB 573, 575 ("*nunc pro tunc* appeals will be allowed only where there has been fraud, a breakdown in the Board's operations, or other unique and compelling circumstances"); *Hopwood v. DEP*, 2001 EHB 1254, 1259 (nunc pro tunc petitions "are only granted where there is fraud or breakdown in the *Board's* operation or unique and compelling factual circumstances establish a non-negligent failure to appeal" (emphasis in original)). *See also Dellinger v. DEP*, 2000 EHB 976, 983 (discussing *JEK Construction Co. v. DER*, 1987 EHB 643, and *Washington Twp. v. DER*, 1995 EHB 403, where breakdowns in the Board's operations justified nunc pro tunc relief). The Petitioners have not directed us to any

Board cases where we have held that a deficient notice in the *Bulletin* has provided grounds for a nunc pro tunc appeal.

Even if we entertain the Petitioners' argument that the public notice is what we should be looking at in terms of an administrative breakdown precedent to a nunc pro tunc appeal or that it can otherwise constitute a unique and compelling circumstance, in this context the Petitioners still have not convinced us that they are entitled to nunc pro tunc relief. In the analogous situation where we consider whether a party received constitutionally adequate notice, we look to whether the notice in question was "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Harvilchuck v. Dep't of Envtl. Prot.*, 117 A.3d 368, 372 (Pa. Cmwlth. 2015). We have held that "the standard for the adequacy of a notice is whether it clearly identifies an action of the Department such that an ordinary member of the public would have sufficient information to determine that they may be affected by such an action for the purposes of filing an appeal with the Board." *Telford Borough Auth. v. DEP*, 2009 EHB 333, 338.

The approval notice at issue here clearly contained sufficient information for an ordinary person to determine that they may be affected by the approval of the nutrient management plan. Perhaps most importantly, the notice contained the name of the permittee, Country View Family Farms, LLC, and the county and full address of the facility. It also contained information on the animal types and units and whether any special protection waters are involved. We think anyone reading the *Bulletin* notice would be able to discern what site was involved. Although a name a permittee makes up for its facility may be helpful information to those already familiar with the operation, we cannot conclude that the absence of that name in this instance renders the notice inadequate. Country View's facility was the only one listed under the notices of nutrient

management plan approvals. Again, anyone who read the notice would understand that the nutrient management plan had been approved, that the approval had been given to Country View Family Farms, LLC, and that the approval governed its facility at 15197 Great Cove Road. We note that a search for the term "Country View" yields exactly one result in the April 2 notice of the application for the nutrient management plan and one result in the June 25 notice of approval of the nutrient management plan. Thus, even if we utilize the Petitioners' method of searching instead of reading the *Bulletin*, simply using a portion of the name of the permittee easily locates the notice. The Petitioners' own choice of using limited search terms and not actually reading the *Bulletin* is not worthy of nunc pro tunc relief.

This case stands in contrast to *Solebury Township v. DEP*, 2003 EHB 208, wherein we denied a motion to dismiss premised on an untimely appeal because we found that the notice published in the *Pennsylvania Bulletin* did not meet the standard that it be reasonably calculated to inform a member of the public of the action taken. *Solebury Township* involved an appeal of a Section 401 water quality certification for the construction and maintenance of a limited access highway. The consolidated appeal was filed more than three years after the publication of notice in the *Bulletin* that purported to reflect the issuance of the water quality certification. However, after reviewing the published notice, we determined that it only indicated approval of the permittee's environmental assessment and contained no mention at all of the water quality certification. An ordinary person reading the notice would have had no idea that the water quality certification had been approved. Here, in contrast, there can be no question that the notice informed the public what was being approved, who the approval was given to, and where the approved facility was located.

The Petitioners cite *H.D. v. Pennsylvania Department of Public Welfare*, 751 A.2d 1216, 1220 (Pa. Cmwlth. 2000). However, in that case the agency sent notice to an outdated address for the petitioner, thereby causing the petitioner to miss the 45-day appeal window. Thus, someone who was entitled to receive personal notice did not because of an error by the agency mailing the notice. *See also UPMC Health Sys. v. Unemployment Comp. Bd. of Review*, 852 A.2d 467 (Pa. Cmwlth. 2004) (reversing denial of nunc pro tunc appeal of employer where Unemployment Center used employer's incorrect zip code and employer did not receive notice until after expiration of appeal period). The Petitioners also cite *Croft v. Board of Property Assessment*, 134 A.3d 1129 (Pa. Cmwlth. 2016), where the Commonwealth Court reversed a denial of nunc pro tunc appeal where a taxpayer's deed was improperly recorded and he received no notice of accumulating liens on one parcel of his property. There are no allegations in the cases cited by the Petitioners that there were any deficiencies in the *contents* of the notices, and none deal with public notice.

Finally, the Petitioners contend that the Commonwealth and Country View had some sort of duty to apprise the Petitioners of the approval of the nutrient management plan as part of broad discovery requests served more than three years ago in the pending consolidated case at EHB Docket No. 2015-116-L. The Petitioners cite to no authority for this duty. They do not, for instance, identify any Pennsylvania Rule of Civil Procedure that imposes an ongoing obligation to supplement that sort of discovery request. Rule 4007.4 imposes an obligation to seasonably supplement responses regarding the identity of expert witnesses and persons with knowledge of discoverable matters. Pa.R.Civ.P. 4007.4(1). *See also DEP v. EQT Prod. Co.*, 2016 EHB 489, 491-95. There is also an obligation to correct a response that was incorrect or is no longer true. Pa.R.Civ.P. 4007.4(2). But absent an order of the Board, an agreement between the parties, or a

new request to supplement a prior discovery response, there is "no duty to supplement the response to include information thereafter acquired." Pa.R.Civ.P. 4007.4(3). The Petitioners provide no explanation for why discovery propounded on the Commonwealth and Country View in April 2019 creates some indefinite, open-ended entitlement to personal notice of every subsequent action taken with respect to the subject site or why, even if it did, a failure to immediately supplement those discovery responses justifies nunc pro tunc relief.

As we stated at the beginning, there is a heavy burden to obtain nunc pro tunc relief. *See Freyer Excavating, LLC v. DEP*, 2020 EHB 270, 273-74 (collecting cases where petitioners failed to demonstrate good cause for being permitted to appeal nunc pro tunc). Indeed, in *Freyer Excavating*, we only granted a nunc pro tunc appeal in light of the recent onset of the COVID-19 pandemic. We found that unique and compelling factual circumstances existed in the Governor of Pennsylvania ordering the closure of all non-life-sustaining businesses shortly after the appellant business received the civil penalty assessment from the Department. There are no comparable unique and compelling circumstances here.[3]

ENVIRONMENTAL HEARING BOARD

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

[3] Because we have not found an administrative breakdown or unique and compelling circumstances justifying an untimely appeal, we do not need to reach the issues of whether the Petitioners acted within a short period of time after discovering the approval or the prejudice to the other parties in allowing an untimely appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARJORIE HUDSON, DAVID LIPPERT, and JAMES H. MELLOTT	:	
v.	:	**EHB Docket No. 2022-055-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, FULTON COUNTY CONSERVATION DISTRICT, and STATE CONSERVATION COMMISSION; and COUNTRY VIEW FAMILY FARMS, LLC, Permittee	:	**Issued: September 27, 2022**

OPINION IN SUPPORT OF
GRANTING PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

By Thomas W. Renwand, Chief Judge

The Pennsylvania Environmental Hearing Board has the power to grant an exception to the general rule prohibiting the extension of the appeal period by allowing an Appellant to file his appeal *nunc pro tunc*. *Union Electric Corporation v. Bd. Of Prop. Assessment, Appeal & Review of Allegheny County*, 746 A.2d 581, 584 (Pa. 2000); *Commonwealth v. Stock,* 679 A.2d 760, 764 (Pa. 1996). *See also* 25 Pa. Code § 1021.53a ("The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*.") An appeal *nunc pro tunc* may be allowed not only where extraordinary circumstances involving fraud or a breakdown in the administrative process exist, but also if non-negligent circumstances related to the petitioner, his attorney or a third party caused the delay in filing the appeal. *Smith v. DEP*, 2002 EHB 640 (petition to appeal *nunc pro tunc* was granted where it was not clear that the Department's letter was a final action); *Fisher v. DER*, 1993 EHB 425 (petition to appeal *nunc pro tunc* was granted where the language of a mine subsidence insurance agreement relating to the appeal period was

misleading). Under the unique history of this litigation involving numerous cases which have all been consolidated and date back to 2014, I find that special non-negligent circumstances exist such that an appeal *nunc pro tunc* is not only allowed but, in the interest of justice and fairness, is required.

I believe the unique factual circumstances of this case slightly tip the scales of justice in favor of allowing the Appellants leave to file their appeal of the nutrient management plan *nunc pro tunc*. A review of the docket shows that the parties have worked closely together for years. Indeed, many of the status reports and the proposed Orders, which were all adopted by the Board, provided that the Appellants would be given notice when the Department was going to modify the NPDES permit and/or the water quality permit.

Notice of the approval of the nutrient management plan appeared in the *Pennsylvania Bulletin* in June 2022. Simply reading the "hard copy" *Pennsylvania Bulletin*, which lawyers have done for decades, rather than conducting a word search, would have revealed the issuance of the plan. Additionally, a more robust word search would have likely brought the notice to Appellants' attention. Nevertheless, by my count, the six times the facility was listed in the *Pennsylvania Bulletin* from 2014 through 2019 the only term used was the "Bivouac Sow Farm" (which was the search term employed by Appellants). Even the renewal application notice for the nutrient management plan in April 2022 still included a reference to Bivouac Sow Farm (but for the first time also referenced Country View Family Farms, LLC).

These facts prove the adage that hindsight is always 20/20. The question before us is whether these facts qualify as extraordinary circumstances that warrant *nunc pro tunc* relief. Although it is a close question, and my colleagues on the other side set forth a reasonable position, I believe that it was also reasonable for the Appellants to rely on a search that was consistent with

the naming convention used in each of the prior publications. The change feels particularly problematic since it is at variance with the terminology used in the April 2022 application notice.

The holding in *Harvilchuck v. Department of Environmental Protection,* 117 A.3d 368 (Pa. Cmwlth. 2015), supports granting Appellants the relief they have requested. In that case, the Commonwealth Court reversed the Board's dismissal of a late filed appeal where the Appellant had received notice of the Department's action on the permit by eNotice emails and eFacts webpage. "Quite simply, Objector did not have and could not have had sufficient knowledge to appeal the Renewal Permit until he received written notification of DEP's action…." *Id*. at 373.

The Commonwealth Court's Memorandum & Order in *Lester v. Department of Environmental Protection,* No. 1778 C.D. 2015 (Pa. Cmwlth. October 30, 2015)[1] is especially instructive. In that case the Board issued an Adjudication which was electronically served on Appellant's counsel. However, even though Appellant's attorney had properly registered for electronic filing in accordance with the Board's requirements, he was not aware of how the email would be forwarded to him. Instead, because the Board's electronic service provider was Thomson Reuters, the parent company of Westlaw and West Publishing, of which the attorney was a customer, he mistakenly thought that the electronic notice of the Adjudication was a solicitation for its online legal research product, Westlaw. Therefore, he deleted it without reading it. When he later learned that the Board had issued its Adjudication several months earlier, he filed an appeal with the Commonwealth Court and asked to proceed *nunc pro tunc* because the thirty-day appeal period had run.

[1] The Commonwealth Court's Memorandum and Order is available on the Board's electronic docket at *Lester v. DEP*, Docket No. 2014-025-B, DOCKET SHEET (courtapps.com) docket entry no. 40.

The Commonwealth Court granted the petition to appeal *nunc pro tunc.* Judge Simpson, writing for the Court, held that the email from Thomson Reuters was "vague and non-descriptive" and the header contained no indication an Adjudication was enclosed.[2] *Lester, slip op*. at 4. When this was coupled with the fact that the attorney received numerous emails from Thomson Reuters, Judge Simpson held that the attorney was not negligent in deleting the email without reading it and found that "the confusion caused by the Board's email constitutes a non-negligent circumstance warranting relief." *Id*. at 5.

I therefore respectfully differ from my colleagues who believe the petition should be denied. I agree with former Chief Judge Krancer in *Solebury Township v. DEP,* 2003 EHB 208, that notice published in the *Pennsylvania Bulletin* should be construed "against the party or parties seeking to rely on it. This is especially so where the Department is one of those parties seeking to rely on the notice and it is the party who controls the publication of the notice." *Id.* at 217.

Moreover, these are consolidated appeals dating back to 2014. I believe the Appellants should be allowed an exception and should be given permission to file their appeal *nunc pro tunc* and would so order.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

[2] The Board has since changed the "sender name" of the email notification to clear up any confusion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN SICKERI and DENNIS NELEN	:	
	:	
v.	:	**EHB Docket No. 2021-026-C**
	:	**(Consolidated with 2021-027-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BELL RESOURCES, INC.,	:	**Issued: October 12, 2022**
Permittee	:	

OPINION AND ORDER
DISMISSING APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses one of the appeals in a consolidated appeal because the appellant failed to file his pre-hearing memorandum despite being afforded multiple opportunities to do so.

O P I N I O N

In February 2021, John Sickeri filed a letter appealing the Department of Environmental Protection's (the "Department's") issuance of Surface Mining Permit No. 17180101 and accompanying NPDES Permit No. PA0269891. The permits were issued to Bell Resources, Inc. for an expansion of surface mining operations at Bell Resources' Area 51 Operation in Penn Township, Clearfield County. The letter from the Department informing Mr. Sickeri of the issuance of the permits provided the following with respect to residents' water supplies:

> After considering the local hydrogeology, it was decided that Bell Resources, Inc., could not operate, as proposed, without impacting many of the water supplies located along Irishtown Road. Bell Resources, Inc., is currently in the process of obtaining permission from the local water authority to install a public water line along Irishtown Road. No coal extraction may occur until this water line is installed and those residents along Irishtown Road are offered the chance to connect to the public water line. The only mining activities that may take place prior to the

> installation of the public water line are the construction of a haul road and installation of erosion and sedimentation control structures.

Sickeri's appeal expressed concern about being forced to connect to public water and sewer and having to pay the associated bills. He also objected to trees being cut down, natural springs being destroyed, property being damaged due to blasting, and the noise and dirt from trucks at the mining operation.

Not long after receiving Sickeri's appeal, we received an appeal from Dennis Nelen appealing the same permits and outlining similar concerns as Sickeri. After the deadlines for filing dispositive motions in both appeals came and went, we held a conference call in each appeal. During the calls, the parties expressed an interest in attempting to reach a settlement. They also indicated that they believed consolidation of the two appeals was appropriate. We issued an Order consolidating the appeals and staying the consolidated appeal to provide time for the parties to discuss the possibility of settlement. The parties' discussions ultimately did not lead toward a settlement so we reached out to obtain dates everyone could agree on for a hearing on the merits. We issued our Pre-Hearing Order No. 2 and scheduled the hearing for October 24-27 from 9:00 a.m. to 12:00 p.m. each day to accommodate the Appellants' work schedules.

Our Pre-Hearing Order No. 2 set a deadline of September 6, 2022 for the Appellants to file their pre-hearing memoranda. On September 2, 2022, Dennis Nelen and Tammy Bukousky emailed staff at the Board saying that their main dispute with Bell Resources was with obtaining water and that it was not clear what Bell Resources was doing with the relevant water authorities to provide them and the other potentially impacted residents with water. The subject line of the email was "pre hearing memoranda." We uploaded Nelen's email to the docket.

On September 7, 2022, having received nothing further from Mr. Nelen, and nothing at all from Mr. Sickeri, we issued an Order providing the following:

1. To the extent the email from Dennis Nelen and Tammy Bukousky was intended to be Dennis Nelen's pre-hearing memorandum, it does not comply with the Board's Rules on what is to be contained in a pre-hearing memorandum, 25 Pa. Code § 1021.104, or what was listed in the Board's Pre-Hearing Order No. 2 issued on August 8, 2022.
2. A pre-hearing memorandum must contain, among other things: a statement of facts and legal issues in dispute and the identification of facts on which the parties agree, a list of witnesses who will testify at the hearing, the identification of any expert witnesses who will testify along with their qualifications and a summary of their testimony, and the exhibits that a party will seek to introduce at the hearing.
3. The deadline for the Appellants to file pre-hearing memoranda that comply with the Board's Rules shall be extended until **September 22, 2022**.
4. The failure to file pre-hearing memoranda that comply with the Board's Rules may result in the imposition of sanctions that could include the dismissal of one or both Appellants, or the dismissal of the appeal. *See* 25 Pa. Code §§ 1021.104(b), 1021.161.

On September 19, we received a filing from Mr. Nelen. To date, we have received nothing from Mr. Sickeri in response to our Orders requiring the filing of his pre-hearing memorandum. Because Mr. Sickeri has not filed anything in response to our Orders, we will dismiss his appeal.

Our Rules of Practice and Procedure authorize us to impose sanctions upon parties for failing to abide by the Board's orders and/or our Rules. 25 Pa. Code § 1021.161. Included within these sanctions is the dismissal of an appeal. We have consistently held that dismissal is appropriate where a party has shown a disinterest in proceeding with an appeal evinced by a failure to submit filings or respond to Board orders. This is particularly true when a party has chosen not to file a pre-hearing memorandum in advance of a scheduled hearing, and then has not responded to a subsequent order giving the party a second chance to file it. *See, e.g.*, *Foust v. DEP*, 2018 EHB 604; *Slater v. DEP*, 2016 EHB 380; *Casey v. DEP*, 2014 EHB 908; *Daly v. DEP*, 2009 EHB 647. This is because the pre-hearing memorandum is not a mere formality. "The pre-hearing memorandum is an essential part of the preparation for a hearing. It advises both the Board and the opposing parties of the details of the evidence supporting the appellant's claim so that surprise

at the hearing will be eliminated." *Zazo v. DEP*, 2006 EHB 650, 654. *See also Stanley v. DEP*, EHB Docket No. 2021-013-L, slip op. at 6 (Opinion and Order Feb. 17, 2022) ("Parties have a right to rely on the information presented in opposing parties' pre-hearing memoranda as the final statement of a party's case before the hearing on the merits commences.").[1] Accordingly, Mr. Sickeri's failure to file a pre-hearing memorandum leaves us with no choice but to dismiss his appeal as Mr. Nelen's appeal moves forward.

We issue the Order that follows.

[1] The Department and Bell Resources have both filed detailed pre-hearing memoranda in accordance with our Rules.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN SICKERI and DENNIS NELEN	:	
	:	
v.	:	**EHB Docket No. 2021-026-C**
	:	**(Consolidated with 2021-027-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BELL RESOURCES, INC.,	:	
Permittee	:	

O R D E R

AND NOW, this 12th day of October, 2022, it is hereby ordered as follows:

1. The above appeals are unconsolidated and the appeal of John Sickeri at EHB Docket No. 2021-026-C is **dismissed**.

2. All future filings shall be made at the following caption and docket number:

DENNIS NELEN	:	
	:	
v.	:	**EHB Docket No. 2021-027-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BELL RESOURCES, INC.,	:	
Permittee	:	

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 12, 2022

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

For the Commonwealth of PA, DEP:
Craig S. Lambeth, Esquire
(*via electronic filing system*)

For Appellants, *Pro Se*:
John Sickeri
4812 Irishtown Rd.
Grampian, PA 16838
(*via U.S. Mail*)

Dennis Nelen
(*via electronic filing system*)

For Permittee:
Matthew R. Zwick, Esquire
C.J. Zwick, Esquire
Gregory D. Sobol, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PD INN, LLC & BLACK GRANITE VILLAGE, LP	:	
v.	:	**EHB Docket No. 2021-001-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 20, 2022**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's inadequately supported motion to dismiss this appeal for lack of jurisdiction.

O P I N I O N

This appeal was filed on January 7, 2021 by PD Inn, LLC and Black Granite Village, LP (the "Appellants") using the Board's Notice of Appeal form. In the part of the form that asks the Appellants to describe the action of the Department of Environmental Protection (the "Department") that they are appealing, the Appellants wrote:

> Upon information and belief, the Department prohibited the Township of Warwick from issuing to Appellant PD Inn, LLC and Appellant Black Granite Village, LP Certificates of Occupancy for certain properties located within the jurisdictional limits of the Township. Pursuant to the Township Zoning Officer, "[t]he Township has not been released by the PADEP to issue final certificates of occupancy."

In response to the form's requirement that the Appellants attach written notification of the Department's action if they received such notice, the Appellants attached two letters from Warwick Township's zoning officer, one to each Appellant, which read as follows:

> I am writing in response to your application for a Zoning Certificate of Occupancy for the above referenced property. Having reviewed your application and communicated with the Pennsylvania Department of Environmental Protection (PADEP). [sic] The Township has not been released by the PADEP to issue the final certificates of occupancy; [sic] Therefore, your application has been denied and we are unable to issue the Zoning/Building Certificate of Occupancy at this time.

The Department filed a motion to dismiss this appeal, contending that the Board lacks jurisdiction to review the Township's letters. The Department correctly argues that we do not have jurisdiction to review a municipality's denial of occupancy permits. However, the Appellants in their response in opposition to the motion state that they are not attempting to appeal from the denial of occupancy permits. Rather, they are appealing from an apparent communication from someone at the Department apparently saying that, due to allegedly unresolved sewage planning concerns, the Township is prohibited from issuing any permits. The question, then, is whether this so-called communication constitutes an appealable action.

The problem with the Department's motion is that we have no record to support a decision other than one vague letter from a Township official quoted above. We do not know exactly what was communicated, by whom to whom, or when it was communicated. The Department says it "may have offered its legal interpretation to the Township" regarding sewer planning, but it does not provide us with any support for that speculation. The Department goes on to tell us what that interpretation might have been, but again, the content of the interpretation at this juncture is without any record support. The context and background provided by the Department regarding the Township's sewage facilities struggles might have been helpful in some setting other than the review of a motion to dismiss, but they are not helpful here without more information regarding the communication itself. We have nothing of record to go on in assessing the appealability of the mystery communication. The Department in a footnote to its memorandum of law says this appeal

is also untimely, but that again cannot be determined without any record support regarding the Departmental communication at issue. We evaluate motions to dismiss in the light most favorable to the nonmoving party and will only grant a motion where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514. The Department clearly has not met that standard here.

This appeal has essentially lain dormant now for almost two years. The parties have asked for and received numerous extensions due to what we are told are settlement discussions in some related litigation. Unfortunately, that settlement has not come to pass and it is time to move this appeal forward. The Board's staff will be in touch with the parties to schedule a hearing on the merits. In the meantime, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PD INN, LLC & BLACK GRANITE VILLAGE, LP	:	
	:	
v.	:	**EHB Docket No. 2021-001-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 20th day of October, 2022, it is hereby ordered that the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: October 20, 2022

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

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

For Appellants:
Michael S. Gill, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: October 27, 2022**

OPINION AND ORDER ON APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND DEPARTMENT'S AND PERMITTEE'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

Summary judgment is granted to the Department of Environmental Protection and Permittee on a limited number of issues in this appeal of a major permit modification for a landfill.

O P I N I O N

Introduction

This matter involves the issuance of a major permit modification (the permit) to Tri-County Landfill (Tr-County) by the Department of Environmental Protection (Department). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty Township and Pine Township, Mercer County within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. Tri-County currently operates a waste transfer station at the site of the old landfill.

On January 27, 2021, an appeal of the permit was filed with the Environmental Hearing Board (Board) by Liberty Township, Pine Township, William C. Pritchard and Lisa L. Pritchard,

and CEASRA.[1] On February 17, 2021 the appellants filed an amended appeal. On June 16, 2021, William Pritchard, Lisa Pritchard and Pine Township petitioned to withdraw from the appeal and their petitions were granted on June 17, 2021. On September 28, 2021, Pine Township petitioned to be reinstated as an appellant, and on October 22, 2021, it filed both a Motion to Reinstate and a Petition to Intervene. The Board denied the Motion to Reinstate but granted the Petition to Intervene. On October 14, 2022, Pine Township again petitioned to withdraw from the appeal, and the petition was granted on October 26, 2022.

The matter now before the Board is the Appellants' Motion for Summary Judgment and the Department's and Tri-County's Motions for Partial Summary Judgment. This Opinion addresses all three motions.

Discussion

Liberty Township and CEASRA (the Appellants) have appealed the issuance of the permit on several grounds including the following: 1) the permit is void under 25 Pa. Code § 271.211 (e), which requires that waste disposal commence within five years of the permit issuance; 2) the information contained in the permit application is out-of-date because it includes material from previous applications; 3) the Appellants and other governmental bodies were not given appropriate notice and opportunity for comment; 4) the landfill fails to comply with Liberty Township's height restrictions; 5) Tri-County failed to perform an adequate harms – benefits analysis; 6) the landfill poses a risk to the Grove City Airport; and 7) the permit will harm water resources, wetlands and endangered species. The Appellants have moved for summary judgment, while the Department and Tri-County have moved for partial summary judgment.

[1] CEASRA is a citizens group registered as Citizens Environmental Association of the Slippery Rock Area, Inc. (Tri-County's Motion, Exhibit B.)

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1-1035.2; *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43, 45 (citing *Williams v. DEP*, 2019 EHB 764, 765-66); *Camp Rattlesnake v. DEP,* 2020 EHB 375, 376. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sunoco Pipeline*, 2021 EHB at 45; *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406).

Summary judgment is granted only in the clearest of cases 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. *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471, *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106. In cases involving complex issues of fact and law, the Board has found that summary judgment may be inappropriate and has held that such matters should be decided on a fully developed record at a merits hearing. *Three Rivers Waterkeeper v. DEP*, 2020 EHB 87, 89; *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

We believe that many of the issues raised in this appeal would be more appropriately decided on a fully developed record. A review of the parties' motions, responses and replies reveals that the issues are complex and a number of facts upon which the parties rely are in dispute. In culling through the parties' motions, briefs, statements of undisputed material facts, responses,

replies and numerous exhibits, we find that there are only a limited number of issues presented here for which summary judgment is appropriate. They are addressed below:

Notice and Opportunity for Comment

Objections X, Z, AA, BB, and OO of the Amended Notice of Appeal[2] allege that the Appellants and other governmental bodies were not given an opportunity to comment on the permit.[3] The Department and Tri-County move for summary judgment on the basis that the Appellants abandoned this objection in discovery. In response to both the Department's and Tri-County's Requests for Admissions, the Appellants admitted that they no longer objected to the permit on the basis that they were not provided with an opportunity to comment on it. (Responses to Department's Request for Admissions – Department's Motion, Exhibit 6, para. 52, 79; and Exhibit 7, para. 49, 52, 79; Tri-County's Request for Admissions – Tri-County's Motion, Exhibits W, para. 49.)

The Appellants do not dispute the fact of the admissions. Nor do they address the Department's and Tri-County's argument that their objection regarding notice and opportunity to comment is abandoned. Rather, they discuss the need for due process. While notice and an opportunity to be heard may be important elements of due process, the Appellants, by their own admission, no longer assert that they were denied notice or the opportunity to comment on the permit. [4] As the Board has held, "Admissions are conclusive within the proceeding unless their withdrawal or an amendment to them is permitted on motion." *United Environmental Group, Inc. v. DEP*, 2017 EHB 644, 649 (citing *Poli v. South Union Township Sewage Authority*, 424 A.2d

[2] The objections are set forth in paragraph 3 of the Amended Notice of Appeal.

[3] Objections X, Z, AA, BB and OO cite different regulations, but all state the same or similar claim regarding a lack of notice and opportunity to comment.

[4] Counsel for Appellants changed during the course of this appeal. Nonetheless, the Appellants are bound by their earlier admissions.

568, 569 (Pa. Cmwlth. 1981)). The Appellants have not moved to withdraw their admissions. Therefore, summary judgment is granted to the Department and Tri-County on Objections X, Z, AA, BB and OO of the Amended Notice of Appeal.

49 US Code Section 44718

Tri-County moves for summary judgment on Objections I and J of Appellants' Amended Notice of Appeal which state as follows:

> I. The Permit was issued in violation of 49 US Code Section 44718, for the permitting of a landfill, that had not previously received a study conducted by the US Secretary of Transportation.
>
> J. The Permit was issued in violation of 49 US Code Section 44718, for the permitting of a landfill, that had not previously received a report by the US Secretary of Transportation.

Subsection (b) of 49 U.S.C. § 44718 requires the Secretary of Transportation to issue a study and report in the following circumstances: adverse impact on the use of the navigable airspace or unacceptable risk to national security. Tri-County asserts that the requirements for when the Secretary of Transportation must submit a study and report are not applicable here nor have the Appellants offered any evidence in support of their claims. The Appellants do not respond to Tri-County's argument, nor have they come forth with any issue of disputed fact.

Under the Board's rules:

> When a motion for summary judgment is made and supported…an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or 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.

25 Pa. Code § 1021.94a(l).

Because the Appellants have not responded to Tri-County's argument and have not demonstrated that there is a genuine issue for hearing, as required by 25 Pa. Code § 1021.94a(l), summary judgment is entered against the Appellants on the question of whether the permit issuance violates 49 U.S.C. § 44718, as set forth in Objections I and J of the Amended Notice of Appeal.

Compliance with Height Restriction

Objection W of the Amended Notice of Appeal states that "[t]he Permit was issued in violation of Liberty Township's zoning restriction against 40-foot structures." The Department and Tri-County assert that this matter has already been addressed in previous litigation. Pursuant to a Consent Order entered into between Tri-County, the Mercer County Regional Planning Commission, Pine Township, and Liberty Township before the Mercer County Court of Common Pleas ("Consent Order") on November 30, 2018, the court found, among other things, that so long as the landfill does not exceed 1,353.4 feet in Liberty Township, excluding flare stacks and gas wells, the landfill is deemed to comply with the height limitations in Liberty Township's zoning ordinance. (Department's Motion, Exhibit 11, p. 3, para. 2.B.)

As to flare stacks and gas wells, the Consent Order states:

> To the extent that the DEP shall require flare stacks and/or landfill gas wells to be located on the Landfill Site and the height of the flare stacks and/or landfill gas wells exceeds the mandated elevation in either municipality, *the flare stacks and landfill gas wells shall be deemed to be in compliance with the height limitations in the municipality.*

(*Id.* at para. 2.D) (emphasis added).

The Department argues that the Appellants are collaterally estopped from relitigating this issue. Additionally, Tri-County points out that in response to its Request for Admissions, the Appellants admitted that Liberty Township and Pine Township agreed to and signed the Consent

Order and that all methane flares and silos to be constructed under the permit are deemed to be in compliance with each township's zoning ordinances. (Tri-County's Motion, Exhibits P, Q and R, para. 1-5.)

The Appellants do not dispute that Liberty Township entered into the aforesaid Consent Order. (Response to Tri-County's Statement of Undisputed Material Facts, para. 43.) They further admit that the permit sets the final maximum elevation of the landfill at 1,353.4 feet in Liberty Township and this is "in compliance with Liberty Township's zoning requirements and the Consent Order." (Response to Department's Statement of Undisputed Material Facts, para. 14.)

Rather, the Appellants state they are concerned that the Department will not adequately enforce the height restriction. However, future compliance and enforcement actions are not a subject of this appeal which is limited to challenging the permit. Should Tri-County violate the terms of its permit regarding height restrictions, as set forth in the aforesaid Consent Order, that matter may be subject to future enforcement action by the Department, but it is not grounds for an appeal of the permit itself. *See Middleport Materials, Inc. v. DER*, 1997 EHB 78, 88 (citing *North Pocono Taxpayer Association v. DER*, 1994 EHB 449, 479) ("In an appeal challenging the issuance of a permit, alleged post-issuance violations are not relevant and will not be considered.")

Therefore, summary judgment is granted to the Department and Tri-County on the issue of height restrictions set forth in Objection W of the Amended Notice of Appeal.

Violation of 35 P.S. § 691.5(b)(1)

In Objections A and B of the Amended Notice of Appeal, Appellants allege that the Department's issuance of the permit violates Section 5(b)(1) of the Clean Streams Law, 35 P.S. § 691.5(b)(1), due to alleged degradation of wetlands and drinking water sources. Section 5(b)(1) states that "the [D]epartment shall have the power and its duty shall be to . . . formulate, adopt,

promulgate and repeal such rules and regulations and issue such orders as are necessary to implement the provisions of [the Clean Streams Law]."

The Department has moved for summary judgment on this issue, asserting that, in this appeal of the issuance of a permit, "there is no aspect of the Department's action relevant to any claim that the Department failed to exercise its duty to formulate, adopt, promulgate, or appeal any rules or regulations, or issue any orders." (Brief in Support of Department's Motion, p. 17.)

The Appellants do not respond to this argument and present no genuine issue for hearing. Therefore, summary judgment is granted to the Department and Tri-County on the question of whether the permit issuance violates 35 P.S. § 691.5(b)(1). 25 Pa. Code § 1021.94a(l).

Violation of 35 P.S. § 691.402

Objections A and B of the Amended Notice of Appeal allege that the Department's issuance of the permit violates Section 402 of the Clean Streams Law, 35 P.S. § 691.402, due to alleged degradation of wetlands and drinking water sources.

Sections 402(a) and (b) state that if the Department finds that an activity not otherwise requiring a permit creates a danger of pollution to the waters of the Commonwealth, the Department may require a permit for that activity, and the permittee's failure to abide by that permit constitutes unlawful conduct. Section 402(c) deals with NPDES permits and certain options available to NPDES permittees.

The Department moves for summary judgment on the grounds that Section 402 is inapplicable: Section 402 simply provides the Department with authority to require a permit when it finds there is a danger of pollution; it cannot, therefore, serve as the basis for appealing the issuance of a permit. As to subsection (c) which deals with NPDES permits, the Department argues that this section also is inapplicable since the NPDES permit has not yet been issued.

The Appellants do not respond to this argument and present no genuine issue for hearing. Therefore, summary judgment is granted to the Department and Tri-County on the question of whether the permit issuance violates 35 P.S. § 691.402. 25 Pa. Code § 1021.94a(l).

Violation of 25 Pa. Code §§ 109.1, 105.17 (1) and 298.1

In Objection C of the Amended Notice of Appeal, the Appellants allege that the permit was issued in violation of 25 P.S. § 109.1 for allegedly permitting a landfill within a wellhead protection area. Since 25 P.S. § 109.1 does not exist, we believe the Appellants intended to refer to 25 Pa. Code § 109.1, which is the "Definitions" section for Chapter 109 of the Department's regulations (Safe Drinking Water).

The Department has moved for summary judgment on this issue. It argues that Section 109.1 does not contain any required activities or regulatory standards that the Department must meet, but merely defines the terms that are used throughout Chapter 109. The Appellants do not respond to the Department's argument. Therefore, summary judgment is entered for the Department on this issue. 25 Pa. Code § 1021.94a(l).

In Objections D, E, F, G, and H, Appellants allege that the Department's issuance of the permit violates 25 P.S. § 105.17(1). Again, this statutory citation does not exist, and, therefore, we believe that the Appellants intended to refer to 25 Pa. Code § 105.17(1). Section 105.17(1) contains a description of one of the characteristics of exceptional value wetlands: "[w]etlands located along an existing public or private drinking water supply, including both surface water and groundwater sources, that maintain the quality or quantity of the drinking water supply." The Department moves for summary judgment on this issue because Section 105.17(1) merely contains a definition and no regulatory requirement that must be met. Again, the Appellants do not respond to the

Department's argument, and, therefore, summary judgment is entered in favor of the Department on this issue. 25 Pa. Code § 1021.94a(l).

In Objection JJ of the Amended Notice of Appeal the Appellants assert that the permit violates 25 Pa. Code § 298.1, the definitions section for Chapter 298 (Management of Waste Oil), by permitting the disposal of liquid waste. The Department moves for summary judgment on this issue on the basis that Section 298.1 does not contain any required activities or regulatory standards but merely defines the terms that are used throughout Chapter 298. Tri-County moves for summary judgment on the basis that the Appellants have offered no evidence in support of their claim.

In response, the Appellants state the following: "Appellants advised Tri-County and the Department that Appellants withdrew this objection as filed with the Board on January 13, 2022, and the Motions are moot with respect thereto; provided, however, Appellants reserve the right to object under this regulation as the [sic] facts surrounding TENORMS in the waste streams together with the Existing Waste." (Brief in Support of Appellants' Joint Response, p. 13, Item no. 3.)

Therefore, summary judgment is entered in favor of the Department and Tri-County as to all matters pertaining to 25 Pa. Code § 298.1, with the exception of "TENORMS in the waste stream." [5]

[5] TENORMS is the acronym for Technologically Enhanced Naturally Occurring Radioactive Material 25 Pa. Code § 287.1. It is defined by EPA as "naturally occurring radioactive materials that have been concentrated or exposed to the accessible environment as a result of human activities such as manufacturing, mineral extraction, or water processing." Technologically Enhanced Naturally Occurring Radioactive Materials (TENORM) | US EPA. We make no ruling on the relevancy of this issue or its admissibility at a hearing on the merits.

Violation of *Payne v. Kassab*

Appellants claim in Objections M, N, Q, S, U, and LL of the Amended Notice of Appeal that the Department violated *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd,* 361 A.2d 263 (Pa. 1976). *Payne v. Kassab* set forth a three-part analysis with regard to Article 1, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. In *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme Court overruled *Payne* and abandoned the three-part test. Because *Payne* is no longer good law, the Department moves for summary judgment on this issue. In response, the Appellants acknowledge that *Payne* has been overturned. Therefore, we grant summary judgment to the Department and Tri-County on this issue.

Conclusion

Summary judgment is granted to the extent set forth above. Summary judgment is denied as to all remaining issues because there are disputed issues of material fact that would be better resolved at a hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 27th day of October, 2022, it is ordered as follows:

1) The Appellants' Motion for Summary Judgment is denied.

2) The Department's and Tri-County's Motions for Partial Summary Judgment are granted in part and denied in part as follows:

   A) Summary judgment is entered against the Appellants as to Objections C, D, E, F, G, H, I, J, M, N, Q, S, U, W, X, Z, AA, BB, LL and OO of the Amended Notice of Appeal, as set forth in this Opinion.

   B) Summary judgment is entered against the Appellants as to Objections A and B of the Amended Notice of Appeal to the extent they allege violations of 35 P.S. § 691.5(b)(1) and 35 P.S. § 691.402.

   C) Summary judgment is entered against the Appellants on the issue raised in Objection JJ with the exception of "TENORMS in the waste stream" as set forth in this Opinion.

   D) Summary judgment is denied as to all other issues.

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

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

DATED: October 27, 2022

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC, Permittee	:	**Issued: November 9, 2022**

OPINION AND ORDER
ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board grants the Permittee's Motion for Summary Judgment where the Appellant lacks standing to challenge the NPDES Permit. The Appellant lacks standing because the record, when viewed in the light most favorable to the non-moving party, did not demonstrate that the Appellant had a substantial, immediate and direct interest in the subject matter of the appeal.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board ("the Board") by Pennsylvania Senator Katie J. Muth ("Senator Muth"), challenging the issuance of Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. PA0276405 ("Permit") to Eureka Resources, LLC ("Eureka") by the Department of Environmental Protection ("the Department"). Eureka has proposed the construction and operation of an oil and gas liquid waste treatment facility located in Dimock Township, Susquehanna County. The Permit authorizes Eureka to discharge wastewater to Tributary 29418

to Burdick Creek, a tributary of the Susquehanna River, in Susquehanna County. Senator Muth is a Pennsylvania State Senator who represents District 44, which includes parts of Berks, Montgomery and Chester Counties. (Amended Notice of Appeal, para. 1, 2.) On April 12, 2022, Eureka filed a Motion to Dismiss on the basis that Senator Muth does not have standing to bring this appeal. Senator Muth filed a Response opposing the motion on May 12, 2022, and Eureka filed a Reply on May 13, 2022. The Department filed no response to the motion. In an Opinion and Order issued June 3, 2022, the Board granted in part and denied in part Eureka's Motion to Dismiss. The Board held that Senator Muth did not have representational standing or standing as a trustee pursuant to the Environmental Rights Amendment. However, the Board deferred ruling on Senator Muth's individual standing until further discovery was conducted. On June 7, 2022, Eureka filed a Petition for Reconsideration that the Board denied on June 8, 2022. The Board also denied a Renewed Motion to Dismiss filed by Eureka on June 15, 2022. The Board issued an Order on June 21, 2022, staying this matter with exceptions for conducting discovery and filing dispositive motions on the issue of Senator Muth's individual standing.

Currently before the Board is a Motion for Summary Judgment ("the SJ Motion") filed by Eureka on September 19, 2022. The SJ Motion argues that Senator Muth does not have individual standing to bring this appeal. Senator Muth filed her Response in Opposition to the SJ Motion on October 19, 2022, and Eureka subsequently filed its Reply to the Response on October 22, 2022. The Department has not filed a response to the SJ Motion. The Board is now prepared to rule on the SJ Motion.

Standard of Review

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories and other related documents, shows that there is no genuine issue of

material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. See 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-808. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the nonmoving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Standing

When an appellant is on notice that its standing is at issue, and then that standing is challenged in a motion for summary judgment filed after the close of discovery, the appellant must be able to point to evidence demonstrating the basis for its standing. *Wurth v. DEP*, 2000 EHB 155, 173. In order to have standing to challenge an action of the Department, an appellant must be aggrieved by that action. *Wurth v. DEP*, 2000 EHB 155, 170 (citing *Florence Township v. DEP*, 1996 EHB 282). To be aggrieved, a party must have a substantial, immediate and direct interest in the subject matter and outcome of the appeal. *Del-AWARE, Unlimited, Inc. v. DER*, 1987 EHB 351, 361. The Pennsylvania Supreme Court has addressed what it means to be "aggrieved." In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), the Court set forth the elements that an appellant must demonstrate in order to have standing:

> [The party] must have a direct interest in the subject matter of the particular litigation, otherwise he can have no standing to appeal. And not only must the party desiring to appeal have a direct interest in the particular question litigated, but his interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must also be substantial.
>
> *****
>
> The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not "aggrieved" thereby and has no standing to obtain a judicial

> resolution of his challenge. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law.

Id. at 280-81 (footnotes omitted) (quoting *Man O' War Racing Assn., Inc. v. State Horse Racing Commn,* 250 A.2d 172, 176-77 (Pa. 1969)).

An interest is "substantial" when it surpasses the common interest of all citizens in procuring obedience to the law. *Food and Water Watch,* 2019 EHB 459, 463 (citing *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016), aff'd, No. 565 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. April 12, 2021). In other words, "there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *William Penn*, 346 A.2d at 282. For an interest to be "direct" there must be a causal connection between the matter complained of and the harm alleged. *Id*.; *Food and Water Watch*, 2019 EHB at 463. Finally, an interest is "immediate" where the causal connection is sufficiently close so as not to be remote or speculative. *Id*. The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to seek relief from the particular action of the Department that is being appealed. *Wurth v. DEP*, 2000 EHB at 170; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944.

Discussion

In our prior Opinion in this case, the Board rejected Senator Muth's claim that she had both representational standing and trustee standing to pursue her appeal of Eureka's Permit. That Opinion left open the possibility that Senator Muth might have standing as an individual to challenge the Permit in front of the Board and suggested that discovery and additional motions would assist the Board in deciding that issue. Eureka conducted discovery through interrogatories, requests for admissions and a request for production of documents directed at Senator Muth.

Apparently, no deposition of Senator Muth was taken by Eureka. Following completion of the limited discovery, Eureka filed its SJ Motion and related filings. Senator Muth filed a Response to the SJ Motion along with related filings and Eureka filed a short Reply Brief. Following our review of the filings in this case, we hold that Senator Muth does not have individual standing and we grant Eureka's SJ Motion and dismiss the appeal.

Turning to the specifics of this case, Senator Muth has filed a third-party permit appeal. In third-party permit appeals, the Board has held that a party challenging a Department permit decision demonstrates a substantial, direct and immediate interest in the decision when the appellant credibly avers that the appellant uses[1] the affected area and there is a realistic potential that the appellant's use of the area could be affected by the challenged activity. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643**.** Senator Muth asserts in her Brief that she has done just that. (Sen. Muth's Brief in Opposition to the Motion, p. 3). Her Brief is full of broad statements setting forth her contention that she uses various areas and resources that will be impacted by the activities authorized by Eureka's Permit. Her claims generally fall into three categories: 1. Impacts to her recreational use of water resources in and around the Dimock area; 2. Impacts to her use of water resources well downstream of Dimock, specifically the Susquehanna River in and around Harrisburg, and; 3. Impact to the food consumed by Senator Muth and others. We will first address the claims surrounding her activities in the Dimock area in proximity to the permitted activity.

She asserts that "Dimock is a place where [she] has significant ties and where she and her family enjoy recreating" and that "[s]he visits the area of the proposed Facility. She recreates

[1] In this context, we read the terms "uses" or "use" broadly to include recreational pursuits and other types of activities that involve interaction with the resource that is of concern to the appellant.

there. She enjoys the environment, sightseeing, visiting good friends and acquaintances. She has recreated along Burdick Creek." (Sen. Muth's Brief in Opposition to the Motion, p. 6, 8). However, none of these statements in her Brief concerning her use of the potentially affected area in and around Dimock are supported by a citation to the record. A close examination of Senator Muth's affidavit and verified responses to interrogatories and request for admissions and the documents produced in response to the request for production of documents do not contain support for the broad assertions regarding her use of the Dimock area that are made in her Brief.[2]

Senator Muth included a signed affidavit with her initial Notice of Appeal ("NOA") filed on March 7, 2022. Her affidavit states that "my personal experience with waters of the Commonwealth spans many counties" but does not provide any further detail about those experiences. (NOA, Exhibit B).[3] In our opinion, nothing stated in the affidavit offers support for her claim of individual standing. In addition to the affidavit, Senator Muth verified two other documents that are included in the record. The first verified document is Appellant's Answers and Objections to Eureka Resources, LLC's First Set of Interrogatories Requests for Production of Documents and Requests for Admissions Directed to Appellant that is attached to Eureka's Statement of Undisputed Material Facts as Exhibit H ("Exhibit H"). The verified responses to the Interrogatories and the Request for Admissions in Exhibit H do not provide any information

[2] The Board is not limited to considering only affidavits and verified responses when evaluating the issue of a party's standing. However, we find that the requirement that these items be sworn to under the penalty of law by the party means they carry more weight in our determinations regarding credible facts than statements made in the other non-verified filings. It would have been most helpful to the Board in reaching its determination in this case if it had been provided sworn deposition testimony from Senator Muth but, as noted, a deposition was not taken so the Board will make its decision on the record it has and not the record it wishes it had.

[3] The initial NOA was corrected once (Docket Entry #2) and amended once (Docket Entry #8). Senator Muth's affidavit was included as an exhibit to the corrected NOA but was not included as an exhibit to the amended NOA so it is not clear whether it was withdrawn or not. Ultimately since we conclude that it does not support the Senator's claim for individual standing, we do not need to decide the legal status of the affidavit.

regarding the Senator's use of the water resources in the Dimock area and, therefore, do not offer any support for her individual standing. The first request set forth in the Request for Production in Exhibit H asks Senator Muth to produce "any and all Documents which Appellant believes supports her claim of individual standing to bring the appeal in the present matter." (Exhibit H, p. 6). After objecting to the request, the Senator responded stating "Without waiver of the forgoing objections, and in addition to documents filed of record in this matter, see attached, including documents evidencing unreimbursed expenses during Appellant's trips to Dimock." (Exhibit H, p. 6).[4] The documents produced by the Senator were as follows: 1. Two Lease Agreements and a Lease Extension Agreement for property in Harrisburg, PA.[5] The term periods for the leases and lease extension were 1/1/19 to 11/30/19 and 8/25/2021 to 11/30/22; and 2. Three redacted credit card statements showing charges from three separate dates in 2021 (January 23, May 4, and July 31) apparently related to payments for hotel, food, gasoline and miscellaneous from several different locations (Trucksville, PA; Pittson, PA; Springville, PA and Montrose, PA).[6] Senator Muth does not provide any explanation of the credit card charges or attempt to link them to her use of the water resources in or around the Dimock area.

Senator Muth also provided verified answers to a second set of interrogatories from Eureka. The two interrogatories and answers are set forth as Exhibit M to Eureka's Statement of Undisputed Material Facts ("Exhibit M"). The first interrogatory asks Senator Muth to "Identify

[4] Senator Muth objected to the four other requests for documents and appears not to have produced any further documents in response to those requests. (Exhibit H, p.6-8).

[5] The addresses in the Lease Agreements and Lease Extension Agreement were redacted to only show that the property or properties in question had a Harrisburg, PA address.

[6] Two of the charges do not list a specific location although the charge for the Hampton Inn dated May 4, 2021 lists a phone number that Eureka asserts identifies the location of the Hampton Inn as Tunkhannock, PA. (Eureka's Statement of Undisputed Facts, #20, p.4). Senator Muth denied that fact in her Response to Eureka's Statement of Undisputed Facts. (Response, #20, p.4).

and state with particularity all facts that you contend support your individual standing in this appeal." (Exhibit M, p. 3). This verified answer is the place in the record where the Senator most directly addresses the factual basis for her assertion that she has individual standing, so we set forth her response in its entirety: "*Without waiving any of the general objections set forth above, or limiting in any way Appellant's prior responses to discovery and filings in the captioned matter, or the Board's findings in its Opinion and Order of June 3, 2022, Appellant has spent time, and currently spends time, personally and professionally in the township of Dimock where the proposed facility would be located. In addition, based on evidence from other Eureka facilities in the State, the discharge from the proposed facility would contain heavy metals, radioactive material and other materials, and will discharge this material into the waters of the Commonwealth (e.g. Burdick Creek) that is tributary to the Susquehanna River. These are areas in which Appellant resides, works, and recreates. Appellant has an apartment in Harrisburg, one of the many places where she works. The Susquehanna River runs through Harrisburg and is the source of drinking water for the City of Harrisburg. Senator Muth and her family enjoy recreating along the Susquehanna River, both in Harrisburg and Susquehanna County. In addition, Burdick Creek is a drinking water source for livestock in the Dimock area, with dairy and beef cow farmers utilizing Burdick Creek for water supply. Eureka's discharge will be consumed by such animals, as well as fish, in the food chain consumed by Appellant and others."* (Exhibit M, p. 3).

In the verified answer quoted above, there are two principal statements that are directed to her use of the water resources in the Dimock area. First, she states that she has spent, and currently spends time, personally and professionally in the township of Dimock where the proposed facility would be located. Secondly, she states that she and her family enjoy recreating along the Susquehanna River, both in Harrisburg and Susquehanna County. Unfortunately, we are provided

no details at all concerning the frequency, length, specific location and nature of the use she asserts in her answer. Given that her claim that she has individual standing was being aggressively challenged by Eureka, it was incumbent on her to bring forward all her evidence and provide sufficient detail about her activities to convince the Board that she satisfied the standing requirements. We would have expected some discussion by way of answers to interrogatories or an affidavit detailing when, where, and how she spent time and recreated in Dimock and along the Susquehanna River in Susquehanna County. Further undermining her claim of individual standing, she failed to provide any physical evidence supporting her claim of use of the waters in the Dimock area beyond the three credit card statements and made no effort to explain how the credit card statements she provided in response to the request for production tie into her use claim. At best, and in the light most favorable to the Senator, the statements arguably demonstrate that she was in the broad vicinity of Dimock on three separate occasions in 2021. The lack of detail and supporting evidence[7] as to her recreational use during those three occasions and any other times she may have been in Dimock strongly contrasts with the evidence of use presented in many of the cases where the Board has found individual standing based on recreational use of a given area**.** *See Citizens for Pennsylvania's Future v. DEP,* 2015 EHB 750, 754 (the Board denied a motion for summary judgment and found the appellant had standing where appellant-member testified that he hiked in the affected area, detailed the time he spent there, took photographs, birdwatched, and had an aesthetic appreciation for the area); *Food & Water Watch v. DEP*, 2019 EHB 459, (the Board found a third-party appellant had representational standing where appellant's

[7] We fully understand that many recreational activities such as walking along a stream, canoeing, birdwatching, etc. may not produce documentary evidence of those uses and we evaluated the facts in this case with that in mind. The lack of physical evidence is not dispositive but in conjunction with the overall lack of detail supporting the claimed activities along with no explanation tying the physical evidence (credit card receipts) that was provided to the uses and/or activities claimed, supports our determination that the Senator has not credibly averred her use of the affected area.

members had individual standing based on a record that detailed their recreational activities such as kayaking, birdwatching, wading and walking along the creek); *Blose v. DEP*, 1998 EHB 635, 638 (the Board held that appellant had standing where his deposition, answers to interrogatories and affidavit all demonstrated that he used the site for swimming, boating, fishing and canoeing on a regular basis for the past 40 years). Ultimately our review of the verified information provided by Senator Muth regarding her use of the affected area in and around Dimock fails to convince us that she has the requisite contact with the area to demonstrate that she has a substantial, direct and immediate interest in the outcome of the appeal.

Senator Muth also relies on her use of the Susquehanna River in the Harrisburg area as a basis for claiming that she has individual standing. Eureka's permitted discharge is into a tributary of Burdick Creek, which flows into Meshoppen Creek, which eventually discharges into a branch of the Susquehanna River. In her verified answer to the first interrogatory (Exhibit M), set forth in its entirety above, Senator Muth states that she and her family enjoy recreating along the Susquehanna River in Harrisburg. She also makes a reference to the Susquehanna serving as a source of drinking water for Harrisburg. We have credible evidence that the Senator has leased and is currently leasing an apartment in the Harrisburg area and we have no doubt that her legislative duties require her to spend significant time in Harrisburg. Once again, however, we have no details concerning the what, when or how she and her family recreate along the Susquehanna River in the Harrisburg area nor any direct evidence of that fact. She also offers no support for her claim that the Susquehanna River is the source of drinking water for the City of Harrisburg. Eureka disputes that claim and states that the Susquehanna is not a primary source of drinking water and instead serves as a backup source. It claims that water from the Susquehanna only enters the drinking water system on limited occasions when the backup system is tested to

ensure it remains operational. We need not resolve that dispute because even if we view that information in the light most favorable to Senator Muth as we are required to do, we hold that the claim that the Susquehanna is a source of drinking water for the City of Harrisburg and that she may suffer some type of harm as a result of Eureka's discharge is not adequate to support her claim of individual standing. In order to have individual standing, there must be a causal connection between Eureka's discharge and the alleged harm claimed by Senator Muth and that causal connection must be sufficiently close so as not to be remote or speculative. Given the readily apparent distances involved between the discharge point in Susquehanna County and any intake for the Harrisburg water system as well as the relative flows involved, the potential harm to Senator Muth that may result from drinking treated water from the Susquehanna during the times she is in Harrisburg is too remote and speculative to constitute the type of direct and immediate harm required to find individual standing.

Finally, we turn our attention to the last argument set forth in Senator Muth's verified responses. In her answer to the first interrogatory (Exhibit H), set forth in its entirety above, she states that Burdick Creek is a drinking water source for livestock in the Dimock area and raises the concern that the discharge from Eureka will be consumed by the livestock as well as fish. She then asserts that these livestock and fish are in the food chain consumed by her and others. She offers no evidence in support of these alleged facts concerning the use of Burdick Creek by livestock or the likelihood of her consuming contaminated food raised in the Dimock area. The sequence of events required to lead to her consumption of such food strikes us as both remote and speculative and entirely within her control. This claim is insufficient to satisfy the requirement that her interests in the outcome of the appeal be both direct and immediate in order to have individual standing.

Conclusion

We have little doubt that Senator Muth is sincerely concerned about the potential impact of the Permit that she is challenging in this appeal. However, concern alone does not equate to standing and an appellant like Senator Muth must make credible averments of her use of an affected area and show that the challenged activity has the realistic potential to affect her and her use of the resource in order to maintain an appeal in front of the Board. Eureka challenged her standing to bring this appeal. That challenge to her individual standing required her to come forward with record evidence that convinced the Board that she had a substantial, immediate and direct interest in the subject matter and outcome of the appeal. The phrase "substantial, immediate and direct interest" is a legal term of art that has a specific meaning in the standing context. Standing is not intended to be a significant barrier to bringing challenges to Department actions but in order to give the standing requirement meaning, when standing is challenged, a party is required to come forward with record evidence sufficient to demonstrate that they are aggrieved by the Department's action in a substantial, direct and immediate way. Senator Muth fails to point to evidence in the record that supports her claim of a substantial, immediate and direct interest in her third-party permit appeal. Therefore, we find that she lacks individual standing to maintain her appeal. Eureka's SJ Motion is granted and because we have resolved the lone standing issue that remained after our prior decision in Eureka's favor, Senator Muth's appeal is dismissed. It is hereby ordered as follows:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENATOR KATIE J. MUTH	:	
	:	
v.	:	**EHB Docket No. 2022-015-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EUREKA RESOURCES, LLC, Permittee	:	

O R D E R

AND NOW, this 9th day of November, 2022, it is hereby ordered that the Permittee's Motion for Summary Judgement is **granted**. The appeal in the above-referenced matter is terminated and the docket will be marked as **closed**.

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/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 9, 2022

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

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For Appellant:
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For Permittee:
Paul J. Bruder, Jr., Esquire
Aaron D. Martin, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GENE STOCKER	:	
	:	
v.	:	**EHB Docket No. 2021-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BENNER TOWNSHIP AND SPRING-BENNER-WALKER JOINT AUTHORITY, Permittees	:	**Issued: November 18, 2022**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appeal of the Department's approval of a township's special study revision to its Act 537 plan that provides public sewer to an area of anticipated growth and commercial development near an interstate interchange and also provides public sewer to several residential areas along the sewer route. The appellant has the burden of proof in the appeal, but he did not meet that burden with respect to any of his claims.

FINDINGS OF FACT

1. Appellant Gene Stocker is an adult individual residing at 1864 Walnut Grove Drive, State College, Benner Township, Centre County, PA 16801, within a residential development known as Walnut Grove Estates. (Stipulation of Parties No. 1.)

2. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the administrative agency vested with the authority and responsibility to administer and enforce the requirements of the Sewage Facilities Act ("Act 537"), 35 P.S. §§

750.1 – 750.20a, the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and the rules and regulations promulgated thereunder. (Stipulation of Parties No. 2; Stipulation of Facts No. ("Stip.") 3.)

3. Benner Township (the "Township"), is a political subdivision, a township of the Second Class, with a place of business located at 1224 Buffalo Run Road, Bellefonte, PA 16823. Among other statutes and regulations, the Township is governed by the Second-Class Township Code, 53 P.S. §§ 65101 – 68701. (Stipulation of Parties No. 3; Stip. 1.)

4. Sewer services within the Township are provided by the Spring-Benner-Walker Joint Authority (the "Authority"). (Stip. 10.)

5. The Authority is a Pennsylvania municipal authority with a place of business located at 170 Irish Hollow Road, Bellefonte, PA, 16823 providing public sewer service to its customers in its incorporating or joining municipalities: Spring, Benner, and Walker Townships. Among other statutes and regulations, the Authority is governed by the Municipality Authorities Act, 53 Pa.C.S. §§ 5601 – 5623. (Stipulation of Parties No. 4.)

6. The University Area Joint Authority (UAJA) is a Pennsylvania municipal authority with a place of business located at 1576 Spring Valley Road, State College, PA, 16801 providing public sewer service to its customers in its incorporating or joining municipalities: College, Ferguson, Halfmoon, Harris, and Patton Townships, and State College Borough. Among other statutes and regulations, UAJA is governed by the Municipality Authorities Act, 53 Pa.C.S. §§ 5601 – 5623. (Stipulation of Parties No. 6.)

7. Benner Township is required to have an officially adopted sewage facilities plan for providing sewage services for areas within its boundaries (an "Act 537 Plan"). 35 P.S. § 750.5. (Stip. 2.)

8. The Township's original Act 537 Plan was approved by the Department in 2003. (Notes of Testimony Page No. ("T.") 155-56, 335-36.)

9. The Township's 2003 Act 537 Plan identified an area in the Township around Shiloh Road as a location for potential extension of public sewer service and also identified residential areas at Rock Road, Big Hollow Road, and Walnut Grove Estates as areas where public sewer service may be extended. (T. 335-36.)

10. The homes in Walnut Grove Estates are currently served by on-lot sewage systems. (T. 125; Stocker Exhibit No. ("Stocker Ex.") 2 (at 15-19).)

11. The 2003 Act 537 Plan established that Walnut Grove Estates and other areas of the Township should be subject to a Sewage Management Plan and monitored. (T. 415-17, 455.)

12. At the time of the Township's 2003 Act 537 Plan, Interstate 99 had not yet been built, but its subsequent construction created an interchange with Shiloh Road. (T. 397-99; Authority Exhibit No. ("Auth. Ex.") 36.)

13. There has been interest for a number of years in commercially developing the Shiloh Road interchange and providing public sewer to the area, including interest from the owners of two commercial properties known as the Claire and Rogers properties. (T. 194-95, 335-36, 398-99.)

14. The Department advised the Township that if it wished to extend sewer service to Shiloh Road and the residential properties in Rock Road, Big Hollow Road, and Walnut Grove Estates, it would be required to revise its current Act 537 Plan by adopting a special study. (T. 336-37, 357.)

15. A "special study" is a type of Act 537 plan revision that is "[a] study, survey, investigation, inquiry, research report or analysis which is directly related to an update revision.

Such study shall provide documentation or other support necessary to solve specific problems identified in the update revision." 35 P.S. § 750.2. *See also* 25 Pa. Code § 71.1. (T. 337-38.)

16. On February 11, 2019, the Township published notice in the Centre Daily Times that it would be discussing a potential sewer line extension at its February 18, 2019 meeting. (T. 526; Township Exhibit No. ("Twp. Ex.") 1.)

17. At that meeting, there was a public discussion of extending public sewer service to the residential properties in Rock Road, Big Hollow Road, and Walnut Grove Estates, as well as to the commercial area of Shiloh Road. (Twp. Ex. 6.)

18. On March 4, 2019, the Township held a meeting at which it appointed the Authority as its agent to commence with the review and amendment of the Township's Act 537 Plan. (T. 401; Twp. Ex. 6; Auth. Ex. 8.)

19. On April 1, 2019, the Township held a meeting where it authorized a special study process to amend the Township's Act 537 Plan to include public sewer services for Shiloh Road, Rock Road, Big Hollow Road and Walnut Grove Estates. (Twp. Ex. 6.)

20. As the agent of the Township, the Authority was responsible for writing the Act 537 Special Study, but the Authority still relied on the Township to review and determine what areas should be sewered. (T. 154-55, 337.)

21. Public notice of the availability of the Special Study for public review and the opening of a 30-day comment period was published in the Centre Daily Times on October 30, 2019. The notice stated that the Township would be considering the amendment of its Act 537 Plan at its next regular meeting on November 4, 2019 and that the Special Study would be presented at that meeting. (T. 527; Twp. Ex. 1.)

22. On November 16, 2029, the Township mailed postcards to affected residents, including those who would be connected to public sewer, notifying them of consideration of the Act 537 Special Study at a meeting on December 16, 2019. (T. 528-29; Twp. Ex. 2.)

23. Due to the high public interest in the Act 537 Special Study, the Township published notice on December 1, 2019 in the Centre Daily Times of its decision to extend the public comment period until December 31, 2019. (Stip. 34; T. 527-28; Twp. Ex. 1.)

24. Another public notice was published by the Township on December 2, 2019 in the Centre Daily Times, advising the public that the Special Study would be discussed at a meeting to be held on December 16, 2019. (T. 528; Twp. Ex. 1.)

25. The Township published newsletters in Spring 2019 and Spring 2020, notifying residents of consideration of the Act 537 Special Study. (T. 529-30; Twp. Ex. 3.)

26. On May 19, 2020, the Township mailed another postcard to affected residents notifying them that the Township would discuss the Special Study at a meeting on June 1, 2020 and could act to adopt the Special Study at that meeting. (T. 529; Twp. Ex. 2.)

27. The Township Supervisors conducted and participated in public meetings where the Special Study was discussed on the following dates: November 5, 2018; January 7, 2019; January 14, 2019; February 18, 2019; March 4, 2019; April 1, 2019; August 5, 2019; November 4, 2019; December 16, 2019; June 1, 2020; October 5, 2020; January 4, 2021; and April 5, 2021. (T. 193-94, 473-74; Twp. Ex. 6.)

28. Members of the public attended the public meetings at which the Act 537 Special Study was discussed. (Stip. 35)

29. Gene Stocker was present at and participated in at least the following public meetings where the Special Study was discussed: January 7, 2019; August 5, 2019; November 4, 2019; December 16, 2019; and June 1, 2020. (Twp. Ex. 6.)

30. Members of the public, including Gene Stocker, provided comments and opinions to the Township Supervisors during public meetings at which the Special Study was discussed. (Stip. 36.)

31. The minutes of the Supervisors' March 4, 2019 meeting note that Gene Stocker had submitted comments on the proposed sewer extension. (Twp. Ex. 6.)

32. Members of the public, including Stocker, submitted written comments regarding the Special Study. (Stip. 15, 33; T. 79-80.)

33. Gwin, Dobson & Foreman, as the engineer retained by the Authority to work on the Special Study, responded to all constituent comments received regarding the Special Study. (Stip. 17; T. 283-84.)

34. The Township approved Gwin, Dobson & Foreman's responses to all public comments that were submitted regarding the Special Study. (T. 237, 530-31; Stocker Exhibit 2 (at 959); Twp. Ex. 4.)

35. UAJA had an opportunity to comment on the Special Study but did not submit any comments. (T. 130-31.)

36. The Township supervisors approved the Special Study by way of resolutions dated June 1, 2020 and October 5, 2020 and thereafter submitted the Special Study to the Department in October 2020. (Stip. 37; Stocker Ex. 1; Twp. Ex. 6, 7.)

37. On October 27, 2020, the Department denied the Special Study because it was administratively incomplete. (T. 224, 226, 487-88; Department Exhibit No. ("DEP Ex.") 1.)

38. The Township cured all of the administrative deficiencies identified by the Department with the submission of a revised Special Study in January 2021. (T. 226, 488-90, 499, 534; Stocker Ex. 2; DEP Ex. 2a; Twp. Ex. 7.)

39. The Department identified one technical deficiency in the Township's January 2021 Special Study due to the omission of tables and exhibits corresponding to layouts and associated costs for the various alternatives listed in the plan. (T. 489-90, 499-500; DEP Ex. 2b.)

40. In April 2021, the Township submitted to the Department an addendum to the Special Study that addressed and corrected the technical deficiency. (T. 492-93, 499-500; Stocker Ex. 3; DEP Ex. 3a.)

41. The Department considers the January 2021 Special Study and the April 2021 Addendum to be one complete sewage planning amendment. (T. 492; Stocker Ex. 2, 3.)

42. The Township's January 2021 Special Study and the Township's April 2021 Addendum collectively were administratively and technically complete. (T. 255-56, 498-500, 549-50, 553; Stocker Ex. 2, 3.)

43. The Department approved the Township's Special Study on April 19, 2021. (T. 255-56; Stocker Ex. 20; DEP Ex. 5.)

44. Multiple employees of the Department thoroughly reviewed the various iterations of the Township's Special Study. (T. 144-45, 211-12, 489, 494, 504, 506, 511.)

45. The Township's Special Study provides for sewage facilities up to the Shiloh Road interchange so that they will be there for future growth and development in the area. (T. 287.)

46. With the Special Study, the Township is planning for the sewage needs for future commercial development in the area of the Shiloh Road interchange. (T. 195, 309.)

47. The Special Study contemplates that development in the Shiloh Road area will be phased in over several years. (T. 288-89.)

48. The Special Study is designed to accommodate the sewage from future growth and development 20 to 30 years into the future. (T. 367.)

49. It is common for municipalities to plan for growth in interchange areas. (T. 269.)

50. The Authority is confident that there will be growth and development at the Shiloh Road interchange. (T. 474-76.)

51. Existing or proposed land development plans are not a necessary prerequisite for the Department's approval of an Act 537 plan revision. (T. 265, 269.)

52. The Township determined that it would be appropriate to extend public sewer service to the residential areas in the Special Study because of the presence of lots under one acre in size, which is the minimum size for on-lot septic systems, the unsuitability of the soils for on-lot septic systems, 25% of the lots being considered potential malfunctioning systems, and the presence of lots and on-lot septic systems in a floodplain. (T. 368, 371-72; Stocker Ex. 2 (at 7-10, 15-19, 34).)

53. The Special Study determined that many soils in the study area were not suitable for on-lot systems because of slow or very fast percolation rates, depth to bedrock, or seasonal high water tables. (Stocker Ex. 2 at 15.)

54. Although there are no documented existing on-lot malfunctions in Walnut Grove Estates, the Authority identified potential and suspected on-lot septic system malfunctions in the study area based on Sewage Enforcement Officer reports, poor soils, rock outcroppings, slopes, and homes within a floodplain. (T. 331-32, 370-73, 420.)

55. On-lot system failures are not a prerequisite for municipal planning or Department approval of a plan to provide sewer to an area with on-lot systems. (T. 265, 455.)

56. Public sewers are generally environmentally safer than on lot septic systems because public sewers have more advanced treatment systems that can be adjusted depending on the contaminants present in the sewage. (T. 265-66.)

57. As part of its alternatives analysis, the Special Study identified nine alternatives and further evaluated two that the Township deemed to be feasible, cost-effective, and environmentally sound: (1) extending public sewer from the Authority, and (2) a no-action alternative. (T. 285-86; Stocker Ex. 1 (at 31-50), 2 (at 33-52).)

58. The Township, at the Department's request, then evaluated three different routes for providing public sewer from the study area to the Authority's collection system in its alternatives analysis. (T. 285-86, 378-79; Stocker Ex. 3 (at 3-17).)

59. The sewer lines to the Special Study area would tie into the Authority's existing sewer lines at the University Park Airport. (T. 358-59.)

60. The most direct route to sewer Shiloh Road from the Authority's system runs through Walnut Grove Estates, making it more efficient and economical, with lower residential tap-in fees, to provide sewer to Walnut Grove Estates now rather than later as part of an independent project. (T. 301-02, 368, 374-75, 379.)

61. The estimated cost of the construction of the sewage facilities outlined in the Special Study is $4 million. (T. 293-94; Stocker Ex. 1, 2, 3.)

62. The Authority has the ability to finance the project, although it has not decided on the mix of financial instruments to achieve the financing. (T. 411, 475.)

63. The Special Study did not evaluate in its alternatives analysis utilizing UAJA's existing system. (T. 131-32.)

64. In order for UAJA to provide public sewer to Walnut Grove Estates, Benner Township would need to remove the area from the Authority's service area in the Township's Act 537 Plan, and the Centre Region Council of Governments would need to revise its Act 537 Plan to add Walnut Grove Estates. (T. 131.)

65. The Centre Region Council of Governments' Act 537 Plan does not include the entire Shiloh Road interchange area. (T. 461.)

66. The Centre Region Council of Governments' Act 537 Plan permits UAJA to provide sewer service to only two commercial properties along Shiloh Road but does not permit it to provide sewer service to the rest of the Shiloh Road interchange area in Benner Township or to the residential properties in or along Rock Road Rock, Big Hollow Road and Walnut Grove. (T. 120-21, 126-27, 128-29, 130, 461.)

67. UAJA could only provide sewer service to two commercial properties along Shiloh Road (the Claire and Rogers properties) if UAJA and the Authority reached an agreement for UAJA to provide sewer service, but UAJA and the Authority have never been able to reach such an agreement. (T. 118, 120-21, 126-27, 128.)

68. Prior discussions between UAJA and the Authority broke down because UAJA did not want to count the Shiloh Road area as a wholesale customer and UAJA wanted to obtain nutrient offset credits from the Township. (T. 118-20.)

69. The Department does not instruct a municipality which alternative to select in an Act 537 plan. (T. 220-21.)

70. Throughout the iterations of the Special Study and the correction of deficiencies from October 2020 through April 2021, the selected alternative and the overall sewering plan remained the same. (T. 315, 317, 326, 551; Stocker Ex. 1 (at 31-50), 2 (at 33-52), 3 (at 3-17).)

71. When the selected alternative in a plan revision remains the same, the Department does not require public notice to be re-published as administrative and technical deficiencies are corrected. (T. 551, 552-53.)

72. The Department became aware of the existence of per- and polyfluoroalkyl substances (PFAS) in Benner Township in September 2019. (T. 106.)

73. PFAS are a family of chemicals that are manmade in a number of household items as well as industrial uses. (T. 103; Stocker Ex. 21.)

74. The Department informed Benner Township in the summer of 2020 that the Department had discovered PFAS in the Township, but the Department did not notify the Authority. (T. 113-14. *See also* Stip. 26.)

75. In June 2021, a Due Diligence Report prepared by an engineering firm at the request of the Department identified that PFAS was contained in flame dousing foam used by the University Park Airport between 2006 and 2019. (T. 107; Stocker Ex. 32.)

76. PFAS contamination has been detected in properties in Walnut Grove Estates, including Mr. Stocker's water well. (T. 39-40, 112-13; Stocker Ex. 46.)

77. The Department does not view contaminated soils as necessarily precluding sewage planning at the municipal level, as long as the plan can still be implemented. (T. 218-19, 252-54.)

DISCUSSION

Gene Stocker is appealing the Department of Environmental Protection's (the "Department's") approval of a Special Study revision to Benner Township's Act 537 Plan. The Special Study was submitted by the Township, which relied on its water authority, the Spring-Benner-Walker Joint Authority (the "Authority"), to develop the Special Study. The Township designated the Authority to act as the Township's agent with respect to sewage planning. The Special Study lays out a plan to provide public sewage to an area where the Township anticipates there will be future growth and commercial development at the interchange of Shiloh Road and interstate highway I-99. In developing the Special Study to provide public sewage to the Shiloh Road area, the Township decided that it would be efficient and cost-effective to also provide sewage to several residential areas near the anticipated sewer line route that are currently served by on-lot septic systems—Rock Road, Big Hollow Road, and Walnut Grove Estates. The Special Study was first submitted to the Department in October 2020. The Township submitted a revised Special Study in January 2021 and an addendum in April 2021 to resolve administrative and technical deficiencies identified by the Department. The Department ultimately approved the revised package in April 2021.

Gene Stocker lives in Walnut Grove Estates and is opposed to the Special Study. He contends that there is no need for public sewer, particularly in the Shiloh Road area, because there is no concrete proposal for any development on the table. With respect to Walnut Grove Estates, Stocker says the on-lot systems are working fine and there are no confirmed malfunctions of those systems. He also argues that the Township Supervisors were not fully engaged in the sewer planning process, and the Township improperly delegated its sewage planning role to the Authority, an arrangement which he says runs afoul of various municipal

statutes. He also takes issue with the failure to account for the existence of per- and polyfluoroalkyl substances (PFAS) in the water and soils in the Walnut Grove area.

Stocker further argues that the "most appropriate" alternative for providing sewer was not considered in developing the Special Study. Stocker advocates for a neighboring sewage authority that serves other municipalities, the University Area Joint Authority, to service the Shiloh Road area, and Walnut Grove Estates if they must be disconnected from their on-lot systems. He critiques the Department's review of the Special Study and says the Department did not do a thorough enough investigation of the proposed plan revision. Finally, Stocker contends that there was inadequate public notice of the Special Study, and that each of the three iterations of the Special Study that existed during the process of correcting administrative and technical deficiencies should have been opened up to their own individual public comment periods.

As a third party appealing the Department's approval of the Special Study revision to the Township's Act 537 Plan, Stocker bears the burden of proof for his claims. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47. He must show that the Department's action was unlawful, unreasonable, or not supported by our *de novo* review of the facts. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. In order to be unlawful, the Department must have not acted in accordance with all applicable statutes, regulations, and case law, or not acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

To carry the burden of proof, Stocker must prove his case by a preponderance of the evidence. *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth.

2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780). The preponderance of evidence standard requires that he show that the evidence in favor of his proposition is greater than that opposed to it. *Telegraphis v. DEP*, 2021 EHB 279, 288; *United Refining*, 2016 EHB 442, 449. In other words, Stocker's evidence challenging the Township's Special Study plan revision must be greater than the evidence supporting the Department's determination that the plan revision was reasonable, appropriate, and in accordance with the applicable law. *Morrison v. DEP*, 2021 EHB 211, 218; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. For the reasons explained below, we find that Stocker has not met the burden of proof on his claims.

Need for the Special Study

Stocker argues that there is no need for a revision to the Township's 537 Plan by way of this Special Study. He says there had been talk of a commercial development in the Shiloh Road area but that development has so far not materialized. He contends that, without a concrete plan for a development, it does not make any sense to provide public sewer to the area. Stocker also argues that there is no need for public sewer at his home in Walnut Grove Estates. He maintains that the existing on-lot sewage systems are functioning properly and there have been no documented malfunctions.

The Shiloh Road area is at the interchange of Shiloh Road and Interstate I-99 in the Township. The Township and the Authority believe that the area is primed for commercial development if public sewer is routed there. The Shiloh Road area was originally identified in the Township's 2003 Act 537 Plan as a potential area for sewer extension. The Special Study extends sewer up to the Shiloh Road area so that sewage facilities will be there for future development. The Township does not believe that commercial development will happen

immediately, but instead, the Special Study contemplates that development in the Shiloh Road area will be phased in over several years. The Township is planning for the eventual development of the entire area, not simply one or two parcels of land. Warren Miller, the Executive Director of the Authority, testified that the Special Study was designed to accommodate sewage from potential future growth and use for 20 to 30 years in the future. (T. 367.)

Contrary to Stocker's assertions, there is no restriction that a municipality can only engage in sewage planning or revise its Act 537 Plan when there is a development proposal waiting to break ground. Instead, sewage planning is meant to be forward-looking and to lend enough flexibility to a municipality to provide sewage to areas where it can reasonably anticipate growth and development in the years to come.

The Sewage Facilities Act requires official plans and the revisions thereto to look ahead and anticipate the future development needs in a municipality:

> Every official plan shall…Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practicable precision those portions of the area which community systems may **reasonably be expected to serve within ten years, after ten years**, and any areas in which the provision of such services is not reasonably foreseeable.

35 P.S. § 750.5(d)(4) (emphasis added). *See also Carroll Twp. v. Dep't of Envtl. Res.*, 409 A.2d 1378, 1381 (Pa. Cmwlth. 1980) ("Section 5 of the Sewage Facilities Act also indicates that mandatory planning is not designed merely to correct deficient municipal facilities, as is The Clean Streams Law, but that its purpose is also to improve all present and future facilities."). The Sewage Facilities Act charges municipalities to assess their sewage needs while looking out more than ten years into the future and then plan accordingly. Revisions to Act 537 Plans must likewise anticipate future growth and plan for the sewage facilities needed to serve that growth.

35 P.S. § 750.5(a) (revisions to official plans shall conform to the requirements of subsection (d) quoted above). Even the statutory definition of "official plan revision" states that its purpose is in part forward-looking "to provide for additional or newly identified or future sewage facilities needs." 35 P.S. § 750.2. *See also* 25 Pa. Code § 71.1 (regulatory definition). The Sewage Facilities Act is about engaging in rational planning by trying to stay ahead of the curve on development.

The forward-looking nature of planning is reiterated again and again in the sewage planning regulations. The stated scope of the sewage facilities planning regulations at Chapter 71 includes "provid[ing] for the sewage disposal needs of new land development **and otherwise to provide for future sewage disposal needs** of a resident or landowner in a municipality." 25 Pa. Code § 71.2 (emphasis added). One of the purposes of Chapter 71 is to "provide[] a comprehensive sewage planning mechanism to identify and resolve existing sewage disposal problems, to avoid potential sewage problems resulting from new land development and **to provide for the future sewage disposal needs of a municipality**." 25 Pa. Code § 71.3 (emphasis added). This is reiterated in Section 71.11, which imposes a general duty upon municipalities to create plans that not only "provide for the future sewage disposal needs of new land development," but also "provide for the future sewage disposal needs of the municipality." 25 Pa. Code § 71.11. Section 71.12 then places a duty on municipalities to revise their plans whenever they are "inadequate to meet the existing **or future sewage disposal needs of the municipality** or portion thereof." 25 Pa. Code § 71.12(a) (emphasis added).

Thus, while the sewage planning program contemplates planning for a specific new land development, *see, e.g.*, 35 P.S. § 750.5(b) (addressing private requests from developers), it also clearly allows for planning for future sewage needs even without a new development in the

wings. When those future needs can be anticipated, it is simply good planning to revise a plan to address them. Municipalities attuned to the future needs of their communities are to be proactive in planning for those needs and must ensure that adequate sewage resources are available to meet the demand. "Flexibility rather than rigidity is what makes planning activities meaningful and able to accommodate changing circumstances." *Lobolito, Inc. v. DER*, 1993 EHB 477, 489. The planning scheme affords a municipality the flexibility to reasonably plan for its future needs and not be tied to first finding a development in order to proceed with planning. To hamstring sewage planning to only areas where development is all but certain would turn planning on its head and make it merely reactive instead of planning for the future.

In this case, the Department understands the purpose of sewage planning. As Tom Randis, the Department's Clean Water Program Manager for the Northcentral Regional Office, testified, the purpose of planning is "[t]o provide for current and future sewage needs in a municipality at their discretion." (T. 237.) To this end, the Department correctly does not require there to be an existing or proposed land development plan in order for a municipality to undertake a revision to its Act 537 plan and obtain approval by the Department. Indeed, Randis testified that most municipalities plan for growth in interchange areas even in the absence of an existing development proposal. (T. 269.) We think that the Township has more than enough reason to justify its planning decision to accommodate future growth in the Shiloh Road area. Although there is no crystalized development plan for the Shiloh Road area, there is a reasonable likelihood of development happening in that area that is entirely consistent with Benner Township's responsibility and authority to engage in sewage planning for its future needs.

In the same way that a concrete development proposal is not a necessary prerequisite for sewage planning, neither are existing on-lot system malfunctions needed to provide for public

sewer in an area. Walnut Grove Estates was placed on a Sewage Management Plan in the Township's 2003 Act 537 Plan to monitor the on-lot systems. Walnut Grove Estates were included in the Special Study, in part, because the most economical way to service the Shiloh Road area with sewage was with a route that would pass by Walnut Grove Estates. Combined with the knowledge of Walnut Grove being comprised of on-lot systems, the Township thought it would be prudent to include Walnut Grove in the Special Study, which would lower the cost of residential tap-in fees compared to the fees if sewer were to be provided to Walnut Grove as part of its own project in the future. In addition, the Authority and the Township thought that Walnut Grove Estates had the potential for malfunctioning systems due to poor soils, rock outcroppings, slopes, and homes built within the floodplain.

The Department does not require there to be malfunctioning on-lot systems for sewage planning to occur in a given area. Stocker's own expert agreed that on-lot malfunctions are not required to plan for public sewer. (T. 455.) Stocker's expert did not go out and do any field work with respect to the on-lot systems to see how they were performing, nor did he claim to have the expertise to investigate an on-lot system. (T. 456-57, 458.) Instead, it seemed as if Stocker's expert was mostly concerned about the cost of providing public sewer to homes that might not have an existing on-lot malfunction. (T. 458-59, 460-61.) But Stocker's expert only provided a generalized critique of the overall cost of implementing the plan. Stocker presented no evidence of what the actual tap-in cost would be for each resident of Walnut Grove Estates or whether that would be unreasonably high. Stocker did not otherwise carry his burden of proof to show that including Walnut Grove Estates in the Special Study was unreasonable or contrary to law. Instead, it seems entirely reasonable for a municipality to want to provide public sewer to homes within its boundaries when it has the opportunity to do so in a more cost-effective manner.

Per- and Polyfluoroalkyl Substances (PFAS)

One of the key considerations in sewage planning, both for the Department's review and the Board's subsequent review, is whether a plan is capable of being implemented.

> The pertinent regulation, 25 Pa. Code § 71.32(d)(4), provides that, in approving or disapproving an official plan, "the Department will consider … (4)[w]hether the official plan or official plan revision is able to be implemented". Also, 25 Pa. Code § 71.31(f) specifies that: "[t]he municipality shall adopt the official plan by resolution, with specific reference to the alternatives of choice and a commitment to implement the plan within the time limits established in an implementation schedule." These provisions taken together suggest that the Department should not approve a make-believe plan. Rather, its approval depends on a showing that the municipality is in fact *able* and *committed* to implementing its plan update.

Wilson v. DEP, 2010 EHB 827, 832 (quoting *Guest v. DEP*, 2010 EHB 257, 258-59).

Stocker argues that there is no assurance that the Special Study can be implemented because of a plume of PFAS contamination that apparently includes parts of the Special Study area. The Special Study would provide public sewer, but not public water, to Walnut Grove Estates. Since some properties within Walnut Grove Estates have tested positive for PFAS, (T. 112-13), Stocker is concerned that well water containing PFAS will be conveyed through the new sewage system to the Authority, which he says is not currently equipped to treat sewage containing PFAS. Since the Authority's treatment plant discharges to Spring Creek, Stocker is concerned about PFAS entering the stream. Stocker also claims that the installation of the sewer lines will spread PFAS into Spring Creek.

The Department, the Township, and the Authority all argue that Stocker has waived this issue because there is nothing about PFAS in his notice of appeal or amended notice of appeal. *See Morrison v. DEP*, 2021 EHB 211, 219 (issues not raised in a notice of appeal are generally waived). They are correct that his notice of appeal and amended notice of appeal contain no reference to PFAS. However, to the extent the issue was not waived, and assuming arguendo

that PFAS not only could be considered but should have been considered in the Special Study, Stocker has not justified a reversal or even a remand. He did not show the PFAS contamination would make the project infeasible or unsafe or that there are better alternatives because of it or any other relevant standard of review on sewer planning. Critically, Stocker has not shown that the Special Study is not "able to be implemented" due to the existence of PFAS. 25 Pa. Code § 71.32(d)(4).

There is simply no evidence in the record to support Stocker's assertion that PFAS contamination will be exacerbated by the installation of the sewer lines or by connecting homes to public sewer. In his reply brief, Stocker tries to invert the burden of proof by contending that "there is no assurance that the plan can be implemented as the contamination radius continues to grow," and that "the Department has more work to do to determine if the project can be permitted." (Reply Brief at 5.) To a very large extent, Stocker assumes facts not in evidence. It is on Stocker to show based on the evidence adduced at the hearing that the plan cannot be implemented, not to claim that there is no assurance that the plan can be implemented. Stocker presented no evidence that there is likely to be any contamination to Spring Creek, either during the installation of the sewer lines, or from a discharge to Spring Creek from the Authority's sewage treatment plant. Nor has he sought to quantify any such contamination. At this point, it is merely supposition and speculation. An appellant bearing the burden of proof cannot simply point to the existence of PFAS, without more, and treat it as a foregone conclusion that all activity in an area with PFAS should be put on indefinite hold.

Stocker also makes an argument under Article I, Section 27 of the Pennsylvania Constitution in terms of the existence of PFAS.[1] However, to make his argument, Stocker relies

[1] Article I, Section 27 of the Pennsylvania Constitution provides:

on the three-part test established in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978), which was overruled by the Pennsylvania Supreme Court in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). In *PEDF*, the Court held that the *Payne v. Kassab* test "is unrelated to the text of Section 27 and the trust principles animating it" and that it "strips the constitutional provision of its meaning." *Id.* at 930. The Court "reject[ed] the test…as the appropriate standard for deciding Article I, Section 27 challenges." *Id.*

A distillation of our articulation of the standard for assessing Article I, Section 27 challenges after *PEDF* has been:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

Del. Riverkeeper Network v. DEP, 2018 EHB 447, 493 (citing *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 858-59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1163). However, "[t]he burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan v. DEP*, 2018 EHB 71, 115 (citing *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 250). Largely for the same reasons that Stocker did not meet his burden of proof to show that the Special Study was not able to be implemented due to the PFAS issue, his argument that the existence of PFAS renders the

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

PA. CONST. art I, § 27.

approval unconstitutional also fails. He has not established the baseline proposition that there will be harm to or degradation of natural resources as a result of the Special Study.

Alternatives Analysis

An Act 537 Plan revision must identify and evaluate alternatives available to provide for new and improved sewage facilities for each area of need. 25 Pa. Code § 71.21(a)(4) and (5). The plan must then select an alternative to meet the needs of a study area and show that that selection is "technically, environmentally and administratively acceptable." 25 Pa. Code § 71.21(a)(6). *See also* 25 Pa. Code § 71.52(a)(3)-(5). In approving a municipality's selected alternative, the Department will assess the technical feasibility of the alternative and the feasibility of its implementation to provide adequate sewage service to an area. 25 Pa. Code § 71.61.

The Township's selected alternative in its Special Study is to provide public sewer to the Shiloh Road area and to connect several residential areas along the way. The Township also evaluated a no-action alternative and then evaluated a number of routes to provide public sewer to the Special Study areas from the Authority's treatment plant. The Township chose the selected alternative because it was the most efficient and cost-effective way of providing sewer to the Shiloh Road area, and in its opinion, it made sense to provide sewer to the residential areas at the same time.

Stocker says that "the most appropriate alternative" was not considered by the Township and the Authority. He asserts that the University Area Joint Authority (UAJA), a different municipal authority serving other municipalities, can provide sewer service to the Walnut Grove Estates and Shiloh Road areas. Stocker also seems to reiterate his assertion that Walnut Grove

Estates should be allowed to continue with their on-lot systems instead of being connected to public sewer.

As we said in *Pine Creek Valley Watershed Association v. DEP*, 2016 EHB 748, a plan revision need not select "the most appropriate alternative" in order to be approved by the Department:

> A plan is not subject to disapproval because the Department or this Board believes that the municipality did not select the "best" alternative. *Wilson v. DEP*, 2015 EHB 644, 673. The selected alternative need only be "technically, environmentally and administratively acceptable." 25 Pa. Code § 71.21(a)(6). Indeed, a prior version of Section 71.21(a)(6) was changed in 1997 to specifically eliminate the need to select the "best" alternative. *See* 27 Pa.B. 5880 (Nov. 8, 1997). *See also Noll v. DEP*, 2004 EHB 712, 721-22.

Id. at 754. This is because it is the municipality that is in charge of making the planning decisions it believes are the most appropriate for its own needs:

> It is well-settled that primary decision-making responsibility regarding sewage facilities plans lies at the municipal level. It is a municipality's decision to adopt a treatment alternative in accordance with the terms and conditions of the Sewage Facilities Act. The Department plays a supervisory role, being charged with approving or disapproving plans and plan revisions and ensuring that the systems are in conformity with local planning and consistent with statewide supervision.

Scott Twp. Envtl. Pres. Alliance v. DEP, 1999 EHB 425, 429. However, "even [the Department's] supervisory role is limited and it is not empowered to undertake this planning itself." *Lobolito Inc. v. DER*, 1993 EHB 477, 487. *Cf. Cmty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468, 480 (Pa. Cmwlth. 1975) ("It is clearly not for the DER, under these sections of The Clean Streams Law, to withhold the issuance of a sewer permit where it independently determines that land might be better planned as open or recreational space rather than for commercial or residential uses."). Indeed, as we have said many times, "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." *Pine Creek Valley*, 2016 EHB at 754 (quoting *Borough of Kutztown v. DEP*, 2016 EHB 80, 93; *Northampton Twp. v. DEP*, 2008 EHB 563, 567).

Tom Randis of the Department testified that the Department leaves the selection of the sewer line route up to the municipality, and as long as the selected alternative meets the requirements of Act 537 and the regulations and it is implementable, the Department will not second-guess the municipality's choice. (T. 221, 222, 269.) The Department's articulation of its role in evaluating a municipality's selected alternative is perfectly in line with Act 537 and our myriad decisions delineating the Department's role in the planning process.

Even if we entertain Stocker's argument, the situation is not quite as simple as he makes it seem. The UAJA option, as it was presented at the hearing, is far from a viable alternative. For one, the areas to be provided with sewer in the Special Study are within the coverage area of the Authority, not UAJA. Cory Miller, UAJA's executive director, testified that the only way UAJA could service the area was if UAJA and the Authority came to an agreement for UAJA to provide service. (T. 120-21.) Earlier efforts in 2015 on reaching an agreement between the two authorities proved unsuccessful. (T. 117-18.) UAJA did not want to count the Shiloh Road area as a wholesale customer and UAJA wanted nutrient credit offsets from the Township. A resolution never panned out.

It is simply not true, as Stocker contends, that the Township did not consider the possibility of utilizing UAJA. Instead, they considered and rejected it. As one of the Township Supervisors put it, the Township went with the Authority instead of UAJA because UAJA is not the Township's sewer authority. (T. 192.) It seems entirely reasonable to us that a municipality would choose its own sewer authority to service an area within a planning revision. The inability of UAJA to service the entire study area without several other contingencies occurring is a

significant barrier that goes directly to the ability to implement the alternative advanced by Stocker. By contrast, he has not produced evidence to show that anything renders the Township's selected alternative as unable to be implemented, or that it is not feasible from a technical or environmental point of view.

Stocker also expresses some concern about the cost of constructing the sewer lines that are contemplated by the Special Study, which was estimated to be $4 million at the time the Special Study was drafted and approved by the Department. Stocker says the cost must be higher now. (*See* T. 453.) The engineer who prepared the Special Study testified that he felt $4 million was still relatively accurate because he factored into his estimate the time it would take before the sewer lines were actually built. (T. 293-94.) We do not know what the estimated cost would be today. Stocker certainly did not substantiate his expert's claim that it would be twice as much money now with any sort of study or construction cost figures. (T. 453.) However, even if that we assume Stocker is correct, he has not shown how he might be personally impacted by the cost, whether $4 million or higher, why it is an unreasonably high cost, or why the cost means that the Special Study cannot be implemented, or the selected alternative is not technically, environmentally and administratively acceptable. The Authority testified that it is committed to financing the project, that it has the money to finance the project, and that the only thing it needs to determine is the mix of financial instruments to accomplish the financing. (T. 411, 475.) We have nothing from Stocker to dispute that.

Benner Township's Involvement in the Special Study

One of the recurring themes of Stocker's case is that the Township Supervisors were not actively engaged enough in the sewage planning process. Instead, the Township relied on the Authority to develop the Special Study when the Township designated the Authority as its agent

to handle the Special Study process. Stocker says this was inappropriate and the Township improperly delegated its role in sewage planning to the Authority. He says that there is no document outlining the agency relationship between the Township and the Authority as he claims is required by the Intergovernmental Cooperation Act, 53 P.S. § 2307. He also argues that the Township "is not permitted to delegate legislative authority to a municipal authority," and that the Township acted contrary to the Second-Class Township Code.

It is a common trope of challenges to sewage facilities planning actions that the Department should have considered other, largely municipal issues in its review of an Act 537 plan or subsequent revision. *See Borough of Kutztown v. DEP*, 2016 EHB 80 (appellant arguing Department should have disapproved township's plan revision because it was allegedly inconsistent with intermunicipal agreement and litigation in the Courts of Common Pleas over that agreement). But, as we just laid out with respect to the alternatives analysis, that again is simply not the Department's role in sewage planning:

> 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)).

Borough of Kutztown, 2016 EHB at 93.

Stocker has not explained to us why the Department or this Board need to be concerned about the various machinations of municipal government when reviewing a revision to an Act 537 Plan, or why we should be concerned about potential disputes under the Second-Class Township Code, 53 P.S. §§ 65101 – 68701, or the Intergovernmental Cooperation Act, 53 P.S. §§ 2301 – 2317.

We have previously refused to inject ourselves into intermunicipal conflicts that are properly resolved before other courts or tribunals. This is because "grievances which fall within the category of a 'local government agency function' are not appropriate for indirect challenge through the Department." *Force v. DEP*, 1998 EHB 179, 189 (citing *Cmty. Coll. of Del. Cnty., supra*), *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. Dec. 30, 1998). In *Force*, we determined that the issue of the apportionment of costs between a resident and the township to connect to public sewer was not an issue within the Board's domain under the Sewage Facilities Act. We held that "[t]he Appellants' remedy, therefore, is not with the Board under the Sewage Facilities Act, but may exist in the courts of common pleas pursuant to the First Class Township Code." *Force*, 1998 EHB at 190. The same holds true here with respect to Stocker's claims under the Second-Class Township Code.

In *Welteroth v. DER*, 1989 EHB 1017, for instance, we declined to decide the appellants' contention that the issuance of a Dam Safety and Encroachment permit for the removal of a bridge violated provisions of the Second-Class Township Code. Instead, we determined that the Department "ha[d] no obligation to assure Clinton Township's compliance with the Second

Class Township Code" and that the Department did not err when it did not specifically consider the Second-Class Township Code in issuing the permit. *Id.* at 1029-31.

In any event, we do not find anything inherently wrong or improper about a municipality relying on the expertise of other entities in making decisions within the municipality, whether that be sewage planning, traffic planning, land use planning, or some other municipal function. The engineers who assisted the Authority in developing the Special Study testified that it is common for them to work with municipal sewage authorities as agents of a township when going through the plan revision process. (T. 315-16, 320.) Regardless, the Township was significantly involved in the consideration of the decision to develop a Special Study to sewer Shiloh Road, Walnut Grove Estates, and the other residential areas. There were at least 13 public meetings held on the subject from late-2018 through the spring of 2021. The Authority's engineer made at least two presentations to the Township Supervisors regarding the plan. (T. 284-85.) The Township passed resolutions at public meetings in June 2020, October 2020, and January 2021 explicitly approving the submittal of the Special Study to the Department. (Twp. Ex. 7.) The Authority also testified that it is the Township that ultimately makes the decisions for which areas of the Township will be sewered. (T. 337.) Stocker has not convinced us that there is anything inappropriate about the Township's approach to sewage planning that should concern us in reviewing the Special Study's approval under the Sewage Facilities Act.

In a similar vein, Stocker argues that running sewage to Walnut Grove will interfere with a forest conservation zoning district in the Township. He says that providing sewer will increase the density of development in Walnut Grove Estates, which will increase the amount of impervious surface, which will thereby result in more runoff and flooding and "defeat[] the original intent of the forest conservation zoning." (Stocker Brief at 34.) The argument about the

forest conservation district is not well-developed, but it is not the role of the Department or this Board to resolve any potential zoning issues. Regardless, Stocker has not shown that the existence of a forest conservation district means that the Special Study is not capable of being implemented or contrary to any other provision of the Sewage Facilities Act or sewage planning regulations.

The Department's Review

Stocker also challenges the adequacy of the Department's review of the Special Study. He says the Department did not review the Township's ordinances or procure "an independent copy" of the reports from the sewage enforcement officer. He says the Department did not conduct its own water or soil testing or make an independent investigation of whether the on-lot systems in Walnut Grove Estates were at risk of potential malfunction or were currently malfunctioning. But Stocker has not produced any of his own evidence showing that the ordinances present any barrier to approval of the Special Study, or produced his own soil testing, or otherwise shown that the on-lot systems are performing well (even if that were relevant to their replacement with public sewer).

As we have said many times before, "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." *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484 (citing *Kiskadden v. DEP*, 2015 EHB 377, 410). This is because "[o]ur function in this proceeding is not to critique the Department's procedures generally or as employed in this case. While an inadequate investigatory process may be evidence of a potentially dispositive finding, it is not dispositive in and of itself." *Kiskadden*, 2015 EHB at 410 (quoting *O'Reilly v. DEP*, 2001 EHB 19, 45).

Stocker makes much of the Department's use of a checklist in determining the completeness of the Special Study during its review. Stocker says Dan Thetford, the Sewage Planning Chief in the Department's Northcentral Regional Office as well as the Acting Regional Director, relied on the checklist to measure the Special Study for completeness and merely skimmed some portions of the Special Study instead of reading the entire thing. However, the testimony reflects that Thetford reviewed the entire January 2021 and April 2021 submissions. (T. 489, 494, 504, 506, 511.) Tom Randis also reviewed portions of October 2020 and January 2021 Special Studies and the entire April 2021 Addendum. (T. 144-45.) The January 2021 Special Study and the April 2021 Addendum was the package that was ultimately approved by the Department so it is the only one that concerns us in this appeal, and it appears that it was adequately reviewed by the Department, Even so, both Thetford and Randis only act in supervisory roles in reviewing Act 537 plan revisions. (T. 500.) The Department employee with the primary responsibility for reviewing this Special Study was Rob Everett. (T. 211, 511-12.) But for some reason Everett was not called by any party to testify at the hearing. Stocker's complaints about the Department not reading every page of each iteration of the Special Study ring somewhat hollow without any questioning of the person who performed the primary administrative and technical review of the Special Study.

In any event, Stocker has not shown us why any perceived inadequacy in the Department's review has any continuing relevance or why the alleged inadequate review renders the Department's approval of the Special Study unsupportable or contrary to law. In *Delaware Riverkeeper v. DEP*, 2004 EHB 599, 657, we concluded as a matter of law that, "[a]lthough the Department is required to use its independent judgment in reviewing the needs and alternatives analysis in an Act 537 Plan, neither the Sewage Facilities Act nor the Department's regulations

thereunder require the Department to perform its own independent study of sewage needs or alternatives analysis." This is not a situation like in *Baney Road Association v. DER*, 1992 EHB 441, where the Department failed to conduct any evaluation to determine whether a planning module satisfied the regulations and instead relied entirely on the applicant. There is no evidence that the Department used the checklist in lieu of performing a review of the Special Study. There is no evidence that the Department simply checked the boxes to see if certain components were present instead of actually reading the components to determine whether they satisfied applicable statutory and regulatory requirements. We find nothing inappropriate in using a checklist as an aid to the Department in reviewing planning modules.

Public Notice

Stocker argues that the public notice provided by the Township of the Special Study was inadequate. Stocker's main issue is that, while the Township published notice of the original 2020 Special Study and opened a public comment period, the Township did not publish notice of the subsequent changes to the Special Study as the Township corrected the administrative and technical deficiencies identified by the Department. Stocker believes that the revised Special Study submitted to the Department in January 2021, and the subsequent addendum of April 2021 both needed to be subject to the public notice provisions of the Sewage Facilities Act and regulations. The Department takes the position that, when a municipality's selected alternative remains the same in an Act 537 Plan or plan revision, the plan does not need to be re-noticed.

Stocker points to Section 5(i) of the Sewage Facilities Act for the public notice requirement, which says:

> Any publication of proposed adoption of or revision to an official plan or notice of application for a permit for department approval required by this act or the regulations promulgated under this act may be provided by the applicant or the applicant's agent, municipality or the local agency by publication in a newspaper

> of general circulation as required by department regulation. Where an applicant or applicant's agent provides the required publication, the municipality and local agency shall be relieved of the obligation to publish.

35 P.S. § 750.5(i).[2] This section sets forth a general publication requirement but leaves the specifics to be determined by regulation. Stocker notably does not discuss the relevant regulation containing the specific requirements for public notice, but it is found at 25 Pa. Code § 71.31. It provides that a municipality needs to publish notice of a proposed plan adoption at least once in a newspaper of general circulation and open up a 30-day public comment period:

> A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan's major recommendations, including a list of the sewage facilities alternatives considered. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

25 Pa. Code § 71.31(c).

There is evidence of extensive public outreach regarding the Special Study. The Township held at least 13 public meetings where the Special Study was discussed from 2018 to 2021. (Finding of Fact No ("FOF") 27.) The Township published notice four times in the Centre Daily Times, as well as mailing out postcards to affected residents and publicizing it in the township newsletter. (FOF 16, 21-26.) Warren Miller of the Authority also testified that at some point he went out and put flyers on the doors of homes that would be affected by the Special

[2] Stocker also says that the notice did not satisfy a provision of the Second-Class Township Code, which provides: "No sanitary sewer system shall be constructed under this article unless a resolution of the board of supervisors authorizing the construction is published in a newspaper of general circulation in the township once a week for three successive weeks." 53 P.S. § 67503. As discussed above, the Board is not the forum to contest alleged violations of the Second-Class Township Code. But further, even if we were, this provision by its own terms applies to the *construction* of a sanitary sewer system, not the sewage planning process. No construction will occur until the Department issues a permit for the work contemplated by the Special Study plan.

Study. (T. 355-56.) The Township also extended the public comment period by 30 days on the initial Special Study. The notice provided by the Township here exceeded the regulatory standard.

Although the record is replete with evidence of public outreach, the key question here is whether public comment periods should have been opened for the revised January 2021 Special Study and the April 2021 Addendum. Our decision in *Ainjar Trust v. DEP*, 2001 EHB 927, is instructive for considering what circumstances require an Act 537 plan to be re-noticed due to changes that have occurred from when the plan was first proposed. Similar to Stocker's complaint here, in *Ainjar Trust*, the appellant's "main complaint [was] that the [planning] Module evolved to some degree over time such that the Module, which eventually emerged from the Township as approved by it and which it submitted to the Department, was different in some ways than the one described in this notice." *Ainjar Trust*, 2001 EHB at 981. In *Ainjar Trust*, from the time the plan was first proposed in December, to when it was approved the following August, several things had changed:

> The acreage involved in the development changed from approximately 26 acres to approximately 32 acres, the number of dwelling units was reduced from 192 to 156, the total number of EDUs was consequently reduced from 222 to 186, and the calculation for Gallons Per Day (GPD) per EDU was changed from 400 GDP per EDU to 265 GPD per EDU.

Id. at 981. We said it was not unreasonable to expect that some aspects of a plan would change along the way during the development and review process because that, in some ways, is the entire reason for public participation in the process. *Id.* at 984. Although the plan in *Ainjar Trust* changed in certain respects from the time it was first submitted to the time it was approved, we concluded: "We do not think that new publication had to be undertaken with each or any of the changes to the project that we have reviewed here." *Id.* at 984. Instead, *Ainjar Trust* provides the

guidance that, in evaluating whether a plan should be re-noticed, we should consider whether the changes to a plan are so fundamental that they represent a new or different plan. *Id.* at 984. *See also Wilson v. DEP*, 2015 EHB 644, 687 (noting township made changes to plan update after receiving comments and published a second notice, but the second notice was not required under 25 Pa. Code § 71.31(c)).

Here, nothing so fundamental changed through the various iterations of the Special Study that it essentially became a completely different plan. The Township's selected alternative stayed the same from the initial Special Study submitted in October 2020 to the final addendum submitted in April 2021 and approved by the Department shortly thereafter. The Special Study was always about providing public sewer to Shiloh Road and connecting residential areas with on-lot systems along the route. That remained true through all versions of the Special Study. The Township did not make any fundamental changes but was merely correcting administrative and technical deficiencies. These involved, for example: providing evidence that the Township gave the Special Study to the Bellefonte Borough Authority for review and comment and confirmation of capacity; providing additional tables and charts; and confirming that the Authority's engineer had the authorization of the Township to respond to the public comments. (T. 224-26, 243-44, 488-90, 499-500; Stocker Ex. 82; DEP Ex. 1, 2b.) None of those changes rises to the level of fundamentally altering the plan and none require repeating the public notice process.

We also noted in *Ainjar Trust* that the appellant actually had access to the planning module to comment on it. 2001 EHB at 980. Stocker clearly had such notice and an opportunity to comment here. Minutes from the Township Board of Supervisors' meetings show that the issue of extending sewer to Shiloh Road and Walnut Grove Estates was extensively discussed at

the public meetings from November 2018 through April 2021. Stocker was present at several of these meetings and spoke publicly during meetings to present his comments, and also had his concerns presented by his counsel and engineer. (Twp. Ex. 6.) He also submitted written comments on the Special Study. (T. 79-80.) There is no evidence that Stocker was somehow inhibited from voicing his concerns about the Special Study during the two-and-a-half years that it was publicly discussed and debated in the Township.

In sum, Stocker has raised several claims in his appeal, but he has not produced the necessary evidence to substantiate those claims and he has not shown that the Department erred in its approval of Benner Township's Special Study revision to its Act 537 Plan. He did not establish that the Special Study cannot be implemented or that any aspect of it is unreasonable or conflicts with the Sewage Facilities Act or the relevant regulations.

CONCLUSIONS OF LAW

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

2. As a third-party appellant appealing the Department's approval of an Act 537 Plan revision, Gene Stocker bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Wilson v. DEP*, 2015 EHB 644, 684; *Del. Riverkeeper Network v. DEP*, 2004 EHB 599.

3. Stocker did not prove by a preponderance of the evidence that the Department's approval of the Township's Special Study was not reasonable, appropriate, supported by the facts, or in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473; *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780).

4. Stocker did not establish that the Special Study cannot be implemented. 25 Pa. Code § 71.32(d)(4).

5. Stocker did not establish that the Department violated Article I, Section 27 of the Pennsylvania Constitution in approving the Special Study. PA. CONST. art I, § 27; *Pa. Envtl. Def. Found. v. Cmwlth.*, 161 A.3d 911 (Pa. 2017); *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493; *Logan v. DEP*, 2018 EHB 71, 115.

6. A municipality acts appropriately in sewage planning when it plans for future growth even in the absence of a land development plan. 35 P.S. § 750.5(d)(4); 25 Pa. Code §§ 71.2, 71.3, 71.11, 71.12(a).

7. Stocker did not establish that the Township's selected alternative was not technically, environmentally, or administratively acceptable. 25 Pa. Code §§ 71.21(a)(6), 71.61.

8. A municipality does not need to select the "best" or "most appropriate" alternative in its Act 537 Plan. *Pine Creek Valley Watershed Ass'n v. DEP*, 2016 EHB 748, 754; *Wilson v. DEP*, 2015 EHB 644, 673; *Noll v. DEP*, 2004 EHB 712, 721-22.

9. The Board is not the appropriate forum to resolve intermunicipal disputes that do not directly impact sewage planning. *Borough of Kutztown v. DEP*, 2016 EHB 80, 93; *Force v. DEP*, 1998 EHB 179, 189 (citing *Cmty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975)), *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. Dec. 30, 1998).

10. Benner Township provided adequate public notice of the Special Study. 25 Pa. Code § 71.31(c); *Ainjar Trust v. DEP*, 2001 EHB 927, 984.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GENE STOCKER	:	
	:	
v.	:	**EHB Docket No. 2021-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BENNER TOWNSHIP AND SPRING-BENNER-WALKER JOINT AUTHORITY, Permittees	:	

O R D E R

AND NOW, this 18th day of November, 2022, it is hereby ordered that the Appellant's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 18, 2022

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

For the Commonwealth of PA, DEP:
David M. Chuprinski, Esquire
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For Appellant:
Christine L. Line, Esquire
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For Benner Township:
Rodney A Beard, Esquire
(*via electronic filing system*)

For Spring-Benner-Walker Joint Authority:
Robert A. Mix, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCK SPRING WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2022-081-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 6, 2022**
	:	

OPINION AND ORDER
DISMISSING APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses an appeal where an appellant company has not perfected its appeal in accordance with the Board's Rules, has not obtained counsel, and has not responded to the Board's orders.

O P I N I O N

On October 3, 2022, the Board received a letter dated September 30, 2022 from Rock Spring Water Company that we docketed as an appeal. The letter provided in its entirety:

> To Environmental Hearing Board
>
> This letter is to inform you that Rock Spring Water Company is appealing the Civil Penalty Assessment dated October 17, 2018. Currently speaking with State College Water on potential sale.
>
> Sincerely,
>
> J. Roy Campbell
> Rock Spring Water Company

We issued an Order on October 3, 2022 requiring Rock Spring to perfect its appeal in accordance with our Rules. *See* 25 Pa. Code § 1021.51 (governing required content of a notice of appeal). Our Order identified the information that Rock Spring needed to submit to the Board, including the

copy of the action of the Department of Environmental Protection (the "Department") that Rock Spring was appealing, the date it received notice of the action, its objections to the action, and proof of service of the appeal on the Department. 25 Pa. Code § 1021.51(d), (e), (f)(2)(vi), and (k). Our Order gave Rock Spring until October 24, 2022 to perfect its appeal and warned that failing to supply the missing information could result in the dismissal of the appeal.

Because the letter appeared to be filed by an employee of Rock Spring and not by an attorney, on the same day we also issued a letter to Rock Spring notifying it of our requirement that parties, except individuals appearing on their own behalf, need to be represented by counsel. 25 Pa. Code § 1021.21. Our letter requested that Rock Spring have counsel enter an appearance on its behalf no later than November 4, 2022. We advised Rock Spring that the failure to do so could also result in the dismissal of its appeal. We also included in our letter information on the pro bono program for small corporations operated by Pro Bono Committee of the Pennsylvania Bar Association's Environmental & Energy Law Section.

On November 1, 2022, we received another letter from Rock Spring, dated October 25, which was identical to the first letter except it contained an additional sentence claiming that this letter constituted a second appeal to the Board:

> To Environmental Hearing Board
>
> This letter is to inform you that Rock Spring Water Company is appealing the Civil Penalty Assessment dated October 17, 2018. Currently speaking with State College Water on potential sale. This letter is now the second appeal sent to the Environmental Hearing Board.
>
> Sincerely,
>
> J. Roy Campbell
> Rock Spring Water Company

We docketed this letter at the existing docket number created by Rock Spring's first letter. The second letter did not have anything attached to it. Rock Spring still did not provide any of the information required by our perfection Order.

On November 9, 2022, after the November 4 deadline for obtaining counsel passed without an entry of appearance, we issued a Rule to Show Cause. We noted that Rock Spring failed to comply with our October 3 Order and failed to have counsel enter an appearance. We stated that Rock Spring's second letter did not provide any of the information we required for the perfection of its appeal. We gave Rock Spring until November 30 to file the missing information and have counsel enter an appearance. Our Rule to Show Cause again advised Rock Spring that failing to comply could result in the dismissal of its appeal as a sanction. *See* 25 Pa. Code § 1021.161. As of the date of this Opinion and Order, we have not received anything further from Rock Spring. Dismissal of this appeal is appropriate.

Our Rule at 25 Pa. Code § 1021.161 authorizes the Board to dismiss an appeal as a sanction when a party fails to abide by the Board's Rules and orders. When appellants ignore the Board's Rules and orders requiring the perfection of their appeal and show no interest in continuing with their appeal, we have found it necessary to dismiss the appeals. In *Phelps v. DEP*, 2018 EHB 838, we encountered a similar situation, where we received a letter that did not include a copy of the Department's action, the date the appellant received notice of the action, or any proof that the appeal was served on the Department. We issued an Order for the perfection of the appeal, and, when we received nothing in response to the Order, a Rule to Show Cause. When we then received nothing in response to the Rule to Show Cause, we dismissed the appeal, concluding that the appellant no longer intended to pursue her appeal. *See also King v. DEP*, EHB Docket No. 2021-102-L (Opinion and Order, Jan. 24, 2022); *Kuncio v. DEP*, 2018 EHB 278. Our dismissal of this

appeal is also consistent with our cases in which an appellant company has filed to obtain counsel after being directed to do so. *See, e.g.*, *Earth First Recycling, LLC v. DEP*, 2018 EHB 819; *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338; *Falcon Coal and Constr. Co. v. DEP*, 2009 EHB 209. Rock Spring has had more than two months to comply with our orders and it has demonstrated no intention of doing so.[1]

Accordingly, we issue the Order that follows.

[1] Furthermore, if Rock Spring's letters are to be believed, it is likely now far too late to appeal a civil penalty assessment from four years ago. *See* 25 Pa. Code § 1021.52 (notice of appeal to be filed within 30 days after receiving notice of the action).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCK SPRING WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2022-081-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of December, 2022, it is hereby ordered that the Appellant's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: December 6, 2022

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

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Geoffrey J. Ayers, Esquire
(*via electronic filing system*)

For Appellant:
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Pennsylvania Furnace, PA 16865
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL RITSICK AND DONNA DUBICK, EXECUTOR OF THE ESTATE OF DAVID G. DUBICK	:	
v.	:	**EHB Docket No. 2022-036-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 8, 2022**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion for summary judgment filed by the Appellants because the record submitted by the Appellants does not contain sufficient information to support granting summary judgment on the issue of whether the Appellants' proposed subdivision qualifies for an exemption from the sewage facilities plan revision process.

O P I N I O N

Paul Ritsick and Donna Dubick, Executor of the Estate of David G. Dubick (collectively, the "Appellants"), proceeding *pro se*, have appealed an April 22, 2022 letter from the Department of Environmental Protection (the "Department") issued to Butler Township in Luzerne County, in which the Department determined that a subdivision proposed by the Appellants is not eligible for an exemption from full sewage facilities planning and revising Butler Township's Act 537 Plan.[1]

[1] The Appellants' notice of appeal shows that a copy of their notice of appeal was served on Butler Township. Under our Rules, Butler Township had the opportunity to intervene in this appeal as of right by filing an entry of appearance within 30 days of service of the notice of appeal. 25 Pa. Code § 1021.51(h)(2) and (j). Butler Township did not intervene within 30 days and has not sought to intervene or otherwise participate in this appeal as of the date of this Opinion and Order.

The letter denied Butler Township's application for the planning exemption for the Appellants' subdivision, known as the Dubick Subdivision. The Appellants argue in their appeal that the Department erred in denying the application and they assert that the subdivision does qualify for a planning exemption under the Sewage Facilities Act (Act 537), 35 P.S. §§ 750.1 – 750.20a, and the sewage planning regulations, specifically the exemption provisions of 25 Pa. Code § 71.51(b)(2).

The Appellants have now moved for summary judgment. The Appellants ask us to invalidate the Department's denial letter, grant the exemption request, and approve the subdivision.[2] They argue that the Department erred in labeling their subdivision as a "community sewerage system" as the reason for denying the exemption and that they have satisfied the exemption requirements of 25 Pa. Code § 71.51(b)(2). The Department opposes the motion, arguing that the Appellants' motion is based on disputed facts and unsupported allegations, and that, in any event, the Department correctly applied the regulations to deny the exemption request. The Department also argues that the Appellants' motion should be denied because the Appellants failed in numerous respects to comply with our Rules of Practice and Procedure regarding motions for summary judgment.[3] 25 Pa. Code § 1021.94a.

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[2] We are not sure what "approve the subdivision" means, but our scope of review in this appeal is limited to the Department's denial of the sewage planning exemption request.

[3] Motions for summary judgment are supposed to consist of three components: a two-page motion, a statement of undisputed material facts with citations to the record, and a brief containing legal argument. The Appellants' filing consisted of a nine-page motion with 33 paragraphs that contained both factual assertions and legal argument, which was accompanied by 16 exhibits in support of the motion. The Appellants' reply to the Department's response also did not comply with our Rules. Typically, a reply is limited to a brief not exceeding 15 pages that addresses arguments in the non-moving party's response to the motion. 25 Pa. Code § 1021.94a(k). The Appellants filed a two-page statement, a 15-page paragraph-by-paragraph reply to the Department's paragraph-by-paragraph response to the motion, a six-page memorandum of law, and eight additional exhibits. Despite these aberrations from our Rules, "the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected." *PQ Corp. v. DEP*, 2017 EHB 870, 876 n.4 (quoting *Neville Chem. Co. v. DEP*, 2003 EHB 530, 532); *Kleissler v. DEP*, 2002 EHB 737, 739. Because the Department

In order to prevail on their motion for summary judgment, the Appellants must show that there is no genuine issue of material fact in dispute and that they are entitled to judgment as a matter of law on the basis of the record, including the pleadings, depositions, answers to interrogatories, and other related documents. Pa.R.Civ.P. 1035.1-1035.2; *Clearfield Cnty. v. DEP*, 2021 EHB 144, 146; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43, 45; *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is granted only in the clearest of cases, 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. *Liberty Twp. v. DEP*, EHB Docket No. 2021-007-R, slip op. at 3 (Opinion and Order, Oct. 27, 2022); *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106.

Our understanding of the facts based on the record provided by the parties is the following. The Dubick Subdivision proposes to divide one 5.7-acre lot into four lots. (App. Ex. 7, 20; DEP Ex. C.) Proposed Lot 1 has no structure on it and would be a new buildable lot for a residential dwelling. Proposed Lot 2 currently contains a single-family residential dwelling. Proposed Lot 3 contains a four-unit apartment building. Proposed Lot 4 has an old barn on it and would be considered a non-building lot. Lot 4 does not currently have any sewage facilities and it is not

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has not asserted an infringement on its substantive rights as a result of the motion's non-conformance with our Rules, and we do not detect one ourselves, we will overlook these shortcomings and address the merits of the motion. However, we remind the Appellants that, even though they have elected to proceed with this appeal *pro se*, they are still required to comply with our Rules of Practice and Procedure. *McCarthy v. DEP*, 2019 EHB 406, 408 n.3; *Ritter v. DEP*, 2017 EHB 729, 736 n.1; *Jake v. DEP*, 2014 EHB 38, 46 n.2.

proposed to have any after the subdivision. The residential dwelling and apartment building on Lots 2 and 3 currently have sewer lines that extend from each of the buildings and connect somewhere on Lot 3, where their flows combine in a single, shared line that then connects to Butler Township's public sewer line at Old Country Road. Lot 1 does not have sewage facilities now, but they would be constructed if the lot is sold and developed with a residential structure. The proposed new sewage flow from Lot 1 is for one equivalent dwelling unit or 400 gallons of sewage per day. It is unclear whether Lot 1's sewage facilities would connect to the shared line with Lots 2 and 3 or directly to the Township's line.

Under the sewage facilities regulations, an exemption from the requirement to revise a municipality's Act 537 plan is available for "subdivisions proposing a connection to or an extension of public sewers" that meet the following four conditions: (1) the Department determines that the existing sewage facilities are in compliance with the Clean Streams Law; (2) the permittee of the sewage facilities has submitted annual reports demonstrating that there is no existing or projected hydraulic or organic overload in the sewage facilities; (3) the permittee has provided written certification that the additional flows from the project will not result in an overload; and (4) the municipality has an approved Act 537 plan that is being implemented. 25 Pa. Code § 71.51(b)(2).

The Appellants argue that the Dubick Subdivision has met these requirements and should be given a planning exemption. They say that Butler Township has certified that it has the capacity to handle 400 gallons per day of sewage and that should be the end of it. (App. Ex. 7, 8.) The Department disagrees that the subdivision is eligible for an exemption because it says the project does not involve a connection to or extension of public sewer. The Department points to the shared

line between Lots 2 and 3 and asserts that the Dubick Subdivision instead consists of a "privately-owned community sewerage system." To this end, the Department's denial letter states:

> The submission does not qualify as an exemption from the requirement to revise the Official Plan because a portion of the subdivision proposes the connection to or an extension of a privately-owned community sewerage system as per Chapter 71, Section 71.51(b)(2). 25 Pa. Code 71.51(b)(2)("Revisions for new land development and supplements are not required for subdivisions proposing a connection to or an extension of **public** sewers when all of the following have been met…".)(emphasis added).

(App. Ex. 3 (emphasis in original).) The Department maintains that the shared sewer line meets the regulatory definition of a "community sewerage system" and that "community sewerage systems" are not eligible for exemptions because exemptions are reserved only for direct connections to or extensions of public sewer.

Right off the bat, we are unable to grant the Appellants' motion to the extent it asks us to conclude that the Dubick Subdivision is eligible for a planning exemption, because the record does not provide us with enough information. No party has attached to their summary judgment papers the original exemption application that the Appellants say was submitted to the Department in August 2020, and we do not have a clear sense of what additional documentation was later submitted in support of that application. The Appellants allude to multiple submissions to the Department over a nearly two-year period, but they have not laid out any coherent chronology of the various exemption submissions that led up to the eventual denial or provided them in the record. The only application-like document we find attached to the Appellants' motion is a one-page sheet dated May 2021, nine months after the Appellants tell us the exemption request was first submitted. (App. Ex. 7.)

The most detailed document we have appears to be a response to a technical deficiency letter from the Department, which is actually attached to the Department's response, not the

Appellants' motion. (DEP Ex. C.) The Appellants then attach a portion of this document to their reply, (App. Ex. 20), but it excludes certain supporting documentation that is contained in the Department's exhibit. Even so, it is not clear whether the Department's exhibit contains all of the material submitted in support of the exemption request. For instance, there is no plan sheet that shows the division of the lots and the existing and proposed sewer connections, which we believe is supposed to be attached to an exemption request. (*See* App. Ex. 7 (noting that a plot plan is attached but it is not actually contained in the exhibit).) We have some arcanely worded deed descriptions of the four lots that might be helpful in conjunction with a plan sheet if we had one. (DEP Ex. C.) The "sanitary sewer easements" accompanying the deed descriptions reference "drawing number (01-722-101) [Revised 04/01/2021], entitled 'Minor Subdivision Final Plan – Lands of David Dubick Estate" but that drawing is nowhere to be found in the parties' exhibits. This presents an obvious problem for the Appellants in requesting that we determine that the project is eligible for an exemption on the papers when we do not even have all the materials upon which the Department based its decision. While we may not need in every case all of the documentation that was submitted to the Department to grant a summary judgment motion, there is some basic information missing here that renders summary judgment inappropriate.

For example, based on the papers it is unclear what the sewage connection scheme will be among the four lots. Although the Appellants in their motion maintain that Lot 1 will connect directly to the Township's sewer line and will not first connect to the shared sewer line of Lots 2 and 3, that is not at all clear from the documentation in the record. Indeed, the Appellants' response to the Department's technical deficiency letter suggests otherwise, stating that Lots 1, 2, and 3 will all share a common lateral that connects to the Township's interceptor line:

> **All sewage both existing and proposed will flow through a common existing lateral to the main interceptor line** located in the County Road just outside the

> Butler Township Wastewater treatment Plant Property. A maintenance agreement will be incorporated into the sale of Lots (1), (2), or (3). Easements have been included in the subdivision to allow access to this **common lateral that will be used by all three lots**.

(App. Ex. 20 (at 4) (emphasis added).) Yet, the various sanitary sewer easements seem to suggest that Lot 1 will *not* connect to the line being shared by Lots 2 and 3, and Lot 1's line will only traverse the property of Lots 3 and 4 in its route to connect to the Township's sewer line. The Department appeared to identify this inconsistency in an email to the Township in September 2021, calling out the exact paragraph above and asking for clarification:

> Please review and verify the following paragraph found on page 4 of the project narrative dated October 2020 and revised on April 2021. The paragraph does not appear to be consistent with the proposal as all proposed sewage is not flowing through the common existing lateral. Provide a revised narrative which is consistent with the proposal.

(DEP Ex. E.)

We do not have any documentation in the record resolving this question. It is unclear if any further submissions from the Appellants or the Township clarified this discrepancy, but if they did, we do not seem to have them. If the Department's position is that sewage connections need to be directly to public sewer to be eligible for an exemption, this seems like an important point to clear up. The onus should not be on the Board to parse through dozens of exhibits filed by the parties to try to figure out basic factual information in a summary judgment motion.

Further, the regulations identify four conditions prerequisite to qualifying for an exemption, but the Appellants really only focus on the one dealing with the Township's certification of capacity. It is not clear whether the other three items have been satisfied or are in dispute since the parties never talk much about them. There is simply no record before us at this juncture, or adequate explanation from the Appellants, that would allow us to determine one way or the other whether all of the requirements for granting an exemption request have been met.

The Department, for its part, never even gets to the four conditions because in its view they are predicated on there first being a connection to public sewer, which the Department says does not exist here because the shared line among at least Lots 2 and 3 is a "community sewerage system." Although we are not granting the Appellants' motion, we have significant questions regarding the Department's position. In the regulations, "community sew*er*age system" is listed as a subset of "community sewage system," which is defined as "[a] sewage facility, whether publicly or privately owned, for the collection of sewage from two or more lots, or two or more equivalent dwelling units **and the treatment or disposal, or both, of the sewage** on one or more of the lots or at another site." 25 Pa. Code § 71.1 (emphasis added). *See also* 35 P.S. § 750.2 (statutory definition of community sewage system). The definition then identifies two types of community sewage systems: (1) a community onlot sewage system, and (2) a community sewerage system. A community onlot sewage system involves "collecting, treating and disposing of sewage" from two or more lots into a soil absorption area or retaining tank. 25 Pa. Code § 71.1. "Community sewerage system" is defined as "[a] publicly or privately-owned community sewage system which **uses a method of sewage collection, conveyance, treatment and disposal** other than renovation in a soil absorption area, or retention in a retaining tank." *Id.* (emphasis added).

As the Appellants point out in their reply, the definition of community sewerage system includes not just collection and conveyance, but also specifically calls out treatment and disposal. Indeed, all of the above definitions of community systems identify treatment and disposal of the sewage as part of what defines such a system. Here, it appears to be undisputed that there is no treatment or disposal happening with the Dubick Subdivision; it is simply a shared pipe among two (or maybe three) lots that leads to Butler Township's public sewer line.

The Department's response to the motion never addresses the treatment and disposal language in the definition. The response does not provide much of an explanation on how the Department came to the conclusion that the Dubick Subdivision is a community sewerage system. The Department seems to take the position that any subdivision that does not directly connect to a public sewer line must therefore be a community sewerage system (if it is not an onlot system). The Department says that proposed Lots 2 and 3 "do not directly tie into a publicly-owned sewer" and "[s]ince the flows from two separate structures on two separate properties are being combined into a single downstream line that is not owned by a municipality or municipal authority, the proposal is not eligible for the exemption from planning." (DEP Memo. at 7.) The Department then simply concludes that the shared line meets the definition of a community sewerage system.

We are not convinced at this point that the Dubick Subdivision involves a community sewerage system. There is a regulation that addresses the alternative analyses for community sewerage systems, 25 Pa. Code § 71.65, but it does not appear to be a good fit for the situation here. That section talks about systems that discharge to waters of the Commonwealth, dry stream channels, or land disposal sites, and systems that require Clean Streams Law permits, among other things. The scant case law on community sewerage systems also does not seem to address the situation here. In *Estate of Charles Peters v. DER*, 1992 EHB 358, the Board considered an appeal of an NPDES permit issued to a community sewerage system which consisted of a sewage treatment plant jointly owned and operated by two private developers (one being a hotel) processing more than one million gallons per day of sewage. This does not seem to fit very squarely with a shared sewer pipe between a single-family house and a four-unit apartment building that leads to public sewer and involves no sewage treatment or discharge to waters of the Commonwealth. We presume that there must be a spectrum of what can constitute a community

sewerage system, but based on what we can discern at this point, we have reservations that what is proposed by the Appellants meets the definition. We expect much further elucidation from the Department on how this project is a community sewerage system as we move forward.

Finally, the Appellants tell us in their motion that they are under significant financial pressure to complete the subdivision so they can pay off debts of the Estate of David Dubick. The Appellants complain that they submitted the exemption request to the Department back in 2020, nearly two years before the Department finally denied it, and the project is still on hold. We are sympathetic to the Appellants' concerns. To keep things in perspective, this case is about a subdivision that adds a single equivalent dwelling unit of 400 gallons per day of sewage to a public sewer system where the municipality has apparently certified that it has the capacity to handle the minor additional flow expected to be generated from the subdivision. It does not seem like it is very complicated. We note that the instructions that accompany the Department's sewage facilities application mailer state that the Department will render a decision on an exemption request within ten working days of receiving the request. (App. Ex. 7 (at 4).) Thus, we do not necessarily agree with the Department's assertion in its response that an exemption request is a fact- and law-intensive inquiry requiring expert testimony that is fundamentally inappropriate for resolution by summary judgment; the record provided to us here simply falls short of satisfying the summary judgment standard.

At this point, the deadline for completing discovery in this appeal has passed. The deadline for filing any additional dispositive motions is approaching. Absent any other proposals from the parties, we will move to schedule the hearing on the merits in an expeditious manner.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL RITSICK AND DONNA DUBICK, EXECUTOR OF THE ESTATE OF DAVID G. DUBICK	:	
v.	:	**EHB Docket No. 2022-036-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 8th day of December, 2022, it is hereby ordered that the Appellants' motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: December 8, 2022

c: **DEP, General Law Division:**
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