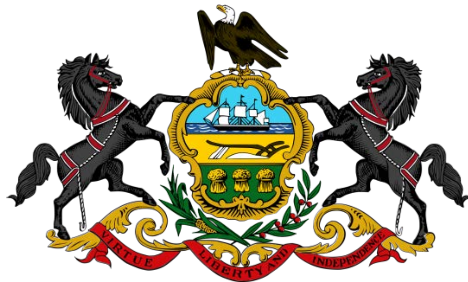
Environmental Hearing Board

Adjudications and Opinions



2016
VOLUME II

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

2016

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

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

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2016 EHB 1

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FOREWORD

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

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-174-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN D. BRANCH, Permittee	:	**Issued: July 7, 2016**

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Pennsylvania Environmental Hearing Board dismisses an Appeal of an oil and gas permit, finding that Appellant has not met its burden of proof. Although the Appellant raised legitimate concerns about the decision to allow drilling under an active oil and gas refinery in a location approximately 300 feet from a 3.6 million gallon gasoline storage tank, there was insufficient expert testimony to demonstrate actual risks associated with the drilling.

BACKGROUND

This Appeal brought by United Refining Company (United) challenges the issuance of an oil and gas permit by the Pennsylvania Department of Environmental Protection (Department) to the Permittee, John D. Branch (Mr. Branch). The permit allows Mr. Branch to drill under United Refining Company's property in Warren, Pennsylvania.

Following discovery and the filing of prehearing memoranda, a hearing was held before the Honorable Thomas W. Renwand in Erie, Pennsylvania. The record consists of a 352 page transcript and 23 exhibits. Following the review of Post Hearing Briefs, at the request of United

Refining Company and over the objection of Mr. Branch, on June 7, 2016, the Board conducted a site view in Warren, Pennsylvania.

FINDINGS OF FACT

1. United Refining Company has owned and operated an 83 acre petroleum refinery in Warren, Pennsylvania since 1902. The Property extends for approximately 1.6 miles along the Allegheny River. (Joint Stipulation of Facts, Paragraph 1).

2. The subsurface below the United Refining Company property where drilling is permitted contains the Warren 1st and 2nd Sands, followed by the Glade and Clarendon Sands. The top of the Clarendon Sands is approximately 780 feet below the surface. (Joint Stipulation of Facts, Paragraphs 3-7).

3. United Refining Company has never drilled oil and gas wells on its property but there are four known oil and gas wells which were properly plugged in 1991. (Joint Stipulation of Facts, Paragraphs 9, 10 & 11).

4. United Refining Company has installed over 100 monitoring wells on its property since 1990. (Joint Stipulation of Facts, Paragraph 12).

5. United Refining Company has constructed several large storage tanks for gasoline products on its property including Tank 234. (Joint Stipulation of Facts, Paragraphs 15 & 17).

6. Tank 234 is an above ground storage tank with a capacity to store 3.6 million gallons of gasoline. (Joint Stipulation of Facts, Paragraph 17).

7. Tank 234 has a steel floor, concrete ring wall, and an earthen dike designed to contain 110% of its contents. It sits on fill materials, soils, gravels, silts sands and clays. The bedrock is approximately 75 feet below the bottom of the tank. (Joint Stipulation of Facts, Paragraphs 18-20).

8. United Refining Company inspects Tank 234 every five years with the last inspection taking place in November 2014 and finding everything in order. (Joint Stipulation of Facts, Paragraphs 23-26).

9. In 2001, United Refining Company discovered an oil plume beneath Tank 234 which recently was measured at approximately 265 feet long by 180 feet wide. (Joint Stipulation of Facts, Paragraphs 27-28).

10. Since its discovery, United Refining Company believes that this oil plume is from an abandoned oil and gas well. (Transcript, Pages 25, 42, 46-47).

11. United Refining Company has drilled five monitoring wells and recovered in excess of 12,500 gallons of oil from the plume. (Joint Stipulation of Facts, Paragraphs 30 & 35).

12. The Permittee, John D. Branch, has been in the oil and gas business for 31 years and in the drilling business for 15 years. (Joint Stipulation of Facts, Paragraph 40; Transcript, Page 139).

13. Mr. Branch has drilled approximately 60 oil and gas wells within the City of Warren, Pennsylvania. (Joint Stipulation of Facts, Paragraph 41; Transcript, Page 140).

14. Prior to the Department's granting of the Permit under Appeal, Mr. Branch met with representatives of United Refining Company to tour the plant and discuss his proposed drilling plans under the United Refining Company property. He originally proposed to drill 6 wells but only one well is currently permitted. (Joint Stipulation of Facts, Paragraph 42).

15. Mr. Timothy Ruth, a geologist and employee of United Refining Company, advised both Mr. Branch and the Pennsylvania Department of Environmental Protection of United Refining Company's concerns and objections to drilling being conducted under United

Refining Company's property and specifically in close proximity to Tank 234. (Transcript, Pages 25-26, 33).

16. Mr. Ruth has been employed by United Refining Company for 26 years. His work for United is concentrated in characterizing and remediating releases of gasoline for the company's retail outlets. He supervises a staff of 16 professionals. (Transcript, Pages 14-16).

17. The Department of Environmental Protection contacted Mr. Branch after learning of United Refining Company's objections, and Mr. Branch addressed the objections in a written response to the Department. (Transcript, Pages 175-176).

18. Mr. Branch altered the proposed well termination point to avoid the vicinity of the plume. (Joint Stipulation of Facts, Paragraph 55).

19. Mr. Branch advised the Department that he would utilize conductivity and video logs when he drilled the new wells and would avoid hydraulically fracturing in the vicinity of the zones indicated by these logs as having excessive water. (Joint Stipulation of Facts, Paragraph 59).

20. On November 12, 2014, the Department issued six corrected Well Permits to Mr. Branch containing special conditions. (Joint Stipulation of Facts, Paragraphs 66-68).

21. Mr. S. Craig Lobins is employed by the Pennsylvania Department of Environmental Protection as the Northwest District Oil & Gas Manager. He is a professional geologist who has worked for the Department for 29 years and oversees a staff of 60 professionals. (Transcript, Pages 244-246).

22. One of the Special Conditions was that "no fracking operations are to be conducted in the Warren 1st or Warren 2d formations." (Joint Stipulation of Facts, Paragraph 68).

23. Mr. Branch commenced drilling of East Side Well 61 which is the well closest to Tank 234. (Joint Stipulation of Facts, Paragraphs 72 & 73).

24. There is no direct evidence of unplugged wells near or under Tank 234 or anywhere else on the United Refining Company property. (Joint Stipulation of Facts, Paragraph 75).

25. United Refining Company has no knowledge of any property damage, surface damage, or environmental harm caused by hydraulically fracturing wells in the Glade or Clarendon Sands in Warren, Pennsylvania. (Joint Stipulation of Facts, Paragraph 79).

26. Mr. Lobins has been the Northwest District Oil and Gas Manager since 2003 and has overseen the issuance of 27,000 conventional oil and gas permits. (Transcript, Page 249).

27. Mr. Lobins is very familiar with conventional well drilling and instances where conventional wells fracked into abandoned oil and gas wells. This occurs approximately 2-4 times a year in Northwest Pennsylvania. (Transcript, Pages 250, 252-253).

28. Mr. Lobins signed the well permits at issue in this case. (Transcript, Page 258).

29. Mr. Lobins is aware of Mr. Branch's slant drilling technique and sees no problem with it. (Transcript, Page 264).

30. Well #60, which Mr. Branch drilled vertically in 2014, is 355 feet from Tank 234 and had no adverse effect on the Tank or the plume underneath it. (Transcript, Page 282).

31. Mr. Lobins testified that the fracking done in Well #61 will break away from Tank 234, will be too far underground to impact the plume or the Tank, and will have no adverse impact on the United Refining Company property. (Transcript, Pages 275-285).

32. There are various layers of bedrock between 75 and 750 feet below the surface of the United Refining Company property. (Transcript, Page 112).

33. Fracking would take place at various depths between 750 feet and 850 feet below the surface of the property. (Transcript, Page 114).

34. Well # 61 is approximately a little less than 300 feet from Tank 234. (Transcript, Page 132).

35. Mr. Branch has drilled approximately 60 oil and gas wells in Warren, Pennsylvania since 2009 and has never had any groundwater contamination problems in any of these wells. (Transcript, Pages 140, 206).

36. Mr. Lobins testified that since no fracturing will occur in the Warren 1st or Warren 2nd formations and because the fractures will stay in the zones being fractured, there will be no effects on Tank 234 or the plume beneath it. (Transcript, Pages 260, 336-347).

37. The plume consists of multiple components and is likely from multiple sources. (Transcript, Page 117).

38. Since the discovery of the oil plume in 2001, United Refining Company has installed five monitoring wells. (Joint Stipulation of Facts, Paragraph 30; Transcript, Pages 105-106).

39. The distance from where the hydraulic fracturing will occur in Well #61 to Tank 234 is approximately 300 to 360 feet, and the fractures from Well #61 would only travel 150 feet horizontally, and would be 600 to 800 feet below the ground surface. (Transcript, Pages 153, 168, 185, 275 & 347).

40. Mr. Lobins and Mr. Branch testified that the drilling of Well #61 is unlikely to create fractures impacting the plume or Tank 234, communicate with any undocumented wells, impact groundwater, or impact the surface. (Transcript, Pages 101, 102, 172, 283, 164-166, 187, 188, 284, 287, 189 & 190).

41. Mr. Branch will be closely monitoring the hydraulic fracturing for pressure changes that would be signs of communication with undocumented wells. (Transcript, Page 158).

DISCUSSION

The issue in this case is straight forward. United Refining Company "bears the burden of proving by a preponderance of the evidence that the Department acted unreasonably or in violation of the laws of the Commonwealth" when it issued a permit allowing Mr. Branch to drill an oil and gas well under its property. *See* 25 Pa. Code Section 1021.122(c)(2); *Foundation Coal Res. Corp. v. DEP*, 2009 EHB 49, 87 (2009).

When seeking a permit, the burden is on the permit applicant, Mr. Branch here, to convince the Department that he meets all the requirements for the issuance of the permit. Pursuant to 58 Pa. C.S.A. Section 3211 (e.1) the Department may deny a permit for any of the following reasons:

1) The well site for which a permit is requested is in violation of any of this chapter or issuance of the permit would result in a violation of this chapter or other applicable law.
2) The permit application is incomplete.
3) Unresolved objections to the well location by the coal mine owner or operator remain.
4) The requirements of section 3225 (relating to bonding) have not been met.
5) The Department finds the Applicant [is in continuing violation of this chapter and has not corrected the violation nor appealed the final Department action to the Board and obtained a Supersedeas] or
6) The applicant has not paid the applicable fee.

Once the Department determines, as it did here, that there were no statutory reasons to deny the issuance of the permit, third parties such as United Refining Company have the right to appeal the permit issuance to the Pennsylvania Environmental Hearing Board. 35 P.S. Section

7514. The burden to show that the permit should not have been issued is on the party challenging the permit. Appellant, therefore, must prove by a preponderance of the evidence that the permit should not have been issued. 25 Pa. Code Section 1021.122 (a) and (c)(2). To prove one's case by a "preponderance of the evidence" means that the "evidence in favor of the proposition must be greater than that opposed to it…It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established." *Noll v. DEP*, 2005 EHB 505, 515 (quoting *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1476). Therefore, United Refining Company was required to present evidence that the Department's issuance of the permit to Mr. Branch was not appropriate or did not conform with the applicable law or was unreasonable, and its evidence must be greater than the evidence showing that the issuance of the permit was appropriate or in accordance with the applicable law.

In other words, an appellant must come forward and prove their allegations by a preponderance of the evidence. They may not simply raise an issue and then speculate that all types of unforeseen calamities may occur. *See Shuey v. DEP & Quality Aggregates, Inc.,* 2005 EHB 657, 711. When they raise technical issues they must come forward with technical evidence. In many cases, such as this one, they need expert testimony to prove their claims. In other words, a party cannot simply come forward with a laundry list of potential problems and then rest their case. They must prove by a preponderance of the evidence that these problems are likely to occur.

Timothy Ruth is a geologist employed by United Refining Company for 26 years. We recognized Mr. Ruth as an expert in the field of geology and found him to be an excellent witness. Mr. Ruth was extremely knowledgeable in his area of expertise and in his explanations

of the operations of the plant. However, Mr. Ruth is not an expert in the drilling of oil and gas wells or the intricacies of hydraulic fracturing and he admitted so during his testimony. Although Mr. Ruth raised legitimate concerns about the risks of drilling an oil and gas well under an active refinery and especially under a 3.6 million gallon gasoline storage tank resting over a plume of oil, this was not sufficient for United Refining Company to satisfy its burden of proof. The evidence regarding unplugged wells in the vicinity of Tank 234 is speculative, rather than established scientific fact. United concedes that there may not be any wells in that location. Even more importantly, the testimony does not provide a scientific basis for how the drilling of Well #61 will impact either the plume or Tank 234. Although we share United's concerns about the drilling of an oil and gas well under a large gasoline storage tank, those concerns are not fully supported by the requisite expert testimony.

We also recognized Craig Lobins, the Department's Northwest District Oil and Gas Manager, as an expert. Mr. Lobins testified that the safeguards in the permit that allow hydraulic fracturing to occur in only certain zones will allow the drilling to take place without any impact to the surface or the structures on it. Mr. Lobins testified that even if there are unplugged wells and even if those unplugged wells were impacted by the drilling (big if's based on his testimony), he opined that there would be little or no impact to any of the structures on the United Refining Company property and that any impacts could be quickly and easily addressed. Mr. Branch, an experienced oil and gas operator, who also was qualified as an expert, testified as to his drilling plan and about the many wells he has drilled without incident in this locale. The expert testimony as a whole leads us to conclude that there is justification under the law to issue the oil and gas permit under appeal.

The weight of evidence does not demonstrate that Mr. Branch's drilling of an oil and gas well is likely to adversely impact United's storage tank or property. The facts and expert testimony do not prove by a preponderance of the evidence that drilling would damage or otherwise impact the storage tank, plume, or property or how it would do so. For example, how would the fracking of the well impact the surface? How would the fracks propagate into the unplugged wells at the depths and distances where the fracking would take place? These are important questions that remain unanswered.

We recognize that United Refining Company has raised important and legitimate concerns regarding the decision to allow drilling under an active refinery, but they did not meet the burden of proof that would allow us to revoke or remand the permit. We commend counsel for United and Mr. Ruth for presenting a very strong case and we acknowledge that this matter presents difficult issues, and our resolution of them comes down to a close evaluation of the expert testimony. Our decision hinges on the burden of proof.

We have several observations and comments regarding the process utilized in this case. We realize the Department issues thousands of oil and gas permits every year and our suggestions are specific to this case. In the vast majority of permit applications, the Department follows a standard procedure for processing permit applications. In most cases such a process is probably sufficient. However, this case is unique as Mr. Lobins, himself, indicated. It is out of the ordinary for the Department to receive an application for an oil and gas permit that allows drilling by a third party underneath an oil and gas refining company in full operation and in close proximity to a 3.6 million gallon gasoline storage tank. The Department, United Refining Company, and Mr. Branch would have greatly benefitted from a more collaborative process than that which was utilized here. United Refining Company found out about the permit applications

filed by Mr. Branch not from the Oil and Gas Division but from another Department employee in the Environmental Cleanup Program. After United Refining Company personnel immediately contacted the permitting section of the Oil and Gas Division to advise of their concerns the Department forwarded the concerns to Mr. Branch. However, the Department did not forward Mr. Branch's "Response to Objections" to the company. United did not even know such a document existed until it was produced in discovery in this appeal. Nor did the Department further reach out to United Refining Company. Instead, the Department issued the permits. It did so with minimal contact with United Refining Company and, inexplicably, without visiting the site.

We believe that if the Department had been more transparent and communicated with all parties involved, including United Refining Company, it would have been beneficial for everyone including the Department. After all, who better to communicate to the Department the unique concerns of drilling under an active oil and gas refinery than the technical employees of the refinery itself? A site visit would have surely aided the permit reviewer. We cannot help but think that if the Department had conducted a more robust permitting application process and involved Mr. Ruth and United Refining Company in discussing and addressing the company's very legitimate concerns, a resolution might have been reached that was acceptable to all, and the time, effort, and expense incurred by everyone in this appeal might have been avoided. As President Harry S Truman once said, it is far better to spend the necessary time on the "front end" of a project than on the "back end."

CONCLUSIONS OF LAW

1. The third party Appellant, United Refining Company, bears the burden of proof in this appeal of a permit issued and renewed by the Pennsylvania Department of Environmental Protection. 25 Pa. Code Section 1021.122(c)(2).

2. United Refining Company failed to show by a preponderance of the evidence that the Department acted unreasonably or contrary to law, that its decision was not supported by the facts, or that it was inconsistent with the Pennsylvania Constitution. *Brockway Borough Municipal Authority v. DEP,* 2015 EHB 221.

3. Expert testimony is required, as it was here, where the issues require scientific or specialized knowledge to decide. *Brockway, supra,* 237-39.

4. United Refining Company did not present the required expert testimony or other sufficient evidence to carry its burden of proof. *Shuey v. DEP*, 2005 EHB 657, 711.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2014-174-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN D. BRANCH, Permittee	:	

O R D E R

AND NOW, this 7th day of July 2016, it is hereby **ORDERED** that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

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

DATED: July 7, 2016

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

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

For Appellant:
Barry Klenowski, Esquire
(via electronic filing system)

For Permittee:
Jean Mosites, Esquire
Nicole Vasquez Schmitt, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE BOROUGH OF STOCKERTOWN	:	
	:	
v.	:	**EHB Docket No. 2014-166-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 14, 2016**

OPINION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Department's Motion for Summary Judgment. While the Department's antidegradation regulations are water quality standards that need to be considered when applying the anti-backsliding regulations, which are incorporated by reference, the Board is not able to determine whether the Department properly applied the antidegradation regulations in this matter or whether it improperly considered certain ABACT limits in a guidance document as a binding norm. The Board also denies the Borough of Stockertown's Cross Motion for Summary Judgment. The antidegradation regulations are water quality standards as a matter of state and federal law and a relaxation of the Borough's existing permits limits triggers review under the antidegradation regulations.

O P I N I O N

Before the Board is an appeal from the Department's decision to issue a renewal of the Borough of Stockertown's NPDES permit for a discharge from the Borough's wastewater treatment plant without any relaxation of the longstanding winter ammonia-nitrogen effluent limitations. The Borough requested that the Department raise the effluent limitations to reflect

the levels achieved by the plant during the winter months. The Department declined to relax the Borough's effluent limitations for winter ammonia-nitrogen because, according to the Department, the requested effluent limitations would violate the Department's antidegradation regulations. The Department refused to consider or approve the request finding that the exceptions to the anti-backsliding requirements were not applicable in light of the violations of the antidegradation regulations that would result from the requested relaxation. The Borough argues that the Borough's request does not implicate the Department's antidegradation regulations, and the Department has the authority to consider the Borough's request. According to the Borough, the antidegradation regulations are not part of the state's water quality standards or the anti-backsliding analysis.

The Department and the Borough of Stockertown have both filed motions for summary judgment. The Department in its motion asserts that the Department, as a matter of law, cannot relax the Borough's effluent limitations for winter ammonia-nitrogen because the relaxation would violate the Department's antidegradation regulations. The Department believes such a violation would be a violation of the state's water quality standards that would preclude the application of an exception to the anti-backsliding requirements.

The Borough in its cross motion for summary judgment argues that the Department's antidegradation regulations are not part of the Commonwealth's water quality standards, and therefore, any alleged violations of these regulations are not a bar to the application of the exceptions to the anti-backsliding requirements. The Borough also questions whether its request involves an "additional or increased discharge" that would trigger the application of the Department's antidegradation regulations. The Borough asserts that the Department's decision to deny its request to relax the ammonia-nitrogen effluent limitation was contrary to law, an

abuse of discretion and arbitrary and capricious. The Borough asks that the Board vacate the renewed NPDES permit, and remand the permit to the Department with instructions to calculate the appropriate winter ammonia-nitrogen effluent limitations consistent with the exceptions to the anti-backsliding requirements.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. 1035.1.

Background

This appeal is not the first time that the Borough of Stockertown has appeared before the Board regarding the NPDES permit for its discharge from the wastewater facility to the Little Bushkill. *See Easton Area Joint Sewer Authority v. DER and Borough of Stockerton*, 1990 EHB 1307, 1310. In this earlier appeal, the Easton Area Joint Sewer Authority, the City of Easton, the

Boroughs of West Easton and Wilson and the Townships of Forks and Palmer filed an appeal of the Department's 1986 decision to issue the initial NPDES permit to the Borough of Stockertown. The appellants, among other things, were concerned about environmental harm to the receiving stream as a result of the discharge of ammonia nitrate to the stream. The Board dismissed the appeal, finding that the appellants had failed to meet their burden to demonstrate environmental harm.

The Department renewed the Borough's NPDES permit in 1992, 1997 and again in 2002. These renewals contained the same winter ammonia-nitrogen effluent limitations as the original NPDES permit. In 2007, the Borough applied for a renewal, and in 2012 the Department published notice of a draft NPDES permit for the Borough for review and comment. In 2012, the Borough submitted comments to the Department regarding the draft NPDES permit including a request to relax the winter effluent limitations for ammonia-nitrogen based upon the Borough's assertion that it qualified for an exception to the anti-backsliding prohibition. The Department published notice of a redrafted NPDES permit in January 2014 still containing the original effluent limitations for ammonia-nitrogen, and the Borough again requested relaxation of the winter ammonia-nitrogen effluent limitations. On November 3, 2014 the Department renewed the Borough's NPDES permit containing the same effluent limitations for ammonia-nitrogen as contained in all prior versions of the NPDES permit (1986, 1992, 1997 and 2002). The Borough filed an appeal of the Department's decision to renew the Borough's NPDES permit without relaxation of the effluent limitations requested by the Borough.

Regulatory Framework

The issues in the matter before the Board arise in the context of the Departments' NPDES permitting program and its water quality standards program including the antidegradation

component. *See* 25 Pa. Code Chapters 92a, 93 and 96. These state regulatory programs are delegated to the Department for state implementation of similar programs established under the Federal Water Pollution Control Act ("CWA") and the regulations promulgated by the United States Environmental Protection Agency ("EPA") thereunder. *See* 33 U.S.C. §§ 1251-1387; 40 C.F.R. Parts 122-131.

The CWA and its implementing regulations contain a general prohibition on the renewal or reissuance of an NPDES permit containing effluent limitations that are less stringent than the effluent limitations in the prior permit. 33 U.S.C. § 1342(o)(1) and 40 C.F.R. § 122.44(1)(1). This prohibition is described as the "anti-backsliding" prohibition. The CWA and its implementing regulations also contain a list of exceptions to the general anti-backsliding prohibition. 33 U.S.C. § 1342(o)(2) and 40 C.F.R. § 122.41(1)(2). Finally, the CWA and its implementing regulations contain a provision described as the "Safety Clause" which restricts the extent to which effluent limitations may be relaxed if an exception to the anti-backsliding prohibition is applicable. 33 U.S.C. § 1342(o)(3) and 40 C.F.R. § 122.44(1)(2)(ii). The Safety Clause in the EPA's implementing regulations provides.

> In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a **violation of a water quality standard under section 1313** of this title applicable to such waters.

Id. (Emphasis added.) The Department's regulation at 25 Pa. Code § 92a.44 incorporate by reference the federal regulations in 40 C.F.R. § 122.44. The federal requirements in Section 122.44, including the general prohibition against backsliding, the exceptions to the anti-backsliding requirements and the Safety Clause, are therefore state law as part of the state's NPDES regulatory program that the Department implements.

The Department also implements its water quality standards program, and many of the requirements of the water quality standards program are applied in the context of the Department's NPDES program. For example, a basic requirement in the NPDES program is the requirement to apply the more stringent of the requirements between technology based effluent limitation and water quality based effluent limitations. 25 Pa. Code § 92a.12(a). The water quality standards are, among other things, used to develop water quality based effluent limitations (WQBELS). 25 Pa. Code §§ 92a.2, 96.1 and 96.4.

The Department's water quality standards program is broader in scope than just the Department's NPDES program, but the water quality standards program plays a major role in the Department's implementation of its NPDES program. *See* 25 Pa. Code §§ 92a.2, 93.4c, 96.1 and 96.4. The Department's regulations define "water quality standards" as: "the combination of water uses to be protected and the water quality criteria necessary to protect those uses." 25 Pa. Code §§ 92.a.2 and 96.1. Protected water uses are set forth in Table 1 of Section 93.3. 25 Pa. Code §93.3, Table 1. Table 1 lists various protected uses including two Special Protection uses: High Quality Waters (HQ) and Exception Value Waters (EV). Special Protection uses are part of the state's antidegradation regulations. Section 93.4a identifies the three tiers of anti-degradation protection that apply to surface water of the Commonwealth:

1. Existing use protection[1]
2. Protection of High Quality Waters
3. Protection of Exceptional Value Waters

25 Pa. Code § 93.4a (b), (c) and (d). These three antidegradation tiers or components are all part of the Department's water quality standards as protected uses.[2] As part of the Department's

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[1] Existing use is defined by Section 93.1 as "those uses actually attained in the water body on or after November 28, 1975 whether or not they are included in the water quality standards." 25 Pa. Code §93.1.

water quality standards, they need to be evaluated when applying the Safety Clause that is also part of the state's regulatory NPDES program. 25 Pa. Code § 92a.44. The existing use and EV use requirements are not an issue in this appeal. The HQ use requirements are an issue because the receiving stream, the Little Bushkill, is designated as an HQ surface water in the state regulations. *See* 25 Pa. Code § 93.9c, Drainage List C.

Discussion

To resolve the cross-motions for summary judgment, the Board needs to address several preliminary issues presented by the Parties. After addressing these preliminary issues, the Board will be in a position to resolve the remaining claims of the Parties. To identify these preliminary issues it is helpful to summarize the positions of the Parties as set forth in their respective motions for summary judgments.

Department's Motion for Summary Judgment

In its motion for summary judgment, the Department makes a fairly straightforward argument. The Borough requested a relaxation of its current effluent limitations in the context of an NPDES permit renewal. The Department asserts that the anti-backsliding regulations prohibit the requested relaxation because none of the exceptions to the anti-backsliding regulations apply. According to the Department, the exceptions to the anti-backsliding regulations do not apply because the Safety Clause, which is incorporated by reference in the Department's regulations, prohibits any relaxation of effluent limitations that would result in "a violation of a water quality standard." According to the Department, the relaxation of the effluent limitations for ammonia-nitrogen would be contrary to the Department's antidegradation regulations which are part of the Department's water quality standards.

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[2] Section 93.4c also contains general requirements for antidegradation implementation including provisions for protections of High Quality and Exceptional Value Waters and special provisions for sewage facilities in High Quality and Exceptional Value Waters. 25 Pa. Code § 93.4c (b) and (c).

The Borough's NPDES permit authorizes a discharge of treated effluent to the Little Bushkill which is designated as a High Quality (HQ) water of the Commonwealth. *See* 25 Pa. Code § 93.9c, Drainage List C. The Department believes that the requested relaxation of the existing effluent limitations would result in an "additional or increased discharge" to a HQ surface water triggering the application of antidegradation regulatory requirements in Sections 93.4a – 93.4d. 25 Pa. Code §§ 93.4a - 93.4d. The Department concluded that if the Department applied these regulations and its Water Quality Antidegradation Implementation Guidance to the Borough's request, the resulting effluent limitations for ammonia-nitrogen "would be half of what they are in the permit under challenge." Thus, the Department concluded that any relaxation of the current standard would be inconsistent with the Department's antidegradation regulations, which are a part of the Commonwealth's water quality standards and would be barred by the Safety Clause incorporated by reference in the Department's regulations. As a result of this analysis, the Department argues that it lacks the legal authority to allow any relaxation of the current standard in response to the Borough's request. Since the Department believes that the relief sought by the Borough is contrary to law, and there are no disputes of material facts, the Department argues that it is entitled to judgment. The Borough disagrees with much of what the Department argues as set forth below.

Borough's Cross Motion for Summary Judgment[3]

The Borough's cross motion for summary judgment is based upon two main points. First, the Borough asserts that the Department's antidegradation regulations, including Section 93.4c governing additional or increased discharges to High Quality waters, are not water quality standards under state or federal law. According to the Borough, the Department's anti-

[3] The Borough filed a Combined Response to the Department motion and its own cross motion for summary judgment.

degradation regulations are not considered when evaluating the applicability of the Safety Clause to preclude the Borough from qualifying for one of the exceptions to the general anti-backsliding prohibition. The Borough asserts that it is entitled to rely upon exceptions to the general anti-backsliding prohibition and to have its winter ammonia-nitrogen effluent limitation relaxed as requested.

Second, regardless of the applicability of the Safety Clause, the Borough asserts that its request for a relaxation of its effluent limitation is not subject to the antidegradation requirements in Section 93.4c because the relaxation requested by the Borough does not qualify as an "additional or increased discharge" under that regulation. The Borough is not asking for an authorization to increase its current discharge, which happens to violate its current authorization. According to the Borough, the "status quo on the ground" is the focus, and since the Borough is not requesting to discharge beyond its actual current load, the Borough's request does not trigger review under Section 93.4c. The Borough believes that the current discharge defines whether there is a proposal for an additional or increased discharge and not the current permit limit or authorization.

On the first major point of disagreement between the Parties, the Board agrees with the Department that the Department's antidegradation regulations are part of its water quality standards. Under the Department's regulation, "water quality standards" are defined as "the combination of water uses to be protected and the water quality criteria necessary to protect those uses." 25 Pa. Code §§ 92a.2 and 96.1. Protected water uses in Pennsylvania includes Special Protection uses, which are HQ and EV waters. 25 Pa. Code § 93.3, Table 1. Special Protection waters, along with existing use protection, are the three tiers of antidegradation

protection established by regulation for the Commonwealth's surface waters. *See* 25 Pa. Code § 93.4a.

For the protection of Special Protection waters, there is no uniform set of criteria to protect these HQ or EV uses. The existing quality of the water in a particular surface water, designated as HQ or EV, sets the criteria for protection of HQ or EV surface waters. The regulations provide that the existing water quality may not be degraded. The requirement for EV waters is absolute, but for HQ waters there is some flexibility under the regulations. 25 Pa. Code § 93.4c. This regulatory flexibility is at issue in this appeal.

The surface water in this appeal receiving the discharge from the Borough's wastewater treatment plant is designated as an HQ water. The outcome of this appeal depends largely upon the application of the antidegradation regulations to the facts of this appeal. The Borough is wrong to assert that the Commonwealth's water quality standards do not include the Special Protection waters. As a matter of Pennsylvania state law, these Special Protection waters are a key part of the Commonwealth's water quality standards, thereby triggering consideration of the Safety Clause which is incorporated by reference into the Department's regulations. While the Department is correct that the Borough's request for relaxation of its NPDES permit effluent limitation triggers consideration of the Safety Clause, this legal conclusion does not answer whether the Department properly considered the Safety Clause in the context of applying its anti-degradation requirements to the Borough's request. To properly consider the applicability of the Safety Clause here requires a closer examination of the antidegradation requirements applicable to HQ waters.

The incorporation by reference of the three related federal regulatory requirements (the general anti-backsliding prohibition, the exceptions to this prohibition and the Safety Clause)

provides a minor point of ambiguity that the Board should address. The federal language in the Safety Clause, incorporated by reference, contains a citation to the federal legal authority for "a water quality standard under section 1313." *See* 33 U.S.C. § 1342(o)(3) and 40 C.F.R. § 122.44(1)(2)(ii). There is no direct connection in the federal Safety Clause language, which is incorporated by reference, to the Department's state antidegradation regulations that identifies these regulations as water quality standards under 1313 triggering Safety Clause consideration. There is only a general reference to a violation of water quality standard under section 1313 of the CWA. The state antidegradation regulations are in fact a key part of the state's water quality standards as set forth above, and they qualify as a "water quality standard under section 1313" as set forth below.

The United States Supreme Court recognized that Section 1313 of the CWA requires that state water quality standards include an antidegradation policy component. *PUD no. 1 of Jefferson County v. Washington Dep't of Ecology,* 114 S. Ct 1900, 1905-1906 (1994). The federal regulations implementing Section 1313 of the CWA also recognizes that water quality standards include antidegradation requirements and require that states develop, adopt and implement an antidegradation policy. 40 C.F.R. § 131.12. Federal guidance concerning application of the anti-backsliding prohibition makes the direct connection to Safety Clause and antidegradation requirements:

> CWA section 402(o)(3) is a *safety* clause that provides an absolute limitation on backsliding. This section of the CWA prohibits the relaxation of effluent limitations in all cases if the revised effluent limitation would result in a violation of applicable effluent guidelines or water quality standards, **including anti-degradation requirements.**

NPDES Permit Waters' Manual, EPA-833-k-10-001, September 2010 at 7.1-4. (emphasis added.) The Department's antidegradation regulations are therefore water quality standards under Section 1313 of the CWA within the meaning of the Safety Clause.

The second major point of disagreement between the Parties is whether the request for relaxation of its ammonia-nitrogen effluent limitations is a new, additional or increased discharge to a High Quality water triggering application of the requirements in Section 93.4c. 25 Pa. Code § 93.4c. The Borough asserts that its request does not involve an additional or increased discharge to the Little Bushkill. The Department disagrees and asserts that the relaxation of the existing effluent limitations is automatically an additional or increased discharge.

The Borough's argument is based upon the fact that its discharge has not historically met the existing winter effluent limitations for ammonia-nitrogen, and the request for relaxation only authorizes the Borough's discharge that has existed for years. If the current discharge, which exceeds its NPDES permit limits, currently exists, then according to the Borough, it is not an "additional or increased discharge" triggering review under Section 93.4c (b)-(c).

The Department relies upon the current permit limits to define what is an "additional or increased discharge" for purposes of applying Section 93.4c(b)-(c). The Borough's request for relaxation would authorize an additional or increased discharge to the Little Bushkill beyond the Borough's current permit limits, and this request for an authorization for an additional or increased discharge triggers applicability of Section 93.4c. The fact that the Borough has not met its existing requirements does not change the analysis from the Department's perspective.

The Board agrees with the Department that the Borough's request for relaxation of its winter effluent limitations for ammonia-nitrogen is a proposal for an additional or increased discharge to the Little Bushkill that triggers application of the antidegradation requirements in Section 93.4c (b)-(c). The fact that the Borough is not currently meeting its existing effluent limitations does not preclude its applicability. The existing effluent limitations in the permit

define what is allowed, and the Borough's request for relaxation appears to be proposing an additional or increased discharge from these existing effluent limitations.[4]

Having addressed the preliminary points of disagreement, the Board is now in a position to decide the Parties' cross motions. The Board denies the Borough's cross motion for summary because its motion is not supported as a matter of law as discussed above. The antidegradation regulations are a key component of the Commonwealth's water quality standards and must be considered when applying the Safety Clause. In addition, the Borough's existing permit limits and the request to relax these limits trigger application of the antidegradation requirements in the Section 9.4c (b)-(c) as an additional or increased discharge.

The Board also denies the Department's motion for summary judgment because it is not clear on the record before the Board that the Department properly applied its antidegradation regulations to the Borough's request. There are disputes of material fact regarding how the Department applied the regulations that affect whether the Department is entitled to judgment as a matter of law. Without any readily apparent analysis the Department concluded that it had no legal authority to relax the Borough's current BAT technology based effluent limitations because the new ABACT based effluent limitations, which would be required, must be more stringent than the longstanding BAT limits in the renewed permit.[5] It appears that the Department is certain that it has no legal authority because it has a guidance document containing possible

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[4] The Board does not have enough facts to fully resolve this issue. It appears that the existing limits are concentration based. If the relaxed limits are also concentration based then the analysis regarding applicability of 93.4c is easy and involves a comparison of the concentration based limits. However, if either the current or requested relaxed limits are massed based limits, then it is not as easy deciding if Section 93.4c is triggered.

[5] Section 93.4c imposes a narrative technology-based standard on persons proposing to discharge an additional or increased pollutant load to a High Quality water. 25 Pa. Code § 93.4c(b)(1)(i)(A). The Department describes this standard as the anti-degradation best available combination of cost-effective treatment or "ABACT."

ABACT based effluent limitations that mandate that no relaxation of the current BAT limits is allowed.

The Board recognizes the benefits of Department guidance documents in implementing various regulatory programs. The Department's Water Quality Antidegradation Implementation Guidance, November 29, 2003 ("Antidegradation Guidance") may, in fact, be a useful guidance document when used properly. The Board is, however, concerned when the Department improperly uses a guidance document as a regulation containing a "binding norm." *See, e.g., Borough of Bedford v. Dep't of Envtl. Prot.*, 972 A.2d 53 (Pa. Cmwlth. 2009). Based upon the Department's Briefs and the limited record before the Board, there is a question whether the Department failed to apply its anti-degradation regulations in Section 93.4c, as written, and instead applied certain possible ABACT limits from its Antidegradation Guidance document as if they were regulatory limits to decline to properly consider the Borough's request to relax its permit limits.

The Borough challenged the Department's use of its Antidegradation Guidance document when it made its ABACT determination. Borough's Reply Brief in Support of Its Cross-Motion for Summary Judgment at 9-11. The Borough asserted that the Department improperly applied its Antidegradation Guidance which provides that ABACT "should be flexible enough to account for case-specific or site-specific unique characteristics and should be "cost effective" and "ABACT determinations must be made on a case-by-case basis subject to the program specific guidelines…" *Id.* citing Department's Antidegradation Guidance at 69, 70 and 97-99. The Borough asserts that the limited record before the Board does not reveal how the Department applied its Guidance to the Borough's request for relaxation and on this basis alone the Department is not entitled to summary judgment. The Board agrees that the limited record

before it does not establish whether the Department properly applied its antidegradation regulations and guidance to the Borough's request. A more complete record is needed to evaluate the Department's decision.

The Board's concern with the Department's position is revealed in the following statement in its Brief:

> If the Department received a new application from Stockertown under the current standards, the effluent limits for ammonia-nitrogen would be half of what they are in the permit under challenge.

Department's Brief at 11. Does the Department view the "current standards" in its guidance document as binding on it so that the Department would impose these "current standards" regardless of the unusual facts of this appeal, without exercising professional judgment and without exercising any discretion in considering how to apply the regulations in Section 93.4c that contain a narrative ABACT requirement, but no binding numerical limits?

To determine whether a binding norm has been created, "the reviewing tribunal must consider the provision's plain language, the manner in which it has been implemented by the agency and whether it restricts the agency's discretion." *Borough of Bedford* 972 A.2d at 63, n.15. Here, the Department's Antidegradation Guidance document contained numeric ABACT limits in Appendix B for wastewater discharges. The record before the Board does not reveal whether the Department applied these ABACT limits as binding limits, or whether the Department used its professional judgment or discretion in determining how to apply these ABACT limits to the Borough's request.[6] The Board therefore denies the Department's motion for summary judgment.

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[6] The language in Appendix B is not necessarily objectionable. The limited record before the Board does not resolve whether the Department properly used the ABACT limits in Appendix B with a case-specific analysis, with the use of professional judgment or with the exercise of discretion, which would be

While the Board agrees with the Department that the antidegradation regulations are a key part of the state's water quality standards and that the Borough's request for relaxation of its effluent limitations is a proposal for an additional or increased discharge triggering application of the Department's antidegradation regulations in Section 93.4c, the Board does not know whether the Department properly applied these regulations in its review of the Borough's request. While the Board disagrees with the Borough on the two preliminary points of dispute, the Board nevertheless agrees with the Borough that there are factual disputes whether the Department properly applied its antidegradation regulations and guidance to evaluate the Borough's request for relaxation of its ammonia-nitrogen effluent limitations. There are also related factual disputes whether the Department properly considered the exceptions to the general anti-backsliding prohibition.

The antidegradation regulations in Section 93.4c are part of the Commonwealth's water quality standards, and the need to be considered when applying the general anti-backsliding prohibition, the exceptions to the general prohibition and the Safety Clause that limits the scope of the exceptions. Unlike some parts of the Commonwealth's water quality standards, such as specific numeric criterion to protect specific designated uses, the requirements in Section 93.4c regarding protection of High Quality Waters are not as straightforward in their application.[7] High Quality waters are a Special Protection use that allows no degradation of existing water quality unless the person qualifies for relief from the antidegradation requirements under the

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necessary to justify the use of the proposed limits in consideration of the Borough's request to relax its NPDES permit limits.

[7] Applying a specific numeric criteria for the protection of a specific designated use involves the application of a mass balance analysis. Knowing the concentrations of the parameter in the proposed discharge and in the receiving surface water and the flows of both, it is relatively straightforward to determine whether a discharge containing the parameter at a certain flow and concentration will cause a violation of the in-stream water quality standard for that parameter.

Department's regulations in Chapter 93. *See* 25 Pa. Code §§ 93.4a-93.5. These regulations and the regulations in Chapter 96 require that the Department undertake and document a proper analysis of the Borough's request to relax its current winter effluent limitation for ammonia-nitrogen. In applying the antidegradation regulations and guidance to the Borough's request the Department had to consider all relevant case-specific facts, use its professional judgment and properly exercise its discretion in determining what would be the appropriate ABACT limit for the Borough's discharge.

As a general rule in developing technology based effluent limitations for NPDES permits, the Department may adopt regulatory limits that establish "binding norm" requirements or where there are no regulatory technology based limits, the Department can, using its best professional judgment, establish technology based limits on a case by case basis. *See* 25 Pa. Code § 92a.44.[8] The Department had a similar choice when it adopted Section 93.4c. It could have included the current limits in its guidance document in its regulations to establish binding requirement, but the Department did not decide to establish binding requirements in this manner. Instead the Department adopted a narrative regulatory standard that it describes as "anti-degradation best available combination of cost effective treatment" or the "ABACT" standard. What is ABACT in the context of a particular permit, in the absence of regulatory limits, can only be established after the Department considers the specific facts of the situation, uses its professional judgment and exercises its discretion to determine what limits meet the narrative ABACT regulatory standard in its regulations.

The Department is allowed to develop a guidance document that explains how it will establish ABACT limits in the future, and the guidance document may also include numerical

[8] Section 92a.44 incorporates by reference the provisions at 40 C.F.R. § 122.44. Section 122.44 includes requirements for establishing technological standards by regulation or on a case-by-case basis using Best Professional Judgment ("BPJ"). 40 C.F.R. §§ 122.44 and 125.3

limits that may be applied in future permit decisions in appropriate situations. The guidance document cannot, however, contain non-regulatory limits that the Department applies in all permits without consideration of site-specific facts, without using its professional judgment and without exercising its discretion to establish appropriate ABACT limits for a particular NPDES permit. The limited record before the Board does not reveal how the Department evaluated the Borough's request. The limited record does not address whether the Department evaluated the exception to the anti-backsliding prohibition.

The facts of this appeal and the Borough's request present the Department with an unusual situation to apply its anti-degradation regulations. The Borough has an existing permitted facility, which the Department concedes, is currently unable to meet its winter effluent limitations for ammonia-nitrogen. In addition, the fact that there is an existing treatment system may affect what is ultimately established as ABACT under the antidegradation regulations. The Board supports the Department's decision to apply Section 93.4c to the Borough's request to increase its permit limits from its existing treatment system, but the Board believes that what is ABACT for a new facility may not be the same as ABACT for an existing facility seeking relaxation of existing limits that the treatment system cannot meet. The Department needed to evaluate these facts and others, exercise its professional judgment and use its discretion to establish appropriate ABACT limits for the Borough's discharge. The limited record before the Board does not address how the Department made this key decision to deny the Borough's request for relaxation of the winter ammonia-nitrogen effluent limitations.

Accordingly, we issued the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE BOROUGH OF STOCKERTOWN	:	
	:	
v.	:	**EHB Docket No. 2014-166-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of July, 2016, it is hereby ordered as follows:

1. The Board **denies** the Department's Motion for Summary Judgment.

2. The Board **denies** the Borough's Motion for Summary Judgment.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 14, 2016

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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(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

B&R RESOURCES, LLC AND RICHARD F. CAMPOLA	:	
	:	
v.	:	**EHB Docket No. 2015-095-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 15, 2016**

OPINION AND ORDER ON
APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board grants in part Appellants' Motion for Partial Summary Judgment as it pertains to Richard F. Campola's status as an "operator" under the Oil and Gas Act, and denies the remainder of that Motion. Disputed material facts exist as to whether or not Richard F. Campola personally participated in the alleged violations in a manner that makes it appropriate to hold him individually liable in this case.

O P I N I O N

Introduction

On June 22, 2015, the Pennsylvania Department of Environmental Protection ("DEP" or "the Department") issued an order ("the Order") addressed to Richard F. Campola[1] ("Mr. Campola") and B&R Resources, LLC ("B&R Resources"). The Order stated that based on the

[1] Mr. Campola is the managing partner of B&R Resources. (Appellants' Statement of Undisputed Material Facts, Paragraph 4; Department's Response to Appellants' Statement of Undisputed Material Facts, Paragraph 4).

inspection of oil and gas wells,[2] 47 wells had been deemed "abandoned" as that term is defined in Section 3203 of the Oil and Gas Act. The Order asserted that "B&R Resources is the 'owner' and Mr. Campola and B&R Resources are the 'operator' of the 47 wells as those terms are defined in Section 3203 of the Oil and Gas Act." The Order also stated that Mr. Campola "personally participated in the matters that are the subject of this Order." The Order cited to Section 3220(a) of the Oil and Gas Act stating that "upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the Department." 58 Pa. C.S. § 3203. As such, the Order directed both B&R Resources and Mr. Campola, in his individual capacity, to plug the 47 oil and gas wells by March 31, 2018.

On July 10, 2015, B&R Resources and Mr. Campola appealed the Order, stating, among other things, that the wells subject to the Order are not abandoned, that seeking individual liability against Mr. Campola based on personal participation in the matters relevant to the Order is improper, and that the Order incorrectly categorized Mr. Campola as an "operator." The discovery phase in this matter ended on March 7, 2016. On May 6, 2016, B&R Resources and Mr. Campola filed a Motion for Partial Summary Judgment ("Motion") arguing that Mr. Campola was not an "operator" of the 47 wells in question under the Oil and Gas Act, and that the Department had failed to produce any evidence that Mr. Campola personally participated in the events pertinent to the Order and therefore, as a matter of law, the individual claims against Mr. Campola should be dismissed. The Department filed its response on June 6, 2016 disputing B&R Resources and Mr. Campola's claims and asserting that Mr. Campola personally participated in the violations that are the basis of the Order and he is therefore properly subject to

[2] The permits for these wells were transferred to B&R Resources from Dylan Resources in 2011. (Appellants' Statement of Undisputed Material Facts, Paragraph 5; Department's Response to Appellants' Statement of Undisputed Material Facts, Paragraph 5).

the Order in his individual capacity. However, the Department did not address Appellants' claim regarding Mr. Campola's status as an "operator." Instead, the Department stated:

> The Department's Order holding Mr. Campola individually liable is based upon his personal participation in the matters set forth in the Order. Thus whether Mr. Campola is an "operator" as that term is defined in the 2012 Oil and Gas Act is not determinative on the issue of Mr. Campola's individual liability and thus need not be addressed by the Board in the resolution of the Motion.

(Brief of the Department in Support of its Response to Appellants' Motion for Partial Summary Judgment, p.9, fn.2). B&R Resources and Mr. Campola filed a reply to the Department's response on June 21, 2016. The Board held a conference call with the parties on June 30, 2016 in order to get a clearer understanding of the Department's position regarding the claim that Mr. Campola was liable for plugging the wells as an operator of the 47 wells.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC,* 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents

accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a),(h); Pa.R.C.P. 1035.1.

DISCUSSION

Operator Liability

In its Order, the Department asserts that Mr. Campola is an operator of the 47 wells and therefore is liable to plug the wells. B&R Resources and Mr. Campola challenged Mr. Campola's status as an operator and cited several factual and legal arguments for their position in their Motion. The Department's response to the Motion contained the cryptic footnote cited above in response to this issue. As previously noted, the Board held a conference call with the parties on June 30, 2016 in order to clarify the Department's position on whether it still considered Mr. Campola an operator. The Department confirmed that its failure to address B&R Resources' claim that Mr. Campola is not an "operator" did in fact constitute an intentional concession that Mr. Campola is not an "operator." On July 12, 2016, the Department filed a Supplement to its Response to Appellants' Motion for Partial Summary Judgment ("Supplement"). The Supplement confirmed that "the Department stipulates that Mr. Campola is not an 'operator' as that term is defined in Section 3203 of the 2012 Oil and Gas Act, 58 Pa.C.S, § 3203." The Department confirmed that it would not be pursuing personal liability against Mr. Campola on those grounds, so we see no need to address the issue further in this opinion and will grant a partial summary judgment to the Appellants on that issue.

Personal Participation

Under our case law, Mr. Campola is not liable for the alleged violations simply because he is the managing partner of B&R Resources. This is why in its Order the Department asserts that Mr. Campola "has personally participated in the matters that are the subject of this Order."

The participation theory is a legal theory that is designed to hold an officer of a corporation or, as in this case, an LLC, liable in his or her individual capacity for corporate environmental violations. We have previously described the participation theory as recognizing "the fundamental point that an individual with authority to direct the affairs of a corporation can be held liable for a violation if he was personally involved in it." *Whiting v. DEP*, 2015 EHB 799, 818 (citing *Whitemarsh Disposal Corp. v DEP*, 2000 EHB 300, 358). Where, as in this case, the alleged violations are based on a failure to conduct a required action, a key factor to consider when applying the participation theory is "whether the individual knew about the violations but intentionally neglected to do anything about them." *Id.* (citing *Whitemarsh*, 2000 EHB at 359). Because knowledge is the main consideration, "[a]n allegation that an officer 'should have known' will not suffice, but an allegation that the officer 'actually knew' of the conduct can be adequate to support individual liability." *Id.* (citing *Whitemarsh*, 2000 EHB at 360).

The application of the participation theory in any given situation is heavily fact dependent and, therefore, claims concerning individual liability of corporate actors do not readily lend themselves to a final decision at the summary judgment stage. In order for Mr. Campola to prevail on his summary judgment argument, he must show that there is no genuine issue of material fact as to his knowledge of the alleged violations and/or regarding his action or inaction in response to the alleged violations, and that he is entitled to judgment as a matter of law. Here, there are simply too many disputed material facts to resolve the question of Mr. Campola's personal participation at this stage in the process. For that reason, we deny the request that we dismiss the claim of individual liability against Mr. Campola based on the participation theory.

In their Motion, B&R Resources and Mr. Campola claim that the Department failed to set forth any evidence in its Order that Mr. Campola had actual knowledge of B&R Resources'

obligation to plug the wells and that he intentionally neglected to fulfill that obligation. They argued that this lack of factual allegations in the Order should result in the Board granting partial summary judgment to Mr. Campola. However, in evaluating the request for summary judgment, the Board is not restricted to the four corners of the Department's Order. In addition to the Statement of Undisputed Facts that each party is required to file, our rules provide that the record that the Board is to consider in reaching its judgment may include evidentiary material such as affidavits, deposition transcripts and other documents. *See* 25 Pa. Code § 1021.94a(h). B&R Resources and Mr. Campola did not provide any facts concerning Mr. Campola's personal participation in their Statement of Undisputed Facts. The Department deposed Mr. Campola as part of the discovery process in this appeal and attached a copy of Mr. Campola's deposition to its response. Relying primarily on Mr. Campola's deposition, along with other exhibits, the Department, in its response, listed several alleged facts under the heading "Additional Disputed Material Facts," although at least some of the listed facts were admitted by B&R Resources and Mr. Campola in their reply. Among the "Disputed Material Facts" set forth by the Department in its reply were the following: 1) Mr. Campola personally made all the decisions on behalf of B&R Resources since June or July of 2011 (Admitted by B&R Resources and Mr. Campola); 2) Mr. Campola specifically made the decisions for B&R Resources regarding what wells to produce and whether to plug abandoned wells (Admitted); 3) Mr. Campola received five separate Notices of Violation over a two-year time from the Department regarding violations associated with the 47 wells (Admitted); 4) Mr. Campola personally directed B&R Resources to not produce and/or plug 10 or 12 of the wells that are subject to the Order in violation of the 2012 Oil and Gas Act (Denied); 5) Mr. Campola personally directed B&R Resources to not correct any of the Department identified violations for a period of time of over four years (Denied); and 6) Mr.

Campola has directed B&R Resources to engage in a course of conduct that deliberately avoids ever plugging an abandoned well (Denied).

In their reply to the Department's response, B&R Resources and Mr. Campola argue that the facts listed by the Department, disputed or otherwise, simply show Mr. Campola acting in his capacity as managing member of B&R Resources and do not adequately establish facts essential to the Department's case. They dispute that Mr. Campola's deposition testimony cited by the Department can be read in the manner suggested by the Department and urge the Board to review the deposition testimony and note Mr. Campola's plain language. We have reviewed the deposition testimony, the other evidence attached to the parties' filings and the arguments set forth by the parties in their briefs. As we have said before, in evaluating a motion for summary judgment, we view the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB at 81. The arguments suggested by B&R Resources and Mr. Campola in their reply run counter to our standard by asking us to view the record and resolve any doubts in favor of the moving party. Evaluating the Motion for Partial Summary Judgment in a manner consistent with the proper approach, it is clear from our review of the briefs, the evidentiary material attached to the filings and the statements and counterstatements of facts discussed above, that there are issues of material fact that preclude a grant of summary judgment on the issue of whether Mr. Campola can be held individually liable under the participation theory. There are issues of material fact concerning what knowledge Mr. Campola had regarding the status of the wells at issue and what actions he took or did not take with regard to those wells. We think that those factual disputes should be decided following full testimony at a hearing.

Therefore, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 15th day of July, 2016, it is hereby ordered that Appellants' Motion for Partial Summary Judgment is **granted** with respect to Richard F. Campola's status as an operator and that Motion is **denied** in all other respects.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 15, 2016

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

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Jon C. Beckman, Esquire
Brian J. Pulito, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN ASTARE AND WESLEY ANNE ASTARE	:	
	:	
v.	:	**EHB Docket No. 2016-038-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 20, 2016**

OPINION AND ORDER
DISMISSING APPEAL

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses this appeal where the Appellants have failed to perfect their appeal and subsequently failed to respond to a Rule to Show Cause. Where a party has evidenced a demonstrated disinterest in proceeding with an appeal, dismissal is appropriate.

O P I N I O N

Before the Board is a third-party appeal objecting to the use of biosolids on a farm in Benner Township, Pennsylvania. The notice of appeal did not contain a copy of the Department action being appealed, the date when the Appellants received notice of the Department's action, objections to the Department's action and proof of service of the notice of appeal. On March 24, 2016, the Board issued an Order directing the Appellants to perfect their appeal no later than April 13, 2016. The Appellants' failed to comply with or file any response to the Board's Order to perfect the appeal and on May 10, 2016, the Board issued a Rule upon the Appellants to show cause why its appeal should not be dismissed as a sanction for failing to comply with the Board's Orders and the Environmental Hearing Board Rules of Practice and Procedure, 25 Pa. Code §

1021.51. The rule was returnable, in writing, to the offices of the Board on or before May 31, 2016. The Appellants have not responded to the Rule to Show Cause.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board Orders. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Failure to comply with Board Orders clearly demonstrates a lack of intent to pursue an appeal and dismissal is warranted. *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP*, 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629 (citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). Where a party has evidenced a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *See Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862.

In this case, the Appellants did not respond to the Board's Order directing the Appellants to perfect their appeal. The Board directed the Appellants to include a copy of the Department action being appealed, the date when the Appellants received notice of the action, the Appellants' objections to the action and the required proof of service. Because of the Appellants' failure to perfect their appeal as directed, the Board issued a Rule to Show Cause affording the Appellants an opportunity to explain to the Board why the appeal should not be dismissed. As of the date of this Opinion, the Appellants have failed to file any response to the Board's Order or its Rule to Show Cause explaining why the appeal should not be dismissed. Therefore, the Board dismisses this appeal for the Appellants' failure to comply with Board Orders as a sanction pursuant to 25 Pa. Code § 1021.161. We issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN ASTARE AND WESLEY ANNE ASTARE	:	
	:	
v.	:	**EHB Docket No. 2016-038-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

<u>O R D E R</u>

AND NOW, this 20th day of July, 2016, following the Appellants' failure to comply with Board Orders, and pursuant to 25 Pa. Code § 1021.161, it is hereby ordered that the appeal in the above-referenced matter is terminated. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 20, 2016

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

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(*via electronic mail*)

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2014-140-CP-L**
v.	:	
EQT PRODUCTION COMPANY	:	**Issued: July 21, 2016**

OPINION AND ORDER ON
MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part a Defendant's motion in limine. The Department is precluded from calling a fact witness and an expert witness to testify where the Department failed to comply with the witness disclosure requirements of the Pennsylvania Rules of Civil Procedure. The Department may present evidence related to all alleged violations at the site but violations not included in the specific counts of the Department's complaint, such as alleged violations of Section 402 of the Clean Streams Law, Section 301 of the Solid Waste Management Act, and 25 Pa. Code § 78.56(a)(1), do not serve as an independent basis for civil penalties. The Department's complaint is not limited to leaks from the pit at the site.

O P I N I O N

EQT Production Company ("EQT") owns and operates a natural gas well facility known as the Phoenix Pad S located in Duncan Township, Tioga County. EQT constructed a 6 million gallon pit nearby, which was known as the S Pit. When EQT discovered that there were holes in the liner of the pit, it emptied it out and closed it. EQT self-reported contamination at the site

and it has been cleaning up the site pursuant to the Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908.

The Department of Environmental Protection (the "Department") filed a complaint for civil penalties on October 7, 2014 asking this Board to impose a civil penalty of at least $4,532,296 against EQT pursuant to Section 605 of the Clean Streams Law, 35 P.S § 691.605, for violations at the site. The hearing in this matter is scheduled to begin on Monday, July 25. Both the Department and EQT have filed extensive prehearing memoranda outlining their respective positions and listing their expected witnesses and anticipated evidence.

EQT has now filed a motion in limine. The purpose of a motion in limine 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. *Kiskadden v. DEP*, 2014 EHB 634, 635; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *RESCUE Wyoming v. DER*, 1994 EHB 1324, 1325-26. A motion in limine should generally only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237.

EQT seeks to preclude the testimony of two of the Department's witnesses—a fact witness and an expert witness. EQT says the fact witness was identified for the first time in the Department's prehearing memorandum, and for the expert witness EQT says the Department never provided an expert report or otherwise summarized the expert's opinions in response to discovery. EQT also asks us to strike portions of the Department's prehearing memorandum and preclude the introduction of any related evidence because, according to EQT, those portions state facts and legal issues that extend beyond the scope of the complaint. The Department responds that the two witnesses will only be called as "rebuttal witnesses," if at all, and that, because they

are part of its potential rebuttal case, the Department had no obligation to comply with the applicable rules regarding witness disclosures. The Department also argues that its complaint fairly encompasses the portions of its prehearing memorandum EQT wishes to have stricken.

Witnesses Zane Brown and Andrew Klinger

EQT served interrogatories on the Department asking the Department to identify all persons with knowledge of the facts alleged in the complaint, and to provide the names of all witnesses the Department expected to call at the hearing and the subject matters on which they would testify. In its initial response to interrogatories, the Department listed approximately 60 people with knowledge of the facts alleged in the complaint, but the name Zane Brown was not included in that list and appeared as a potential fact witness for the first time in the Department's prehearing memorandum.[1] The Department later supplemented its interrogatory response to include Zane Brown on July 1, 2016, three weeks after filing its prehearing memorandum, long after the conclusion of discovery, and three weeks before the beginning of the hearing in a case that has been pending since October 2014.

The Rules of Civil Procedure are clear that a party is entitled to discover the identity of persons having knowledge of any discoverable matter, which is precisely what EQT's interrogatories sought. Pa.R.C.P. No. 4003.1(a). The Rules also create a duty for parties to seasonably supplement certain responses to discovery. Pa.R.C.P. No. 4007.4. This duty is automatic. Pa.R.C.P. No. 4007.4, Explanatory Comment—1978. While the obligation to seasonably supplement is not categorical in scope, it does encompass persons with knowledge of discoverable information and persons expected to be called as expert witnesses. Pa.R.C.P. No. 4007.4(1). The Rules are equally clear that any witness whose identity has not been revealed in

[1] Zane Brown is mistakenly identified in the Department's prehearing memorandum and elsewhere as "Vane Brown."

accordance with the Rules shall not be permitted to testify on behalf of the defaulting party, unless the failure to disclose is the result of extenuating circumstances. Pa.R.C.P. No. 4019(i).

There is no question that the Department was obligated to identify Brown in response to EQT's interrogatories as a person possessing relevant knowledge who will testify at the hearing. *McGinnis v. DEP*, 2010 EHB 489, 493-94; *Rhodes v. DEP*, 2009 EHB 237, 244. 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 was not seasonable.

The Department offers no explanation why Brown was not identified earlier and does not describe any extenuating circumstances. In any event, we would not have been inclined to overlook the Department's late disclosure in a case in which it is seeking more than $4 million in civil penalties absent compelling circumstances. The Department says that Brown would only have been offered as a "rebuttal witness," but we see no distinction in the Rules regarding the duty to reveal "rebuttal witnesses" and witnesses to be called in the case in chief. The Department having provided us with no reason justifying Brown's last-minute identification, we have no choice but to prevent him from testifying. Pa.R.C.P. No. 4019(i).

EQT also requested in its interrogatories that the Department identify its expert witnesses and provide a summary of each expert's opinions. EQT tells us that Andrew Klinger was

identified in the Department's prehearing memorandum as an expert witness with the qualifier of "possible rebuttal," but the Department never detailed Klinger's opinions or provided an expert report from him in response to EQT's expert interrogatories. The Department initially identified Klinger as one of the 60 people with relevant knowledge in its response to EQT's interrogatories in May 2015. On March 28, 2016, the deadline for conducting discovery, the Department emailed EQT to supplement its response to the interrogatories by identifying its experts and attaching their expert reports. In that email the Department indicated that it was reserving the right to call Andrew Klinger as a "rebuttal expert." The Department did not at that time produce a report for Klinger or provide any summary of his expected testimony.

Expert testimony is usually critically important in Board cases. The Rules of Civil Procedure are explicit regarding parties' responsibilities in conducting expert discovery. In response to expert interrogatories a party must identify expert witnesses expected to be called at trial and disclose the substance of the facts and opinions of the expert's anticipated testimony, or the responding party may provide an expert report in lieu of answering expert interrogatories. Pa.R.C.P. No. 4003.5(a)(1). The duty to supplement discovery responses extends to identifying experts. Pa.R.C.P. No. 4007.4(1). The consequence for failing to disclose an expert and provide the substance of the expert's testimony is essentially the same as that discussed above with respect to any other witness—the expert shall not be permitted to testify on behalf of the defaulting party absent extenuating circumstances. Pa.R.C.P. No. 4003.5(b).

The Department in its response attempts to create a distinction between "rebuttal expert witnesses" and expert witnesses that will testify during a party's case in chief. But contrary to the Department's position, there is no carve out in the Rules for what the Department terms as rebuttal expert testimony; there is one set of discovery rules for all experts. Parties cannot skirt

the expert disclosure requirements by calling their experts "rebuttal" or "merely responsive." *Kiskadden v. DEP*, 2014 EHB 648, 654.

Other than saying Klinger is merely a "rebuttal expert," the Department offers no explanation or extenuating circumstances justifying its failure to comply with expert discovery requirements with respect to Klinger. And again, in a case in which the Commonwealth is seeking civil penalties in excess of $4 million, we must insist on strict compliance with the rules. The Department in its response to the motion does attach a two-page internal memo Klinger prepared that the Department says it produced at some point during discovery. However, the memo was composed in March 2014, more than six months before the Department filed its complaint in this matter, apparently for the purpose of settlement discussions. It does not appear to have been served in response to expert interrogatories, but instead as part of a larger production of documents. The memo critiques a report commissioned by EQT assessing the impact to Rock Run from the activities at the Phoenix well site. The Department points to this memo as a fair summary of the topics on which Klinger will testify at the hearing. At the risk of stating the obvious, this is not in compliance with the Rules of Civil Procedure. The memo is not an expert report, and even if we were to consider it as a summary of Klinger's opinions, the memo is so couched in qualifiers and preliminary hedging that it would be unfair to EQT to treat the memo as an accurate summary of what Klinger would say at the hearing. (See Klinger Memo at 1: "These comments are rough, initial reactions to the report contents and suggested findings. I have not been to the site myself, so my assessment of the report must be couched in that understanding.") The memo even poses questions that appear to be directed at other Department program staff. (*Id.*: "What does the Fish and Boat Commission say about this result? Does the PFBC have any of their own data on Rock Run prior to this sample that would show

otherwise?") This post hoc attempt to justify noncompliance with the expert disclosure requirements is inadequate. Accordingly, Andrew Klinger will not be permitted to testify as an expert for the Department.

Paragraphs 18, 21, and 22 of the Department's Statement of Legal Issues

EQT next argues that we should strike Paragraphs 18, 21, and 22 from the Department's statement of legal issues in its prehearing memorandum because those legal issues allege violations of statutes and regulations that were not raised in the complaint. The three paragraphs cite Section 402 of the Clean Streams Law, 35 P.S. § 691.402, Section 301 of the Solid Waste Management Act, 35 P.S. 6018.301, and 25 Pa. Code § 78.56(a)(1), respectively.

It is true that the Department is only seeking penalties for Sections 301 and 307 of the Clean Streams Law (Count 1), Section 401 of the Clean Streams Law (Count 2), Section 611 of the Clean Streams Law (Count 3), and 25 Pa. Code § 91.34 (Count 4). The Department's complaint does not seek penalties for any violations of Section 402 of the Clean Streams Law, Section 301 of the Solid Waste Management Act, or 25 Pa. Code § 78.56(a). However, we see no reason to strike Paragraphs 18, 21, or 22 from the prehearing memorandum. The complaint mentions those provisions only as "factual background." (See Complaint ¶¶ 12, 13, 21, 22, 37, 38, 44, 45.)[2] The fact that the Department cited EQT for violations of these provisions in inspection reports and NOVs is certainly relevant to our understanding of the events leading up

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[2] As an example, Paragraph 13 of the complaint states:

> The Department's May 9, 2012 inspection report included a NOV for the following:
>
> > a. Failure to contain pollutional substances and wastes from completion of the well(s) in a pit, tank, or series of pits and tanks, in violation of 25 Pa. Code § 78.56(a);
> >
> > b. Creating the potential to pollute waters of the Commonwealth, in violation of Section 402 of The Clean Streams Law, 35 P.S. § 691.402; and,
> >
> > c. The unpermitted discharge of residual waste onto the ground, in violation of Section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301.

to the filing of a complaint, and we are not prepared at this juncture to definitively rule out the possibility that those alleged violations, or at least the facts associated with those alleged violations, may factor into our calculation of any civil penalties that we might assess for any violations of Sections 301, 307, 401, and 611 of the Clean Streams Law or 25 Pa. Code § 91.34.

Paragraphs 224 through 254 of the Department's Statement of Facts

EQT argues that we should strike Paragraphs 224 through 254 of the Department's statement of facts in its prehearing memorandum and preclude the introduction of any related exhibits because they are irrelevant and beyond the scope of the complaint. Paragraphs 224 through 254 fall under a subsection of the statement of facts in the prehearing memorandum titled "Additional Violations at Phoenix Pad S." Those paragraphs primarily discuss events the Department observed on the well pad as opposed to the leaking pit. For instance, the Department says that tanks were placed on the lined well pad and the Department found fluid seeping out from beneath the liner and discharging onto the ground, which the Department claims impacted a nearby wetland. (DEP PH Memo ¶¶ 228, 231, 232.) EQT says that this case is all about penalties resulting from violations from the leaking pit, and we should not consider any evidence of events that occurred at the well pad.

We think that EQT is reading the complaint far too narrowly. We do not see the complaint as being limited to leaks from the pit. The complaint speaks broadly in terms of violations resulting from "Marcellus drilling operations." (See, e.g., Complaint ¶¶ 66, 67, 68, 72.) The counts to the complaint also contain broad language regarding the release of flowback fluid into the environment, but it never limits the release to a particular source or area of the site. (See, e.g., Complaint ¶¶ 70, 71, 72.) The complaint alleges that EQT has polluted waters of the Commonwealth through its operations but does not limit that harm to leaks originating from the

pit. (See, e.g., Complaint ¶¶ 76, 77, 78.) In addition, the factual background to the complaint states that EQT began pumping out the contents of the pit to the well pad (¶ 23) and the Department's later inspections of the site found fluid discharging from the well pad (¶¶ 37, 44), fluid which may have originally come from the pit. We see no reason to preclude testimony or evidence on any events observed at or near the well pad, or any other area of the site for that matter connected with EQT's "Marcellus drilling operations."

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2014-140-CP-L**
EQT PRODUCTION COMPANY	:	

O R D E R

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

1. EQT's motion in limine is **granted in part and denied in part**;

2. Zane Brown may not testify as a witness for the Department;

3. Andrew Klinger may not testify as an expert witness for the Department;

4. The motion is in all other respects denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 21, 2016

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

For the Commonwealth of PA, DEP:
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David M. Chuprinski, Esquire
Anne Shapiro, Esquire
Mary Martha Truschel, Esquire
(*via electronic filing system*)

For Defendant:
Kevin J. Garber, Esquire
Jean M. Mosites, Esquire
Mark K. Dausch, Esquire
Esther S. Mignanelli, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
v.	:	**EHB Docket No. 2016-096-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	**Issued: July 22, 2016**

OPINION AND ORDER ON THE PERMITTEE'S AND THE DEPARTMENT'S MOTIONS TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants in part the Motions to Dismiss to the extent that they address any objections by Appellants regarding Permittee's Notice of Intent by Well Operator to Plug a Well, as such notice alone does not constitute an appealable final action of the Department of Environmental Protection. The Board also grants in part the Motions to Dismiss to the extent that they address the July 22, 2016 conference call's status as an appealable action. The Board denies all other aspects of the Motions to Dismiss, namely as they apply to Appellants' appeal of the Department's approval of EQT's proposed alternate drilling method.

O P I N I O N

Introduction

The first event relevant to this appeal occurred on or about June 1, 2016 when EQT Production Company ("EQT") submitted a Notice of Intent by Well Operator to Plug a Well ("Notice of Intent to Plug") to both the Department of Environmental Protection ("DEP" or "the

Department") and the Appellants in this case, Ronald Teska and Giulia Mannarino (collectively "Appellants").[1] The Notice of Intent to Plug stated that EQT intended to plug the G.E. Houston # 186 Well ("Well 186").[2] An Application for Approval of Alternate Method of Plugging was also submitted along with the Notice of Intent to Plug. On or about June 4, 2016, Appellants sent a letter to EQT objecting to the proposed plugging operations and requesting a conference call with the Department and EQT. The Department received a similar letter on or about June 10, 2016. The parties scheduled a conference call for June 22, 2016 in order to discuss the issues surrounding the Notice of Intent to Plug and the alternate plugging method proposed by EQT. Following the call, on June 23, 2016, the Appellants received an email from the Department informing them that EQT's proposed alternate plugging method had been approved. Also on June 23, 2016, Appellants filed their Notice of Appeal[3] along with a Petition for Supersedeas and an Application for Temporary Supersedeas. The Notice of Appeal contained two primary objections. First, Appellants objected to "determinations regarding plugging of [Well 186]." The Appellants' second objection was regarding the perceived failure on the part of the Department to conduct the June 22, 2016 conference call "in a manner that follows [the] intent of [the] statute." Both the Petition for Supersedeas and the Application for Temporary Supersedeas sought to halt any plugging operations at Well 186, which at that time were scheduled to begin the following Monday, June 27, 2016. The Board held a conference call with the parties on June 24, 2016, and immediately thereafter issued an order granting a temporary supersedeas in order to maintain the status quo until certain issues could be resolved.

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[1] The parties to this case were involved in a prior action in front of the Board that was the subject of a Board Opinion and Order found at EHB Docket No. 2015-088-B.

[2] EQT is the owner and operator of Well 186, located on Appellants' property in Aleppo Township, Green County, Pennsylvania.

[3] It is unclear from the record before us whether the Department's email approving the alternate drilling method came before or after the filing of the Notice of Appeal.

EQT filed a Motion to Dismiss on June 28, 2016, asserting that the Board lacked jurisdiction on the grounds that a Notice of Intent to Plug alone does not constitute an appealable action. EQT also alleged that at the time that the Notice of Appeal was filed, no final action had been taken by the Department regarding the alternate drilling method. The Department also filed a Motion to Dismiss on June 30, 2016 on the grounds that a Notice of Intent to Plug alone does not constitute an appealable action. The Department further alleged that the conference call held on June 22, 2016 also did not constitute an appealable action, as no decision was reached during the call. On July 7, 2016, Appellants filed an Amended Notice of Appeal which stated that they were appealing "[d]eterminations regarding plugging of shallow gas well including, but not limited to, approval of alternate method of plugging." The Amended Notice of Appeal also, for the first time, pointed to the June 23, 2016 email sent by the Department to Appellants informing them that EQT's alternate drilling method had been approved. On July 11, 2016, the Department filed a letter in response to the Appellants' Amended Notice of Appeal. The letter stated that the Department did not object to the Amended Notice of Appeal, however it did maintain that its Motion to Dismiss should apply to all issues raised in the original Notice of Appeal such that the only issue properly before the Board is "whether the alternative plugging method for the Houston Well approved by the Department meets the requirements for alternative plugging method in Section 3221 of the Oil and Gas Act, 58 P.S. § 3221 and Pa. Code § 78.75." In a July 20, conference call with the Board and all the parties, EQT stated that its Motion to Dismiss should be read to apply to all issues raised by both the Notice of Appeal and the Amended Notice of Appeal. EQT thus maintains that the original Notice of Appeal was filed after the Department's final action approving the alternate drilling method and is therefore not properly before the

Board. The Appellants filed timely responses to both Motions to Dismiss, and EQT and the Department filed timely replies to the Appellants' respective responses.

Standard

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. *See Burrows v. DEP*, 2009 EHB 20, 22. When considering a Motion to Dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

When determining whether or not the Board has jurisdiction over an appeal, one of the main inquiries is always whether the alleged Department action under appeal constitutes a final Department action. The Board only has jurisdiction to review final actions of the Department. 35 P.S. § 7514(a); *Teska v. DEP*, 2012 EHB 447, 453 (citing *Kennedy v. DEP*, 2007 EHB 511, 512). The Board Rules define "action" as "[a]n 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.

Where a Notice of Intent to Plug is submitted along with an Application for Approval of Alternate Method of Plugging, the Department's decision regarding the approval or denial of the alternate drilling method is the only appealable action that can result. *See Teska v. DEP*, 2015 EHB 639, 640-41. A Notice of Intent to Plug alone is not an appealable Department action because the Department makes no decision regarding such notices. Plugging abandoned wells is a statutory duty under 58 Pa. C.S. § 3220(a), thus a Notice of Intent to Plug simply serves to put the Department and other interested parties on notice that plugging will commence in order "to

permit representatives of the persons notified to be present at the plugging." 58 Pa. C.S. § 3220(b). The Department takes no action regarding a Notice of Intent to Plug, thus such a notice cannot properly be appealed to the Board. Conversely, a Department decision regarding a proposed alternate plugging method is the type of Department action that can be properly appealed to the Board. *Teska*, 2015 EHB at 640.

Presently, the Appellants in this case are appealing "[d]eterminations regarding plugging of [Well 186] including, but not limited to, approval of [EQT's] alternate method of plugging." (Appellant's Amended Notice of Appeal, p.1). To the extent that this objection applies to the Notice of Intent to Plug, we dismiss it. As stated above, a Notice of Intent to Plug is simply a form of notice to the Department and other interested parties that a permittee is completing its statutory duty to plug an abandoned well. The Department makes no decision or determination on a Notice of Intent to Plug, therefore it is not a final action of the Department and any appeal thereof to the Board is improper. For these reasons, we grant the Motions to Dismiss as they pertain to Appellants' appeal of the Notice of Intent to Plug.

Appellants' Amended Notice of Appeal does, however, make clear that Appellants are also objecting to the Department's approval of EQT's proposed alternate plugging method, an objection that is properly before the Board. All of the parties agree that the Department has taken a final action by approving the alternate plugging method, but there is some dispute as to whether the original Notice of Appeal was filed before or after the Department's final action. Both EQT and the Department assert that no final action was taken on the June 22, 2016 conference call. We agree. The conference call was the product of a statutory provision that allows any interested party to request that a conference be held in order to discuss and attempt to resolve a matter arising under Chapter 32 of the Oil and Gas Act. 58 Pa. C.S. § 3251. The statute

provides that "[a]n agreement reached at a conference shall be consistent with this chapter and, **if approved by the department**, it shall be reduced to writing and shall be effective, unless reviewed and rejected by the department within ten days after the conference." *Id*. (emphasis added). This language is indicative that any agreement or decision reached in the course of a Section 3251 conference shall be approved by the Department before it becomes effective. In this case, there is no evidence that the Department reached any type of final decision or approval regarding the alternate plugging method during the June 22 conference call. The first evidence we have of final Department approval is the June 23 email sent by the Department to the Appellants. Because there is no evidence that the Department approved the alternate plugging method or took any other final action during the June 22 conference call, we find that neither the call itself nor the manner in which it was conducted constitutes an appealable action.

EQT further asserts that although the Appellants received email confirmation of the Department's final approval of the alternate drilling method on June 23, 2016, their Notice of Appeal, filed the same day, was filed before the final approval was given. EQT asserts that this discrepancy deems Appellants' objection to the alternate drilling method untimely and therefore improper. In its July 11, 2016 letter, the Department did point to some procedural concerns regarding Appellants' Amended Notice of Appeal, but the Department essentially stated that it was willing to overlook any perceived procedural issues with Appellants' Amended Notice of Appeal "in the interests of administrative economy and efficiency." The Department further stated in its July 11 letter that "the only issue that may be before the Board is whether the alternative plugging method for the Houston Well approved by the Department meets the requirements for alternative plugging method in Section 3221 of the 2012 Oil and Gas Act, 58 P.S. § 3221 and 25 Pa. Code § 75.75." We agree.

Although EQT still takes issue with the discrepancy over the order in which the Notice of Appeal was filed and the final action on the alternate plugging method was taken, we find this discrepancy to be immaterial. The Notice of Appeal was filed on the same day that the Appellants received an email from the Department stating that the alternate drilling method had been approved, thus a difference of mere hours or minutes between when the respective documents were timestamped does not change the fact that a final Department action was taken, and the Appellants have squarely placed their appeal of that action before the Board in their Amended Notice of Appeal. While we grant the Motions to Dismiss as they pertain to Appellants' appeal of the Notice of Intent to Plug and with regard to Appellants' issue with the manner in which the June 22, 2016 conference call was conducted, we deny the Motions to Dismiss in all other respects, namely as they pertain to Appellants' appeal of the Department's Approval of EQT's alternate drilling method.

For the foregoing reasons, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
v.	:	**EHB Docket No. 2016-096-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	

ORDER

AND NOW, this 22nd day of July, 2016, it is hereby ordered that the Department's Motion to Dismiss and EQT's Motion to Dismiss are **granted in part** to the extent that they pertain to Appellants' objection to Permittee's Notice of Intent by Well Operator to Plug a Well. The Motions are **denied** in all other respects.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 22, 2016

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)*

For Appellant, *Pro se*:
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Giulia Mannarino
(*via electronic filing system*)

For Permittee:
Jean M. Mosites, Esquire
Kevin J. Garber, Esquire
Kathy Condo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK STASH	:	
	:	
v.	:	**EHB Docket No. 2015-125-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 22, 2016**

OPINION AND ORDER ON
DEPARTMENT'S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department of Environmental Protection's motion to dismiss an appeal as untimely where the appellant provides no response to the motion and fails to dispute the allegation of untimeliness raised in the motion.

O P I N I O N

This matter involves an appeal filed by Mark Stash on August 31, 2015, challenging a Compliance Order issued to him by the Department of Environmental Protection (Department) for allegedly burning material on his property without the proper authorization. The Department has filed a motion to dismiss the appeal as being untimely. According to the Department, Paul J. Minor, a Solid Waste Supervisor for the Department's Southwest Regional Office, personally served the Department's Compliance Order on Mr. Stash at his residence in Franklin Township, Fayette County on July 15, 2015. (Affidavit of Paul J. Minor, Exhibit A to Motion) Mr. Stash did not file his appeal until August 31, 2015. Additionally, he filed no response to the Department's motion to dismiss the appeal as being untimely.

Under the Environmental Hearing Board Rules of Practice and Procedure, a person who is a direct recipient of a Department action must file his appeal within thirty days after receiving notice of the action. 25 Pa. Code § 1021.52(a)(1). If the appeal is not received within thirty days, the Board is deprived of jurisdiction. *See, e.g, Boinovych v. DEP*, 2015 EHB 566, 568. Here, the notice of appeal was not filed with the Board until 46 days after Mr. Stash was personally served with the Department's Compliance Order.

We evaluate a motion to dismiss in the light most favorable to the non-moving party. *Harvilchuck v. DEP*, 2014 EHB 166, 172; *Teska v. DEP*, 2012 EHB 447, 452. A motion to dismiss may be granted where no material issues of fact are in dispute and the moving party is entitled to judgment as a matter of law. *Id.* By failing to file a response to the Department's motion to dismiss, Mr. Stash has elected not to contest the facts set forth in the Department's motion. Therefore, we deem them admitted. 25 Pa. Code 1021.91(f); *KH Real Estate, LLC v. DEP*, 2012 EHB 319, 320-21; *Doctorick v. DEP*, 2012 EHB 244, 246. Additionally, Mr. Stash's appeal acknowledges that he received the Compliance Order on July 15, 2015, more than 30 days before filing his appeal with the Board.[1]

Finding that there are no material facts in dispute and the Department is entitled to judgment as a matter of law, we grant the Department's motion and dismiss the appeal.

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[1] In response to the question "on what date did you receive notice of the Department's action," Mr. Stash's appeal form states "July 6, 2015" and "July 15, 2016." We understand the July 6, 2015 date to refer to an inspection report conducted by the Department. According to the affidavit of Paul J. Minor, Mr. Stash was served with the Compliance Order on July 15, 2015, as well as a copy of the July 6, 2015 inspection. (Exhibit A to Motion)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK STASH	:	
	:	
v.	:	**EHB Docket No. 2015-125-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 22nd day of July, 2016, it is hereby **ORDERED** that the Department of Environmental Protection's Motion to Dismiss is **granted** and this appeal is marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 22, 2016

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
v.	:	**EHB Docket No. 2016-096-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	**Issued: July 29, 2016**

***AMENDED OPINION ON THE PERMITTEE'S AND THE DEPARTMENT'S MOTIONS TO DISMISS**

By Steven C. Beckman, Judge

Synopsis

The Board grants in part the Motions to Dismiss to the extent that they address any objections by Appellants regarding Permittee's Notice of Intent by Well Operator to Plug a Well, as such notice alone does not constitute an appealable final action of the Department of Environmental Protection. The Board also grants in part the Motions to Dismiss to the extent that they address the July 22, 2016 conference call's status as an appealable action. The Board denies all other aspects of the Motions to Dismiss, namely as they apply to Appellants' appeal of the Department's approval of EQT's proposed alternate plugging method.

O P I N I O N

Introduction

The first event relevant to this appeal occurred on or about June 1, 2016 when EQT Production Company ("EQT") submitted a Notice of Intent by Well Operator to Plug a Well ("Notice of Intent to Plug") to both the Department of Environmental Protection ("DEP" or "the

Department") and the Appellants in this case, Ronald Teska and Giulia Mannarino (collectively "Appellants").[1] The Notice of Intent to Plug stated that EQT intended to plug the G.E. Houston # 186 Well ("Well 186").[2] An Application for Approval of Alternate Method of Plugging was also submitted along with the Notice of Intent to Plug. On or about June 4, 2016, Appellants sent a letter to EQT objecting to the proposed plugging operations and requesting a conference call with the Department and EQT. The Department received a similar letter on or about June 10, 2016. The parties scheduled a conference call for June 22, 2016 in order to discuss the issues surrounding the Notice of Intent to Plug and the alternate plugging method proposed by EQT. Following the call, on June 23, 2016, the Appellants received an email from the Department informing them that EQT's proposed alternate plugging method had been approved. Also on June 23, 2016, Appellants filed their Notice of Appeal[3] along with a Petition for Supersedeas and an Application for Temporary Supersedeas. The Notice of Appeal contained two primary objections. First, Appellants objected to "determinations regarding plugging of [Well 186]." The Appellants' second objection was regarding the perceived failure on the part of the Department to conduct the June 22, 2016 conference call "in a manner that follows [the] intent of [the] statute." Both the Petition for Supersedeas and the Application for Temporary Supersedeas sought to halt any plugging operations at Well 186, which at that time were scheduled to begin the following Monday, June 27, 2016. The Board held a conference call with the parties on June 24, 2016, and immediately thereafter issued an order granting a temporary supersedeas in order to maintain the status quo until certain issues could be resolved.

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[1] The parties to this case were involved in a prior action in front of the Board that was the subject of a Board Opinion and Order found at EHB Docket No. 2015-088-B.

[2] EQT is the owner and operator of Well 186, located on Appellants' property in Aleppo Township, Green County, Pennsylvania.

[3] It is unclear from the record before us whether the Department's email approving the alternate plugging method came before or after the filing of the Notice of Appeal.

EQT filed a Motion to Dismiss on June 28, 2016, asserting that the Board lacked jurisdiction on the grounds that a Notice of Intent to Plug alone does not constitute an appealable action. EQT also alleged that at the time that the Notice of Appeal was filed, no final action had been taken by the Department regarding the alternate plugging method. The Department also filed a Motion to Dismiss on June 30, 2016 on the grounds that a Notice of Intent to Plug alone does not constitute an appealable action. The Department further alleged that the conference call held on June 22, 2016 also did not constitute an appealable action, as no decision was reached during the call. On July 7, 2016, Appellants filed an Amended Notice of Appeal which stated that they were appealing "[d]eterminations regarding plugging of shallow gas well including, but not limited to, approval of alternate method of plugging." The Amended Notice of Appeal also, for the first time, pointed to the June 23, 2016 email sent by the Department to Appellants informing them that EQT's alternate plugging method had been approved. On July 11, 2016, the Department filed a letter in response to the Appellants' Amended Notice of Appeal. The letter stated that the Department did not object to the Amended Notice of Appeal, however it did maintain that its Motion to Dismiss should apply to all issues raised in the original Notice of Appeal such that the only issue properly before the Board is "whether the alternative plugging method for the Houston Well approved by the Department meets the requirements for alternative plugging method in Section 3221 of the Oil and Gas Act, 58 P.S. § 3221 and Pa. Code § 78.75." In a July 20, conference call with the Board and all the parties, EQT stated that its Motion to Dismiss should be read to apply to all issues raised by both the Notice of Appeal and the Amended Notice of Appeal. EQT thus maintains that the original Notice of Appeal was filed after the Department's final action approving the alternate plugging method and is therefore not

properly before the Board. The Appellants filed timely responses to both Motions to Dismiss, and EQT and the Department filed timely replies to the Appellants' respective responses.

Standard

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. *See Burrows v. DEP*, 2009 EHB 20, 22. When considering a Motion to Dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

When determining whether or not the Board has jurisdiction over an appeal, one of the main inquiries is always whether the alleged Department action under appeal constitutes a final Department action. The Board only has jurisdiction to review final actions of the Department. 35 P.S. § 7514(a); *Teska v. DEP*, 2012 EHB 447, 453 (citing *Kennedy v. DEP*, 2007 EHB 511, 512). The Board Rules define "action" as "[a]n 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.

Where a Notice of Intent to Plug is submitted along with an Application for Approval of Alternate Method of Plugging, the Department's decision regarding the approval or denial of the alternate plugging method is the only appealable action that can result. *See Teska v. DEP*, 2015 EHB 639, 640-41. A Notice of Intent to Plug alone is not an appealable Department action because the Department makes no decision regarding such notices. Plugging abandoned wells is a statutory duty under 58 Pa. C.S. § 3220(a), thus a Notice of Intent to Plug simply serves to put the Department and other interested parties on notice that plugging will commence in order "to permit representatives of the persons notified to be present at the plugging." 58 Pa. C.S. §

3220(b). The Department takes no action regarding a Notice of Intent to Plug, thus such a notice cannot properly be appealed to the Board. Conversely, a Department decision regarding a proposed alternate plugging method is the type of Department action that can be properly appealed to the Board. *Teska*, 2015 EHB at 640.

Presently, the Appellants in this case are appealing "[d]eterminations regarding plugging of [Well 186] including, but not limited to, approval of [EQT's] alternate method of plugging." (Appellant's Amended Notice of Appeal, p.1). To the extent that this objection applies to the Notice of Intent to Plug, we dismiss it. As stated above, a Notice of Intent to Plug is simply a form of notice to the Department and other interested parties that a permittee is completing its statutory duty to plug an abandoned well. The Department makes no decision or determination on a Notice of Intent to Plug, therefore it is not a final action of the Department and any appeal thereof to the Board is improper. For these reasons, we grant the Motions to Dismiss as they pertain to Appellants' appeal of the Notice of Intent to Plug.

Appellants' Amended Notice of Appeal does, however, make clear that Appellants are also objecting to the Department's approval of EQT's proposed alternate plugging method, an objection that is properly before the Board. All of the parties agree that the Department has taken a final action by approving the alternate plugging method, but there is some dispute as to whether the original Notice of Appeal was filed before or after the Department's final action. Both EQT and the Department assert that no final action was taken on the June 22, 2016 conference call. We agree. The conference call was the product of a statutory provision that allows any interested party to request that a conference be held in order to discuss and attempt to resolve a matter arising under Chapter 32 of the Oil and Gas Act. 58 Pa. C.S. § 3251. The statute provides that "[a]n agreement reached at a conference shall be consistent with this chapter and, **if**

approved by the department, it shall be reduced to writing and shall be effective, unless reviewed and rejected by the department within ten days after the conference." *Id*. (emphasis added). This language is indicative that any agreement or decision reached in the course of a Section 3251 conference shall be approved by the Department before it becomes effective. In this case, there is no evidence that the Department reached any type of final decision or approval regarding the alternate plugging method during the June 22 conference call. The first evidence we have of final Department approval is the June 23 email sent by the Department to the Appellants. Because there is no evidence that the Department approved the alternate plugging method or took any other final action during the June 22 conference call, we find that neither the call itself nor the manner in which it was conducted constitutes an appealable action.

EQT further asserts that although the Appellants received email confirmation of the Department's final approval of the alternate plugging method on June 23, 2016, their Notice of Appeal, filed the same day, was filed before the final approval was given. EQT asserts that this discrepancy deems Appellants' objection to the alternate plugging method untimely and therefore improper. In its July 11, 2016 letter, the Department did point to some procedural concerns regarding Appellants' Amended Notice of Appeal, but the Department essentially stated that it was willing to overlook any perceived procedural issues with Appellants' Amended Notice of Appeal "in the interests of administrative economy and efficiency." The Department further stated in its July 11 letter that "the only issue that may be before the Board is whether the alternative plugging method for the Houston Well approved by the Department meets the requirements for alternative plugging method in Section 3221 of the 2012 Oil and Gas Act, 58 P.S. § 3221 and 25 Pa. Code § 75.75." We agree.

Although EQT still takes issue with the discrepancy over the order in which the Notice of Appeal was filed and the final action on the alternate plugging method was taken, we find this discrepancy to be immaterial. The Notice of Appeal was filed on the same day that the Appellants received an email from the Department stating that the alternate plugging method had been approved, thus a difference of mere hours or minutes between when the respective documents were timestamped does not change the fact that a final Department action was taken, and the Appellants have squarely placed their appeal of that action before the Board in their Amended Notice of Appeal. While we grant the Motions to Dismiss as they pertain to Appellants' appeal of the Notice of Intent to Plug and with regard to Appellants' issue with the manner in which the June 22, 2016 conference call was conducted, we deny the Motions to Dismiss in all other respects, namely as they pertain to Appellants' appeal of the Department's Approval of EQT's alternate plugging method.

For the foregoing reasons, we issued the order that is attached hereto.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 29, 2016

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

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

For Appellants, *Pro se*:
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Giulia Mannarino
(*via electronic filing system*)

For Permittee:
Jean M. Mosites, Esquire
Kevin J. Garber, Esquire
Kathy Condo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
	:	
v.	:	**EHB Docket No. 2016-096-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	

O R D E R

AND NOW, this 22nd day of July, 2016, it is hereby ordered that the Department's Motion to Dismiss and EQT's Motion to Dismiss are **granted in part** to the extent that they pertain to Appellants' objection to Permittee's Notice of Intent by Well Operator to Plug a Well. The Motions are **denied** in all other respects.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 22, 2016

c: **DEP, General Law Division:**
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For Appellant, *Pro se*:
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For Permittee:
Jean M. Mosites, Esquire
Kevin J. Garber, Esquire
Kathy Condo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2014-072-B (Consolidated with 2014-083-B and 2015-051-B)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	**Issued: August 1, 2016**

OPINION AND ORDER ON MOTION TO STRIKE PORTIONS OF APPELLANTS' PREHEARING MEMORANDUM CONTAINING PREVIOUSLY UNDISCLOSED OBJECTIONS THAT THE DEPARTMENT VIOLATED ARTICLE 1, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION

By Steven C. Beckman, Judge

Synopsis

The Board denies a Motion to Strike Portions of the Appellants' Prehearing Memorandum. The Contested Paragraphs are sufficiently within the scope of the objection set forth in the Notices of Appeal and therefore are not waived. The issues in the Contested Paragraphs were adequately addressed in the discovery phase and the sanction requested in the Motion to Strike is not warranted in this case.

O P I N I O N

Introduction

This matter involves appeals by the Center for Coalfield Justice and the Sierra Club ("CCJ/SC") of the Department of Environmental Protection's ("DEP" or the "Department") issuance of two permit revisions to Consol Pennsylvania Coal Company, LLC ("Consol") for the Bailey Mine in Greene County, Pennsylvania. This matter is scheduled for an August 2016

hearing in front of the Board and all parties have filed their prehearing memos. On July 18, 2016, Consol filed a Motion to Strike Portions of Appellants' Prehearing Memorandum Containing Previously Undisclosed Objections that the Department Violated Article I, Section 27 of the Pennsylvania Constitution ("Motion"). On July 25, 2016, the Department filed a letter with the Board stating that it would not file a response to Consol's Motion. CCJ/SC filed their response to the Motion on July 26, 2016 and requested that the Board deny Consol's Motion or, in the alternative, allow CCJ/SC to further amend their amended Notices of Appeal ("Response").

Consol's Motion requests that the Board strike five paragraphs, 67-69 and 72-73, ("Contested Paragraphs") found in Section III of CCJ/SC's prehearing memorandum. Section III is labeled "Statement of the legal issues, including citations to statutes, regulations and case law supporting the Appellants' position" and consists of 73 paragraphs. The five specific paragraphs that Consol argues should be struck are as follows:

> 67. The Department violated its constitutional duties when it failed to prohibit or require alternatives to longwall mining where significant damage to public natural resources was predicted.
>
> 68. The Department violated its constitutional duties by failing to keep an adequate record of the trust's administration when it did not develop an independent adequate assessment of risk to public natural resources prior to making the permitting decision.
>
> 69. Department did not adequately consider whether CPCC's longwall mining at the Bailey Lower East Expansion together with other past, present, and reasonably foreseeable coal mining activities in the vicinity of the Bailey Lower East Expansion, may cause significant environmental impact cumulatively in accordance with 86.37(a)(4) and PA CONST. Art 1, § 27.
>
> 72. The Department violated the Pennsylvania Constitution when it failed to exercise a reasonable effort to reduce the environmental incursion to a minimum, as described above.

> 73. The Department violated the Pennsylvania Constitution when it failed to engage in a balancing of environmental harms and benefits to be derived, and when it issued authorized the mining activity in spite of the fact that the environmental harms clearly outweigh the benefits to be derived.

Consol argues that the Contested Paragraphs, that it labels as novel objections, should be struck because they are not within the scope of CCJ/SC's amended Notices of Appeal and are therefore waived. Consol further argues that even if the novel objections were not waived, CCJ/SC should be prevented from offering evidence and argument on the Contested Paragraphs as a sanction for failing to disclose the factual averments and applications of law to facts related to the Contested Paragraphs during the discovery process. In their reply, CCJ/SC asserts that the Contested Paragraphs do not contain new legal objections but are encompassed by the language in the amended Notices of Appeal and therefore, have not been waived. They argue that the Contested Paragraphs simply reflect the factors from the 3-factor test for assessing the Department's compliance with its Article I, Section 27 obligations established in *Payne v. Kassab*, 312 A.2d. 86, 94 (1973), *aff'd*, 361 A.2d 263 (1976). CCJ/SC also argue that the Board should not preclude them from offering evidence related to the Contested Paragraphs because, contrary to the position asserted by Consol, the issues were raised throughout the discovery process.

Legal Standard

The notice of appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. 25 Pa. Code § 1021.51(e). The parties agree and Board precedent makes clears that objections to a Department action not raised in a notice of appeal are waived. *Rhodes v. DEP*, 2009 EHB 325. The Board generally applies the waiver rule with discretion, particularly in light of the requirement that parties file a notice of appeal within 30 days of being notified of a Department

action. As we stated in *Rhodes*, "[s]o long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver". *Rhodes,* 2009 EHB at 327.

Analysis

Our analysis of whether to grant Consol's Motion on the basis of waiver begins with determining what was said about Article 1, Section 27 in the amended Notices of Appeal. The main reference identified by CCJ/SC in their Response is an identical paragraph in each that states the following:

> Due to impact to public streams within the permit area and likely additional impacts to other surface waters of the Commonwealth outside of the permit area, the Department's approval of Permit Revision No. 180 (189) is not in accordance with its duties as public trustee of the natural resources of the Commonwealth and conservator of pure water and other environmental rights of Pennsylvania citizens as required by Article I, Section 27 of the Pennsylvania Constitution. 189 NOA ¶ 52; 180 NOA ¶ 79.

The question is whether the quoted NOA paragraph is sufficient to cover the issues in the Contested Paragraphs in CCJ/SC's prehearing memorandum or whether it fails to encompass them and therefore they are waived. In considering that question, we also keep in mind that the point of the waiver rule 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 the hearing. We find that the issues in the Contested Paragraphs are encompassed in the Notices of Appeal by the broadly stated objection that the Department failed to act in accordance with its duties under Article I, Section 27. As several recent Board and Commonwealth Court decisions make clear, the current legal standard for determining Department compliance with its Article I, Section 27 duty is the 3-factor test set forth in *Payne v. Kassab*. *See Funk v. Wolf*, ___

A.3d ___ (No. 467 M.D. 2015, Pa. Cmwlth. filed July 26, 2016); *Pa. Envtl. Def. Found. v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Brockway Borough Mun. Auth.* v. DEP, 2015 EHB 221. We read the Contested Paragraphs as describing the 3-factor test set forth in *Payne v. Kassab* and stating how CCJ/SC contend that the Department failed in meeting its duty under the *Payne v. Kassab* standard. Once CCJ/SC raised the Article I, Section 27 issues in their Notices of Appeal, all parties were, or should have been, aware that the 3-factor test would be in play in this case. We reject Consol's argument that the NOA paragraph only addressed the first *Payne v. Kassab* factor, i.e. compliance with applicable statutes and regulations, and did not implicate the other two factors which are the basis for some of the Contested Paragraphs. Consol's proposed reading of the NOA paragraph is too narrow and not supported by the language of the NOA paragraph. It makes no specific mention of compliance with applicable statutes and regulations and instead speaks more broadly about the Department's duties as a public trustee and conservator of the public's rights under Article I, Section 27. We find that the objections set forth in the Contested Paragraphs are sufficiently encompassed in the NOA paragraph that they have not been waived by CCJ/SC.

We also reject Consol's argument that we should limit CCJ/SC from offering evidence and argument on the Contested Paragraphs as a sanction for alleged failures during the discovery process. We do not think that any such sanction is warranted. Consol and CCJ/SC attached several discovery related exhibits including interrogatories and deposition testimony to the Motion and Response. Our review of these attachments, particularly those from CCJ/SC directed at the Department, clearly raised questions about and sought discovery regarding the objections set out in the Contested Paragraphs. Specifically, they seek information regarding the Department's review of the permit application and how the Department complied with its duties

under Article I, Section 27 during that review. We also note that the Contested Paragraphs involve legal questions concerning the Department's alleged failure to take certain actions or consider certain information during its permit review. Further, it is difficult to envision what factual information CCJ/SC would have about Department actions or inactions that they could have provided in response to Consol's discovery requests. Ultimately, we don't think that Consol will suffer from any unfairness or surprise if we don't grant the requested sanction, nor do we believe that allowing evidence or argument regarding the Department's actions or inactions and how those responses measure up to its obligations under Article I, Section 27 will prevent a fair hearing on the merits.

For all the reasons stated above, we deny Consol's Motion to Strike and issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 1st day of August, 2016, it is hereby ordered that Consol's Motion to Strike Portions of Appellants' Prehearing Memorandum Containing Previously Undisclosed Objections That The Department Violated Article I, Section 27 of the Pennsylvania Constitution is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 1, 2016

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PERDUE AGRIBUSINESS LLC, Permittee	:	**Issued: August 2, 2016**

OPINION AND ORDER ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a township's petition to intervene on the side of the Department and a permittee in a third-party appeal of the Department's issuance of an air quality plan approval for a soybean oil extraction facility within the township's borders.

O P I N I O N

Annette Logan, Patty Longenecker, and Nick Bromer (the "Appellants") have challenged the Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval No. 36-05158A for a soybean oil extraction facility operated by Perdue Agribusiness LLC ("Perdue") located in Conoy Township, Lancaster County. Among other things, the Appellants contend in their notice of appeal that Perdue did not demonstrate the use of Best Available Technology (BAT) for the entire facility, that Perdue did not perform an adequate alternatives analysis, and that Perdue did not demonstrate that the benefits of the project outweigh the environmental and social costs under the New Source Review regulations and Article I, Section 27 of the Pennsylvania Constitution. The Appellants argue that the Department

acted unreasonably and contrary to law in issuing the plan approval in the face of Perdue's alleged failures in the application.

On June 22, 2016, Conoy Township, where Perdue's facility will be operated, filed a petition to intervene in the appeal. The Appellants opposed the petition and pointed out that the petition was not verified as required by our rules. 25 Pa. Code § 1021.81(b). We denied the petition without prejudice to the right of the Township to file another petition that complied with our rules. The Township did just that on July 1, 2016, and the Appellants once again oppose the petition. Perdue filed an answer supporting the Township's intervention. The Department has not weighed in either way.

Conoy Township supports the Department's issuance of the plan approval. The Township states in its petition that it has an interest in ensuring adequate consideration of the local benefits of the proposed facility in relation to the environmental and social costs. It tells us that it seeks to advance and protect the environmental well-being and economic stability of the Township and its residents. It argues that Perdue's facility will result in increased employment opportunities for its residents, and it will provide an outlet for farmers to sell their crops to the facility. The Township seeks to intervene to present evidence to this effect.

The Appellants argue that the Township has failed to demonstrate that it has a substantial, direct, and immediate interest in the appeal. They contend that, because the Township actually supports the project, it cannot possibly have an interest in protecting the environment. The Appellants assert that the Township's economic interest is only an indirect interest that does not provide a sufficient basis for intervention. The Appellants also argue that Perdue and the Department are fully capable of defending the plan approval, and the Township's participation in this proceeding would be duplicative and burdensome on the Appellants.

Section 4 of the Environmental Hearing Board Act 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). Because the right to intervene in a pending appeal should be comparable to the right to file an appeal in the first instance, we have held that an intervenor must have standing. *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434. A person has standing if that person has 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, supra*, 2014 EHB at 2. A substantial interest is one that is greater than the abstract interest of all citizens in having others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). "Direct" and "immediate" mean that there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *Id.* 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). Our Supreme Court has held that a political subdivision has a substantial, direct, and immediate interest in protecting the environment and the quality of life within its borders, an interest that confers standing upon the political subdivision. *Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 919-20 (Pa. 2013). When standing is challenged in an answer to the 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. *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.

The notice of appeal alleges that the issuance of the plan approval violates Article I, Section 27 of the Pennsylvania Constitution.[1] We employ a three-prong test in assessing challenges to Department actions under Article I, Section 27:

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

Brockway Borough Mun. Auth. v. DEP, 2015 EHB 221, 249, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Pa. Envtl. Def. Found. v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976). *See also Funk v. Wolf*, ___ A.3d ___, No. 467 M.D. 2015, slip op. at 5 (Pa. Cmwlth. Jul. 26, 2016) ("The *Payne* test is particularly applicable in situations where a person challenges a government decision or action."). The third prong of the test gets to precisely the type of balancing between harms and benefits of a project on which the Township seeks to present evidence. The notice of appeal alleges that the Department erred in determining that the benefits of the project outweigh the harms, while the Township's position is that any environmental harms were properly mitigated and it wants to ensure that the benefits of the project are properly accounted for during this proceeding.

---

[1] Article I, Section 27 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 the people.

PA. CONST. art. I, § 27.

A similar balancing test is also enshrined in the New Source Review regulations at 25 Pa. Code § 127.205, which provides in part:

> The Department will not issue a plan approval, or an operating permit, or allow continued operations under an existing permit or plan approval unless the applicant demonstrates that the following special requirements are met:
>
> ….
>
> (5) For a new or modified facility which meets the requirements of and is subject to this subchapter, an analysis shall be conducted of alternative sites, sizes, production processes and environmental control techniques for the proposed facility, which **demonstrates that the benefits of the proposed facility significantly outweigh the environmental and social costs** imposed within this Commonwealth as a result of its location, construction or modification.

25 Pa. Code § 127.205(5) (emphasis added). This provision of the regulations provides additional support for the Township's interest in arguing that the plan approval strikes the proper balance between development and environmental protection.

Accordingly, accepting as true all facts set forth in Conoy Township's petition, the Township's interests in this appeal are substantial and direct. The interest the Township asserts is greater than the abstract interest of all citizens because Perdue's plant stands to affect the local economy and job prospects for the Township's citizens, in addition to the area environment. There is a causal connection between the action under appeal and the interest the Township seeks to protect because the appeal of the plan approval could at least theoretically determine whether or not the plant ever operates or under what conditions in its plan approval it may operate, which in turn would determine whether the jobs the Township's residents hope to fill would ever be created. We have little difficulty seeing that a political subdivision in the Township's position has a substantial and direct interest in this appeal.

In terms of immediacy, Commonwealth Court has held that an immediate interest may be shown "where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question." *Funk v. Wolf*, ___ A.3d ___, No. 467 M.D. 2015, slip op. at 29 (Pa. Cmwlth. Jul. 26, 2016) (quoting *Unified Sportsmen of Pa. v. Pa. Game Comm'n*, 903 A.2d 117, 123 (Pa. Cmwlth. 2006)). To assess a party's standing in terms of the zone of interests of a statute it is appropriate to look to a declaration of policy contained within the act at issue. The plan approval under appeal was issued pursuant to the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015. The Air Pollution Control Act's declaration of policy provides:

> It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) **protection of public health, safety and well-being of its citizens**; (ii) prevention of injury to plant and animal life and to property; (iii) protection of comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; (iv) **development, attraction and expansion of industry, commerce and agriculture**; and (v) implementation of the provisions of the Clean Air Act in the Commonwealth.

35 P.S. § 4002(a) (emphasis added).

We analyzed the Air Pollution Control Act's zone of interests in *Matthews International v. DEP*, 2011 EHB 402. In *Matthews*, the Department granted an exemption from plan approval and operating permit requirements to a facility that would produce bronze plaques to be used in cemetery memorial markers. The appellant was a company with a production division manufacturing bronze memorial products at a facility that was not exempt from the plan approval and operating permit requirements. There was no dispute that the two facilities would compete in the same geographic market. The appellant asserted that it would sustain financial harm and be put at a competitive disadvantage by having to comply with the plan approval and operating

permit requirements. The Department filed a motion to dismiss asserting that the appellant in *Matthews* lacked standing. The appellant pointed to Subsection (iv) in the Air Pollution Control Act's statement of policy in support of its standing to assert a competitive disadvantage:

> Matthews argues that subsection (iv) above is evidence that one of the policies of the Air Pollution Control Act is the protection of *individual* competitive interests. Therefore, it asserts that its interest in this appeal falls within the zone of interests protected by the Act. We read subsection (iv) as *encouraging* competition and the *expansion* of industry, whereas Matthews is seeking to use it to protect against alleged competitive injury. The policy does not indicate that it provides for the protection of one manufacturer over another. Instead, it encourages development, attraction and expansion of industry. We do not find that a policy of the Act is to protect the individual interest of one market participant over another market participant.

Matthews, 2011 EHB 402, 407 (emphasis in original).

While we held in *Matthews* that the Air Pollution Control Act did not embody a policy of protecting a competitive interest between two companies and we dismissed the appeal, we did not hold that all economic interests were outside the zone of interests of the Act. In fact, we found that the statement of policy in the Act encouraged the expansion of industry. Here, the Township seeks to ensure the expansion of this particular industry within its borders and to support commerce and agriculture of local farmers, while at the same time providing protection to its citizens from any environmental harms associated with the industry. The Township's stated interest falls squarely within the zone of interests of the Air Pollution Control Act, and therefore, its interest is immediate.

Finally, 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). Merely because a prospective intervenor supports a project being challenged does not mean that the intervenor's interest is any less substantial, direct, or immediate. We conclude that the Township has standing to intervene in this appeal.[2]

Accordingly, we issue the following Order.

[2] It is unknown at this point whether the Township participated in any public comment process for the plan approval, but such participation would provide an additional basis for standing under the Air Pollution Control Act. 35 P.S. § 4010.2.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PERDUE AGRIBUSINESS LLC, Permittee	:	

O R D E R

AND NOW, this 2nd day of August, 2016, it is hereby ordered that Conoy Township's petition to intervene is **granted**. The caption is revised to read as follows:

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; PERDUE AGRIBUSINESS LLC, Permittee; and CONOY TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

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

DATED: August 2, 2016

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

For the Commonwealth of PA, DEP:
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Douglas G. White, Esquire
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For Appellants:
William J. Cluck, Esquire
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For Permittee:
Peter J. Fontaine, Esquire
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For Intervenor, Conoy Township:
Bernadette M. Hohenadel, Esquire
Matthew J. Creme, Jr., Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
	:	
v.	:	**EHB Docket No. 2016-096-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	**Issued: August 3, 2016**

OPINION ON APPELLANTS' PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Judge

Synopsis

The Board denies Appellants' Petition for Supersedeas where the Appellants have failed to establish a likelihood of success on the merits and have failed to establish that there is a likelihood of irreparable harm or injury to them, the public or any other party if the Petition for Supersedeas is not granted.

O P I N I O N

Introduction

On or about June 1, 2016, EQT Production Company ("EQT") submitted a Notice of Intention by Well Operator to Plug a Well ("Notice of Intent to Plug") to both the Department of Environmental Protection ("DEP" or the "Department") and the Appellants in this case, Ronald Teska and Giulia Mannarino (collectively "Appellants").[1] The Notice of Intent to Plug stated that

[1] The parties to this case were involved in a prior action before the Board that was the subject of a Board Opinion and Order found at EHB Docket No. 2015-088-B.

EQT intended to plug the G.E. Houston # 186 Well ("Well 186").[2] An Application for Approval of Alternate Method of Plugging was also submitted along with the Notice of Intent to Plug. On or about June 4, 2016, Appellants sent a letter to EQT objecting to the proposed plugging operations and requesting a conference call with the Department and EQT. The Department received a similar letter on or about June 10, 2016. The parties scheduled a conference call for June 22, 2016 in order to discuss the issues surrounding the Notice of Intent to Plug and the alternate plugging method proposed by EQT. Following the call, on June 23, 2016, the Appellants received an email from the Department informing them that EQT's proposed alternate plugging method had been approved. Also on June 23, 2016, Appellants filed their Notice of Appeal along with a Petition for Supersedeas and an Application for Temporary Supersedeas. The Notice of Appeal contained two primary objections. First, Appellants objected to "determinations regarding plugging of [Well 186]." The Appellants' second objection concerned the perceived failure on the part of the Department to conduct the June 22, 2016 conference call "in a manner that follows [the] intent of [the] statute." Both the Petition for Supersedeas and the Application for Temporary Supersedeas sought to halt any plugging operations at Well 186, which at that time were scheduled to begin the following Monday, June 27, 2016. The Board held a conference call with the parties on June 24, 2016 and immediately thereafter issued an order granting a temporary supersedeas in order to maintain the status quo until certain issues could be resolved.

EQT filed a Motion to Dismiss on June 28, 2016, and the Department filed a Motion to Dismiss on June 30, 2016. On July 7, 2016, Appellants filed an Amended Notice of Appeal which stated that they were appealing "[d]eterminations regarding plugging of shallow gas well

[2] EQT is the owner and operator of Well 186, located on Appellants' property in Aleppo Township, Green County, Pennsylvania.

including, but not limited to, approval of alternate method of plugging." In consideration of the Motions to Dismiss, the responses and replies thereto, and the Amended Notice of Appeal, the Board issued an Opinion and Order granting in part the Motions to the extent that they addressed any objections by Appellants to EQT's Notice of Intent to Plug. The Board also granted the Motions in part to the extent that they addressed the June 22, 2016 conference call's status as an appealable action. The Board denied the Motions in all other respects, such that the only issue now before the Board is whether the alternate plugging method complies with the Oil and Gas Act and the relevant regulations promulgated thereunder.

On July 1, 2016, the Board issued an order scheduling a supersedeas hearing for July 28, 2016 and extending the temporary supersedeas through July 31, 2016. Since Appellants are in a different country until mid-September, Appellants were given the option to participate in the supersedeas hearing in person or via conference call. Appellants chose to participate in the July 28 supersedeas hearing via conference call, and EQT and the Department participated in person at the Board's courtroom in Erie, Pennsylvania. Following the conclusion of the supersedeas hearing, the Board issued an Order dated July 29, 2016 denying Appellants' Petition for Supersedeas. This Opinion is issued in support of that Order.

Supersedeas Standard

A supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *See Weaver v. DEP*, 2013 EHB 486; *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829. The petitioner bears the burden to prove that a supersedeas should be issued. *Tinicum Twp. v. DEP*, 2008 EHB 123, 126. The standard for granting or denying a petition for supersedeas is set forth in the Environmental Hearing Board Act, and by the regulations promulgated thereunder. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63. In ruling on a

supersedeas request, the Board is guided by relevant judicial precedent and its own precedent, and among the factors to be considered are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b).

In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Hudson v DEP*, 2015 EHB 719, 726 (citing *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91; *Neubert v. DEP*, 2005 EHB 598, 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *M.C. Resource Development v. DEP*, 2015 EHB 261, 265 (citing *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369). In order to be successful, the petitioner's chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Global*, 2000 EHB 829, 831-32. It is important to remember that a ruling on a supersedeas is merely a prediction, based on the limited record before the Board and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver*, 2013 EHB 486, 489; *Tinicum*, 2008 EHB 123, 127. In the final analysis, the issuance of a supersedeas is committed to the Board's sound discretion based upon a balancing of all of the above criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

Likelihood of Success on the Merits

Appellants had the burden of proving that they had more than a speculative likelihood of showing that the Department's approval of EQT's proposed alternate plugging method was

arbitrary, capricious or contrary to law. Appellants have failed to carry this burden. At hearing, Appellants called two Department witnesses, Joel Keller, Oil and Gas Inspector and Scott Sabocheck, Oil and Gas Inspector Supervisor. Both witnesses testified that they were satisfied that the documentation submitted by EQT in conjunction with the Notice of Intent to Plug and the proposed alternate plugging method was sufficient to establish that the alternate method of plugging satisfied the requirements of the Oil and Gas Act and the relevant regulations. No testimony was presented that contradicted Mr. Keller's and Mr. Sabocheck's testimony with respect to the information provided with the Notice of Intent to Plug and the proposed alternate plugging method.

Appellants also called EQT's sole witness, Fil Sciullo, a senior principal engineer at EQT and the individual responsible for developing the alternate method of plugging in this case. While the Department witnesses were unable to recall if they had ever plugged a well that was in the same proximity to a water well as Well 186 is to Appellants' water well (approximately 100 feet), Mr. Sciullo testified that he has successfully plugged wells within the same proximity using the same alternate method of plugging that is at issue in this case. Mr. Sciullo stated that the alternate method of plugging was developed in order to provide added protections to nearby water supplies beyond the statutory and regulatory minimum protections detailed at 58 Pa. C.S. § 3220 and 25 Pa. Code §§ 78.92-78.98.

The testimony and evidence presented at hearing showed that the alternate method of plugging differs from the standard method of plugging in three major ways. First, the remaining casing in the well would be left in place in order to avoid disturbances that could affect the water supply. Second, the plugging contractor would omit a vent that would be otherwise used in similar plugging scenarios. Third, the well would be filled with water when the plugging

reached just below the water-bearing strata in order to check for any leaks in the existing casing. If any leaks exist, bentonite clay pellets would be used in lieu of concrete in order to create a proper seal and prevent the liquid concrete from escaping through the cracks and into the water supply before hardening. Mr. Sciullo also mentioned that the proposed alternate method of plugging would use shorter concrete plugs in order to ensure that the plugs, which would occupy the entirety of the well bore, were sufficiently settled and cured in each segment before moving to the higher segments.

Appellants' only other witness, Mr. Teska, mainly provided background information regarding the property. Appellants presented no expert testimony regarding the alternate plugging method, and were unable to elicit any testimony from the Departments' or EQT's witnesses suggesting that the alternate plugging method presented any undue environmental risks or did not otherwise comport with the regulatory requirements. In fact, the testimony presented at hearing regarding the alternate plugging method actually suggested that it provided added protections that were above and beyond the regulatory minimum requirements for standard methods of plugging. While Appellants did establish that their water well is quite close to the well bore of Well 186, they failed to establish that the alternate method of plugging would present any risks that would not otherwise exist if the statutorily-mandated standard method of plugging were used. If the alternate method of plugging is not used, the other option would be the standard, regulatory minimum requirement, which, according to the testimony and evidence presented at hearing, is less protective of surrounding water sources than EQT's proposed alternate method.

Irreparable Harm to the Petitioners and Likelihood of Injury to the Public and Other Parties

Since Appellants were unable to establish a likelihood of success on the merits, we are not obligated to address the other two factors to consider when deciding whether or not to grant a Petition for Supersedeas. *See M.C. Resource Development*, 2015 EHB at 265 (citing *Dickinson Twp.*, 2002 EHB at 268; *Oley Twp.*, 1996 EHB at 1369) (if the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief). Despite having found that Appellants have not established a likelihood of success on the merits, we think it proper to briefly discuss the other two factors as they apply to this case: 1) irreparable harm to the petitioners; and 2) likelihood of injury to the public and other parties, including the permittee.

Appellants did not establish a likelihood of irreparable harm to themselves beyond mere speculation on the part of Appellants as to the effects of the plugging on their water supply. If anything, the testimony at trial evidenced that there will be a greater risk of harm to Appellants' water supply if we do grant the Petition for Supersedeas. The standard, regulatory minimum method for plugging provides less protection to Appellants' water supply than the alternate method of plugging. The approval of the alternate method is the only issue before the Board, and the testimony and the evidence presented at hearing showed that the alternate method was actually proposed in order to take additional precautions to ensure that the Appellants' water supply is not compromised. Therefore, we find that the use of the alternate plugging method in lieu of the standard, regulatory minimum method does not create the likelihood of irreparable harm to the petitioner. In fact, we think that it actually presents a lower risk of harm.

We also find that there is also no likelihood of injury to the public or any other party, including EQT, if we deny Appellants' Petition for Supersedeas. In fact, if we grant the Petition

for Supersedeas, EQT can simply plug the well using the standard, regulatory minimum method for plugging without Department approval. Despite the fact that the alternate plugging method will cost EQT more money according to the testimony, EQT apparently requested the approval of the alternative plugging method because it considered using that method to be in its best interest so there is certainly no likelihood of injury to EQT if we deny the Petition for Supersedeas. Further, because the evidence and testimony presented at hearing established that the alternate method of plugging provides additional protections beyond the standard, regulatory minimum requirement, we think that there is actually a greater likelihood of injury to the public or other parties if we do grant the Petition for Supersedeas.

Conclusion

Appellants were unable to present sufficient evidence to convince the Board that they are likely to succeed on the merits of this case. The testimony and the evidence presented at hearing showed that the proposed alternate method of plugging actually provides greater protection to Appellants' water source than the standard, regulatory minimum method. Because Appellants failed to establish a likelihood of success on the merits and failed to establish that any harm is likely to result to them, the public, or any other parties as a result of the Department's approval of the proposed alternate method of plugging, we must deny Appellants' Petition for Supersedeas.

For the reasons above, we issued the order dated July 29, 2016, which is attached hereto.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 3, 2016

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

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For Appellants, *Pro se*:
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Giulia Mannarino
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For Permittee:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD TESKA AND GIULIA MANNARINO	:	
v.	:	**EHB Docket No. 2016-096-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT PRODUCTION COMPANY, Permittee	:	

O R D E R

AND NOW, this 29th day of July, 2016, following a hearing on Appellants' Petition for Supersedeas and in consideration of the arguments presented, it is hereby ordered as follows:

1) Appellants' Petition for Supersedeas is **denied**;
2) An opinion in support of this order shall follow;
3) The temporary supersedeas previously issued by the Board in this matter is terminated.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 29, 2016

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

For Appellants, *Pro se*:
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Giulia Mannarino
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For Permittee:
Jean M. Mosites, Esquire
Kevin J. Garber, Esquire
Kathy Condo, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
v.	:	**EHB Docket No. 2015-163-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees	:	**Issued: August 9, 2016**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment filed by appellants in an appeal from the Department's approval of a joint sewage facilities plan because the record does not show that the Department erred as a matter of law based upon undisputed facts.

O P I N I O N

This is an appeal filed by Donald E. Longenecker and Maria J. Kawulych (hereinafter collectively referred to as "Longenecker") from the Department of Environmental Protection's (the "Department's") September 29, 2015 approval of a joint Act 537 plan submitted by East Earl Township and Terre Hill Borough in Lancaster County (the "Municipalities"). The Department and the Municipalities have apparently been working to address sewage needs in and around the Village of Goodville since 2002, where we are told the majority of on-lot disposal systems are malfunctioning. Pursuant to an April 22, 2014 Consent Order and Agreement between the Department and the Municipalities, the Municipalities were required to develop a joint Act 537 plan update. The purpose of the joint plan is to address the sewage needs in and

around the Village of Goodville, which is in East Earl Township, and the upgrade of Terre Hill's existing wastewater treatment plant.

In the joint plan, the Municipalities elected to provide public sewer to Goodville. The sewage is to be transmitted to a new sewage treatment plant that will be owned and operated by a newly formed municipal authority, the Weaverland Valley Municipal Authority. This sewage treatment plant will also serve the Borough of Terre Hill and allow the closure of its existing aging facility that discharges to a High Quality stream. In addition, two existing package sewage treatment plants will be discontinued. The new sewage treatment plant will discharge to a stream designated as Warm Water Fisheries.

Longenecker has now filed a motion for summary judgment, which the Department and the Municipalities oppose. The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94a; *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, Jun. 6, 2016). The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a). There are two ways to obtain summary judgment on the substance of the motion. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). Second, summary judgment may be available

> If after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2.

In third-party appeals of Department actions the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that it is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016), *pet. alloc. denied*, No. 47 W.A.L. 2016 (Pa. Aug. 3, 2016); *Gadinski v. DEP*, 2013 EHB 246, 269. The Board reviews Department actions *de novo,* meaning we decide the case anew on the record developed before us. *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth, 1975).[1] In order to prevail in this appeal Longenecker will be required to show by a preponderance of the evidence that the Department erred in approving the Municipalities' joint plan.

It bears repeating that the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, places no obligation upon the Department to tell a municipality how to develop an appropriate sewage facilities plan. *Bear Creek Twp. Bd. of Supervisors v. DEP*, 2008 EHB 86, 93. As we said in *Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 14 (Adjudication, Feb. 29, 2016), and *Northampton Township v. DEP*, 2008 EHB 563, 567, "[N]either the Department nor this

---

[1] Longenecker continues to insist that our review is not *de novo* and instead that the facts are frozen in time at the time the Department acts. As we previously held in this case, Longenecker is, quite simply, wrong regarding his understanding of how the Board works. *Longenecker v. DEP*, EHB Docket No. 2015-163-L (Opinion and Order, Jun. 10, 2016).

Board function as überplanners, and we must be wary of any scheme that would have us make planning choices in lieu of the municipality." As stated by the Commonwealth Court in affirming our Adjudication in *Oley Township v. DEP*, 1996 EHB 1098, although sewage facilities planning touches on a divergent set of issues in the law, it is not the Department's place to insert itself into all of these areas of dispute, which are properly resolved before other tribunals:

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

Oley Twp. v. Dep't of Envtl. Prot., 710 A.2d 1228, 1230 (Pa. Cmwlth. 1998) (quoting *Cmty. Coll. Of Del. Cnty. v. Fox,* 342 A.2d 468, 478 (Pa. Cmwlth. 1975)). *See also Gilmore v. DEP,* 2006 EHB 679, 690 (citing *Force v. DEP*, 1998 EHB 179, 189; *Young v. DER*, 1993, EHB 380, 407, *aff'd*, 1032 C.D. 1993 (Pa. Cmwlth. 1994)).

Longenecker does not dispute the need for a plan, and we note that no appeal was taken from the 2014 COA requiring a joint plan. Although many of Longenecker's assignments of error are less than perfectly precise, his fundamental criticism seems to be that the Municipalities' plan is incomplete. It is so incomplete in his view that it shows that the Municipalities are not really committed to implementing the plan, and the lack of detail shows

that there is no proof that this plan can be implemented, even if the Municipalities had the will to implement it.

With respect to commitment, Longenecker refers us to *Wilson v. DEP*, 2010 EHB 827 ("*Wilson I*"), where we reversed the Department's approval of a plan because our *de novo* review revealed that the municipality had "changed its mind" and had no intention whatsoever of implementing the plan. It had even gone so far as to enact an ordinance that directly contradicted the plan. We held that it would have been absurd for us to uphold the Department's approval of a plan that the municipality had itself already disavowed. *Id*., 2010 EHB at 841.

Here, Longenecker points us to no such similar evidence. Instead, he primarily relies on the asserted lack of detail in the plan as evidence of an absence of commitment, but we do not agree that the latter conclusively or necessarily follows from the former. Longenecker adds that the plan under review is merely the latest in a long line of planning revisions that the Municipalities have devised since 2002 but failed to implement. Even if this is true, it does not follow that the Municipalities are not committed now.

We would need a very clear showing of a lack of commitment to reverse a plan approval under *Wilson I*, and Longenecker has made no such showing here at the summary judgment stage. To the contrary, the Municipalities entered into a Consent Order and Agreement with the Department. They voluntarily committed themselves through the COA to provide a joint solution to the sewage planning needs in their communities. If they were not truly committed to providing a joint solution to the long term sewage issues facing both of their communities, the Department argues rather convincingly, they would not have entered into a COA. We note that the COA includes stipulated penalties if there is a failure to comply in a timely manner. Furthermore, since the plan was approved, the Municipalities have formed a joint authority as

contemplated in the plan. There is every indication, at least based on the existing record, that the Municipalities are committed to moving forward in accordance with the plan. The Municipalities have even asked us for an expedited schedule in this matter so that, assuming we dismiss the appeal, they can move forward in accordance with the COA.

After we reversed the Department's plan approval in *Wilson I*, the township revised its plan and presented convincing evidence that it was committed to implementing the new plan. Among other things, the Chairman of the Board of Supervisors credibly testified that the township was a "hundred percent" committed to the plan. We upheld the Department's approval of the new plan. *Wilson v. DEP*, 2015 EHB 644, 704-06 ("*Wilson II*"). The instant case appears to be more like *Wilson II* than *Wilson I* based on the limited record currently before us. The existing record certainly does not support a conclusion that Longenecker is entitled to summary judgment.

Longenecker next says that the Municipalities' joint plan does not contain enough information to demonstrate "with certainty" that it can be implemented. The first problem with this argument is that, as we have already held in this case, such certainty is simply not required. *Longenecker v. DEP*, EHB Docket No. 2015-163-L (Opinion and Order, Jun. 10, 2016). As we recently explained in *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L (Adjudication, Feb. 29, 2016),

> At the planning stage there is no need to definitively prove that the chosen method of sewage disposal can be done to a certainty. Rather, the municipality is only required to show that the proposal is capable of being done or it is feasible. We have consistently held as much in the past when analyzing the planning regulations. In *Noll v. DEP*, 2005 EHB 505, we interpreted the regulatory language in Section 71.32(d)(4) requiring the Department to consider whether a plan or plan revision is "able to be implemented" as not requiring the Department to ensure with 100-percent certainty that a plan can be implemented as outlined in the

> planning proposal. In *Noll*, the township's plan revision proposed in part to expand the area of sewer service. The Appellants challenged the economic analysis that accompanied the plan revision, arguing that the Department did not adequately consider the true costs of the plan revision in terms of costs to homeowners and the financing base for the system. We looked at the various regulatory provisions governing the Department's review, which provide, for instance, that the Department must evaluate the "feasibility for implementation of the selected alternative," 25 Pa. Code § 71.61(d)(2), and the "technical feasibility" of the selected alternative, 25 Pa. Code § 71.61(d)(1). We read these provisions in parity and similarly construed the "able to be implemented" language to mean that the Department must ensure that a plan is "feasible" meaning "capable of being done." *Noll* 2005 EHB 505,520 (quoting *Montgomery Twp. v. DER*, 1995 EHB 483, 522). We held that "[c]ertainty of implementation is not the standard, rather capability of implementation is the standard." *Noll*, 2005 EHB at 520.
>
> ….
>
> What emerges from our prior decisions is that, at the planning stage, potential issues need to be identified and carefully evaluated, but there is no requirement that the methods selected and proposals made for sewage treatment need to be absolutely certain of implementation. The regulations repeatedly employ less than definite language suggesting that plans must contain proposals that have a reasonable chance of succeeding, but the regulations in no way demand perfection at the planning stage. There are no bright line rules for what constitutes "able to be implemented," and it is committed to the Department's discretion on a case-by-case basis. Any indication of a legitimate barrier to implementation is worthy of the Department's close consideration when exercising its judgment on whether to approve a plan or plan revision, but it does not necessarily prevent the Department from approving a plan or revision that presents a reasonable likelihood of succeeding.

Slip op. at 16-18.

A plan by definition does not predict the future with certainty. A plan must allow for flexibility, which an overly detailed or constricted plan does not. Furthermore, it makes no sense for planning municipalities to move too far forward in implementing a plan before their plan has been approved.

We believe that in order to prevail on this argument at the summary judgment stage, Longenecker would need to make a very clear showing based upon undisputed facts that the Municipalities will not be able to implement their plan. Longenecker has made no such showing. Instead, he has criticized the Municipalities for failing to provide enough detail or to perform enough work to prove that the plan can be implemented. Evaluating this claim requires a more comprehensive review than a desktop review of lengthy planning documents without the benefit that a hearing allows.

Longenecker goes on to say that, even if the missing details in the plan do not rise to the level of showing a lack of commitment or feasibility, their mere absence without more compels us to reverse the Department's approval of the plan. The Department and Municipalities counter, we believe correctly, that the Department has considerable discretion in deciding what details need to be included in a plan in order for it to be "complete." The regulation at 25 Pa. Code § 71.21(a) says that, *"[i]f applicable to the specific planning needs of the municipality, as determined by the Department,* the completed plan submitted to the Department shall…" include the items enumerated in 25 Pa. Code § 71.21(a)(1) through (8). (Emphasis added). Section 71.21 then outlines what should be included in an official plan, assuming it is appropriate for the planning needs of the municipality. Notably, the section begins with the caveat "if applicable." Not every subsection of Section 71.21 is applicable to every Act 537 plan. Each plan is unique to the specific sewage planning needs of that municipality. The Department, in appropriate cases, considers and approves plan submissions that do not contain the entire universe of information included in the subsections of Section 71.21.

The Department and the Municipalities say that many of the details that Longenecker claims are missing are: irrelevant or inapplicable for this project; not required by any regulation;

not missing at all or not missing when considering other documents incorporated by reference in the plan;[2] and/or best deferred to a later phase in the process such as, for example, the permitting stage. For example, Longenecker alleges that the joint plan was incomplete because it did not include completed archaeological or endangered species studies for the entire property where the proposed treatment plant will be located. Because the majority of the work to be completed by the Municipalities will be confined to existing roads and rights of way, the Department deferred full endangered species and Pennsylvania Historical and Museum Commission (PHMC) searches for the entire project until the design phase. Engineering designs may change. Indeed, the PHMC in its review noted that "[t]his project is a planning study; therefore this office cannot assess the effects on specific historic and archaeological resources until more detailed plans are developed." The Department tells us that it does not anticipate any PNDI hits will occur in land that has already been disturbed for an existing right of way and an existing wastewater treatment plant. However, if the Municipalities deviate from following these existing rights of way, PNDI and PHMC searches will be required for every acre disturbed. Based upon this record, we are hardly in a position to grant summary judgment in favor of Longenecker.

Another example is Longenecker's contention that the joint plan was incomplete because the exact location of the treatment facility was not delineated in the plan. The Department argues that there is no requirement in the regulations that the plan state with specificity where the treatment plant will be located on a property. There are many additional engineering factors that may arise. Deciding the exact location of the plant is better determined during the Part II Water Quality Management permitting phase than during the planning phase.

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[2] Section 71.21(a)(8) provides that a plan can incorporate information by reference "[w]hen the information required as part of an official plan or revision has been developed separately…." 25 Pa. Code § 71.21(a)(8).

Longenecker cites missing information regarding the operation of the joint authority. The Department responds that the plan does in fact contain institutional information, and in any event, Longenecker is demanding a level of institutional detail regarding the formation of the joint authority that is not required by regulation. The regulations require that a plan evaluate the ability to implement the chosen alternative by addressing the "[a]dministrative organization and legal authority necessary for plan implementation." 25 Pa. Code § 71.21(a)(5)(vi)(D). According to the Department, the joint plan addresses that issue.

Longenecker alleges that the joint plan is incomplete because the Municipalities failed to include effluent limitations as part of the submission. The Department says that it provided preliminary effluent limitations to the Municipalities in a letter dated January 7, 2015, which the Municipalities referenced in page 61 of the joint plan. ("Based on preliminary effluent limits developed by the Pennsylvania DEP Southcentral Regional Office's engineer, a regional WWTP is likely required to meet a nutrient cap load of 7,306 lbs/yr of TN and 974 lbs/yr of TP.") In addition, throughout the discussion of current issues and possible alternatives, the Municipalities addressed issues concerning the wastewater flows and Chesapeake Bay requirements. For instance, as set forth in the joint plan on page 58, the Municipalities noted:

> Based on DEP's 2014 Integrated Water Quality Monitoring and Assessment Report (formerly 303d list) and the Department's Water Viewer for the Enterprise (WAVE) GIS application, the Conestoga River, within East Earl Township, is impaired due to nutrients and sedimentation. Under 25 Pa. Code §§ 93.4a, 93.6 and 96.3, the Department must protect the existing surface water use from degradation or further degradation and therefore develop and implement through a NPDES permit, protective effluent limits for discharges to waters of the Commonwealth. A draft and final NPDES permit is likely to include more stringent BOD, TSS, TN and TP effluent limitations for discharge to the Conestoga River. The Township, in order to meet the requirements of a final NPDES permit, will likely need to install advanced secondary or tertiary treatment technologies.

The Municipalities also recognized that they needed to consider preliminary effluent limitations with respect to the regulatory antidegradation requirements. As set forth in the joint plan,

> Preliminary effluent limits were obtained from the Pennsylvania DEP for the proposed discharge point from a regional WWTP. Please see Appendix N for the preliminary effluent limits developed by PA DEP. The wastewater treatment technologies reviewed are all capable of operating to meet the required effluent limits at the proposed point of discharge and therefore not degrade water quality. The recommended wastewater alternative also reduces the impact of existing OLDS on groundwater and therefore eliminates direct sources of groundwater degradation.

(Joint Plan at 80, "Antidegradation".)

A review of the joint plan finds that the Municipalities appear to have not included the preliminary effluent limits in the plan itself. However, it appears that the preliminary effluent limits were considered by the Municipalities as they drafted the joint plan. In the Department's view, the Municipalities' failure to include the preliminary effluent limits in the plan itself does not strike a fatal blow to the plan or justify a remand. The material issues, i.e., antidegradation, Chesapeake Bay requirements, and the preliminary effluent limitations, were clearly analyzed from a planning perspective, and that is the key.

A great deal of information was provided in the joint plan with regard to existing groundwater issues and malfunctioning on-lot disposal systems. The joint plan also references the 2002 Update Revision addressing the Village of Goodville. As set forth in the plan,

> The 2002 Act 537 Sewage Facilities Update Revision (2002 Update Revision) specifically addressed the Village of Goodville, located just northeast of Blue Ball, Pennsylvania. The Village of Goodville is home to approximately 330 residents and some commercial establishments. The 2002 Update Revision identified malfunctioning on-lot disposal systems (OLDS) through well sampling of 37 potable wells, which showed that twenty-seven

> (27) percent contained nitrates above the 10.0 mg/L limit and nineteen (19) percent showed bacterial contamination.

The joint plan adequately described the existing needs within the planning area by including pertinent information, but also by referencing earlier studies.

Without going on in this vein, the important point at this stage is that the Department's largely discretionary determination that an official plan is complete is a more complicated and nuanced exercise than a rote checking off of boxes on a list. A proper review requires evaluation of the plan as a whole in light of the facts and circumstances surrounding the unique needs of the municipality in question. A motion for summary judgment is a particularly ill-suited vehicle for such review.

Longenecker also complains in rather vague terms that the Municipalities failed to properly and fully coordinate their planning with the municipal and county planning commissions. The Department and Municipalities correctly respond that the record at least as it currently exists does not support this charge. Section 71.21(a)(5)(i)(D) requires that an Act 537 plan evaluate each alternative for consistency between the proposed alternative and comprehensive plans developed under the Pennsylvania Municipalities Planning Code. Section 71.31(b) mandates that a municipality request, review, and consider comments by official planning agencies. Finally, 25 Pa. Code § 71.32(d)(6) requires that the Department consider whether the official plan contains documentation that any inconsistencies identified by planning agencies have been resolved. The thrust of these regulatory requirements is that any inconsistencies between the selected alternative and issues raised by planning agencies be identified and resolved.

The Lancaster County Planning Commission, via a May 12, 2015 memorandum, states that:

> The formation of a joint sewer authority between the Borough of Terre Hill and East Earl Township, to own, operate and maintain a regional WWTP to serve the Township and all of the Borough is consistent with the *Elanco Region Comprehensive Plan* (2008). The formation of a joint sewer authority and the construction of a regional WWTP is also consistent with Balance, the Lancaster County Growth Management Plan (2006), which recommends connection of failing OLDS and package WWTPs.

The Lancaster County Planning Commission also suggested the addition of some information to the final plan. This included the provision of some additional details to maps and some additional analysis. Terre Hill's engineer and East Earl Township's Planning Commission made several comments/recommendations regarding the joint plan. None of the comments or recommendations from the local planning bodies resulted in any significant substantive changes in the plan. We are told that all of the relevant planning entities have found that the selected alternative is consistent with their planning documents. None of the planning entities have identified any inconsistencies or have objected to the selected alternative.

Longenecker seems to allege that some or all of the planning agencies ignored their own comprehensive plans when providing comments to the Municipalities. He in turn seems to be asking this Board to ignore these agencies' own interpretation of their planning requirements and to conduct our own independent review of the underlying land use plans. However, the role of the Board is to determine whether the Department acted unreasonably in its reliance on the comments from the planning agencies, not to review whether these planning agencies properly interpreted their own land use plans.

Finally, Longenecker complains that changes that were made along the way as the iterative planning process progressed were not adequately resubmitted to municipal planning agencies and the public for comment. The Department and Municipalities respond that the joint plan that was submitted to the Department was substantively the same as that which was subject

to public comment. Specifically, the means of sewage disposal, utilizing a jointly owned and operated sewage treatment plant, and the location of the sewage treatment plant, did not change. We have held that changes to a plan must generally be so fundamental that they essentially represent a new or different plan in order for additional public comment to be required. *Ainjar Trust v. DEP*, 2001 EHB 927, 984. The record at this point does not support Longenecker's claim that such fundamental changes were made after initial public comment or that the planning process was anything other than transparent.

In short, Longenecker has fallen far short of showing that it is entitled to judgment as a matter of law based on undisputed facts. To the contrary, the record at this stage does not appear to support any of his claims that the Department erred in approving the Municipalities' joint plan. Longenecker seems to be insisting upon a level of detail in the joint plan that is simply not required or perhaps even advisable. The Municipalities have pressing sewage disposal needs that are not being met. Whether Longenecker can ultimately show that the Department acted unreasonably or contrary to the law in approving the joint plan under all of the facts and circumstances can only be resolved after a hearing on the merits, which has already been scheduled.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
v.	:	**EHB Docket No. 2015-163-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees	:	

O R D E R

AND NOW, this 9th day of August, 2016, it is hereby ordered that the Appellants' motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 9, 2016

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

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

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

For Permittees:
Martin R. Siegel, Esquire
Sarah L. Doyle, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2016-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, LP, Permittee	:	**Issued: August 18, 2016**

OPINION AND ORDER ON
ELECTRONIC DISCOVERY PLAN AND MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an appellant's motion to compel where a permittee has withheld documents on the basis of an overly narrow conception of the appropriate scope of discovery in the appeal of an air quality plan approval. The Board also resolves a dispute within a joint proposed electronic discovery plan by concluding that the historical cutoff date for searching and producing electronically stored information is not necessarily limited to the date when a permittee began working on its plan approval application.

O P I N I O N

Clean Air Council has appealed the Department of Environmental Protection's (the "Department's") issuance of Plan Approval No. 23-0119E to Sunoco Partners Marketing & Terminals, L.P. ("Sunoco") for the construction and operation of certain air emissions sources at the Marcus Hook Industrial Complex in Delaware County. Among other things, Clean Air Council alleges in its notice of appeal that the Department erred in issuing the plan approval because, according to Clean Air Council, Sunoco and the Department incorrectly calculated the

emissions increases that will result from the approved sources, in part because Sunoco relied on data from 2009 and 2010 for its baseline emissions. Clean Air Council also claims that the Department has improperly allowed Sunoco to circumvent certain New Source Review requirements by letting Sunoco segment a larger project at Marcus Hook into small pieces across several plan approvals, including previously approved plan approvals as well as the current one under appeal.

On July 8, 2016, the parties filed a joint proposed plan for conducting the discovery of electronically stored information (ESI). The proposed plan was complete except for a dispute between Clean Air Council and Sunoco regarding the appropriate historical cutoff date for searching and producing electronic discovery. The proposed plan provided in Paragraph 1: "Unless ordered based on good cause shown, the parties are not required to search for or produce responsive ESI that was generated before __________." Sunoco proposed that the parties submit memoranda of law in support of their respective positions regarding the appropriate cutoff date to be inserted into the blank, and Clean Air Council and the Department did not oppose that course of action. We issued an Order approving the remainder of the plan.

While we were awaiting the memoranda on the electronic discovery issue, Clean Air Council filed a motion to compel discovery responses from Sunoco. In its motion Clean Air Council asserts that Sunoco failed to provide complete, responsive answers to Clean Air Council's six document requests and three interrogatories. The interrogatories generally seek the identity of persons who helped prepare any plan approval application for the Marcus Hook facility from January 1, 2012 to the present, including Plan Approval No. 23-0119E currently under appeal. The interrogatories specifically request the following:

> 1. Identify each application you made to the Air Quality Program at the Department between January 1, 2012 and the present for any activity occurring at [the Marcus Hook Industrial Complex].
>
> 2. With respect to each application you identify in response to Interrogatory No. 1, identify every business or other entity which contributed to the preparation of said application, and the manner in which that business or other entity contributed.
>
> 3. Identify every individual who contributed to the preparation of the 23-0119E Application(s).

The six document requests served on Sunoco generally seek documents supporting the 23-0119E plan approval application, and certain information regarding the Marcus Hook plan approvals from 2012 to the present that were to be identified in response to Interrogatory #1. Specifically, the document requests seek the following:

> 1. All documents you considered or relied on in preparing the 23-0119E Application(s).
>
> 2. All drafts and versions of the 23-0119E Application(s).
>
> 3. With respect to the Sub-Projects, all documents relating to all mathematical calculations of, and the basis (including, for example, manufacturer specifications or engineering plans) for all numerical figures used in the mathematical calculations of:
>
> a. The emissions increase;
> b. The net emissions increase;
> c. The baseline actual emissions;
> d. The steam demand; and
> e. The cooling tower water demand.
>
> 4. With respect to the substances designed to flow through or be contained within the piping components associated with the Sub-Projects, all documents relating to their Reid vapor pressure(s) or their classification as "gas," "light liquid," or "heavy liquid," as you used those terms in your 23-0119E Application(s).
>
> 5. All documents independently corroborating the design values you used in your 23-0119E Application(s).
>
> 6. With respect to each application you identify in response to Interrogatory No. 1:
>
> a. all documents relating to your choice(s) to make each such application separate, as opposed to combining them, including without limitation any analysis of (i) each application's relationship to the Mariner East project, (ii) each application's

> relationship to other such applications, (iii) what constitutes the "project" for purposes of New Source Review, and (iv) the regulatory prohibition of circumvention within the meaning of 25 Pa. Code § 127.216;
>
> b. all documents relating to your determination(s) of the appropriate 24-month period(s) to use in calculating baseline actual emissions pursuant to 25 Pa. Code § 127.203a(a)(4)(i); and
>
> c. all documents relating to the amount and kind of emissions actually released from each source for each year from January 1, 2009 to the present from any emissions sources which are or would be subject to any Department plan approval issued in response to the application.

Because of the overlap between the issues regarding the electronic discovery plan date and the motion to compel, we will address both of the disputes within this Opinion.[1]

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. Since it can be difficult to tell early on in a case what is relevant in a matter, we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant. *Cabot Oil & Gas Corp. v. DEP*, EHB Docket No. 2015-131-L, slip op. at 5 (Opinion, Feb. 3, 2016); *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (citing *T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 610); *Parks v. DEP*, 2007 EHB 57. We do not need to get into whether the material will ultimately be determined to be admissible at this point, Pa.R.C.P. No. 4003.1(b), but we do need to make an assessment of relevancy, Pa.R.C.P. No. 4003.1(a). No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance,

[1] The Department has not weighed in on either the appropriate electronic discovery date, a matter in which the Department would presumably have some interest, or Clean Air Council's motion to compel.

embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. We must also keep in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517.

The basic disagreement between Sunoco and Clean Air Council concerns the appropriate scope of discovery, and centers on whether to allow discovery into certain plan approvals for the Marcus Hook facility other than the one being appealed. We are told in Clean Air Council's motion to compel that, in addition to Plan Approval No. 23-0119E, Sunoco also possesses approved plan approvals for Marcus Hook that fall under the numbers 23-0119, 23-0119A, 23-0119B, 23-0119C, and 23-0119D, and that Sunoco has also filed an application for No. 23-0119F. Clean Air Council believes that these plan approvals are all related to a Sunoco project known as the Mariner East pipeline, which Clean Air Council tells us Sunoco announced in 2012, and which they tell us will transport natural gas liquids from other areas of Pennsylvania to Marcus Hook. Sunoco admits to possessing the 23-0119-series plan approvals, but it denies Clean Air Council's characterization of the Mariner East pipeline project. Although Clean Air Council's discovery requests seek information related to all Marcus Hook plan approvals since 2012, its motion appears limited to the 23-0119-series plan approvals. Clean Air Council does

mention "other minor applications" in its motion, but it has not described what those applications are or how they may be relevant to this appeal.

Clean Air Council contends that the information it seeks in discovery and its motion is directly related to the objections contained in its notice of appeal. It argues that the information sought will support its claims that the Department (1) miscalculated various emissions increases, (2) failed to use the correct vapor pressure of the product feedstock moving through the facility's piping, (3) accepted Sunoco's plan approval application as complete when it was in fact missing needed documentation, (4) erred in allowing the use of data from the years 2009 and 2010 to calculate baseline emissions, and (5) erred in allowing Sunoco to divide the Marcus Hook project into several smaller plan approvals in violation of the circumvention regulation at 25 Pa. Code § 127.216. Accordingly, Clean Air Council argues that discovery on Marcus Hook plan approvals other than the one currently under appeal is necessary because the information could prove relevant to its circumvention and baseline emissions claims.

Sunoco responds by asserting that Clean Air Council has an overly broad conception of the proper scope of discovery in this appeal. Sunoco contends that discovery should be limited to the application for Plan Approval No. 23-0119E and any associated data and calculations, the Department's review of the application, communications regarding the application, and any public comments.

Before turning to Sunoco's relevancy argument, Sunoco argues that allowing any discovery into these prior plan approvals amounts to permitting a collateral attack on them, but this contention is without merit. Sunoco outlines a parade of horribles where allowing discovery into other potentially related plan approvals will somehow result in unappealed plan approvals being revoked or modified, causing rampant business uncertainty. Sunoco argues that this

violates the concept of administrative finality, but we fail to see how administrative finality comes into play. Allowing discovery into unappealed plan approvals in no way authorizes a collateral attack on those plan approvals. The Board's role is necessarily circumscribed by the action under appeal, *Love v. DEP*, 2010 EHB 523, 530; *Winegardner v. DEP*, 2002 EHB 790, 793, meaning we can only act with respect to that action, namely here, Plan Approval No. 23-0119E. In other words, even if Clean Air Council were able to show that the prior plan approvals were issued in error, there is nothing we could do about it in the context of the instant appeal. Whatever impact there may be, if any, to the Marcus Hook facility as a result of this appeal is necessarily limited to the facility's reliance on the only plan approval that is the subject of this appeal. However, merely because a prior Department action was not appealed and is now final does not mean that it is forever off limits for purposes of discovery. What is generally discoverable and what actions can be challenged on appeal are distinct concepts. Administrative finality in no way functions as a strict bar, temporal or otherwise, on relevant discovery in this matter.

Sunoco next argues that Clean Air Council's interpretation of the circumvention regulation is erroneous and cannot support discovery forays into any other plan approvals for the Marcus Hook facility. The circumvention regulation provides:

> Regardless of the exemptions provided in this subchapter, an owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application.

25 Pa. Code § 127.216. Clean Air Council points to this regulation in support of its assertion that Sunoco improperly segmented its work at Marcus Hook to avoid more stringent air

permitting requirements and thus it is entitled to conduct discovery into plan approvals beyond the one under appeal. Focusing on the last clause of the regulation, Sunoco advances a different interpretation and argues that, because Sunoco has consistently submitted applications and obtained plan approvals for Marcus Hook and the circumvention prohibition only applies to facilities that go entirely unpermitted, the regulation does not apply. Therefore, Sunoco argues, this regulation cannot support Clean Air Council's discovery into any plan approvals other than the one under appeal.

It is difficult to make broad proclamations about the appropriate scope of an appeal in the relative abstract of a discovery motion. *Friends of Lackawanna v. DEP*, 2015 EHB 785, 790. We believe it is premature at this juncture, in the context of a motion to compel and a dispute over the timeframe for electronic discovery, and with little specific briefing, to make any sweeping determinations regarding potentially important issues in this case, such as the proper interpretation of the circumvention provision. Notably, the Department has not at this point articulated its interpretation or explained any institutional interpretation it may hold of the circumvention regulation.

With that being said, we have little difficulty concluding that the 23-0119-series plan approvals appear to have a reasonable potential to be relevant in terms of Clean Air Council's circumvention challenge and its argument regarding the baseline emissions that were utilized in the application of the plan approval under appeal. The plan approval numbers themselves suggest a more than superficial relationship to the 23-0119E plan approval under appeal. The plan approvals may cover the same portion of the facility or involve similar sources or the same type of equipment. The plan approvals may rely on or build upon each other, or affect the emissions estimates used for the 23-0119E plan approval application. While it is difficult to say

at this point exactly how these plan approvals may be related, they should not be off limits to discovery. Accordingly, Sunoco must produce information regarding the 23-0119-series plan approvals in response to Clean Air Council's discovery requests.

Having clarified the scope of relevant discovery in this matter, we briefly turn to Sunoco's answers to Clean Air Council's discovery requests. Sunoco responded to the discovery requests with a number of objections, many of which were premised on its narrow view of the scope of discovery. Sunoco produced a CD with 25 documents consisting of 371 pages, but Clean Air Council tells us that these documents consist entirely of information Sunoco submitted to the Department during the plan approval application process for Plan Approval No. 23-0119E.[2] However, apart from Interrogatories #1 and #2 and Document Request #6, all of Clean Air Council's discovery was in fact tailored to Plan Approval No. 23-0119E. Clean Air Council argues that even beyond the relevancy objections, Sunoco's answers to the requests were not completely responsive. We generally agree.

Sunoco made several other objections that are based on certain terms not being specifically defined by Clean Air Council in the definitions section preceding the requests themselves. Sunoco therefore asserts that the requests are overbroad, irrelevant, ambiguous, unreasonable, and/or unduly burdensome. We believe that many of these objections lack merit.

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[2] We note that Sunoco's conception of discovery as being more or less limited to the four corners of the plan approval application runs counter to our *de novo* review, in which we decide an appeal of a Department action based on the record that is developed before us. *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 12 n.2 (Adjudication, Feb. 29, 2016); *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Young v. Dep't of Envtl. Res.*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). We do not step into the shoes of the Department to second-guess its decision based upon the record it had before it. Instead, we make our own decision based on a record created entirely before us that is not limited in either time or scope by what the Department considered. *Tri-Realty Co. v. DEP*, 2015 EHB 184, 188. *See also Pa. Trout v. Dep't of Envtl. Prot.,* 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472. An appeal before the Board is not the functional equivalent of conducting a file review at a Department office and then making a decision. We are interested in relevant documents that exist beyond the confines of the Department's file.

For example, Sunoco objects to the use of the term "contributed to" in Interrogatory #3 and argues that the term could encompass anyone who "completed all or part of the application, supplied information that was used to complete all or part of the application, reviewed all or part of the completed application, provided advice on how to complete the application, provided equipment or materials that were used to complete the application, or assisted in transporting or transmitting the application." While we understand Sunoco's position that the term "contributed to" is somewhat broad, we do not agree that it is ambiguous to the point of relieving Sunoco of its obligation to provide a responsive answer. Except for the person Sunoco imagines as a courier for the delivery of the application at the end of its illustrative list, it would appear that all of the classes of people it has come up with have a reasonable potential to possess knowledge of discoverable matter and should be identified. *See* Pa.R.C.P. No. 4003.1(a).

Along the same lines, Sunoco objects to Document Request #1 because Clean Air Council did not define the terms "considered" and "relied on," and Sunoco argues that the requests are ambiguous and therefore unduly burdensome. Again, we do not think any latent ambiguity inherent within these terms excuses the obligation to provide a responsive answer. Elsewhere, Sunoco objects to the use of "relationship to" in Document Request #6a as undefined and ambiguous, but Clean Air Council in fact provided a definition of "relating to (and any form thereof)" in its request that appears to address the objection. As a final example, Sunoco objects to the term "baseline actual emissions" in Document Request #3 as undefined, insufficiently specific, and ambiguous, but that term is defined in the air quality regulations at 25 Pa. Code § 121.1. In short, looking beyond Sunoco's relevancy objections, we do not believe many of its other objections nevertheless justify not providing responsive answers. What Clean Air Council is generally seeking are documents that were developed or used in preparing the application.

These documents are relevant and properly discoverable. Likewise, the drafts or alternate versions of the application Clean Air Council seeks in Document Request #2, if they exist, are clearly relevant. To the extent that Sunoco possesses responsive documents, it must produce or make them available to Clean Air Council.

Finally, with respect to the start date for searching and producing electronically stored information, Clean Air Council argues for an outside date of January 1, 2009 because it says Sunoco used 2009 and 2010 as baseline years for calculating emissions levels, and Clean Air Council again points to its circumvention argument. For its part, Sunoco argues for a date of June 1, 2015 because it says that is the date it began working on the plan approval application. However, Sunoco concedes that "to the extent that, in the application for Plan Approval [No. 23-0119E], it identifies emissions from calendar years 2009 and 2010 as baseline emissions, conducting discovery into the data for those emissions is permissible." Clean Air Council goes on to argue that the electronic discovery plan encompasses more than just the emissions data from 2009 and 2010, and Sunoco should not be permitted to limit discovery to only that data. In light of our discussion above, we agree with Clean Air Council. Potentially relevant documents generated before June 1, 2015 appear to exist and are appropriate subjects for electronic discovery.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2016-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, LP, Permittee	:	

O R D E R

AND NOW, this 18th day of August, 2016, it is hereby ordered as follows:

1. Paragraph 1 of the parties' joint plan on the discovery of electronically stored information shall contain the date of **January 1, 2009**;
2. Clean Air Council's motion to compel is **granted**;
3. Sunoco shall provide responsive answers to Clean Air Council's interrogatories and document requests, consistent with this Opinion, on or before **September 6, 2016**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 18, 2016

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

For the Commonwealth of PA, DEP:
Jessica Hunt, Esquire
Douglas White, Esquire
(*via electronic filing system*)

For Appellant:
Alexander Bomstein, Esquire
Joseph Minott, Esquire
Christopher D. Ahlers, Esquire
(*via electronic filing system*)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SARAH L. BERNARDI	:	
	:	
v.	:	**EHB Docket No. 2016-090-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 29, 2016**

OPINION AND ORDER ON THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's Motion to Dismiss based on lack of jurisdiction where no appealable action has been presented by the Appellant. Additionally, the Department's decision not to pursue an enforcement action falls squarely within the definition of the Department's prosecutorial discretion.

O P I N I O N

Introduction

The Notice of Appeal in this matter was docketed by the Board on June 2, 2016. The substantive concern presented by the Appellant, Ms. Bernardi, is with West Penn Power Company's ("WPP") use of certain herbicides on the transmission line right-of-way held by FirstEnergy, Inc., WPP's parent company, across her property. Ms. Bernardi has lodged a variety of complaints, some formal, some informal, with the Pennsylvania Public Utility Commission ("PUC"), the Pennsylvania Department of Environmental Protection ("DEP" or "the Department"), the Department of Agriculture, and the Environmental Protection Agency. In her Notice of Appeal, Ms. Bernardi states that she is "appealing this PUC case: C-2014-2453852 to

the EHB for the enforcement of the listed PA Codes below (violated by FirstEnergy) which the PUC did not have the authority to enforce; and, the DEP and DAG **would not** enforce." The Department filed a Motion to Dismiss for Lack of Jurisdiction ("Motion") on July 26, 2016 and Ms. Bernardi filed her response to the Motion on August 9, 2016. The Department did not file a reply to Ms. Bernardi's response and the Motion is now ripe for decision.

Standard

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. *See Burrows v. DEP*, 2009 EHB 20, 22. When considering a Motion to Dismiss, we accept the nonmoving party's version of events as true. *Ehmann v. DEP*, 2008 EHB 386, 390.

Analysis

In its Motion, the Department raises three issues that it contends entitle it to dismissal of this appeal. Each of the issues address the fundamental question of Board jurisdiction to hear Ms. Benardi's appeal. First, the Department argues that to the extent Ms. Bernardi is appealing the PUC decision, the Board lacks jurisdiction to hear that appeal. Second, the Department asserts that it took no appealable actions in this case and that even if the one piece of written correspondence from the Department was an appealable action, the 30 day time period to appeal that letter had long since passed prior to the filing of this appeal. Finally, the Department argues that to the extent the appeal is challenging the Department's decision to forego enforcement action, that decision is an exercise of its prosecutorial discretion and not appealable to the Board. We will address each of the Department's contentions in turn.

Board Jurisdiction

The Environmental Hearing Board Act and the regulations promulgated thereunder clearly define what constitutes an appealable action before the Board. Under Section 4(a) of the

Act, the Board has jurisdiction over "orders, permits, licenses or decisions of the [D]epartment." 35 P.S. § 7514(a). The Board's Rules of Practice and Procedure define the term "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Furthermore, the Board's jurisdiction will not apply to appeals that are not filed within 30 days after an appellant has received notice of the action. 25 Pa. Code § 1021.52(a).

PUC Case

On October 16, 2015, the Appellant in this case, Ms. Bernardi, filed a formal complaint with the PUC in an attempt to prevent WPP from using herbicides on the transmission line right-of-way held by FirstEnergy across Ms. Bernardi's property. In her complaint, Ms. Bernardi alleged that the herbicides WPP proposed to use were toxic and presented a risk to the well water on her property and the unnamed tributary ("UNT") that runs through her property. On November 3, 2015, the PUC granted in part Ms. Bernardi's complaint "insofar as it desire[d] to prevent the spraying of herbicides on the [UNT] flowing through the right-of-way across Complainant's property and insofar as it [sought] to prevent a full foliar application of herbicides." *Bernardi v. West Penn Power Co., No. C-2014-2453852,* 2015 Pa. PUC LEXIS 511, at *76 (Oct. 20, 2015). The PUC denied Ms. Bernardi's complaint to the extent that it sought a complete prohibition of the use of herbicides to maintain the transmission right-of-way. *Id.* at *76-77. More specifically, the PUC permitted WPP to apply herbicides using the "hand cut and stump" treatment method, wherein "the vegetation would be manually cut down within about two or three inches from the ground and the cut surface is treated with an herbicide mix to prevent re-sprouting." *Id.* at *34. Ms. Bernardi filed exceptions to the PUC's determination, but

the PUC denied those exceptions. These decisions by the PUC are apparently the decisions that Ms. Bernardi is attempting to appeal to the Board.

In this case, the plain language of Ms. Bernardi's Notice of Appeal indicates that she is attempting to appeal a decision of the PUC to the Board. Since the Board only has jurisdiction over Department actions, a formal decision by the PUC clearly does not fall within the Board's jurisdiction. Therefore, we agree with the Department that the portion of the appeal challenging the PUC decision must be dismissed.

Appealable Action(s)

As previously discussed, in order for the Board to have jurisdiction over an appeal, there must be a Department action. In the Notice of Appeal, Ms. Bernardi states repeatedly that the Department failed to act to address her concerns. For instance when asked on the appeal form to describe the subject of the appeal, she stated that she was appealing the violation of several "listed PA Codes" … that "the DEP … **would not** enforce." Later in the Notice of Appeal when asked to identify how and on what date she received notice of the Department's action, she stated that she notified various agencies, including the DEP, on multiple occasions and "[n]one acted on my complaint." In describing her objections to the Department's action, she stated that she objected to the fact that "not one Department or Agency forced FirstEnergy to comply with the PA State Codes regulating Pesticide Application. (listed above) Every person I contacted refused to help me." Ms. Bernardi raises similar points regarding the lack of action by the Department in her reply to the Motion.

In reviewing the various filings, it is clear that the Department responded in an attempt to address Ms. Bernardi's concerns but that she was not satisfied with that response. Department staff spoke with Ms. Bernardi several times and on March 24, 2015, three Department personnel

visited her property and conducted an investigation, although the investigation was limited because the last herbicide application by WPP had occurred eight months prior to the site visit. As a result of that investigation, the Department required FirstEnergy to apply for a NPDES permit regarding future herbicide applications. The review process for that permit application is presently still pending.[1] In addition to the site investigation and conversations with Ms. Bernardi, the Department also sent her a letter dated May 5, 2015 ("2015 Letter"), wherein Susan Malone, a Regional Director for the Department, informed Ms. Bernardi that based on its investigation, the Department had notified FirstEnergy of the need for a permit and was in discussion with FirstEnergy to ensure that all necessary permit applications were submitted for review.

Looking at the facts as set forth in the filings and viewing them in a light most favorable to Ms. Bernardi, to the extent that the Notice of Appeal could be read to be an appeal of any of the activities undertaken by the Department or the communications she had with the Department, we find that there is no appealable Department action on the record before us. In order to fall within the Board's jurisdiction, a Department decision, letter, or other communication must be properly "classified as quasi-judicial in nature and … affect rights or duties." *Constitution Drive Partners, L.P. v. DEP*, 2014 EHB 465, 470 (quoting *Sayreville Seaport Assocs. Acquisition Co., LLC v. DEP*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012)). In making a determination regarding jurisdiction, the Board also looks at whether the communication affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." *Chesapeake Appalachia, LLC v. DEP*, 2013 EHB 447, 461 *aff'd*, 89 A.3d 724 (Pa. Cmwlth. 2014).

[1] If the Department does issue that permit, that issuance would constitute a Department action that Ms. Bernardi could properly appeal within 30 days after notice of its issuance.

We find that none of the activities conducted by the Department personnel or communications between the Department and Ms. Bernardi outlined in her Notice of Appeal can reasonably be construed in a way that brings it within the Board's jurisdiction. There does not appear to be any order, decree, decision, determination or ruling by the Department in this matter that constitutes a quasi-judicial determination affecting Ms. Bernardi's personal or property rights, privileges, immunities, duties, liabilities or obligations. In fact, her complaint is really with the lack of action by the Department. The only written communication from the Department to Ms. Bernardi that we have before us is the 2015 Letter. The 2015 Letter simply serves to update Ms. Bernardi on the ongoing investigation of WPP's proposed use of herbicide on her property. At no point in the Letter is there a suggestion that the Department has reached any decisions or issued any permits, licenses or orders. The 2015 Letter simply does not constitute a Department action that can be appealed.

Even if we were to find that the Department investigation of the complaint, the requirement that FirstEnergy apply for a permit and/or the 2015 Letter constitute an appealable action, which we do not, the Notice of Appeal was filed more than a year after any of the possible triggering events. This fact alone establishes independent grounds to dismiss Ms. Bernardi's appeal, as the Notice of Appeal was filed well beyond the regulatory 30 day timeframe, thereby rendering it untimely and outside the Board's jurisdiction.

<u>Prosecutorial Discretion</u>

The core issue raised by Ms. Bernardi in her Notice of Appeal is a claim that the Department failed to take an enforcement action against WPP for the application of herbicides in a manner that she asserts violates various requirements under the regulations found in the Pennsylvania Code. We find that the Department's decision to forgo an enforcement action is a

matter of prosecutorial discretion and therefore not reviewable by the Board. Prosecutorial discretion is a term used to describe the Department's decision regarding whether or not it will pursue enforcement against a party it is tasked with regulating. *Ridenour v. DEP*, 1996 EHB 928, 929 (quoting *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 268-69). The Board does not have jurisdiction over the Department's exercise of its prosecutorial discretion, because such Department determinations do not constitute an "action." *Id.* at 929-30 (citing *McKees Rocks Forging*, 1994 EHB at 268-69; *North Pocono Taxpayers' Ass'n v. DER*, 1994 EHB 449, 480; *Washington Twp. Concerned Citizens v. DER*, 1991 EHB 205, 206-07). The Board has also previously held that:

> Where, however, a letter does no more than describe the outcome of the Department's investigation of a third-party complaint and reports that the Department will not pursue enforcement action against the object of the complaint, the letter is generally not appealable absent a claim of bias or corruption or perhaps other unusual circumstances.

Ballas v. DEP, 2009 EHB 652, 653.

In this case, the Department has investigated the allegations of illegal herbicide application made by Ms. Bernardi and has also updated her on its intent to reach out to FirstEnergy and ensure that it submits for review the appropriate permit applications for WPP's intended herbicide application. In the 2015 Letter, the Department made no mention of pursuing an enforcement action against FirstEnergy or WPP. While the fact that the Department is now requiring the submittal of a permit application for the spraying activity suggests that doing so without a permit may constitute a violation, the Department has presumably made a decision not to pursue an enforcement action in this case at this time, which is well within its legal right under the doctrine of prosecutorial discretion. As such, the Department's apparent decision not to

pursue an enforcement action in this case is not a matter that can properly be reviewed by the Board.

Conclusion

To the extent that Ms. Bernardi is requesting us to review any decision of the PUC, we find that a review of such a decision is improper as it is not a Department action and thus squarely outside the Board's jurisdiction. We also find that no appealable action has been taken by the Department in this case, and even if we were to find that the Department investigation, the requirement that FirstEnergy apply for a permit and/or the 2015 Letter did constitute an appealable action, which we do not, Ms. Bernardi filed her Notice of Appeal far outside the requisite 30 day timeframe. Finally, any decision by the Department not to seek enforcement against WPP or FirstEnergy is a clear exercise of prosecutorial discretion by the Department and not subject to Board review.

For the reasons described above, we issue the following order granting the Department's Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SARAH L. BERNARDI	:	
	:	
v.	:	**EHB Docket No. 2016-090-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of August, 2016, it is hereby ordered that the Department of Environmental Protection's Motion to Dismiss is **granted**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 29, 2016

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

For the Commonwealth of PA, DEP:
Charney Regenstein, Esquire
Melanie Seigel, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Sarah L. Bernardi
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 2014-175-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZELTON CREEK PROPERTIES, LLC, Permittee	:	**Issued: August 31, 2016**

OPINION AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT AND
DENYING CROSS-MOTION FOR SUMMARY JUDGMENT

By: Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Permittee's cross-motion for summary judgment. The Appellant has standing to pursue its appeal of the Department's action to issue the approval to Hazelton Creek Properties, LLC under the facts of this appeal. The Board grants the Appellant's motion for summary judgment. The Department lacked the authority to grant an approval under 35 P.S. § 902 (a) under the facts of this appeal in which residual waste from unrelated off-site natural gas drilling operations was accepted at the HCP Act 2 site for on-site remediation activities without the appropriate residual waste permit or approval.

O P I N I O N

On November 21, 2014, the Department sent a letter to Hazleton Creek Properties, LLC ("HCP") in which the Department stated:

> Under Section 902(a) of the Land Recycling and Environmental Remediation Standards Act (35 P.S. §§ 6026.101 – 6026.908, or Act 2) Hazleton Creek Properties LLC (HCP) has submitted a Plan

> dated December 27, 2013, as amended March 15, 2014; May 15, 2014; September 22, 2014; and November 3, 2014, (Project Plan) for the beneficial use of drill cuttings to perform Remediation under the Special Industrial Area Agreement dated December 6, 2005 (SIA Agreement). The Department of Environmental Protection (DEP or Department) has reviewed The Project Plan for conformance to the applicable requirements of the Solid Waste Management Act (35 P.S. §§ 6018.101 – 6018.1003, or SWMA), the regulations regarding beneficial use of residual waste under 25 Pa. Code §§ 250.1 – 250.708. The Department has determined that the acceptance and beneficial use of horizontal and vertical drill cuttings from oil and gas drilling activities at the HCP site under the Project Plan meet all applicable requirements of the Department's laws and regulations, provided HCP complies with the Project Plan and the below noted conditions from the Department's review.

According to HCP, the Department invited HCP to submit the "Project Plan" approved by its November 21, 2014 letter in an earlier letter dated November 1, 2013.[1] The initial November 1, 2013 letter indicated that an earlier communication from HCP was the source of the idea to use Section 902(a) as authority for the approval under appeal. PWIA Exhibit 2. The Department ultimately agreed with HCP and relied upon its authority under Section 902(a) of the Land Recycling and Environmental Remediation Standards Act[2] ("Act 2") as authority for both its "invitation" in the November 1, 2013 letter and its "approval" in its November 21, 2014 letter. See 35 P.S. § 6026.902(a). The "approval" in the Department's November 21, 2014 letter is the Department action under appeal.

On December 19, 2014, the Pennsylvania Waste Industry Association ("PWIA") filed its Notice of Appeal. ("NOA"), challenging the Department's approval of HCP's Project Plan issued under Section 902(a) of Act 2. In its NOA, PWIA raised a number of objections with the

[1] The November 1, 2013 letter was signed by Deputy Secretary Vincent J. Brisini, and the November 21, 2014 letter was signed by George Hartenstern, Director, Bureau of Environmental Cleanups and Brownfield. Deputy Secretary Brisini and Director Hartenstein were Central Office Department officials at the time they wrote their respective letters.

[2] The Act of May 19, 1995 (P.L. 4, No. 2).

Department's "approval." In summary, the objections concern PWIA's position that the "approval" of the acceptance and beneficial use of the unprocessed drill cuttings from off-site natural gas drilling operations at the HCP Site required a permit under the Department's residual waste regulations at 25 Pa. Code Chapter 287 and the Department's Management of Fill Policy, 258-218-773 (August 7, 2010). PWIA argues that DEP lacked the authority under Section 902(a) to grant the approval issued to HCP under the facts of this appeal.

PWIA is a non-profit trade association that represents the interests of its members. The members are for-profit businesses that are involved in solid waste activities in Pennsylvania, which include landfills, transfer stations, recycling, and waste-hauling companies.[3] PWIA does not own any permitted waste facilities, but PWIA's members do.

HCP has a 277-acre site in Hazleton, Luzerne County, Pennsylvania (HCP Site). The HCP Site is an active Act 2 remediation site, and the HCP Site is subject to a December 6, 2005 Consent Order and Agreement ("December 6, 2005 CO&A") executed by the Department, HCP and the Hazleton Redevelopment Authority.[4] In the December 6, 2005 CO&A, HCP was identified as a party who desired to undertake remediation activities at the HCP Site.

On April 16, 2015, PWIA filed a Motion for Summary Judgment asking the Board to vacate the "approval" issued to HCP under Section 902(a) of Act 2. PWIA argues that the Department abused its discretion in approving the HCP Project Plan to accept and beneficially use drill cuttings from off-site shale drilling operations at the HCP Site without a residual waste

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[3] The members of PWIA are: Waste Management, Republic Services, Progressive Waste, Advanced Disposal and Vogel Disposal. HCP's Exhibit 4, 31:8-17.

[4] The Board addressed issues involving the HCP Site in an earlier appeal. *See Citizen Advocates United to Safeguard the Environment v. DEP,* 2007 EHB 632. In this earlier appeal, appellants challenged a Determination of Applicability for a beneficial use of residual waste general permit which the Department issued to HCP.

permit issued by the Department under the Pennsylvania Solid Waste Management Act ("SWMA"). 35 P.S. §§ 6018.101 *et seq*.[5] PWIA asserts that the permit exception in Section 902(a) of Act 2, does not apply to the acceptance and use of drill cuttings from off-site natural gas drilling operations because the acceptance and use of these materials is not undertaken entirely on the HCP Site.

On July 10, 2015, HCP filed a Cross-Motion for Summary Judgment asking the Board to dismiss PWIA's appeal because PWIA lacked standing to challenge the Department's approval of its Project Plan under Section 902(a) of Act 2. HCP encouraged the Board to rule on its Cross-Motion for Summary Judgment because as HCP stated "if this Board rules that PWIA does not have standing to bring its appeal, then PWIA would also not have standing to make its motion for Summary Judgment." HCP Brief in Support of its Cross-Motion for Summary Judgment at 1.

The Board agrees with HCP that the Board should first resolve HCP's Cross-Motion for Summary Judgment and the challenge to PWIA's standing before considering the merits of PWIA's challenge to the Department's action. This is the proper approach that the Pennsylvania Supreme Court followed when it affirmed the judgment of the Commonwealth Court to dismiss a petition for review filed by Gene Stilp on the ground that Mr. Stilp lacked standing. *Gene Stilp v. Commonwealth of Pennsylvania*, 940 A.2d 1227, 1231-32 (Pa. 2006). The Pennsylvania Commonwealth Court had found that Mr. Stilp had standing, but the Commonwealth Court nevertheless dismissed Mr. Stilp's petition for review after considering the merits of his petition for review. The Pennsylvania Supreme Court ultimately disagreed with the Commonwealth Court that Mr. Stilp had standing and concluded:

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[5] The Act of July 7, 1980 (P.L. 380, No. 97), as amended.

> We will first address the Senators' standing claim because, if it is determined that Stilp does not have standing to seek the relief requested, we need not, and indeed cannot, address the merits of the substantive issues raised on Stilp's appeal.

Stilp, 940 A.2d at 1231-32. The Board will follow the Pennsylvania Supreme Court's approach and only consider the merits of PWIA's challenge to the Department's action, after we determine whether PWIA has standing.

Standard of Review

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code §1021.94a (which incorporates Pa. R.C.P. Nos. 1035.1-1035.5); *Global Eco-Logical Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party, and resolves all doubt as to the existence of a genuine issue of material fact against the moving party. *Lexington Land Development Corp.*, 2014 EHB at 742-43. Summary judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Citizen Advocates United to Safeguard the Environment*, 2007 EHB at 106. When applying this standard to a motion for summary judgment that contests standing of the appellant, the Board looks to whether there are genuine issues of material fact as to the standing issue and if it is clear that the appellant whose standing is being challenged lacks standing as a matter of law. *Richard L. Sledge v. DEP*, 2015 EHB, 31, 33; *In-County Landfill v. DEP*, 2014 128, 133;

Giordano v. DEP, 2000 EHB 1184, 1187. With these general principles in mind, the Board now turns to consider the dueling motions for summary judgment.

Nature of Department's Approval

One of the issues that the Board needs to address is to decide the exact nature of the Department action under appeal. The question is complicated by the Department's refusal to explain or describe the action it took or the authority for the action, in writing, for the Board. Because the Department has repeatedly refused to respond to either pending motion for summary judgment in accordance with the Board's Rules at 25 Pa. Code § 1021.94a, the Board is forced to sift through various Department letters to uncover the true nature of the Department action under appeal.[6]

According to the Parties, the first Department letter to consider is the November 1, 2013 letter from Deputy Secretary Vincent J. Brisini to Mr. William Rinaldi regarding HCP's proposed use of Section 902(a) to authorize the beneficial use of drill cuttings on the HCP Site. PWIA's Exhibit 2. In this letter, the Department told HCP that in order to initiate the process for approval to use Marcellus drill cuttings under the Land Recycling Act, HCP should submit a project plan to the Department for review. HCP complied with the Department's direction and submitted a proposed Project Plan to the Department for review on December 27, 2013. HCP subsequently submitted amendments to the Project Plan four times: March 15, 2014; May 15, 2014, September 22, 2014 and November 3, 2014. On November 21, 2014, the Department sent HCP the approval letter, which PWIA appealed to the Board. The four-page single-spaced letter includes three pages of twenty-three "noted conditions" and the following operative paragraph:

[6] The Board's Rules governing motions for summary judgment contain detailed requirements that list the duties of parties responding to motions for summary judgment that the Department simply ignored.

> Under Section 902(a) of the Land Recycling and Environmental Remediation Standards Act (35P.S. §§ 6026.101 – 6026.908, or Act 2) Hazleton Creek Properties LLC (HCP) has submitted a Plan dated December 27, 2013, as amended March 15, 2014; May 15, 2014; September 22, 2014; and November 3, 2014, (Project Plan) for the beneficial use of drill cuttings to perform Remediation under the Special Industrial Area Agreement dated December 6, 2005 (SIA Agreement). The Department of Environmental Protection (DEP or Department) has reviewed The Project Plan for conformance to the applicable requirements of the Solid Waste Management Act (35 P.S. §§ 6018.101 – 6018.1003, or SWMA), the regulations regarding beneficial use of residual waste under 25 Pa. Code §§ 250.1 – 250.708. The Department has determined that the acceptance and beneficial use of horizontal and vertical drill cuttings from oil and gas drilling activities at the HCP site under the Project Plan meet all applicable requirements of the Department's laws and regulations, provided HCP complies with the Project Plan and the below noted conditions from the Department's review.

Under Section 902(a) of Act 2 HCP submitted a plan for the acceptance and beneficial use of drill cuttings at the HCP Site. The Department approved the acceptance and beneficial use of the drill cuttings pursuant to the Project Plan and twenty-three noted conditions.

PWIA and HCP both agree that this letter is an approval issued pursuant to Section 902(a) of Act 2 that provides an exemption from otherwise applicable permitting requirements for "remediation activities undertaken entirely on the [Act 2] site." 35 P.S. § 6026.902(a). The language in the letter under appeal is somewhat ambiguous, and the Department declined to offer the Board any hint or suggestion about the nature of the regulatory action it purported to take. Section 902(a) contains a statutory permit exemption for certain remediation activities conducted on an Act 2 remediation site, and it appears that the Department approved HCP's use of the statutory permit exemption provided HCP complied with its Project Plan and the twenty-three noted conditions. The Department included its standard appeals paragraph in its approval letter,

and PWIA subsequently filed an appeal. Now, the Board needs to sort out exactly what the Department did without any assistance from the Department.

While the Department did not use any of the opportunities to describe exactly what it did, which are mandated by 25 Pa. Code § 1024.94a, it did write another letter. This later letter was short, but unfortunately not to the point. In a letter dated July 15, 2015, in which the Department responded to PWIA's motion for summary judgment, the Department stated:

> The Department requests that this Honorable Board consider this letter as the Department's formal response to PWIA's Motion for Summary Judgment, which was filed on April 16, 2015. Given that this is a "third-party appeal" and that Permittee HCP has filed its own response to that motion, DEP will not file a separate response of its own, nor does the Department join in HCP's response.

The Board found this letter deficient on many levels. First, Rule 1021.94a mandates that parties file a response that conforms to the detailed requirements of the Rule.[7] Failure to comply with the Rule is sufficient basis to enter summary judgment against the person who fails to properly respond. 25 Pa. Code § 1021.94a(l).

Second, the letter provides no hint or suggestion regarding the Department's views on the major legal issue in this appeal. Does Section 902(a) of Act 2 provide the Department with the legal authority to allow the acceptance and beneficial use of residual waste on an Act 2 site that was generated at unrelated, off-site and active operations without requiring a residual waste permit or approval? Because the Department's response was so deficient, the Board issued an order directing the Department to file a response to PWIA's motion for summary judgment that complied with the Board's Rules at 25 Pa. Code § 1021.94a.

[7] The Rule in Section 1021.94a provides, in part, that a person responding to a motion for summary judgment shall file a response to the motion, a response to the statement of material facts, admitting or denying or disputing the facts alleged by the moving party and a brief contains legal arguments. The Department failed to comply with any of the mandated requirements.

In response to the Board's order, the Department filed yet another letter, which also did not comply with the Board's Rules. The letter did not provide any indication whatsoever of the Department's position on the major legal issue in this appeal regarding its authority to approve HCP's proposal to accept and beneficially use residual waste from off-site and unrelated operations for remediation activities on the HCP Site without a permit. The Department simply indicated that PWIA and HCP had both "fully articulated the relevant legal arguments on the issue of the Department's authority under Act 2 and the SWMA." These are statutes that the Department is authorized to administer. Apparently the Department had nothing to add other than it believed "it would be unfair for it to revisit or rescind its approval of the permit previously granted to HCP."[8]

In an exchange of private letters the Department invited HCP to submit a proposal for Department review and approval under the authority of Section 902(a) which provides a permit exemption for remediation activities undertaken entirely on the Act 2 site, if they are undertaken pursuant to the requirements of Act 2. HCP submitted a proposal. The proposal was reviewed by the Department, and HCP submitted amendments to the proposal four times. Eventually, the Department agreed that the proposal was acceptable and it issued its approval letter to HCP, including an appeal paragraph and three pages of "noted" conditions from the Department's review. There are twenty-three conditions that include a wide range of topics from control of fugitive emissions (Condition No. 3), to compliance history review (Condition No. 6) to radiation, chemical and physical testing of drill cuttings (Condition Nos. 11, 13 and

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[8] The Department's use of the term "permit" to describe its "approval" is puzzling. Section 902(a) allows remediation activities without a permit. HCP asserts that a permit is not required, but the Department describes its letter approval as a permit in many of the noted conditions, although there is no dispute that the Department did not follow any of the detailed residual waste permitting procedures.

14), and recordkeeping and reporting requirements (Condition Nos. 21 and 22). Condition No. 5 contains a consent of rights entry to have access to and to inspect all areas on the site on which activities will be conducted under the approval. The Condition specifically references Sections 608 and 610 (7) of the SWMA which governs rights of entry to conduct inspections and unlawful conduct related to refusing, hindering, obstructing or delaying rights of entry to inspect under the SWMA. 35 P.S. §§ 6018.608 and 6018.610(7). The Department and HCP assert that the approval of HCP's proposal, including the twenty-three noted conditions, provides the same types of substantive requirements as a beneficial use general permit issued under the residual waste regulations. HCP's Brief in Opposition to PWIA's Motion for Summary Judgment at 16-17; N.T. at 79-95. The approval is however not a residual waste general permit, but as the Parties agree it is an approval granted under Section 902(a) of Act 2.

HCP'S Cross-Motion for Summary Judgment Challenging PWIA Standing to Appeal Department Action

In its Cross-Motion for Summary Judgment, HCP asserts that PWIA lacks standing to appeal the Department's approval. HCP asserts that PWIA lacks standing because the alleged harm caused to its members is competitive in nature and related to a competitive disadvantage. HCP's Brief in Support of Cross Motion for Summary Judgment at 6. In HCP's view competition between market participants and competitive disadvantages are not within the zone of interest protected by the laws governing the approval issued to HCP. In this appeal, HCP asserts that the laws governing the approval are the SWMA and Act 2 and the regulations promulgated thereunder and that neither of these related regulatory programs "include protection of competitive interests of PWIA and its members." HCP's Brief in Support of its Cross-Motion for Summary Judgment at 15. Neither statute according to HCP provides protection of the interest of one market participant over another market participant.

The Department did not file a response to HCP's Cross-Motion for Summary Judgment as required by the Board's Rules at 25 Pa. Code § 1021.94(a). The Department wrote the Board another letter in which it stated:

> "Please accept this letter as the Commonwealth of Pennsylvania, Department of Environmental Protection's ("Department") concurrence with Hazleton Creek Properties, LLC ("HCP") Cross Motion for Summary Judgment. The Department's concurrence is limited to HCP's assertions relating to the Pennsylvania Waste Industries Association ("PWIA") standing to bring its above-referenced appeal."

The Department's letter expresses general support for HCP's Cross-Motion for Summary Judgment but nothing more. Under the Board's Rules, the Department should have filed a brief in support of the motion for summary judgment containing an introduction, summary of the case and the legal argument supporting the motion. 25 Pa. Code § 1021.94a(f). The Department's short letter offers no explanation why it did not comply with the Board's Rules which are clear and self-explanatory.

PWIA disputes HCP's claim that it has no standing to challenge the "approval" issued by the Department to HCP to accept and beneficially use drills cuttings on the HCP Site. PWIA contends that its standing is based "on the fundamental right that its member be treated fairly and consistently, and not disparately, by the Department." PWIA's Concise Statement at 2. PWIA does not argue that the challenged approval did not place PWIA's members at a competitive disadvantage. PWIA acknowledges that the approval does, in fact, place its members at a competitive disadvantage. PWIA asserts that it bases its standing in this appeal on more than just these consequences alone. PWIA asserts that its members were subject to unfair or disparate treatment under the residual waste regulations, and that they were denied mandated public notice. In addition, PWIA asserted that, even if the Board were to decide that the PWIA did not

have standing under the traditional standing rules, the Board should allow PWIA to proceed because the Department's decision would "otherwise go unchallenged" under *Piunti v. Pa. Dep't. of Labor and Indus.,* 900 A.2d 1017, 1021 (Pa. Cmwlth. 2006).[9]

HCP filed a Reply Brief to PWIA's Response in which it made three points to contest PWIA's arguments. First, HCP asserts that PWIA's mudslinging attempts do not provide a basis for standing. HCP believes that these mudslinging allegations on the part of PWIA which HCP listed in its Reply Brief, are irrelevant and based on a false premise.[10] Second, HCP asserts that the disparate treatment under the residual waste regulations, which PWIA alleges, is not a basis to grant PWIA standing to challenge the Department's decision to grant the approval under appeal. Finally, HCP asserts that PWIA is not entitled to standing under the "Taxpayer Standing" exception to the traditional standing rules. HCP asserts that the exception has only been applied in a limited number of situations and that this limited exception is not applicable here.

Standing is not a jurisdictional matter under Pennsylvania law, unlike standing under federal law.[11] *See, e.g., Jake v. DEP,* 2014 EHB 38, 58. The Board has stated:

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[9] Under the Taxpayer Standing rule discussed in this decision, PWIA would be allowed to proceed if: i) the decision would otherwise go unchallenged; ii) those directly and immediately affected are not inclined to challenge it; iii) judicial relief is appropriate; iv) there is no redress through other channels; and v) the appealing party is best suited to make the challenge. *Id, citing Lawless v. Jubelirer* 789 A.2d 820 *aff'd*, 811 A.2d 974 (Pa.2002).

[10] For example, PWIA asserted that HCP devised and implemented an intentional strategy of generating friction between the NERO and the Department's Central Office in order to ensure that the authority to approve this decision was transferred from the NERO to the Department's Central Office. HCP denies there was such a strategy.

[11] Unlike standing under federal law, which is grounded in Article III of the United States Constitution, Pennsylvania courts are not bound by Article III, *Erfer v. Commonwealth,* 794 A.2d 325, 329 (Pa. 2002) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)), nor does the Pennsylvania Constitution contain any standing requirements, *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 896. In fact, the Pennsylvania Constitution states that the Pennsylvania Supreme Court "shall have such jurisdiction as shall be provided by law." PA. CONST. art. V, § 2; *see also* PA. CONST. art. V, § 4 (vesting Commonwealth Court with "jurisdiction as shall be provided by law"). The Pennsylvania Supreme Court

> In contrast to the Board's subject matter jurisdiction, which examines whether a Department action has adversely affected *any person*, standing before the Board is narrower in scope and examines whether a Department action has adversely affected *an individual appellant*. *Pa. Game Comm'n v. Dep't of Envtl. Res.,* 555 A.2d 812, 815 (Pa. 1989) ("The concept of 'standing,' in its accurate legal sense, is concerned only with the question of *who* is entitled to make a legal challenge to the matter involved."). To establish standing, individuals must show a "direct and substantial interest" in the subject matter of the litigation, as well as a "sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.'" *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269, 286 (Pa. 1975); *DeFazio v. Civil Serv. Comm'n* 756 A.2d 1103, 1105 (Pa. 2000). Although the Board's analysis of standing relies on the same phrase, "adversely affected," as does the Board's analysis of subject matter jurisdiction, the Board, following the lead of the Pennsylvania Supreme Court's nearly half century-long line of precedent, has consistently held that standing is not a jurisdictional issue and is waivable. *Hendryx,* 2011 EHB at 129-30; *Borough of Roaring Spring*, 2004 EHB at 896 n.2; *Oley Township*, 1996 EHB at 1126-27.

Jake, 2014 EHB at 59-60. A person has standing if that person has a substantial, direct and immediate interest in the outcome of the appeal. *Tri-County Landfill, Inc. v. DEP*, 2014 EHB 128, 129 *citing Robinson Twp. v. Cmwlth. of Pa.,* 83 A.3d 901 (Pa. 2013) and *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009).[12] To have a substantial interest, the concern in the

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has "repeatedly recognized that the fact that a party lacks standing does not by itself deprive [the Court] of jurisdiction over the action, as it necessarily would under Article III of the federal Constitution." *Borough of Roaring Spring,* 2004 EHB at 896 n.2 (quoting *Housing Auth. of the City of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 941 (Pa. 1999)).

[12] The Board applies the traditional standing test to determine whether a person is "adversely affected" under subsection (c) of Section 7514 of the Environmental Hearing Board Act. ("EHBA") 35 P.S. § 7514(c). The Board also applies the traditional standing test to determine whether a person is an

outcome of the litigation must surpass "the common interests of all citizens in procuring obedience to the law." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) *citing In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). A direct interest requires a showing that the matter complained of caused harm to the party's interest. *Id.* An interest is immediate if the causal connection between the harm and interest is not remote or speculative. Id.

The Board has explained these principles as follows:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct and immediate way [citations omitted]….The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellant's harm (i.e. causation in fact and proximate cause)…

Matthews International Corp. v. DEP, 2011 EHB 402, 405 *citing Pennsylvania Trout Unlimited v. DEP*, 2003 EHB 622, 625, and *Giordano v. DEP*, 2000 EHB 1184, 1185. 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. *Greenfield Good Neighbors v. DEP*, 2003 EHB 555, 566; *Giordano,* 200 EHB at 1186.

PWIA is a trade association that represents the interests of its members to support the solid waste industry in Pennsylvania. All of the members of PWIA are for-profit businesses who

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"interested party" to allow intervention under subsection (e) of Section 7514 of the EHBA. 35 P.S. § 7514(e). Commonwealth Court has noted that the traditional standing test, which the Board applies under Section 7514(c), is a more onerous test than what a litigant must prove to appeal an administrative agency adjudication under Section 702 of the Administrative Agency Law ("AAL") and is also more onerous than what a person must show to be eligible to intervene under Section 35.28(a)(2) of the General Rules of Administrative Practice and Procedure ("GRAPP.") *Bensalem Racing Ass'n., Inc. v. Pennsylvania State Harness Racing Commission*, 19 A.3d 549, 562-563 (Pa. Cmwlth. 2011.) The Board's reliance on the traditional standing test under Section 7514(c) is therefore a more onerous standing test than the standing test applied under the AAL or the GRAPP.

are involved in various solid waste activities including landfills, transfer stations, recycling and waste-hauling companies.[13] As an organization representing the interests of its member companies, PWIA may have standing either in its own right or as a representative of its members if at least one of its individual members has a direct, immediate and substantial interest in the outcome of the litigation. *Pa. Trout. v. DEP*, 2004 EHB 310, 355 *aff'd* 893 A.2d 93 (Pa. Cmwlth. 2004); *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 751. PWIA asserts that it has standing in its own right in this appeal and also as a representative of its member companies.

The Board's evaluation of a challenge to a party's standing varies depending upon when the challenge is presented. *Tri-County Landfill, Inc.,* 2014 EHB at 131. If standing is challenged in an appropriately timed motion for summary judgment, as is the case in this appeal, we look to whether there are genuine issues of fact regarding the issue of standing. *Id.* In considering HCP's cross-motion for summary judgment, HCP has the burden to establish that there are no material facts in dispute and that it is entitled to judgment as a matter of law. *Matthews International Corp.*, 2011 EHB at 404. In addition, once an appellant's standing has been adequately challenged, the appellant must come forward with evidence which supports their standing. *Borough of Roaring Springs v. DEP*, 2004 EHB 889; *Valley Creek Coalition v. DEP*, 1999 EHB 935. (Where a party moves for summary judgment alleging appellant lacks standing, the appellant must produce facts supporting its standing in response to the motion). HCP has adequately challenged PWIA's standing in its motion, and PWIA has to come forward to identify facts in its response to support its standing. The Parties agree that there are no material facts in

[13] The members of PWIA are: Waste Management, Republic Services, Progressive Waste, Advanced Disposal, and Vogel Disposal. The members are involved in solid waste activities, which include landfills, transfer stations, recycling, and hauling companies. *See* HCP's Exhibit 4, 31:7-17.

dispute on the issue of PWIA's standing. The Board agrees. Because both Parties assert that they are entitled to judgment as a matter of law and there are no material facts in dispute, the Board will need to examine the Parties' legal claims to decide which party is entitled to judgment.

HCP's claim that PWIA lacks standing relies primarily on two prior Board decisions in *McCutcheon v. DER*, 1995 EHB 6 and *Matthews International.* Under these decisions, HCP argues that PWIA's "competitive interests" would establish standing only if the goals of the legislative scheme in Act 2 and SWMA included protection of competitive interests. To have standing for its competitive interests, HCP asserts that Act 2 and the SWMA must have competitive interests within the "zone of interest" protected by these statutes. HCP's Brief in Support of Cross Motion at 14. While the Board recognizes the continued validity of these prior Board decisions, the Board finds that they are distinguishable and disagrees with HCP that these earlier Board decisions support HCP's position that PWIA lacks standing to pursue its appeal of the approval issued to HCP for several reasons. First, HCP misconstrues the scope of the Board's decisions in *McCutcheon* and *Matthews International* and misapplied them to the facts of this appeal. The Board also considered additional factors when it decided these appeals as set forth below. Second, HCP fails to recognize the limited scope of the "zone of interest" consideration as a matter of Pennsylvania case law when evaluating whether a person has standing under the traditional standing rules.

In *McCutcheon*, one of the two appellants in the matter objected to a permit allowing the use of a product as an alternative daily cover at a particular landfill that was a competing alternative cover to a product it produced. The Board decided that the financial harm alleged by the appellant was not within the scope of interests protected by the SWMA. In addition and

equally important, the Board decided that the alleged financial harm was too speculative to be an immediate interest to support standing. In *McCutcheon*, the Board did not apply the "zone of interest" consideration as an absolute rule, but the Board looked at other considerations in addition to the "zone of interest" consideration. The Board also evaluated the nature of the alleged financial harm and decided it was too speculative to be an immediate interest in the outcome of the litigation that would support standing. In this appeal PWIA asserts it has identified interests that are not too speculative to support standing.

In *Matthews International*, the appellant was an economic competitor of the person who received an air quality permit exemption. The Board determined that the only interest asserted by the appellant was an interest as an economic competitor and the only harm alleged was the harm that the appellant may be placed at a competitive disadvantage. The Board decided that the appellant's narrow interest as an economic competitor was not an interested protected by the Air Pollution Control Act.[14] The Board decided that the appellant lacked standing under these circumstances.

In *Matthews International*, the appellant claimed that a newly permitted bronze foundry would compete with appellant's bronze foundry for at least some of the market that the appellant's foundry currently enjoyed. The Appellant claimed it would sustain financial harm and be at a competitive disadvantage if its competitor's operations were exempt from permitting requirements and the appellant were not. The appellant did not identify any specific facts to support its argument that it had standing, and it merely relied upon its claim that it would suffer financial harm because its bronze foundry would be at a competitive disadvantage. In the absence of any specific allegations of harm the Board applied the "zone of interest" analysis to

[14] The Act of January 8, 1960, P.L. 2119 as amended; 35 P.S. §§ 4001.1 *et seq.*

conclude that the appellant lacked standing. *Matthews International v. DEP*, 2011 EHB at 406-408 *citing Nernberg v. City of Pittsburgh*, 620 A.2d 692 (Pa. Cmwlth. 1993).[15]

In *Matthews International* the Board also distinguished two earlier Board decisions in which the Board had determined that claims of financial harm were sufficient to support standing. *Highridge Water Authority v. DEP*, 1999 EHB 27 and *Perkasie Borough Authority v. DEP*, 2002 EHB 75.[16] In both of these decisions the Board relied upon specific allegations of financial harm to determine that the appellants had standing. In *Highridge Water Authority*, the Board decided that the financial impact on Highridge of a permit, issued to one of its major customers was sufficient to confer standing where Highridge's Executive Director testified extensively to the economic harm that Highridge would suffer as a direct result of the Department's action under appeal. *Highridge Water Authority*, 1999 EHB at 32-33. In *Perkasie Borough Authority*, the Board decided that a municipal sewer and water authority, which was a member of a regional sewer authority, could defeat a motion for summary judgment challenging its standing to appeal the Department's issuance of a permit to another municipal sewer and water authority, which was also a member of the regional sewer authority. The appellant's allegations that the construction of the newly permitted facility would force the appellant to raise its rates to pay for the new facility were sufficient to defeat a motion for summary judgment. In

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[15] The Board also cited the *Upper Bucks County Vocational-Technical School Education Ass'n v. Upper Bucks County Vocational Technical School Joint Comm.*, 474 A.2d 1120 (Pa. 1984) as authority for the "zone of interest analysis. In the *Upper Bucks County* decision the Pennsylvania Supreme Court held that a union representing teachers at a school had no standing to challenge the school's failure to comply with the state statute that mandated 180 days of school. The Pennsylvania Supreme Court decided that teachers' contract rights to compensation and retirement benefits were not within the zone of interests protected by the 180-day requirement and the teachers, and the union as their representative, did not have an immediate interest as to confer standing. *Upper Bucks County*, 474 A.2d at 1122-23.

[16] The Board also distinguished *Mill Services, Inc. v. DER*, 1980 EHB 406. The Board in the *Matthews International* decision did not consider the Board's earlier *Mill Services* decision as controlling because it was decided prior to the decisions in *Nernberg* and *Upper Bucks County* which applied the "zone of interest" analysis.

both of these earlier decisions the Board relied upon specific allegations of financial harm to support a finding that the appellants had standing.

Specific allegations of financial harm or competitive injury may be sufficient to confer standing as the *Highridge Water Authority* and *Perkasie* decisions demonstrate. General allegations of financial harm or competitive injury are not sufficient to confer standing unless the statutory scheme is designed to protect such general competitive interests within the zone of interest. In *Matthews International* there were no specific allegations of financial harm or competitive injury, and the appellant only made general allegations that the appellant "may be placed at a competitive disadvantage." *Matthews International v. DEP*, 2011 EHB at 408.

Neither of the earlier Board decisions, relied upon by HCP, support an absolute rule that financial or competitive interests may never support standing unless such general financial or competitive interests are within the zone of interests protected by a particular statute. Appellants that identify specific financial or competitive interests and harm to those specific interests may have standing if those specific interests in the outcome of the litigation are nevertheless direct, immediate and substantial. Generalized non-specific financial or competitive interests will not confer standing, but specific financial and competitive interests may. By focusing on the specificity of the allegations of financial or competitive interests, the Board is able to harmonize the Board's earlier decisions.

In addition, the Board's decision in *Matthews* relied heavily upon Commonwealth Court's decision in *Nernberg*. A close reading of the *Nernberg* decision supports the position that the specificity of the allegations of harm to financial or competitive interests is a consideration in deciding whether such interests and claims of harm will support a challenger's standing. In *Nernberg*, Commonwealth Court examined whether owners of apartments situated

near the University of Pittsburgh, who rented to college students, had standing to challenge a conditional use approval issued by the Pittsburgh City Council for the construction of a student residence facility. The Commonwealth Court agreed with the challengers that Local Agency Law applied to the challenge and Section 752 of the Local Agency Law addresses standing requirements and states:

> Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeal by or pursuant to Title 42 (relating to judiciary and judicial procedure).

2 Pa. C.S.A. § 752. The challengers in *Nernberg* asserted that this "aggrieved person" language of the Local Agency Law provides a broad more liberal basis for standing than the traditional standing rules.

Commonwealth Court agreed with the challengers in *Nernberg* that the "aggrieved person" language under the Local Agency Law established a more liberal standing rule than the traditional standing rules established under the *William Penn Parking Garage*. *Nernberg* 620 A.2d at 695. Section 752 of the Local Agency Law contains identical "aggrieved person" language as Section 702 of the Administrative Agency Law ("AAL"). 2 Pa. C.S.A. § 702. Commonwealth Court relied upon the case law construing Section 702 of the AAL to distinguish the standing requirements arising under Section 752 from the traditional standing requirements under *William Penn Parking Garage*. *Nernberg,* 620 A.2d at 694-695. Under the statutory provisions in Section 752, as well as Section 702, Commonwealth Court concluded that the challengers only had to demonstrate that they had a direct interest in the government action (the conditional use approval) and that they were aggrieved by the decision to issue the approval.

Id.[17] A person challenging an action under the Local Agency Law or the AAL must merely have a direct interest that is adversely affected by the action to have standing to challenge the action. *Id.* n.8

Commonwealth Court agreed with the trial court in *Nernberg* that the harm alleged by the challengers was the mere possibility of competition and that this mere possibility of competitive harm was not sufficient to confer aggrieved party standing in a zoning challenge. Commonwealth Court concluded that the "zoning ordinance was not part of a regulatory scheme to protect against competitive injury and thus competition is not the kind of direct injury which give rise to standing in a zoning appeal." *Nernberg*, 620 A.2d at 696.

It is also important to note that the challengers in *Nernberg* did not appear before the local agency to offer any evidence of how the new student residences caused them harm. Other than the possibility of competition, there was no evidence in the record that the challengers were aggrieved or had a direct interest in the adjudication upon which to find standing to appeal the grant of the conditional use. Commonwealth Court also affirmed the trial court's decision not to grant the challenger's Motion to Supplement the Record with evidence of the challengers' aggrieved party status. The challengers were not entitled to an additional opportunity to present evidence to support their standing because they failed to appear at the earlier public hearing to enter evidence in the record to support standing. Commonwealth Court concluded:

> Even if the objectors might otherwise have had standing, they failed to seize the moment by presenting evidence at the public hearing.

Nernberg, 620 A.2d at 697. The mere possibility of competition for student housing was insufficient to confer standing, and the challengers in *Nernberg* missed their opportunity to

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[17] Under the traditional *William Penn Parking Garage* standing requirements, a person also has to establish a substantial and immediate interest in the outcome of the litigation. *Nernberg*, 620 A.2d at 694.

provide specific evidence at the public hearing to support their claim of a direct competitive interest and harm to that interest. Commonwealth Court left open the possibility that the challengers could have had standing, if they had seized the moment and presented specific evidence to support standing at the public hearing. The challengers in *Nernberg* simply relied upon the general allegation of competitive harm and did not allege any specific evidence of their competitive interests or harm to those interests. These general allegations of harm to their competitive interests were insufficient to confer standing.

One final comment about the *Nernberg* decision. In *Nernberg*, Commonwealth Court applied the "zone of interest" consideration to evaluate whether the appellant had a direct interest in the outcome. In *Nernberg* as previously discussed, Commonwealth Court did not apply the traditional standing analysis. Under the traditional standing analysis, the "zone of interest" consideration is applied to determine whether the appellant has an immediate interest in the outcome of the litigation. *Funk v. Wolf*, __A.3d__ (No. 467 M.D. 2015 Pa. Cmwlth. filed July 26, 2016); *Annette Logan v. DEP*, EHB Docket No. 2016-091-L (Opinion dated August 2, 2016). Because the Board applies the traditional standing analysis, and not the less onerous analysis applied in *Nernberg,* the Board will also evaluate the "zone of interest" consideration in the same manner in connection with the evaluation of the immediate interest.

There is a second basis to distinguish the *McCutcheon* and *Matthews International* decisions. HCP relies solely on a "zone of interest" argument to assert that PWIA decisions lack standing without recognizing the limitations on this consideration that the Pennsylvania Supreme Court has identified. In its motion, HCP has asserted that PWIA's or its members' competitive or financial interests are not within the zone of interest protected by the two statutes in

question.[18] HCP asserts that PWIA lacks standing based upon this consideration alone. While the "zone of interest" consideration can be part of a test to determine whether a party has an immediate interest to support standing, the "zone of interest" consideration "does not amount to a requirement." *Johnson v. Am. Std.*, 8 A.3d 318, 331 (Pa. 2010). In *Johnson*, the Pennsylvania Supreme Court explained:

> Thus, under *William Penn Parking Garage*, we observed that when a party falls within a zone of interests, this fact would permit "standing [to] be found more readily." *Id. at 284.* This analysis, however, does not amount to a requirement that one be in the zone of interests for the immediacy prong of a standing analysis to be satisfied. Four years later, this Court reiterated the notion that the zone of interest analysis could be used as a guideline for finding standing, but not an absolute test.

Johnson v. Am. Std, 8 A.3d at 331. The "zone of interest" consideration is therefore only a guideline to aid courts in finding immediacy. The Pennsylvania Supreme Court further concluded:

> We stress, however, that such a consideration is merely a guideline that may be used to find immediacy, and not as an absolute test, as the Superior Court used below.

Johnson v. Am. Std, 8 A.3d at 333. HCP asks the Board to follow the same absolute test that the Pennsylvania Supreme Court rejected in *Johnson*.

The Board rejects HCP's suggestion that we only consider the "zone of interest" consideration to evaluate PWIA's standing and will follow the Pennsylvania's Supreme Court direction to apply this consideration as a guideline and not as an absolute rule. The standing inquiry is not, in all, cases limited to the "zone of interests" protected by statute. Appellants have other means to demonstrate standing. In rejecting the "zone of interest" consideration as an

[18] SWMA, 35 P.S. §§ 6018.1 *et seq*., and Act 2, 35 P.S. §§ 6026.101 *et seq*.

absolute rule, the Board also recognizes that competitive or financial interest may support standing beyond the narrow "zone of interest" consideration suggested by HCP. The focus is whether the alleged competitive or financial interests and the harm to those interests is too general or speculative to support standing. Appellants may rely upon competitive or financial interests and harm to those interests to demonstrate standing, even if these interests are not within the "zone of interest" so long as they demonstrate a substantial, immediate and direct interest in the outcome of the appeal.

In support of its standing, PWIA asserts that it has identified sufficient interests and harm to those interests that is not too speculative or general to support its claim that it possesses standing to pursue this appeal. PWIA, however, agrees with HCP that the Department's issuance of the approval to HCP would place its members at a competitive disadvantage. PWIA disagrees with HCP that this alleged economic harm is the sole basis for determining whether PWIA and its members have standing to challenge the issuance of the approval to HCP. PWIA asserts that the record makes it clear that the primary reason for the current appeal is that in issuing the approval to HCP, PWIA members were being unfairly or disparately treated under Pennsylvania's residual waste regulatory program under the SWMA. PWIA asserts that it is not fair or lawful to allow HCP to accept and beneficially use drill cuttings from off-site natural gas drilling operations without a residual waste permit where PWIA's members are required to obtain residual waste permits to conduct similar activities.

According to PWIA, its members, which operate waste disposal facilities, are not allowed to accept drill cuttings for disposal without a permit required under the SWMA. To obtain a landfill permit for a new or expanded landfill PWIA asserts that it takes its members three to six years. To accept drill cuttings, PWIA alleges that its member have to comply with the Form U

process for each oil and gas drilling site that seeks to dispose of its residual waste at the permitted landfill. PWIA specifically asserts that the permitting process, which PWIA members are subject to, is time consuming, expensive and burdensome including an extensive process for public notice, public and host municipality participation and public comments. PWIA also alleges that there are also specific bonding requirements and post-closure requirements for permitted waste disposal sites. PWIA asserts that its members have a financial interest in their permitted facilities, and these interests will be harmed if the residual waste regulations are not fairly applied to others subject to these requirements.

In contrast to the detailed regulatory requirements imposed on PWIA members to be allowed to accept drill cuttings for disposal, PWIA asserts that the Department allowed HCP to accept and beneficially use drill cuttings on the HCP Site from off-site drilling operations without a permit in violation of the law. PWIA asserts that this approval treats PWIA members unfairly and subjects them to disparate treatment under the SWMA and the regulations promulgated thereunder because it allows HCP to accept and beneficially use drill cuttings from off-site oil and gas drilling operations without a residual waste permit or approval.

PWIA has asserted competitive or financial interests, but it has provided the Board with specific allegations to identify its specific competitive or financial interests that PWIA members have in their permitted waste disposal facilities. PWIA has identified members that currently accept oil and gas drill cuttings for disposal. PWIA has alleged harm to those identified interests if HCP is allowed to accept and beneficially use residual waste without a permit that PWIA asserts is required as a matter of law. PWIA has alleged a residual waste permit is required to conduct the activities authorized by the Department's approval, and PWIA and its members are unfairly treated in a disparate manner if HCP is allowed to proceed without a permit. The

specificity of PWIA's allegations of its interests and harm to its identified interests distinguishes this case from the Board's prior decisions in *Matthews International* and *McCutcheon.* The specificity of its allegations allows the Board to apply the Board's decision in *Highridge Water Authority* and *Perkasie Borough Authority* to deny HCP's motion for summary judgment.

The Board finds that PWIA's interest is substantial because PWIA and its members have an interest in the outcome of the challenge to the approval that surpasses the common interest of the public. PWIA members are subject to the residual waste regulatory program requirements and have an interest in the fair and non-disparate implementation of those requirements. PWIA's interest is direct because PWIA members have expended considerable time, effort and resources to comply with the residual waste regulations and some of PWIA members currently accept drill cuttings for disposal at their facilities. The Department's alleged failure to require HCP to secure a permit required by law provides HCP with an unfair advantage to accept and beneficially use drill cuttings that is not available to PWIA. PWIA's interest in the outcome of this appeal is immediate because the harm to PWIA and its members is not remote or speculative. If PWIA is correct that the Department issued the approval to HCP without authority, then PWIA and its members, which currently accept drill cuttings at their permitted facilities, will suffer harm as a result of HCP's receipt of an unfair disparate and unlawful advantage.[19] PWIA has not merely relied upon a general concern of competitive disadvantages but it has provided the Board with specific statements to support its financial interests and its interest in having the residual waste regulatory program implemented in a fair, non-disparate and lawful manner.

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[19] In determining whether a party has standing a court is concerned with the question of who is entitled to make a legal challenge and not the merits of the challenge. *Unified Sportsmen v. Pa. Game Commission*, 903 A.2d 117, 122 (Pa. Cmwlth. 2006).

If PWIA's claim to standing were not already established as set forth above, PWIA has also identified another important consideration in evaluating its standing claim. PWIA has also asserted that the Department's approval was granted without compliance with all applicable legal requirements including those which require that the Department provide public notice and an opportunity for public comment. PWIA's Brief in Opposition to HCP's Cross Motion for Summary Judgment at 1-2. PWIA claims that the Department ignored applicable permitting requirements that mandate public notice of receipt of permit applications that provide for an opportunity for public comment and that require public notice of its decision to grant the approval. PWIA also asserts that these permitting requirements regarding public notice are considerations in evaluating whether PWIA has standing. The Board agrees with PWIA that a failure to provide mandated public notice is a consideration when evaluating whether an appellant has standing. *See Prizm Asset Management Company, LLC et al. v. DEP*, 2005 EHB 819 and *Richard L. Stedge v. DER*, 2015 EHB 577. Both of these decisions discuss whether the alleged failure to receive proper public notice is a consideration when evaluating whether an appellant has standing where the appellants claim that they were denied required public notice.

In *Prizm Asset Management*, Judge Krancer in a one-judge opinion, discussed whether two competitors for a proposed commercial mall development had standing as members of the public to challenge whether the Department failed to provide proper public notice for an NPDES stormwater construction permit before it was issued.[20] In this opinion, the Board declined to decide the standing issue, but the Board suggested that a failure to provide proper public notice

[20] A major concern discussed in this earlier opinion is whether standing as to lack of notice entitled the appellant to raise any objection beyond the public notice objection under *Florence Township v. DEP*, 1996 EHB 282, 289-290. This concern is no longer present because the Board has more recently rejected issue specific standing. *See Citizen Advocates United to Safeguard the Environment v. DEP*, 2007 EHB at 647.

required by law may be sufficient to establish standing of a person entitled to receive public notice, including a person which could not otherwise establish standing as a mere economic competitor. In the opinion, Judge Krancer found:

> In addition, there is more than just a bare economic competitive interest of PRIZM's and PREIT's in this case. In addition to their interest as competitors, they are members of the public who were entitled to notice of the change in the permit application but did not receive it. That interest is distinct and separate from their interest as competitors. The right to public notice, by its very nature, is a right granted to everyone in the public. That would include economic competitors and everyone else. It is virtually definitional that the notice provisions of the law are intended to protect the right of the public to have proper notice and that protection of that right to receive public notice is the essence of the policy underlying the legal rules requiring public notice.

Prizm Asset Management, 2005 EHB at 838. The Board concluded that the appellants, which were economic competitors, had a right to receive the required public notice.[21]

More recently, the Board, in a full Board decision, discussed whether an alleged failure to receive proper notice was sufficient to confer standing. *Richard L. Stedge,* 2015 EHB at 594-95. While the Board did not decide that failure to provide proper public notice was sufficient alone to support standing, the Board decided that claims of deficient notice are an important consideration to support a Board's finding that an appellant had standing. *Richard L. Stedge*, 2015 EHB at 595. [22] The Board held that the appellant had standing "[i]n considering these alleged harms together—harm to his enjoyment of the area and failure to receive proper

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[21] Under the NPDES permitting regulations the Board observed that the amended permit application had to be renoticed before the permit was issued.

[22] In *Richard L. Stedge*, the Board distinguished the Pennsylvania Commonwealth Court decision in *Campbell v. Dep't. of Envtl. Res.*, 396 A.2d 870, 871 (Pa. Cmwlth. 1979) in which Commonwealth Court held that appellants could not rely on claims of deficient notice on behalf of persons not a party to the appeal to support the appellant's standing. In *Richard L. Stedge*, and in this appeal, the appellants claimed they were entitled to public notice.

notice…." *Id.* The *Prizm Asset Management* and *Richard L. Stedge* decisions establish that a claim of a failure to receive public notice, required by law, is a consideration when evaluating whether an appellant has standing to challenge a Department action.

There is one last point about failure to receive public notice and its relationship to standing that the Board should mention. In *Matthews International*, the Board evaluated an appellant's standing in the context of a claim of a deficient public notice. In this earlier appeal, the Department advised Granite Resources Corporation that its facility was exempt from the plan approval on permitting requirements because the facility constituted a source of minor significance under 25 Pa. Code § 127.14(a)(8). This type of Department approval does not involve public notice or an opportunity for public comments.[23] An appellant challenged the determination of minor significance. In *Matthews International,* the Board rejected an argument that an appellant had standing under Section 10.2 of the APCA which provides statutory standing to anyone who participated in the public comment process established for permits issued under the APCA. See 35 P.S. § 4010.2. Because the Department granted the exemption from the permitting requirements under 25 Pa. Code § 127.14, the Board decided that the statutory standing procedures under Section 10.2 were never triggered. The Board believes that this situation is distinguishable from the situation in this case. The Department has clear authority to issue the exemption under 25 Pa. Code § 127.14 and more importantly, the procedures to grant the exemption under this regulation do not provide for public comments. *Matthews International* 2011 EHB at 409. This aspect of the *Matthews International* decision regarding a claim of lack

[23] Public notice and an opportunity for public comments is only required under Section 127.14 when the Department establishes or modifies a list of sources meeting the requirements of subsections (a)(8) or (a)(9). 25 Pa. Code § 127.14(a)(8)-(9). In *Matthews International*, the Department made a case specific determination that a facility was exempt from the requirements, which did not involve any list of sources.

of public notice is therefore distinguishable because the procedures under Section 127.14 do not require public notice.[24]

In this appeal the Board is in a similar position as it was in *Richard L. Stedge*. PWIA has claimed that the Department failed to follow applicable permitting procedures under the residual waste regulation, including those for the general permits for the beneficial use of a residual waste. These residual waste permitting procedures mandate public notice and opportunities for public comments and participation. *See* 25 Pa. Code §§ 287.151-154 and 287.623.[25] The Department's alleged failure to provide the required public notice associated with residual waste permitting requirements under the SWMA is an important consideration that supports the Board's decision that PWIA has standing to challenge the approval the Department granted to HCP.

PWIA's claim that it was denied public notice mandated by the residual waste permitting regulations supports its claim that it has standing to challenge the approval as an action that is not permitted by law. If PWIA is correct that the Department lacks the authority to issue the letter approval to HCP and that a residual waste permit was required, the Department's action to issue the approval without any public notice deprives PWIA and its members of the public notice mandated by law. The lack of required public notice supports a finding that PWIA's interest is direct and immediate. If the Department had followed the law, as alleged by PWIA, public notice would have been provided and PWIA has a direct and immediate interest in challenging the approval which deprived PWIA of its right to public notice.

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[24] To the extent the *Matthews International* decision is not distinguishable on the issue whether the failure to provide required public notice is a consideration in evaluating whether an appellant has standing, the Board overrules its prior decision in *Matthews International* to this limited extent.

[25] Sections 287.151-154 establish public notice requirements for individual permits and Section 287.623 establishes public notice requirements for general permits.

In conclusion, PWIA has alleged a sufficient basis to establish its standing to challenge the approval that the Department issued to HCP. PWIA has not merely alleged a general interest as a competitor of HCP to support its standing, but it has identified specific instances in which PWIA's interests and those of its member companies will be impacted by the Department's decision to issue the approval without compliance with residual waste permitting requirements. PWIA has described how, in its view, the Department's failure to properly and fairly administer its residual waste program will adversely impact the interests of PWIA's member companies. Finally, PWIA has asserted a residual waste permit was required and that it was entitled to public notice of the Department's decision and an opportunity to participate in the public participation procedures mandated by the Department's residual waste permitting regulation. *See* 25 Pa. Code §§ 287.151-154 and 287.623. The Department's alleged failure to follow the permitting procedures, to provide public notice and to follow the mandated public participation procedures is an important consideration in evaluating whether PWIA has standing to challenge the Department's decision to issue the approval to HCP without following the residual waste permitting procedures that include public notice and opportunities for public participation. The Board concludes that PWIA has a substantial, direct and immediate interest in the approval issued to HCP to support its standing in this appeal.

Taxpayer Standing exception to the standing requirements.

In addition to its other arguments that it has traditional standing, PWIA also asserts that it has standing under a "Taxpayer Standing" exception to the traditional standing requirements.[26] *Piventi v. Pa. Dep't of Labor and Indus.,* 900 A.2d 1017, 1021 (Pa. Cmwlth. 2006). The

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[26] PWIA has apparently decided to rename the Taxpayer Standing exception to the traditional rules of standing and to call it the "otherwise go unchallenged" rule. The Board sees no benefit in changing the name of the Taxpayer Standing exception and will use the exception's well-established name.

recognition of standing based upon taxpayer status is an exception to the traditional requirements of standing. The reason for the exception was identified by the Pennsylvania Supreme Court as:

> [T]he fundamental reason for granting taxpayer standing is simply that otherwise a large body of government activity would go unchallenged in the Courts.

Application of Biester, 409 A.2d 848, 853 (Pa. 1979); *Consumer Party of Pennsylvania v. Commonwealth,* 507 A.2d 323, 329 (Pa. 1986); *Fumo v. City of Philadelphia*, 972 A.2d 487, 503 (Pa. 2007); *Lawless v. Jubelirer*, 789 A.2d 820, 826-27 (Pa. Cmwlth 2001). Under *Biester*, a taxpayer has standing to challenge a government action if:

> (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim.

Stilp v. Commonwealth, 940 A.2d at 1233. PWIA asserts that it also satisfies the five-part *Biester* test to support the Taxpayer Standing exception in this appeal as an alternative basis for standing.

HCP disagrees and asserts that the narrow Taxpayer Standing exception to the general standing rules is inapplicable to the appeal at hand as a matter of law. In addition, HCP asserts that PWIA has failed to satisfy any of the five conditions set forth above. The Board disagrees with HCP's position. PWIA is entitled to rely upon the narrow Taxpayer Standing exception to the general standing rules if it meets the five part *Biester* test. This exception provides an alternative basis for the Board to conclude that PWIA has standing to pursue its appeal because PWIA has met each of the five conditions set forth above. Regarding the first factor, the record before the Board supports the conclusion that Department's "approval" would otherwise go unchallenged if PWIA's appeal was dismissed. The Department held various private meetings

with HCP regarding HCP's proposal and exchanged various private letters with HCP outside the boundaries of established regulatory procedures and provided no public notice of its receipt of HCP's proposal or of its approval of HCP's plan.[27] The secrecy with which the Department and HCP conducted their discussions belies HCP's claim. In the absence of PWIA's diligence to inform itself regarding these private discussions, the Department's action would have otherwise gone unchallenged.

PWIA has little difficulty meeting the second factor. HCP is the person directly and immediately affected by the Department's approval, and it is obviously not inclined to challenge it. Moreover, the Department's December 13, 2013 letter to HCP suggests that it was HCP's idea to rely upon Section 902(a) as authority for the approval. Why would HCP challenge its suggested approach?

PWIA is also able to establish that the Board's review of the Department's decision to grant the approval to HCP is appropriate. PWIA asserts that the approval is an appealable action of the Department that was granted in violation of the state laws that the Department is directed to implement. The Board's review of such Department approvals is appropriate. The Board has jurisdiction to hear appeals of Department action. 35 P.S. § 7514. In addition, there are also no other readily apparent channels for redress of PWIA's challenge to the Department's approval.

Finally, the Board agrees with PWIA that there is no other person who is better suited to challenge the Department's approval. PWIA and its members assert that they are harmed by the Department's failure to apply its residual waste regulations in a fair, non-disparate and lawful manner. HCP is the beneficiary of the challenged Department's action and HCP's and the

[27] HCP believes that general public knowledge that HCP received drill cuttings and random newspaper articles regarding HCP's use of drill cuttings were sufficient to alert others who could have appealed DEP's approval. The Board disagrees that these random and general references in the press were sufficient to alert anyone that DEP had taken a specific action that could be appealed to the Board.

Department's efforts to avoid public notice and comment regarding the private nature of discussions with HCP, ensures that there were no other persons with specific knowledge about the approval to assert the challenge to the approval that PWIA has filed. The Board agrees that Pennsylvania Courts will "most often" use the Taxpayer Standing exception when those directly and immediately affected by the action are beneficially as opposed to adversely affected. *Fumo v. City of Philadelphia*., 972 A.2d at 503-504, *quoting Biester*, 409 A.2d at 552. HCP is clearly the beneficiary of the Department's approval, because it is the recipient of the approval, which PWIA asserts is not allowed under law. PWIA is therefore able to establish Taxpayer Standing under *Beister,* and it is entitled to pursue its appeal under this alternative basis for standing.

HCP makes an additional argument in support of its position that PWIA lacks standing to pursue this appeal that the Board should briefly address. HCP asserts that "In its appeal PWIA did not allege that it or any of its members have standing…" HCP Brief in Support of its Cross-Motion for Summary Judgment at 11. Under the Board's case law, an appellant need not demonstrate or even allege standing in the appellant's notice of appeal. *See Winner v. DEP*, 2014 EHB 135. Once a party challenges standing, an appellant must then come forward and identify facts supporting its standing. *Matthews International*, 2011 EHB at 404. PWIA was not required to allege standing in its notice of appeal. PWIA is now entitled to identify for the Board those facts that support its argument that PWIA has standing to challenge the approval. For the reasons set forth above, the Board now finds that PWIA has identified a basis to support its standing to pursue its appeal in the context of addressing HCP's cross-motion for summary judgment.

In its Response to HCP's Cross-Motion for Summary Judgment, PWIA asserts that HCP devised a "plot" to convince the Department to approve its "nefarious ends," which was an

approval to use drill cuttings on the HCP Site without a permit. The Board has decided that HCP is not entitled to judgment as a matter of law on the issue of PWIA's standing. For the reasons set forth earlier in this opinion, the Board believes that PWIA has standing and on this basis alone, the Board denies HCP's Cross-Motion for Summary Judgment.[28] The Board did not find it necessary to consider PWIA's allegations of a nefarious plot to address the standing issue.

There is one more important point to note regarding standing. As the Board previously stated:

> The purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether the appellant is the appropriate party to file an appeal from an action of the Department.

Ziviello v. DEP, 2000 EHB 999, 1005. Whether PWIA's arguments challenging the Department's action to grant the approval to HCP have merit is of no consequence in the context of deciding the challenge to PWIA's standing. *Citizen Advocates United to Safeguard the Environment v. DEP,* 2007 EHB at 675-761 (A person's standing turns on assessment of objective threat to a person's interests from Department action and not the merits of action.) In this appeal, PWIA has identified objective threats to its interests to support its standing to challenge the approval that the Department granted to HCP. PWIA is the appropriate party to challenge the approval the Department issued to HCP. These arguments are sufficient to defeat HCP's cross-motion for summary judgment. Having decided to deny HCP's cross-motion for summary judgment, the

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[28] Part of the nefarious plot alleged by PWIA was a strategy on the part of HCP to convince the Department to transfer the decision making authority from the Regional staff to Central Office Staff. The November 21, 2014 Approval Letter to HCP was from George Hartenstine, Director, Bureau of Environmental Cleanup and Brownfield, which is a Central Office Bureau. This fact appears to be consistent with PWIA's assertion about HCP's strategy, however, the Board does not have to address PWIA's claims about HCP's nefarious plot to resolve this appeal on the merits. PWIA's nefarious plot claims were not a factor in the Board's decision.

Board is now able to consider the merits of PWIA's claims in the context of its motion for summary judgment.

PWIA's Motion for Summary Judgment

In its motion for summary judgment PWIA asserts that the Department erred in issuing the approval to HCP to accept drill cuttings from natural gas drilling operations at the HCP Site without a permit. In support of its position, PWIA asserts that drill cuttings are clearly a residual waste and that the SWMA, 35 P.S. §§ 101 *et seq.*; and the regulations governing the management of such wastes, including the beneficial use of residual waste, at 25 Pa. Code Chapter 287 require a permit for such activities.

PWIA recognizes that Section 902(a) of Act 2, 35 P.S. § 6026.902(a) provides an exemption from the requirement to secure a permit for remediation activities undertaken entirely on the Act 2 remediation site, but PWIA asserts that this permit exemption is not applicable here. In PWIA's view the remediation activities at the HCP Site involving the use of drill cuttings are not undertaken "entirely on the site" because the drill cuttings do not originate on the HCP Site. The drill cuttings are generated at active and unrelated natural gas drilling sites across the state. These residual waste materials are transported to the HCP Site for beneficial use on the HCP Site by HCP. PWIA asserts that HCP needs a residual waste permit to accept and beneficially use the drill cuttings that originated at active off-site natural gas drilling operations.

HCP disagrees with PWIA's position. HCP agrees with PWIA that the drill cuttings are a residual waste but HCP argues that the Department "acted in full compliance with applicable law in issuing the approval…to HCP to beneficially use drill cuttings, originating from off-site for remediation purposes at HCP's Act 2 site in Hazleton, PA…without a solid waste permit." HCP's Response to PWIA's Motion for Summary Judgment at 1. The legal dispute between

PWIA and HCP is whether DEP has the legal authority under Section 902(a) to issue the approval under appeal to HCP to accept and beneficially use the drill cuttings from active and off-site natural gas drilling operations on the HCP Site without a residual waste permit.

The Department has not taken a position in writing on this critical legal dispute. The Department filed a letter with the Board indicating it "will not file a separate response of its own, nor does the Department join in HCP's response." The Department's response was puzzling. PWIA challenged the Department's legal authority to issue the approval, while HCP asserted the Department complied with all applicable laws when it issued the approval. The Department apparently did not want to express any opinion on the challenge to its authority to issue the approval. Because the Board wanted the Department's position on the contested legal issue of the Department's authority to issue the approval, the Board issued an order specifically directing the Department to file a response to PWIA's motion for summary judgment as required by the Board's Rules. In response, the Department "respectfully" declined to comply with the Board's Order and filed another letter. While this second letter was longer it merely observed that "both HCP and PWIA have defensible legal arguments," but the Department again declined to state a position on the critical legal dispute concerning its legal authority to issue the approval.[29] The Department did state that it now believed "it would be unfair for it to revisit or rescind its approval of the permit previously granted to HCP."

The Department's repeated failures to articulate a legal position for its approval in writing cast a shadow over its approval. If the Department was unwilling or unable to set forth a written legal justification to support its approval, then the Department's lack of a written position

[29] The letter was drafted from the perspective of a disinterested observer providing commentary on the positions of others. On the issue of the Department's authority to take an action under appeal, the Department should never be a disinterested observer.

supports PWIA's position that the Department's approval was not authorized by law. The Department's silence is implicit recognition of the lack of legal authority to issue the approval. The Board will now have to decide this important legal issue about the nature of the Department's legal authority under Section 902(a) without knowing the Department's position regarding the scope of its authority to a grant statutory permit exemption, in the form of an approval, under Section 902(a).

The Board agrees with the Parties that Section 902(a) provides a permit exemption for remediation activities on Act 2 sites under certain circumstances. Section 902(a) provides:

> (a) General rule – A state or local permit or permit revision shall not be required for remediation activities undertaken entirely on the site if they are undertaken pursuant to the requirements of this Act.

35 P.S. § 6026.902(a). Under this authority, HCP believes that the Department has the authority to review proposals, such as HCP's Project Plan, and to issue an "approval" of its Project Plan including twenty-three detailed conditions contained in its November 21, 2014 letter under appeal.

Implicit in the Department's letter approving HCP's proposal is a Department position that it has authority under Section 902(a) to review proposals or applications for exemptions and to grant "approvals" with detailed conditions. This implicit position is surprising for several reasons. First, the language in subsection (a) of Section 902 appears to be self-executing. A permit, including a permit issued under the SWMA, is not required for remediation activities undertaken entirely on the site if they are undertaken pursuant to the requirements of Act 2. There is no express authority for an active Department role including the Department's review of proposals, such as HCP's Project Plan, for a permit exemption or for its issuing "approvals" under this provision with detailed conditions. This lack of express authority in subsection (a) is

in stark contrast with the Department's authority in subsection (b) of Section 902 which provides:

> **(b) Applicable requirements.**—The Department may waive in whole or in part, in writing, otherwise applicable requirements where responsible persons demonstrate that any of the following apply:
>
> > (1) Compliance with a requirement at a site will result in greater risk to human health, safety and welfare and the environment than alternative options.
> >
> > (2) Compliance with a requirement at a site will substantially interfere with natural or artificial structures or features.
> >
> > (3) The proposed remedial action will attain a standard of performance that is equivalent to that required under the otherwise applicable requirement through the use of an alternative method or approach.
> >
> > (4) Compliance with a requirement at a site will not provide for a cost-effective remedial action.
>
> The Department may not waive the remediation standards established under sections 301, 302, 303 and 304.

35 P.S. § 6026.902(b). In subsection (b) the General Assembly provided the Department with express authority to waive, in whole or in part, in writing, otherwise applicable requirements where persons demonstrate compliance with any of four statutory criteria. Neither the Department nor HCP assert that the approval at issue here was granted pursuant to subsection (b), but the existence of subsection (b) indicates the General Assembly was well aware of the need to expressly authorize a Department role in issuing waivers under subsection (b). In the absence of express statutory authority, the Department has not promulgated any regulations that establish, describe or even mention the procedures it followed to issue the approval to HCP under subsection (a). In the absence of express regulatory authority for its action, the Department has not adopted any statements of policy that describe the approval procedures

followed in this appeal and announce a Department interpretation of subsection (a) that includes authority for the Department to issue approvals with detailed conditions in response to proposals for permit exemptions. In the record before the Board in this appeal, there is only an exchange of private letters between HCP and the Department.

This series of letters between the Department and HCP received no public notice or opportunity for public comments. Private letters between the Department and a private entity such as HCP may not be the most appropriate means to develop a new regulatory program to grant "approvals" under Section 902(a). The Board, however, need not resolve the question of whether the Department has implicit authority under Section 902(a) to issue approvals with detailed conditions in response to proposals because HCP's approved Program Plan presents a more fundamental legal concern as set forth below. Even if Section 902(a) allows the Department to review proposals and to issue approvals with detailed conditions, such approvals would still have to comply with the express requirements in Section 902(a). For the reasons set forth below the approval issued to HCP does not meet the requirements in Section 902(a) that the permit exemption only covers "remediation activities undertaken entirely on the site."

The basic disagreement between PWIA and HCP regarding the authority to issue the approval to HCP under Section 902(a) is the scope of the permit exemption and meaning of the phrase "permit or permit revision shall not be required for *remediation activities undertaken entirely on the site*…" 35 P.S. § 6026.902(a) (emphasis added). HCP asserts that the remediation activities that the Department approved in its letter qualify for the permit exemption in subsection (a), and PWIA asserts that they do not.

HCP asserts that the permit exemption is broad enough to cover the acceptance and beneficial use of residual waste from off-site sources and unrelated generators so long as the

remediation activities, as defined by HCP, are undertaken entirely on the site. According to HCP, the remediation activities consist solely of the capping of the HCP Site. Since the capping of HCP's Site will occur only on the HCP Site, HCP believes that the remediation activities involving the drill cuttings will only occur "entirely on the site." Once the drill cuttings from off-site, unrelated and active natural gas drilling operations are delivered on-site, according to HCP, the exemption applies because then they will only be used on-site for reclamation activities.

The Board rejects HCP's circular argument and believes that HCP has too narrowly defined the remediation activities that trigger the permit exemption. Several of the approval conditions illustrate the point. Capping of the HCP site is not the only remediation activity associated with the acceptance and use of the oil and gas drill cuttings from off-site operations. Because the drill cuttings are from unrelated off-site operations, they must be transported and deposited on the HCP site. The approved Program Plan and the Department's approval conditions require that the drill cuttings will be placed on a lined staging area after the drill cuttings are tested prior to placement. Processing of the drill cuttings to remove excess moisture and to improve stability is also required. There are also requirements for the rejection of non-conforming drill cuttings. Areas associated with these activities for testing, storage and processing of the off-site drill cuttings present new remediation obligations for HCP beyond the capping activity described by HCP as the "only" remediation activity involving the drill cuttings. By bringing residual waste materials on to the HCP Site from off-site natural gas drilling operations, the acceptance and use of the drill cuttings from off-site operations expand the scope of existing remediation activities required on the HCP Site beyond those needed for just the

remediation of the HCP Site. Now HCP has additional remediation obligations for the drill cuttings transported to the HCP Site.

The acceptance and beneficial use of off-site residual waste creates new remediation obligations on the HCP Site. These new remediation activities are not covered by the permit exemption in Section 902(a) which is limited to "remediation activities undertaken entirely on the site." Bringing new residual waste materials onto the HCP Site for testing and further processing and possible rejection does not fit with the statutory permit exemption in Section 902(a).

In addition, HCP's position ignores the fundamental and obvious fact that the residual waste, the drill cuttings, are generated off-site by natural gas drilling companies which have no apparent connection to HCP or the HCP Site other than these unrelated entities, conduct off-site drilling activities and generate residual waste requiring appropriate management under the SWMA if these materials are removed from the actual drilling sites. The fact that these materials originate off-site, as HCP readily acknowledges, prevents the applicability of the permit exemption in Section 902(a). These residual wastes, which are from off-site operations, have off-site remediation obligations. If you ignore the off-site origin of the drill cuttings and only focus on their use after they are brought onto the Act 2 site, then the permit exemption in Section 902 (a) becomes an open-ended opportunity to bring any waste materials from any off-site locations onto the Act 2 remediation site for beneficial use without a permit. That open-ended permit exemption is not what Section 902(a) allows. Waste materials that are already on an Act 2 site may be used for remediation activities without a permit under Section 902(a), but waste materials from off-site operations or locations have to be transported to the site and accepted for beneficial use at the Act 2 site. Waste materials from off-site operations that are transported to

an Act 2 site from off-site locations for use on the Act 2 site for remediation activities are not covered by the Section 902(a) permit exemption that only covers remediation activities undertaken entirely on the site. The off-site origin of these residual waste material precludes application of the permit exemption in Section 902(a).

HCP's claim that the Department has already issued similar Section 902(a) permit exemptions or other approval for other Act 2 sites under similar circumstances as those at the HCP site is just plain wrong. The other "examples" set forth in HCP's Brief are clearly distinguishable and not applicable here for the reasons set for in PWIA's Reply Brief at 4-5. The first example involved a co-product determination at a Palmerton site involving a bentonite slurry generated during natural gas pipeline installations under 25 Pa. Code § 287.8. A co-product determination under Section 287.8 is obviously different than a permit exemption under Section 902(a) of Act 2. The other examples involved permit waivers issued under Section 902(b) that involved the acceptance of processed residual waste under a general permit issued to a third party. The Parties agree that the approval issued to HCP is not a waiver issued under Section 902(b). In addition, the waivers in the other examples allowed the acceptance of waste materials processed in accordance with a residual waste permit issued to a third party. The approval issued to HCP does not involve processed waste materials processed under a residual waste permit issued to a third party.[30]

HCP also mistakenly claims that the residual waste regulations allow the beneficial use of residual waste without a permit similar to the approval for the HCP Site. This claim is also not supported by a close reading of the residual waste regulations identified by HCP. While HCP is

[30] In the example listed by HCP, a Research and Development General Permit was issued which allowed Clean Earth, Inc. to process and deliver drill cuttings to Act 2 sites for use as capping material. HCP's acceptance and use of drill cuttings under the approval are not subject to this general permit.

correct that a permit is not always required under the residual waste regulations listed by HCP, these regulatory provisions are not applicable here, just as the statutory permit exemption in Section 902(a) is not applicable here.

The examples listed by HCP are clearly not applicable for the reasons set forth below. Section 287.101(d) allows the Department to not require a residual waste permit in emergency type situations. 25 Pa. Code § 287.101(d). HCP is not responding to an accident or other unplanned event requiring immediate action so this provision is not applicable. Section 287.632 allows the Department to waive otherwise applicable permitting requirements in the context of issuing a general permit. 25 Pa. Code § 287.632. This provision does not allow the Department to waive the requirement to get a permit, only identified application or operating requirements. In addition, the Parties agree that the approval under appeal is not a waiver and therefore Section 287.632 is not applicable here. Section 287.102 allows the Department to issue a permit-by-rule which is a permit-by-regulation to meet applicable permitting requirements. A permit-by-rule is still a permit issued by the Environmental Quality Board. All Parties agree that the approval under appeal is not a permit-by-rule and therefore this provision is not applicable here. Section 287.1 defines the term "waste" and allows materials that meet the definition of a co-product or are reused in an industrial or manufacturing process to be excluded from the definition of waste. 25 Pa. Code § 287.1. All Parties agree the drill cuttings in this appeal are not subject to the waste exclusions set forth in the definition of the term "waste" in the Department's residual waste regulations and therefore this provision is not applicable. The SWMA and Section 287.1 define drill cuttings, and under the provisions of the SWMA drill cuttings are excluded from the definition of "solid waste" provided the rock cuttings and related mineral residues created during the drilling are disposed of at the well site in accordance with law. 35 P.S. § 6018.103; 25 Pa.

Code § 287.1. The drill cuttings in this appeal are not disposed of on the well site and therefore this provision is not applicable. Section 287.625 allows the Department to issue Department initiated beneficial use general permits. 25 Pa. Code § 287.625. All Parties agree that there is no Department initiated general permit associated with the approval issued to HCP and therefore this provision is not applicable here.

The existence of the statutory or regulatory provisions listed above does not support HCP's argument that the Department has the authority to issue the approval under appeal. In fact, the specificity of the statutory and regulatory requirements highlighted by HCP under cuts its arguments. There is no similar express regulatory support for the approval or for interpretation of Section 902(a) that HCP asks the Board to adopt, unlike the examples listed by HCP.

In addition, HCP claims that there are no DEP guidance documents that support PWIA's interpretation of the "entirely on-site" language in Section 902(a). The Board agrees with HCP that the Department has not taken a position on this language in any Department guidance document submitted to the Board or in any Brief filed with this Board. The Board nevertheless agrees with PWIA that the Department has clearly taken a position contrary to HCP's position on the issue of whether a waste permit is needed under similar circumstances in the Department's Management of Fill Policy, Do. No. 258-2182-73 (2010) and in related documents entitled "Management of Fill Questions and Answers." *See* PWIA Exhibits F, G, H and I attached to PWIA's Reply Brief. These Department guidance documents clearly state that a general permit is required if the source of the regulated fill is not an Act 2 site and the receiving site is. *Id*. A general permit is not required if both sites are Act 2 sites and the movement of the regulated fill is documented in the cleanup plans and final reports for both sites. *Id*. Here there are active off-

site natural gas drilling sites, where the drill cuttings are generated, and these sites are not Act 2 sites. Under the Management of Fill guidance and related question and answer supporting materials, the Department has announced a clear position that a general permit is required where the source of the materials received at an Act 2 site is not an Act 2 site. The Approval that the Department issued to HCP is clearly inconsistent with the position the Department announced in its Management of Fill guidance documents.

HCP relies heavily upon the affidavit of Mark McCellan as support for its legal position that Section 902(a) authorizes the Department to accept and beneficially use natural gas drill cuttings from offsite drilling operations without any permit or approval under the SWMA or regulations issued thereunder. The Board did not similarly rely upon Mr. McCellan's affidavit for the reasons set forth in this opinion.[31] The Board gave no weight to the assertions of former Deputy Secretary McCellan that the:

> Approval in the form of a letter rather than a permit is entirely consistent with the procedures, policies and practices followed by DEP since 1995

HCP's Exhibit 5. Other than Mr. McCellan's bare statement, the Board was not presented with any evidence to support this position.

The Board fully recognizes that the remediation of an Act 2 site and the proper management of residual waste at a commercial waste disposal site are two distinct situations. Each situation is subject to distinct regulatory requirements, and the requirements for a commercial waste disposal site permitted by the Department are different than those for the remediation of an Act 2 site. Subsection (a) and (b) of Section 902 are legislative recognition of

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[31] The Board happens to agree with Mr. McCellan's April 22, 2014 email to HCP's President, William Renaldi, in which Mr. McCellan indicated that drill cuttings are a residual waste and that beneficial use of a waste can only be approved through the use of a beneficial use general permit. PWIA's Exhibit A at 1.

the difference between these two situations. 35 P.S. § 6026.902(a) and (b). The Board also fully recognizes that the relaxation of some regulatory requirements authorized by Section 902 properly promotes the remediation of Act 2 sites. Section 902(a), nevertheless, includes some requirements that are applicable here, and the approval issued by the Department to HCP in this appeal is not authorized by Section 902(a). To qualify for the permit exemption in subsection 902(a), the residual waste must originate on the Act 2 site and may not be accepted and beneficially used at the Act 2 site from off-site locations without appropriate authorization.

The Board also recognizes that the Department's residual waste regulations do not mandate that all residual waste be managed at commercial waste disposal facilities such as those owned and operated by PWIA's members. The Department has the authority to issue general permits for the beneficial use of residual waste in connection with the remediation of Act 2 sites as evidenced by the earlier appeal of the general permit issued to HCP for use at the HCP Site. *See Citizen Advocates United to Safeguard the Environment v. DEP,* 2007 EHB 632. A general permit for the beneficial use of residual waste can contain requirements that are vastly different than the mandated requirements for commercial residual waste disposal facilities.

HCP also argues that DEP interpretation of the applicability of Section 902(a) to HCP is entitled to significant deference. HCP Brief in Opposition to Motion for Summary Judgment of PWIA at 2, 9-15. The Board wonders what Department interpretation HCP wants the Board to consider because the Department never provided the Board with any written interpretation of Section 902(a) even though the Board ordered the Department to submit a written response to PWIA's Motion for Summary Judgment. HCP attempts to give its version of the Department's interpretation in its Brief. HCP's version is not a substitute for the missing Department

interpretation and HCP's version of the missing Department interpretation is not entitled to deference.[32]

At the end of their arguments, the Department and HCP conclude that the Department's approval has the same protections and requirements as a beneficial use permit for residual waste.[33] HCP's Brief in Opposition at 16; N.T. at 79-95. The Board disagrees that the approval is the equivalent of a residual waste beneficial use general permit as a matter of law. If the Section 902(a) permit exemption is not applicable here, as the Board concludes, then a permit was required. The Department has detailed regulatory requirements for the review and issuance of a general permit for the beneficial use of a residual waste. These detailed requirements include public notice and an opportunity for public comments. Without the benefit of public notice and an opportunity for public comments required for beneficial use general permits, the Board is unable to agree that the substantive requirements of the approval issued to HCP are the same as would be included in a properly issued beneficial use general permit. The public process associated with the Department's review and issuance of beneficial use general permits

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[32] At the oral argument before the Board, the Department voiced an interpretation of Section 902(a). N.T. 79-95. The Department's oral statements are not entitled to any deference because they are late utterances made as part of the Department's untimely litigation strategy. As a general rule, the Department's reasonable interpretations of the environmental regulations it implements are entitled to deference. *See, e.g., Tire Jockey Service, Inc. v. DEP*, 791 A.2d 461, 466 (Pa. 2007). There are exceptions to the general rule and no deference is required for an interpretation developed in anticipation of litigation or in the course of litigation. *See, e.g., Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1154 (Pa. 2009).

[33] This argument that HCP and the Department make undercuts their legal arguments that the permit exemption in Section 902(a) is applicable. If the permit exemption is applicable there is no need to otherwise include the same requirement as a beneficial use permit in the approval. If the approval includes all of the substantive requirements of a residual waste beneficial use general permit, it resembles the permit without all of the public notice requirements that are a key part of the residual waste permitting regulatory program. If the Department wants to issue general permit-like approvals without public notice or the public participation procedures, it needs to secure additional legal authority for such general permit-like approvals which are not subject to public notice requirements.

provides an opportunity and obligation for the Department to consider public comments and to make changes in the proposed general permit in response to appropriate comments.

Even if the substantive requirements in the letter approval would be the same as HCP and the Department suggest, the lack of public notice and an opportunity for public comments is nevertheless sufficient to sustain PWIA's challenge to the approval. The Department's residual waste permitting regulations governing general permits mandate a public process which is missing here. *See* 25 Pa. Code § 287.623. If a permit is required to conduct the remediation activities that HCP wants to conduct using drill cuttings from off-site natural gas drilling operations, then the Department and HCP must follow the required permitting procedures.

In conclusion, HCP asks the Board to extend the scope of the permit exemption in Section 902(a) to allow the acceptance and beneficial use of residual waste from active off-site and unrelated natural gas drilling operations at its HCP site without a permit or approval. Such an extension is unprecedented and inconsistent with the express terms of Section 902(a). The Board therefore views such an extension of the Section 902(a) permit extension under the facts of this appeal as A Bridge Too Far.[34]

Accordingly we issue the following Order.

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[34] A Bridge Too Far is the title of a 1974 book by Cornelius Ryan about the Allies' failed attempt to end World War II in Europe in 1944 by capturing a series of bridges leading into Germany. All of the bridges were secured except for the last one, which ended up being the bridge too far and the Market Garden Plan failed without it. HCP's plans to remediate its HCP Site under the Approval under appeal is likewise a regulatory bridge too far that is not authorized by law even though the Board recognizes and supports the overall objectives of Act 2.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 2014-175-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZELTON CREEK PROPERTIES, LLC, Permittee	:	

O R D E R

AND NOW, this 31st day of August, 2016, it is ordered as follows:

1. The cross-motion for summary judgment filed by HCP is **denied**.

2. The motion for summary judgment filed by PWIA is **granted**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 31, 2016

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

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

For Appellant:
Andrew D. Klein, Esquire
Brian S. Uholik, Esquire
John P. Judge, Esquire
(*via electronic filing system*)

For Permittee:
Michael Klein, Esquire
D. Troy Sellars, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: September 2, 2016**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion for summary judgment challenging the appellant's standing and the appellant's claim that the Department did not act in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

O P I N I O N

This is Friends of Lackawanna's ("FOL's") appeal from the Department of Environmental Protection's (the "Department's") issuance of a solid waste management permit renewal (Permit No. 101247) to Keystone Sanitary Landfill, Inc. ("Keystone") for the continued operation of a municipal waste landfill in Lackawanna County. Keystone has moved for summary judgment on two grounds. First, it argues that FOL lacks standing to pursue this appeal. Second, in the event we do not dismiss the appeal in its entirety due to lack of standing, Keystone asks us to dismiss FOL's objection that the Department's renewal of the permit is inconsistent with the Department's duties and responsibilities under Article I, Section 27 of the

Pennsylvania Constitution, also known as the Environmental Rights Amendment (ERA). FOL, of course, opposes the motion. The Department has remained silent.

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94a; *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, Jun. 6, 2016). The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

Standing

With respect to standing, we have the benefit of the Commonwealth Court's recent Opinion addressing the subject in *Funk v. Wolf*, ___ A.3d ___, No. 467 M.D. 2015 (Pa. Cmwlth. Jul. 26, 2016). For our current purposes, the Court's discussion regarding standing may be distilled down to this: Appellants have standing if they credibly aver that they use the affected area and there is a realistic potential that their use of that area could be adversely affected by the challenged activity. *Id*., slip op. at 21-29. *See also Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 922 (Pa. 2013) (standing can be premised on a serious risk of alteration of the components of parties' surrounding environment); *PennFuture v. DEP*, 2015 EHB 750, 752; *CAUSE v. DEP*, 2007 EHB 632, 673. *See generally* 35 P.S. § 7514(c) ("[N]o action of the department adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the Board."). *Funk* also reaffirms that an association or group has standing if at least one individual associated with the group has standing. *Funk*, slip op. at 24 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TDC), Inc.*, 528 U.S. 167, 183 (2000)); *Malt Bev. Distribs. Ass'n v. PLCB*, 965 A.2d 1254 (Pa. Cmwlth. 2009); *PennFuture*, 2015 EHB at 752. The Court also held that if one party (or person associated with an organization that is the party) has standing, there is no need to address whether other aligned parties also have standing. *Funk*, slip op. at 29-30 n.12 (citing *Callowshill Neighborhood Ass'n v. City of Phila. Zoning Bd. of Adjustment*, 118 A.3d 1214, 1220-21 (Pa. Cmwlth. 2015), *app. den.*, 129 A.3d 1244 (Pa. 2015)).

Applying these principles to the case at hand, it is clear that Keystone's motion for summary judgment must be denied. FOL's response to the motion, including affidavits submitted in support thereof, reveals that multiple persons affiliated with FOL live in and/or use the area around the landfill, and they credibly allege that their use of that area will be adversely

affected if the renewal of the landfill's permit is upheld. Viewing the record in the light most favorable to the nonmoving party (FOL), its individual members have credibly alleged that they have been adversely affected by the landfill's operations through malodors, dust, bird droppings, truck traffic, and interference with aesthetic values. They have concerns about the landfill's impact on their community and their families' health, and can cite specific reasons for those concerns, such as landfill fires (i.e. thermal events), leaking leachate, groundwater contamination, and their experiences living around the landfill. In short, they "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." *Tri-County Landfill v. DEP*, 2014 EHB 128, 132; *CAUSE*, 2007 EHB at 676-77; *Pa. Trout v. DEP*, 2004 EHB 310, 356-359; *Giordano v. DEP*, 2001 EHB 713, 729-30. Some members live a half-mile or less from the landfill, "use the roads that are close to the landfill, and have personally suffered the adverse effects of" the landfill. *Giordano v. DEP*, 2000 EHB 1184, 1188 (appellants lived about 2 miles from landfill). These facts, which are supported by FOL's response and we therefore accept as true for purposes of resolving Keystone's motion, show that the FOL members live and use the area around the Keystone Sanitary Landfill, that the landfill adversely affects their daily lives and their community, and that the Department's action in renewing the permit extends these harms by allowing operations and associated problems to continue for another 10 years.

In the face of this rather overwhelming evidence that individuals associated with FOL have standing, Keystone argues that those individuals do not have a close enough association with the FOL organization to confer standing on that organization, which is the only named

appellant.[1] Indeed, Keystone's primary argument, as emphasized in its reply brief, is that FOL in order to have representational standing must either have "members" as that term is used in the Pennsylvania Nonprofit Corporation Law, 15 Pa.C.S.A. § 5101,[2] or have persons associated with it that at least have "indicia of membership." FOL responds that such a formalistic standard for organizational standing has no support in Pennsylvania or Board case law, and, on the facts, although FOL conceded that it does not have any "members" as the term is used in nonprofit corporate law, persons associated with the group do in fact have "indicia of membership."

We reject Keystone's attempt to narrow standing law before the Board. First, as FOL correctly points out, we have never adopted anything even approaching Keystone's meager view of standing. Indeed, Keystone lifted its "indicia of membership" test from somewhat unsettled federal case law, and in particular, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342-43 (1977), which has never been adopted by the Pennsylvania Supreme Court. In fact, in *Pennsylvania Medical Society v. Department of Public Welfare*, 39 A.3d 267, 278 (Pa. 2012), the Court cited the last United States Supreme Court case to discuss organizational standing **before** *Hunt*—*Warth v. Seldin*, 422 U.S. 490 (1975). If the Pennsylvania Supreme Court intended to adopt the test articulated in *Hunt* for organizational standing in Pennsylvania, it could have done so. It did not.

In any event, we do not agree that FOL must adhere to corporate formalities in order for it to have standing to pursue this appeal on behalf of individuals who legitimately view themselves as constituents of the group. Even if FOL were nothing more than an informal, ad hoc group of like-minded individuals with standing who self-identify as members of the group,

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[1] This discussion is necessitated by the fact that no individuals associated with FOL are named appellants.

[2] A "member" under that law is "[o]ne having membership rights in a corporation in accordance with the provisions of its bylaws." 15 Pa.C.S.A. § 5103.

we would have no difficulty in allowing the group to pursue the appeal. We have no need to delve into the intricacies of nonprofit corporate law where, as here, the bona fide standing of the individuals associated with the group has been established. In other words, we are far more concerned with substance than form.

Judge Coleman's insightful discussion regarding this issue in *Borough of Roaring Spring v. DEP*, 2004 EHB 889, is directly on point. In that case, as in this case, the permittee challenged whether members were part of the entity (an unincorporated citizens group) appealing the Department's action. After viewing how such an inquiry would conflict with the Environmental Hearing Board Act and Board rules and processes, Judge Coleman wrote:

> [P]roblems of administration would result as the Board is immersed in needless distractions over what it means to be a "member" of an organization and in-depth inquiries into the timing of membership for specific individuals. Arguments would ensue over the nature of practices an organization must follow before being considered a legitimate "association" with actual "members" and acceptable membership rituals. Here, for example, [Roaring Spring Area Citizens Coalition] is an unincorporated association that meets irregularly and informally; membership appears to be based on an individual's interest and willingness to contribute to the association's goals rather than any formalized practice. Defining "membership" could prove to be quite time-consuming. The discovery and motion practice connected with such inquiries would work special hardship on local citizens groups and non-profit recreational associations. Citizens groups in particular can be loose affiliations of individuals with a common interest in protecting local environmental resources who are only able to effect oversight of agency actions by pooling their resources under the rubric of an unincorporated association. Though these associations may lack corporate-style formality, their interest in the controversy is close to home, and they can serve an important function as protectors of the public interest. Associations can also serve to greatly simplify the process of administering the appeal of a DEP action that could have taken the form of a multitude of individual appeals.

Borough of Roaring Spring, 2004 EHB at 906-07. These considerations apply with equal force to citizens groups that go through the trouble of incorporating.

To this we would add that any effort to delve into the internal workings of the organization tends to bump up against our often expressed concern that citizens should not be intimidated and unduly harassed simply because they pursue their constitutionally protected right to due process review of a Department action that adversely affects them. Indeed, we have already so held in this case. *Friends of Lackawanna v. DEP*, 2015 EHB 772, 774. *See also Sludge Free UMBT v. DEP*, 2014 EHB 939, 950; *Hanson Aggregates PMA*, *Inc. v. DEP*, 2003 EHB 1, 6. If details regarding every particular of an organization's incorporation, operation, hierarchy, and membership list were relevant, they would be discoverable and the subject of examination at the hearing, which would have the intended or unintended but unavoidable consequence of enabling the very intimidation tactics that must be avoided. It is, at best, a distraction that does not contribute in any way to the Board's statutory duty to ensure that the Department has acted lawfully and reasonably.

In any event, the FOL affiants in this case have demonstrated a sufficient connection with FOL. They have all actively advanced and directed the mission and work of FOL. They have publicly held themselves out as members of the organization. We have no sense that FOL's standing has somehow been "manufactured" or that FOL is some sort of sham entity with no one behind it. FOL has been very forthcoming on who those people are. Even if the "indicia of membership" test applied, which it does not, the individuals involved would have satisfied that test.

Having attacked the members of FOL's individual standing to no avail, and having attacked their bona fide connection to FOL, also to no avail, Keystone next turns to FOL itself

and argues that FOL has no independent standing. Initially, as noted above and in *Funk*, *supra*, once representational standing is established, it is not necessary that the organization have standing in its own right. We need not address whether FOL has standing distinct from its affiant constituents because, for purposes of resolving Keystone's motion, those constituents have standing. Nevertheless, the record at this point would also support a finding that FOL itself—entirely separate from the standing of its members—has standing. An environmental organization has standing in its own right if its mission includes protection of the environment in the area affected by the Department's action. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839. FOL's mission is to support the health, welfare, and education of "individuals in need" in Northeastern Pennsylvania. Here, as in *Valley Creek*, FOL has devoted considerable time and resources toward improving the quality of the environment in the area of the landfill. A clear nexus exists between the Department's action, FOL's mission, and its ongoing work in the community on various fronts.

That FOL's *raison d'etre* includes protection of the environment would seem to be beyond peradventure, but Keystone also seems to imply that FOL's efforts to challenge the renewal permit do not help those "in need." To this FOL responds that Keystone's facility is located in an area of Dunmore that is a Department-designated Environmental Justice ("EJ") Area. Indeed, half of Dunmore Borough, including the Swinick Development where some of FOL's members live, is in this EJ area. According to the Department: "An EJ area is any census tract where 20 percent or more [of] individuals live in poverty, and/or 30 percent or more of the population is minority." FOL has advocated for this area. FOL says it is directly invested in the community and is working with both FOL members and others to fight for a healthier

community and their rights to clean air, pure water, and other rights protected by Article I, Section 27 of the Pennsylvania Constitution. FOL adds that citizens "in need" are not necessarily limited to citizens with economic challenges. Citizens can also be "in need" of a healthy and safe environment.

Article I, Section 27

The Commonwealth Court's decision in *Funk* is also helpful with respect to Keystone's argument that FOL's claims based on Article I, Section 27 of the Pennsylvania Constitution (the ERA) must be dismissed. That constitutional provision reads as follows:

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

PA. CONST. art. I, § 27. In *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), the Commonwealth Court established a three-fold test to determine whether a government decision complies with the ERA:

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

Id., 312 A.2d at 94. "The *Payne* test is particularly applicable in situations where a person challenges a government decision or action." *Funk*, *supra*, slip op. at 5. *See also Feudale v. Aqua Pa., Inc.*, 122 A.3d 462 (Pa. Cmwlth. 2015), *aff'd*, 135 A.3d 580 (Pa. 2016) (analyzing second and third prongs of *Payne* test after finding compliance with all applicable statutes and

regulations relevant to the protection of the Commonwealth's resources under the first prong); *Pa. Envtl. Def. Found v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015); *Logan v. DEP*, EHB Docket No. 2016-091-L (Opinion and Order, August 2, 2016) (citing *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 249, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016)).

One of the objections in FOL's notice of appeal is that the Department's decision to renew Keystone's permit is inconsistent with the Department's duties and responsibilities under the ERA. Keystone in its motion somehow interprets this objection as "necessarily a challenge to the constitutionality of the SWMA [Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003] itself." We do not interpret FOL's notice of appeal as "devolving into" nothing more than a frontal assault on the Solid Waste Management Act. Rather, FOL appeals the way the Department *applied* that Act to the facts at hand. We are fully able to distinguish between challenges to Department actions regarding failures to comply with the governing law (including the Pennsylvania Constitution), challenges to the constitutionality of a regulation, and challenges to the constitutionality of a statute. *Snyder v. DEP*, 2015 EHB 857.

Secondly, Keystone takes the rather extreme position that, once the Legislature has passed an environmental statute, neither the Executive Branch nor the Courts have any further role to play with respect to the ERA. This position is, quite simply, wrong. The Commonwealth Court in *Feudale, supra*, specifically held that the ERA requires *each* branch of government to consider, in advance of proceeding, the environmental effect of any proposed action. *Id.*, 122 A.3d at 467. *Feudale* was affirmed by the Pennsylvania Supreme Court. 135 A.3d 580 (Pa. 2016).

The Commonwealth Court expounded on the respective roles of the various branches of government in *Funk* as follows:

> Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action. *See Nat'l Solid Wastes Mgmt. Ass'n v. Casey*, 600 A.2d 260, 265 (Pa. Cmwlth. 1991), *aff'd*, 619 A.2d 1063 (Pa. 1993) (holding that the Governor can only execute laws and the balance required by the ERA was achieved through legislative enactments). While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General Assembly makes "basic policy choices" and imposes upon the agencies or departments "the duty to carry out the declared legislative policy in accordance with the general provisions of the statute." *MCT Transp. Inc. v. Phila. Parking Auth.*, 60 A.3d 899, 904 (Pa. Cmwlth.), *aff'd sub nom. MCT Transp., Inc. v. Phila. Parking Auth.*, 81 A.3d 813 (Pa.), and *aff'd sub nom. MCT Transp., Inc. v. Phila. Parking Auth.*, 83 A.3d 85 (Pa. 2013) (quotation omitted). The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to "expand the powers of a statutory agency…." *Cmty. Coll. of Delaware Cnty.*, 342 A.2d at 482. Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act. *Id.* at 473.

Funk, supra, slip op. at 6-7. Thus, executive branch agencies such as the Department from time to time are also put in the position of striking the balance between environmental and other societal concerns, even after the Legislature has initially spoken. Our role is to ensure that the Department has done so correctly.

Keystone relies very heavily on the *Casey* decision cited in the above quoted language from *Funk*. However, in that case the Governor attempted to, in effect, overrule a statute by issuing an executive order pursuant to no authority other than the ERA. The Court held that the

ERA does not give the Governor that authority. The Court in *Casey* did *not* hold that executive branch agencies can disregard their independent duty to comport their actions with the ERA, and even if it had, that ruling would not be consistent with the Court's several recent pronouncements as cited above.

Keystone then goes one step further and argues that, even if we can be said to have some sort of *pro forma* role with respect to the ERA, that role is limited to ensuring that there has been compliance with the Solid Waste Management Act and the regulations promulgated thereunder. Once again, Keystone gets it wrong. Our role is not restricted to ensuring that there has been compliance with the regulatory minimums. Our role is to consider the "environmental effect of any proposed action." *Feudale, supra*, 122 A.3d at 467. We have now been repeatedly instructed that the way to do that when a Department action is challenged is to apply the three-pronged test set forth in *Payne*.

Compliance with all pertinent laws is only the first step in the *Payne v. Kassab* analysis. Keystone's view would have us ignore the second and third steps, which instruct us to evaluate the extent of the environmental incursion, as well as the consequences of that incursion relative to the benefits of the project. We cannot ignore the second and third steps if we are to fulfill our constitutional responsibility as described in *Payne*. *Feudale, supra*; *Pa. Envtl. Def. Found., supra*; *Snyder*, 2015 EHB at 880; *Hudson v. DEP*, 2015 EHB 719, 739-41; *Sludge-Free UMBT v. DEP*, 2015 EHB 469, 473-75. As we said in *Brockway, supra*, 2015 EHB at 243, we must ensure that activities with environmental impacts are intelligently regulated "so that regulatory standards are met, environmental incursions are minimized, and any remaining harms are justified."

Again, Keystone relies on *Casey*, but as discussed in *Funk*, there is no question that the Department's action must not only comply with the Solid Waste Management Act, but its action must also be consistent with the "basic policy choices" expressed in that statute. *Funk*, slip op. at 6-7. *Casey* reinforces that point, but it certainly did not explicitly or even implicitly overrule *Payne v. Kassab*. Of course, the ERA does not empower the Department or this Board to disregard the balance between environmental and other societal concerns struck by the General Assembly in a statute. The balance struck by the Legislature in the applicable laws obviously informs our analysis of the second and third prongs of the *Payne* test, but that is not to say that the second and third prongs need not be addressed at all. Unless and until *Payne* is overruled, we must continue to give full credence to its analytical framework and answer the last two questions posed in that case. We do not view that duty as in any way inconsistent with our duty to ensure that there has been compliance with the law and that the Legislature's basic policy choices are honored.

Our role under the first prong of *Payne* is essentially to ensure that the Department has acted lawfully. Our role under the second and third prongs is to ensure that the Department has not otherwise abused its discretion. Thus, there is very little difference between our analysis under the ERA and the standard of review that this Board has employed for decades. *See Solebury School v. DEP*, 2014 EHB 482, 519; *Coolspring Twp. v. DER*, 1983 EHB 151, 178. The *Payne* test simply adds some detail regarding how we review the Department's exercise of its discretion. Keystone's robotization of the Department, the Board, and the Courts would eliminate all discretion from the process, which makes no sense to us.

Accordingly, we issue the Order that follows.

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

O R D E R

AND NOW, this 2nd day of September, 2016, it is hereby ordered that the Permittee's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 2, 2016

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY A. GREEN	:	
	:	
v.	:	**EHB Docket No. 2014-171-B**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: September 7, 2016**
PROTECTION and DJ & W MINING, INC.,	:	
Permittee	:	

OPINION AND ORDER
DISMISSING APPEAL AS SANCTION

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of Appellant, Gary A. Green, where Appellant has repeatedly failed to follow Board Rules and comply with Board Orders, and has evidenced a lack of intent to do so.

O P I N I O N

Background

Gary A. Green filed a Notice of Appeal on December 15, 2014, wherein he objected to the Pennsylvania Department of Environmental Protection's ("DEP" or "Department") approval of Stage I and II bond release to DJ & W Mining, Inc. ("DJ&W") for the Green Mine. On December 17, 2014, Mr. Green filed a letter with the Board requesting pro bono counsel that the Board forwarded to the coordinator for the Pennsylvania Bar Association Environmental and Energy Law Section's pro bono committee. The committee coordinator sent a letter to Mr. Green, dated January 15, 2015 and docketed on January 26, 2015, in which she stated that Mr. Green was eligible for pro bono representation and that she would try to find an environmental

attorney to represent him in front of the Board. On February 19, 2015, pro bono counsel entered an appearance on behalf of Mr. Green.

After pro bono counsel entered the case and following the late entry of an attorney for DJ&W, the parties filed a series of requests that extended the case deadlines for over a year. On October 2, 2015, after the deadline for dispositive motions had passed, the parties submitted a joint request for a stay wherein the parties represented to the Board that Mr. Green and DJ&W were "optimistic about reaching settlement." The parties filed a joint request for an extension of the stay on November 3, 2015 indicating that a proposed settlement agreement had been drafted and was currently under consideration. On December 15, 2015, the parties submitted another joint request for an extension of the stay representing that Mr. Green needed more time to review and consider the proposed settlement agreement. In yet another joint request for an extension of the stay filed on January 22, 2016, the parties stated that a settlement agreement had been reached, but that more time was needed to finalize and execute the agreement. The parties filed a joint status report on February 10, 2016 wherein Mr. Green's counsel stated that Mr. Green had confirmed receipt of the settlement agreement but had failed to return the executed document to counsel. Mr. Green's counsel also stated that attempts to contact Mr. Green regarding his execution of the settlement agreement had been, to date, unsuccessful. Finally, on March 4, 2016, Mr. Green's counsel filed a status report stating that they had been able to reach Mr. Green via telephone on March 3, 2015. Despite being able to speak with Mr. Green, counsel was unable to learn of the status of the settlement agreement or Mr. Green's execution thereof in that call. Due to the ongoing delays and apparent difficulty in settling the case, the Board held a conference call with counsel for the parties on March 16, 2016 to address the case schedule.

Following the call, the Board issued Pre-hearing Order No. 2 setting forth the pre-hearing deadlines and scheduling the hearing on the merits for September 27-28, 2016.

On March 31, 2016, Mr. Green's counsel filed a Motion for Leave to Withdraw as Counsel for Appellant Gary A. Green ("Motion to Withdraw"). In the Motion to Withdraw, Mr. Green's counsel cited continued difficulty in reaching and communicating with Mr. Green and stated that Mr. Green's repeated and continuing lack of cooperation in communicating with counsel had led to the significant delays as evidenced by the abundance of requests for extension of the stay. Mr. Green's counsel further stated that they had informed Mr. Green that they did not think they could continue representing him. Mr. Green was copied on the Motion to Withdraw. In their responses to the Motion to Withdraw, neither the Department nor DJ&W objected to counsel's desire to withdraw; however, DJ&W did express a concern that allowing Mr. Green's counsel to withdraw without replacement counsel in place would cause further delays. Following a conference call with counsel for all parties, the Board issued an Order on April 11, 2016 establishing a timeframe for resolving the issues surrounding counsel's continued representation of Mr. Green. The April 11, 2016 Order stated:

> 1. If Mr. Green desires to obtain new counsel, he shall provide the Board with the name of new counsel by April 25, 2016. If the name of new counsel is provided within that timeframe, the Board shall grant Appellant's Motion For Leave To Withdraw As Counsel For Appellant Gary A. Green ("Motion") and new counsel shall enter an appearance;
>
> 2. If Mr. Green does not desire new counsel or is unable to obtain new counsel on or before April 25, 2016, he shall, no later than April 26, 2016, file a notice to the Board informing the Board whether he intends to proceed forward in this matter with his current counsel or whether he intends to proceed on a pro se basis until he obtains new counsel;
>
> 3. If Mr. Green proceeds on a pro se basis, he shall be required to comply with the Board's scheduling orders in this matter, including, but not limited to, Prehearing Order No. 2,and he shall

> be obligated to otherwise proceed in this matter in compliance with the Board's Rules of Practice and Procedure.

On April 26, 2016, the Board received a letter from Mr. Green's counsel stating that Mr. Green had not found a new attorney and that he wished to retain his current counsel as his counsel moving forward. In the letter, Mr. Green's counsel also stated that despite Mr. Green's request, they maintained the position expressed in their Motion to Withdraw. Following review of the April 26 letter, and in consideration of the issues expressed by Mr. Green's pro bono counsel regarding their continued representation, the Board granted the Motion to Withdraw. Mr. Green was therefore required to proceed in this matter on a pro se basis unless or until he retained new counsel. As of the date of this Opinion and Order, no new entry of appearance has been entered by counsel on behalf of Mr. Green.

On July 22, 2016, the date Mr. Green's prehearing memorandum was due under Pre-hearing Order No. 2, Mr. Green filed a request that the Board grant a 30 day extension for the filing of his prehearing memorandum. In response to Mr. Green's request, the Board granted a more limited extension and ordered that Mr. Green file his prehearing memorandum on or before August 5, 2016. On August 5, 2016, Mr. Green filed a document entitled "Pre order #2 response," which apparently was Mr. Green's attempt to file his prehearing memorandum. In that filing, Mr. Green first listed the contents of 25 Pa. Code § 1021.104, the section of the Board Rules of Practice and Procedure ("Board Rules") regarding prehearing memoranda, followed by an assertion that "[t]he only item I was able to somewhat complete is # 6." Mr. Green then provided what appears to be a list of proposed witnesses followed by several paragraphs of various complaints regarding his previous counsel and the actions of the Department. He concluded the filing with a request that the Board appoint suitable counsel for him.

On August 16, 2016, in response to Mr. Green's August 5, 2016 filing, the Department filed a Motion to Strike Appellant's Pre-Hearing Memorandum ("Motion to Strike") and Motion for Expedited Consideration of Department's Motion to Strike Appellant's Pre-hearing Memorandum ("Motion for Expedited Consideration"). In the Motion to Strike, the Department generally contended that Mr. Green's August 5, 2016 filing was not in compliance with Board Rules and the Board's Pre-hearing Order No. 2. The Motion to Strike requested that the Board strike Mr. Green's August 5, 2016 filing and order Mr. Green to file a prehearing memorandum that complies with the Board Rules and Pre-hearing Order No. 2. In response to the Department's Motion to Strike and Motion for Expedited Consideration, the Board issued an Order on August 17, 2016: 1) staying the requirement that the Department and DJ&W file their prehearing memoranda by August 22, 2016; 2) requiring Mr. Green to respond to the Department's Motion to Strike on or before August 24, 2016; and 3) excusing Mr. Green from responding to the Motion to Strike if he filed a prehearing memorandum that was in compliance with Board Rules on or before August 22, 2016.

Mr. Green filed two documents with the Board on August 22, 2016. In the first document, entitled "Motion for Court Appointed Counsel," Mr. Green again listed reasons he thought he was ill-equipped to proceed pro se and requested that the Board appoint counsel for him. The Board denied Mr. Green's Motion for Court Appointed Counsel on August 23, 2016. In the second document, entitled "Response to motion to strike; motion for appointed attorney," Mr. Green provided a list of reasons why he viewed himself as ill-equipped to proceed pro se, stating "I am not refusing to comply…I cannot!!!" Following review of this response and the Department's August 16, 2016 Motion to Strike, the Board issued an Order granting the Motion to Strike and giving Mr. Green yet another opportunity to file a proper prehearing memorandum

on or before August 31, 2016. The Order warned Mr. Green that if he failed to file a prehearing memorandum that fully complied with Board Rules by August 31st, his appeal may be dismissed. On August 26, 2016, Mr. Green filed a document entitled "answer to Judges order of 08/23/2016." In the August 26 filing, Mr. Green again listed reasons why he thought the Board should help him retain counsel and why he was ill-equipped to proceed pro se but he did not provide a prehearing memorandum. No further filings have been received from Mr. Green and, as of the date of this Opinion and Order, he still has not filed a prehearing memorandum that is in compliance with Board Rules as he was ordered to do several times by the Board.

Standard

The Board's Rules authorize sanctions, including dismissal of an appeal, for a party that fails to abide by Board orders and/or the Board Rules. 25 Pa. Code § 1021.161. Dismissal of an appeal as a sanction is appropriate in cases where an appellant fails to comply with Board Rules and/or orders in such a manner that there appears to be a "lack of intent to pursue the appeal." *Schlafke v. DEP*, 2013 EHB 733, 735-36 (citations omitted). Pro se appellants are not excused from following the Board Rules. *Id.* at 736 (citing *Goetz v. DEP*, 2002 EHB 976).

Analysis

Two days after Mr. Green filed his Notice of Appeal, he submitted to the Board a request to be represented by pro bono counsel that the Board immediately forwarded to the coordinator for the Pennsylvania Bar Association Environmental and Energy Law Section's pro bono committee. The Board's Secretary is authorized to refer people to the pro bono committee under 25 Pa. Code § 1021.25. Pro bono counsel was obtained and the parties were reportedly able to reach a settlement agreement, but the document outlining the settlement was never executed and the case continued. As a result of an apparent breakdown in communications between Mr. Green

and his pro bono counsel[1], which resulted in several delays in this case, Mr. Green's counsel was permitted to withdraw from this appeal. Since then, Mr. Green has been proceeding pro se, and has continued to exhibit either an inability or an unwillingness to comply with Board Rules and our Orders in this case. The Board fully appreciates that the ability of some pro se appellants to effectively litigate an appeal is limited when compared with that of a trained attorney; however, we have repeatedly held that pro se appellants are not excused from following the Board Rules of Practice and Procedure. *Schlafke*, 2013 EHB at 735-36 (citations omitted).

In this case, Mr. Green's repeated failure to comply with Board Rules and clear Orders of the Board render dismissal an appropriate sanction. Despite Mr. Green's continued requests to have the Board appoint counsel for him, which the Board does not have the authority to do, the Board did help Mr. Green to obtain pro bono counsel. Mr. Green's apparent unwillingness to cooperate and communicate with that counsel is the reason for his current status as pro se. Following his counsel's withdrawal, Mr. Green has remained unwilling to cooperate. The only difference is that rather than failing to cooperate with counsel, Mr. Green is now failing to cooperate with the Board. After being afforded an extension, Mr. Green failed to produce a prehearing memorandum that complied with Board Rules and Pre-hearing Order No. 2. Mr. Green was afforded a second and third chance to do so and was warned that the failure to do so might lead to the dismissal of his appeal. However, rather than comply with the Board's Orders and Board Rules, which he obviously is familiar with given his inclusion of the Board Rule regarding prehearing memoranda in his first attempt at a prehearing memorandum, Mr. Green continues to assert that he is ill-equipped to proceed pro se and continues to elude compliance

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[1] The Board appreciates the efforts of pro bono counsel in this case and while we are not aware of all the circumstances that resulted in the breakdown of communications between Mr. Green and his counsel, nothing we say in this opinion is intended to criticize or question those efforts or the counsel involved in Mr. Green's representation.

with the Board Rule regarding prehearing memoranda. In fact, in his filing entitled “Response to motion to strike; motion for appointed attorney” Mr. Green clearly stated that he cannot comply with the relevant Board Rules and our Orders in this case. It is apparently Mr. Green’s belief that his self-proclaimed inability to comply with Board Rules and Board Orders is grounds to continuously delay this case.

At this point, the Board has made every effort to give Mr. Green a fair opportunity to challenge the Department’s action. Despite these efforts, Mr. Green has been unable or unwilling to meet the requirements to proceed with this case. We have no reason to believe that granting Mr. Green additional opportunities will lead to a different result. In light of the continuing failure of Mr. Green to comply with our Orders in this case and follow Board Rules, we conclude that continuing this case will be unproductive as well as unfair to the Department and DJ&W. As such, dismissal is the most appropriate form of sanction. *Id.* Mr. Green’s contention that he is incapable of proceeding pro se is simply not grounds to refuse compliance with Board Rules and our Orders, nor does it convince the Board that dismissal as a sanction in this case is in any way improper.

Conclusion

Therefore, we find that the only appropriate action in this case is dismissal of Mr. Green’s appeal as a sanction for failing to comply with Board Rules and our Orders in this case as provided for under 25 Pa. Code § 1021.161.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY A. GREEN	:	
	:	
v.	:	**EHB Docket No. 2014-171-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DJ & W MINING, INC., Permittee	:	

O R D E R

AND NOW, this 7th day of September 2016, upon consideration of Appellant's repeated failure to comply with the Board Rules of Practice and Procedure and our Orders in this case, it is hereby ordered that the above-captioned appeal is **dismissed** pursuant to 25 Pa. Code §1021.161.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 7, 2016

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)

For Appellant, *Pro Se*:
Gary A. Green
(via electronic filing system)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
	:	
v.	:	**EHB Docket No. 2016-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	**Issued: September 12, 2016**

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part an intervenor's motion for a protective order. A protective order is granted where discovery sought by a permittee is not relevant to the action under appeal, not proportional, and where the discovery pertains to issues that are foreclosed by administrative finality due to final orders of the Department, and/or pertains to issues that were previously litigated by the permittee, decided by a Board Adjudication, and are now barred by the doctrine of collateral estoppel. The Board denies the motion insofar as the permittee's discovery seeks relevant communications occurring after the date of the action under appeal.

O P I N I O N

New Hope Crushed Stone & Lime Company ("New Hope") has appealed the Department of Environmental Protection's (the "Department's") January 29, 2016 letter disapproving and modifying New Hope's reclamation plan for the limestone quarry it operates in Solebury Township, Bucks County. Mining at the quarry property has taken place since at least 1829. The Department issued New Hope its first mining permit in 1976. This Board's first

involvement was in 2002 when Solebury Township challenged the Department's decision to renew New Hope's NPDES permit. We issued an Adjudication in that case holding that the Department failed to adequately consider the impact to the area's hydrologic balance caused by the quarry's continued operation. *Solebury Twp. v. DEP*, 2004 EHB 95. There have been a number of appeals involving the quarry since then. (*See* EHB Docket Nos. 2005-183-MG, 2006-116-MG, 2011-135-L, 2011-136-L, 2015-164-L, and 2015-187-L.) The appeal docketed at EHB Docket No. 2011-136-L culminated in the Board's issuance of an Adjudication on July 31, 2014 rescinding a depth correction the Department had issued to New Hope, which would have allowed it to mine 50 feet deeper to a level of 170 feet below mean sea level (-170 MSL). *Solebury School v. DEP*, 2014 EHB 482. The Adjudication followed a hearing lasting ten days during which numerous fact and expert witnesses testified and hundreds of exhibits were admitted into evidence. That appeal was initiated by Solebury School, a private school whose campus is located immediately adjacent to the New Hope quarry. Solebury School complained that New Hope's quarrying, and the associated need to pump water out of the quarry to keep it dry to facilitate mining, had depressed the water table beneath the School by approximately 100 feet, which led to the propagation of at least 29 collapse sinkholes between 1989 and the time of the hearing in the fall of 2013. Some of the sinkholes were as large as a quarter of an acre in size, while others were small but no less dangerous.

Although New Hope and the Department raised several defenses in support of the Department's issuance of the depth correction, there actually was no dispute "that New Hope's continued mining is at the very least contributing to an intolerable and dangerous sinkhole problem at the School." *Solebury School*, 2014 EHB 482, 521. Instead, New Hope and the Department argued that the quarry should be allowed to go deeper because doing so would not

"increase the frequency and severity of sinkhole formation." In other words, it would perpetuate a bad situation but not make it worse. They also argued that the School's campus development was contributing to sinkhole formation, even though the School has been in place since the 1920s and sinkholes did not begin to form on the campus until 1989. They further defended the Department's action by arguing that New Hope was required by the permit modification to fix the sinkholes as new ones formed and closely monitor groundwater levels moving forward.

In our Adjudication we agreed with the School and sustained its appeal. We found that the continuing occurrence of sinkholes presented an unreasonable threat to the health, safety, and welfare of the children and faculty that lived on and used the campus. 2014 EHB at 495, 543. In our 67-page Adjudication and Order, we first noted the undisputed point[1] that the quarry was causing the sinkholes:

> The School presented a compelling case that it is suffering from an alarming collapse sinkhole problem on its campus. To their credit, neither the Department nor New Hope disputed this point, nor could they. The School has now been the site of 29 sinkholes, and that does not include the 12 known sinkholes that have formed on nearby properties. The sinkholes appear suddenly and without warning. At least one person has already fallen into one. Some holes are small, but others have been as large as a quarter of an acre. One hole was narrow and deep enough to potentially cause entrapment. It would seem that it is only a matter of time before someone gets hurt.
>
> Aside from the danger to adults and children, the School is being deprived of the quiet use and enjoyment of its property. The School must operate under the constant threat that at some unknown time and location, the ground will collapse underfoot. There is no dispute that this will occur again and again so long as New Hope keeps mining. The School has lost grant money, foregone construction projects, and cancelled—sometimes permanently—school activities.
>
> ….
>
> Despite a hearing on the merits lasting ten days, there was a remarkable lack of disagreement among the credible experts regarding many of the key facts in this case. As previously mentioned, there was no disagreement that the School is enduring a severe sinkhole problem, and that the problem presents a significant risk to the health, safety, and welfare of the children and adults who live, work, and go to school on its campus. Perhaps somewhat surprisingly, none of the

[1] One Department witness opined that the matter required further study. We did not credit his testimony.

> credible experts disagree that New Hope's mining is at least a contributing factor that is causing the hazard.

2014 EHB at 522, 529 (citation omitted).

We then went on to reject on both legal and scientific grounds the Department's standard that mining should be allowed to go deeper so long as the "frequency and severity of sinkholes" did not increase:

> The Department was fully aware of the School's precarious situation. Indeed, the Department's lead permit reviewer was taken aback when he first learned of the School's sinkhole problem. Yet, for reasons we find difficult to understand, the Department decided that New Hope's ability to continue mining must take precedence. Toward that end, the Department fashioned and applied an unlawful and unreasonable standard for reviewing the depth correction application. The Department decided that the depth correction would be approved unless the School proved to the Department's satisfaction that the additional 50 feet of mining authorized by the depth correction, and only that narrow band of mining, would "increase the frequency and severity" of collapse sinkhole formation on the School's campus. Every aspect of this standard of permit application review is wrong.

2014 EHB at 523 (citation omitted). We described how the Department's standard was inconsistent with applicable statutes and regulations, that it improperly placed the burden of proof on the School, that there was no scientific basis for evaluating the effect of only one small band of mining in a deep pit, that the question was ill-defined at best, and indeed, in all likelihood impossible to meet, and that it was unacceptable to hold that "the odds of someone getting hurt must increase before the Department does something about it."

Next, we evaluated the wealth of expert testimony in the case and concluded as follows:

> The evidence is overwhelming that New Hope's mining is the predominant cause of the sinkhole problem at Solebury School. The quarry pumps an average of between two and three million gallons of water per day out of its pits. Before New Hope's dewatering, the groundwater table underneath the School was about ten feet below the surface. It is now about 100 feet below the surface as a result of the quarry dewatering. The quarry is essentially draining all of the in-basin groundwater from the basin, and it is now pulling groundwater originating from outside of the basin as well. Since the basin itself has nothing left to give, future

> effects will be muted, but groundwater levels will continue to go down. No expert testified that groundwater levels will return to natural levels so long as dewatering continues. No expert testified that groundwater levels will go up, or that sinkholes will stop forming.
>
> The drop in groundwater caused by the quarry is what is in turn causing the sinkholes. The absence of water causes an immediate destabilizing effect as a result of a loss of cohesion, but the bigger problem is that the quarry opening, including the opening of high conductivity groundwater pathways, coupled with lower groundwater in general and a more extreme hydraulic gradient, induces regolith that formerly filled voids in the soluble karstic rocks to wash away. If this happens from the bottom up as it does under the School, the unconsolidated materials at the surface hold for a while with nothing but air beneath them. Then suddenly, the arch collapses and the School is left with a collapse sinkhole. This process will continue unabated until the quarry stops pumping. A lot of damage has already been done, but when the quarry stops pumping, the pit will fill up and the sinkholes will eventually stop.

2014 EHB at 533.

Next, we found New Hope and the Department's contention that the School was partially to blame "entirely unconvincing":

> First, in terms of the School's development, the School constructed a number of buildings between 1948 and 1968 without any sinkholes forming. Between 1978 and 1997 the School engaged in no campus development, yet saw eight sinkholes form from 1989 through 1997. In addition, the development that the School has engaged in from 1998 to the present has been done in a cautious and responsible manner, seeking out geotechnical consultants to ensure that development and post-construction drainage pathways would be done in ways that would not exacerbate the sinkhole problem. The School has taken all reasonable precautions to ensure that it did nothing to contribute to sinkhole formation. Furthermore, collapse sinkholes have formed both on and off the School's campus, in areas of long-existing buildings and in forested areas, such as the swallet in Primrose Creek….
>
> Putting aside its lack of technical merit, the Noncoal Act was not intended to elevate the right to mine above the right of the mine's neighbors to the quiet enjoyment of their property. As discussed above, the Act expresses the opposite intent. Through no fault of its own, Solebury School is now constrained in the lawful use of its property as an educational institution for children. There is no support in the law for the Department's decision to allow this situation to go forward.

2014 EHB at 534-35 (citations omitted).

Finally, we discussed at some length the Department and New Hope's theories that natural features and permit conditions would help protect the School from more frequent and severe sinkholes:

> The Department and New Hope point to a number of natural and permit conditions that they believe will protect the School. The School's response is that none of these conditions are working now, so they are largely irrelevant. We agree. The conditions will not eliminate or even reduce the existing, ongoing hazard to health and safety. The Department and New Hope argue that the conditions will prevent the situation from getting worse, but as previously mentioned, that is an entirely inappropriate question and, in any event, in terms of risk to health and safety the situation cannot get any worse.

2014 EHB at 535. Putting aside our holding that the Department was asking the wrong question as a matter of law, we went on to accept the School's experts' view that the Department and New Hope's theories were also invalid as a matter of fact. In the end, we rescinded the depth correction because it would have perpetuated an ongoing threat to public health, welfare, and safety. Although we relied on the fact that the quarry was creating a public nuisance and the Department has a duty to abate and remove public nuisances, *see* 2014 EHB at 546 (citing 52 P.S. § 3311(b) and 71 P.S. § 510-17(3)), we did *not* direct the Department to take any specific actions going forward.

New Hope appealed our Adjudication to Commonwealth Court (Docket No. 1497 C.D. 2014). New Hope discontinued the appeal before any decision was reached.

Our Adjudication rescinding the depth correction did not otherwise affect New Hope's existing surface mining permit authorizing the quarry to be mined to a depth of -120 MSL. New Hope continued to mine out its reserves above the -120 MSL level. At some point, however, the Department decided that steps needed to be taken to abate the nuisance in a more timely manner than that provided for in the quarry's existing reclamation plan. In a series of meetings and letters, the Department told New Hope that it needed to submit a new reclamation plan. In

response, New Hope submitted revised plans that were based on the time needed to mine out its existing reserves above -120 MSL. After some additional unproductive back-and-forth, the Department lost patience and issued an order to New Hope on October 1, 2015, formally requiring New Hope to modify its reclamation plan to begin expeditiously abating the public nuisance. The October order found that New Hope was in violation of Sections 7(c)(5) and 10 of the Noncoal Surface Mining Act, 52 P.S. §§ 3301 – 3326. The order stated:

> NHCS [New Hope Crushed Stone] has failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. Specifically, NHCS has failed to submit to the Department an adequate Reclamation Plan and Sequence that addresses an acceptable timeline for reclamation of the quarry and how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater. Specifically, the reclamation plan provided by NHCS fails to address the following: (1) The reclamation plan provided by NHCS is based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The reclamation plan does not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 is unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The reclamation plan does not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the Department's letter dated July 10, 2015 specifically requests revisions to both the mining permit and the NPDES permit. (4) The reclamation plan does not address installation of a monitoring well on Solebury School's campus to monitoring groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requests an update regarding the installation of the above-referenced monitoring well. (5) The reclamation plan does not identify approximate acreages that will be reclaimed during the proposed timeframe, nor does it identify these areas on a map.

The order thus established and memorialized New Hope's legal duty to abate the nuisance it was causing in a timely manner. After finding New Hope in violation of this duty, the order then required New Hope to submit the following:

1. A reclamation plan based on the amount of time required to reclaim the quarry, not based on mineable reserves. Mining may occur concurrently with reclamation, however timely abatement of the public nuisance caused by NHCS's lowering of the water table under Solebury School is required.

   At a minimum, the reclamation plan and schedule submittal must include the following:

   A) A timetable for the reclamation of each highwall area of the quarry. This timetable must include a specific description of the reclamation methods for each highwall (i.e., blasting and/or backfilling), and the associated estimated reclamation costs. For each method to be utilized, the description must include the following:

      1) The amount of blasting needed for each highwall area in order to achieve the required final reclamation grades. This description must include, at a minimum, the required number of blasts, the time required to drill and blast each area and any other associated or pertinent information.

      2) The amount of excavation, filling and/or grading work required to achieve the final reclamation grades. This description must include, at minimum, the volumes of fill material required for each highwall area, the source of the fill material, the equipment to be utilized to achieve reclamation slopes, and the estimated time required for this equipment to backfill highwall areas.

      3) The reclamation plan must include a proposed timeframe for reclaiming all affected acreage within the surface mining permit. A map showing the stages of reclamation must be included.

      4) A detailed cost estimate, to include line items for each phase of reclamation.

   B) A timetable for the stream restoration work required under the existing Primrose Creek Consent Order and Agreement. The stream restoration timetable must be detailed in the same manner as the timetable for reclamation required under Section A above.

2. A schedule describing when the lower lifts of the quarry will be flooded. The EHB decision requires abatement of the public nuisance, thus restoration of water table under the school must be conducted concurrently with the reclamation plan.

3. A plan to install a monitoring well on Solebury School's campus to monitor groundwater elevations.

The order required New Hope to submit the revised reclamation plan and the other requested information by October 30, 2015. New Hope requested an extension from that deadline, and the Department issued another order on November 3, 2015, which amended the

prior order by granting the extension for New Hope to comply, setting the date at November 30, 2015. The Department's November order stated that all terms and conditions of the October order remained in full force and effect, and indeed, the November order contains the same list of requirements that is quoted above. New Hope appealed both the October and November orders. (*See* EHB Docket Nos. 2015-164-L; 2015-187-L.) We consolidated those appeals into EHB Docket No. 2015-164-L. New Hope in those appeals objected to the Department's compliance orders because in its view the Department read too much into our Adjudication. New Hope said it was in compliance with all laws and permit conditions and the Department's insistence on expedited reclamation was unreasonable.

Thereafter, the Department and New Hope entered into a Consent Assessment of Civil Penalty. In the CACP, the Department made the following findings, which New Hope agreed were accurate and which New Hope agreed not to challenge in any future proceeding involving the Department:

> F. Section 7(c)(5) and (10) of the Noncoal Surface Mining Conservation and Reclamation Act, Act No. 1984-219, 52 P.S. § 3307(c)(5) and (10) provides that:
>
> > (c) Reclamation plan: The applicant shall also submit a complete and detailed plan for the reclamation of the land affected. Each plan shall include the following: (5) A detailed timetable for the accomplishment of each major step in the reclamation plan the operator's estimate of the cost of each step and the total cost to the operator of the reclamation program; and (10) Such other information as the Department may require.
>
> G. On July 31, 2014, the Environmental Hearing Board (EHB) rescinded a depth correction that authorized NHCS to mine from -120' MSL to -170' MSL, citing that the quarry's ongoing dewatering operations are causing unabated sinkhole formation at the nearby Solebury School. The EHB also declared the quarry a public nuisance. Following the EHB's Adjudication, the Department and NHCS exchanged a series of correspondences culminating in the Compliance Order dated October 1, 2015.
>
> H. On September 11, 2014, the Department sent NHCS a deficiency letter requesting revisions to the mining and NPDES permit to bring both permits into compliance with the EHB adjudication. The revisions were due October

11, 2014. These revisions included requests for information concerning the Reclamation Plan for the quarry in Solebury Township.

I. On September 15, 2014, the Department received an email from EarthRes Group (ERG), NHCS' consultant, requesting an additional month as well as requesting a meeting with the Department.

J. On October 10, 2014, ERG sent a response to the Department's deficiency letter.

K. On February 24, 2015, the Department sent NHCS a letter stating that the October 10, 2014 response was unacceptable and again asked NHCS to provide the information requested in the September 11, 2014 deficiency letter.

L. On March 24, 2015, ERG, on behalf of NHCS, sent a letter attempting to address the Department's deficiency letter.

M. On May 13, 2015, Department staff, NHCS and its technical representatives met at the Pottsville District Mining Office to discuss Department expectations for how to bring the mining and NPDES permits into compliance with the EHB adjudication. The Department gave NHCS ninety days to provide a response.

N. On June 30, 2015, ERG, on behalf of NHCS, sent the Department a letter with a proposed reclamation and mine closure sequence for the quarry in Solebury Township.

O. On July 10, 2015, the Department sent NHCS a letter explaining why the proposed reclamation and mine closure sequence was unacceptable. The letter also gave NHCS thirty days to file a response.

P. On August 7, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department.

Q. On August 11, 2015, the Department sent a response to NHCS stating the Reclamation Plan was unacceptable and providing NHCS with fifteen days to file an acceptable plan.

R. On August 26, 2015, ERG submitted another Reclamation Plan on behalf of NHCS which the Department found to be unacceptable.

S. On October 1, 2015, the Department issued Compliance Order No. 15-5-048-N requiring NHCS to submit the deficient information for its Reclamations Plan to the Department by 8:00 AM on October 30, 2015. The Compliance Order stated that NHCS failed to conduct mining and/or mining related activities in accordance with the terms and conditions of the permit and applicable rules and regulations of the Department. Specifically, NHCS failed to submit a plan that includes all of the requested information required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication. NHCS failed to submit an adequate Reclamation Plan and Sequence that addresses how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by NHCS lowering of the groundwater within an acceptable schedule. The Reclamation Plan

provided by NHCS did not address the following: (1) The reclamation plan provided by NHCS appeared to be based on the time needed to mine out existing reserves instead of the time required to reclaim the quarry. Item no. 1 of the Department's letter dated July 10, 2015 specifically identified this proposal as unacceptable. (2) The Reclamation Plan did not provide a timetable for abating the public nuisance caused by the quarry's dewatering activities. The plan to begin flooding the pit in 2023 was unacceptable. Item no. 3a of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit to abate the nuisance caused by NHCS' lowering of the water table. (3) The Reclamation Plan did not revise the existing NPDES permit to account for the flooding of the lower lifts of the quarry. Item no. 3 of the Department's letter dated July 10, 2015 specifically requested revisions to both the mining permit and the NPDES permit. (4) The Reclamation Plan did not address installation of a monitoring well on Solebury School's campus to monitor groundwater elevations. Item no. 5 of the Department's letter dated July 10, 2015 specifically requested an update regarding the installation of the above-referenced monitoring well. (5) The Reclamation Plan did not identify approximate acreages that will be reclaimed during the proposed timeframe, nor did it identify these areas on a map.

T. On November 2, 2015, the Department issued Compliance Order No. 15-5-048-N(A) to amend the compliance date from October 30, 2015 as specified in Compliance Order No. 15-5-048-N to November 30, 2015. All terms and conditions specified in Compliance Order No. 15-5-048-N remained in full force and effect.

U. On November 30, 2015, ERG submitted another Reclamation Plan on behalf of NHCS to the Department. After review, the Department determined that the November 30, 2015 Reclamation Plan was also deficient.

V. On January 29, 2016, the Department issued a letter to NHCS modifying the November 30, 2015 proposed Reclamation Plan.

The Department found that New Hope's conduct constituted a violation of 52 P.S. § 3307(c)(5) and (10) because it failed to provide the Department with a complete and detailed plan for reclamation. It found that New Hope's violation constituted unlawful conduct under Section 23 of the Noncoal Surface Mining Act, 52 P.S. § 3323, and that New Hope was subject to civil penalty liability under Section 21 of the Noncoal Surface Mining Act, 52 P.S. § 3321. New Hope agreed to pay a civil penalty of $4,000 and withdraw its appeals from the Department's orders. New Hope then withdrew its consolidated appeal on February 12, 2016.

In the meantime, New Hope on November 30 submitted its latest revised reclamation plan to the Department. After reviewing the reclamation plan, the Department in a letter dated January 29, 2016 determined that the plan was again deficient. The letter states that New Hope's reclamation plan is unacceptable in part because it does not expeditiously abate the public nuisance declared by our 2014 Adjudication. The Department's letter makes seven modifications to New Hope's reclamation plan so that the plan satisfies the Department's directives set forth in the October and November orders. The mandated modifications to the reclamation plan are as follows:

1. The Primrose Creek stream work and/or the highwall reclamation work currently underway shall continue to be conducted on a continuous basis until completed to the Department's satisfaction.
2. NHCS shall conduct the stream and reclamation work for a minimum of 160 hours per week, utilizing at least four (4) workers/laborers who each work a 40 hour week.
3. NHCS shall place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during the highwall reclamation phases of operation.
4. The flooding of the quarry and lowering of the required daily pumping of pit water to the permit-required minimum of 500,000 gallons per day shall begin immediately. Pumping rates may increase only if water levels rise to an elevation that prohibits safe reclamation of the quarry walls. There shall be at least two (2) safety benches below the active highwall reclamation area and the pit water. The Department reserves the right to modify pumping rates based on site conditions and other related issues.
5. A reclamation progress report shall be included with the quarterly groundwater and surface water monitoring report.
6. The quarterly report shall include the Mine & Reclamation Phase Development Plan map with the current +48' MSL contour and the inflow and outflow structure locations highlighted.
7. NHCS shall install a monitoring well designed to monitor groundwater elevations on the Solebury School property within 90 days of the date of this letter. Prior to installation of the monitoring well, NHCS shall discuss NHCS' plans for placement and design of the monitoring well with the Department.

It is this letter that is the subject of the current appeal.

New Hope argues in its notice of appeal that is now before us that the Department acted unreasonably and contrary to law in modifying its reclamation plan. New Hope essentially repeats the objections set forth in its notices of appeal from the compliance orders themselves, which appeals were withdrawn. It contends that it had a valid and existing reclamation plan already in place and that the Department never informed New Hope that the existing plan violated any statutory or regulatory provisions. New Hope says that at the time the letter was issued it was in compliance with all statutes, regulations, and permit conditions. New Hope also argues that the Department's letter effectively revokes New Hope's existing surface mining and NPDES permits because the 500,000 gallons per day (gpd) pumping limit will cause water to accumulate in the quarry pits, thereby limiting the amount of mining and reclamation work that can be conducted under the current permits as the quarry gradually floods. Solebury School and Solebury Township have both intervened in the current appeal on the side of the Department.

New Hope filed a petition for supersedeas and an application for temporary supersedeas specifically contesting the Department's modification to its reclamation plan limiting the amount of water New Hope can pump out of the quarry to 500,000 gpd. We denied the application for temporary supersedeas following a conference call, and the hearing on the petition for supersedeas was held on May 5, 2016. Following a full day of testimony we denied the petition for supersedeas. Although New Hope showed that it would suffer some harm during the pendency of the overall appeal from the gradual flooding of the quarry, it did not show that it satisfied the other criteria for a supersedeas. *See* 25 Pa. Code § 1021.63(a). In addition, we noted that a supersedeas cannot issue where there would be a threat to public health during the time the supersedeas would be in place. 25 Pa. Code § 1021.63(b). No testimony or evidence presented at the supersedeas hearing showed that the continuing public nuisance had been abated.

By Order dated February 29, 2016, we directed that all discovery in this appeal was to be completed by August 29, 2016.[2] We are not aware of the full extent of discovery that has been conducted in this case, but we do know that in July New Hope served discovery requests on Solebury School and Solebury Township. Pursuant to Pennsylvania Rule of Civil Procedure 4009.21(a), New Hope also noticed on the other parties its intent to serve a subpoena for the production of documents on the Bucks County Water and Sewer Authority. Both the Department and the School filed objections to the subpoena on August 1 and August 2, respectively. To date, the Board has not received a motion from any party pursuant to Rule 4009.21(d)(1) to rule on the objections and decide whether the subpoena should be served.

The School, however, has filed a motion for a protective order from discovery sought by New Hope from the School. That is the only motion before us that is ripe for decision.[3] The discovery requests at issue in the School's motion include a request for a designated representative from the School to be deposed on certain topics, requests for document production, interrogatories, and a request to enter the Solebury School campus for an inspection by New Hope's counsel and their experts. Solebury Township has submitted a short memorandum in support of the School's motion. New Hope opposes the motion. The Department has remained silent, although its position generally appears to be reflected in its objections to the Bucks County Water and Sewer Authority subpoena.

The School sought within its motion for a protective order a temporary stay of its discovery obligations with respect to New Hope pending the Board's resolution of the motion. The request for a temporary stay was not opposed by any party and we issued the stay on August

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[2] Any dispositive motions must be filed on or before September 26. The hearing on the merits is scheduled to begin on March 20, 2017.

[3] New Hope also has pending a motion to compel the Township to respond to discovery served by New Hope.

16, 2016. Although that stay only applied to New Hope's discovery served on the School, New Hope by letter dated August 18 asked that the previously scheduled discovery deadline of August 28 be stayed indefinitely pending the Board's resolution of the School's motion for a protective order. All parties agreed to the request. We took it under advisement pending our consideration of the School's motion.

The notice to inspect the School's campus that New Hope served pursuant to Pa.R.C.P. Nos. 4009.31 and 4009.32 says that it needs to enter the campus for the purposes of "inspecting, photographing, videotaping, and otherwise observing the Solebury School and its surrounding grounds." Regarding New Hope's request to produce a designated representative of the School to provide deposition testimony, the School seeks protection from providing testimony on the following topics:

1. The effect of the requirements on the School of the Department's January 29, 2016 Letter that is the subject of this Appeal.
2. The construction of buildings on the School property since 2006.
3. The use of groundwater on the School from 2006 to the present.

The interrogatories the School seeks protection from are as follows:

1. Describe in detail all structures or features that have been constructed on the School Property since 1978, including the:
   a. Name of structure or feature;
   b. Date construction began;
   c. Date of the completion of construction;
   d. Purpose of the structure or feature;
   e. Location of the structure or feature.
2. Describe in detail the construction techniques used for all structures or features that have been constructed on the School Property since 1978, specifically with regard to the mitigation of the threat of sinkholes.
3. Describe in detail the specific actions taken or consideration given, if any, during construction, planning or execution to the possibility or existence of sinkholes on the School Property.
4. Describe in detail the specific actions taken, if any, by the School or at the School's direction relating to mitigation of sinkholes on the Property.

5. Describe in detail the specific actions taken, if any, by the School or at the School's direction relating to remediation of sinkholes on the Property.
6. Describe in detail all geotechnical engineering or work performed, if any, on the School's Property, at the School's Request, or relating to the School's land or structures.
7. Describe in detail the costs [the School has] incurred as a result of the remediation or mitigation of sinkholes from July 31, 2014 to date.

….

9. Identify all persons affiliated with the School who have been involved in making any decision pertaining to the mitigation or remediation of sinkholes on the Property and any decisions relating to the Quarry. For each person, state the person's responsibility in making any decision pertaining to the reclamation which is the subject of the appeal, the School's involvement in the appeal, or the mitigation or remediation of sinkholes on the property.
10. Describe in detail each and every sinkhole, including those sinkholes you characterize as existing sinkholes that have "reopened," that have allegedly formed on the School's Property since July 31, 2014, along with all actions you have taken with respect to each sinkhole.
11. Describe in detail any investigation, if any, you have conducted since July 31, 2014 regarding sinkholes on the School's Property.

….

17. Identify all environmental, biological, water, air, or other tests or sampling results that you have undertaken or caused to be undertaken relating to the sinkholes, Quarry, and the Appeal. State with specificity the following:
    (a) The dates of tests;
    (b) The times of tests;
    (c) The individuals conducted each test/sampling result;
    (d) The reason the test sampling was completed;
    (e) The location where the test/sampling was completed; and
    (f) Produce all documents relating to these tests/sampling results
18. Describe in detail all groundwater withdrawals, deposits, injections, and related structures or features employed on the School Property since 1978, including the:
    a. Name of structure or feature;
    b. Date construction began;
    c. Date of the completion of construction;
    d. Purpose of the withdrawal, deposit or injection;
    e. Purpose of the structure or feature;
    f. Location of the structure or feature;
    g. Volumes of water handled monthly;
    h. Conveyance capacity of water; and
    i. Users of groundwater.

19. Describe in detail all structures or features for the collection, control, deposition or any other type of management of sewage or stormwater on the School Property since 1978, including the:
    a. The function of the structure or feature;
    b. Date construction began;
    c. Date of the completion of construction;
    d. Purpose of the structure or feature;
    e. Location of the structure or feature;
    f. Volumes handled on a monthly basis;
    g. Improvements or renovations to those structures or features; and
    h. If maintained by others, the name of the party maintaining theirs.

….

23. Identify and describe in detail any communications you had with Solebury Township or any representative of Solebury Township relating to sinkholes at the School.

24. Set forth in detail the School's [policies and rules] relating to trespassing on Quarry property.

Finally, the School also seeks protection from the following requests for the production of documents:

7. All documents and communications containing or relating to building plans for any structure or feature constructed by or at the direction of the School.

8. All documents and communications relating to any geotechnical engineering or work performed on the School Property, at the School's request, or relating to the School's land or structures.

9. All documents and communications relating to construction techniques considered or employed in the construction of any structure or feature on the School Property.

10. All documents and communications relating to the School's remediation of sinkholes.

11. All documents and communications relating to any consideration of sinkholes taken by the School in construction of any structure or feature on the School Property.

….

13. All design plans and as-builts of structures constructed on the School Property.

14. All design plans and as-builts for stormwater, sewage and rainfall controls or structures on the School Property.

15. All records concerning pumping of groundwater on the School Property since 1985.

16. All documents reflecting governmental approvals of the items in 11, 12 and 13.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 4003.1. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. We must also keep in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517. Pursuant to Rule 4012, the Board is empowered to issue a protective order upon good cause shown to protect a person from improper discovery or unreasonable annoyance, embarrassment, oppression, burden, or expense. *Haney v. DEP*, 2014 EHB 293, 297; *Chrin Bros. v. DEP*, 2010 EHB 805, 811.

In evaluating whether discovery regarding a matter should be permitted, we must first determine whether it appears to be reasonably calculated to lead to information that is relevant to the subject matter involved in the appeal. If the matter being inquired into is not likely to lead to the discovery of relevant evidence, that is the end of our inquiry. The discovery is not permitted. *Cabot Oil & Gas Corp. v. DEP*, EHB Docket No. 2015-131-L, slip op. at 7 (Opinion, Feb. 6,

2016); *Sludge Free UMBT v. DEP*, 2014 EHB 939, 941. The subject of this appeal is the Department letter disapproving New Hope's reclamation plan and modifying it in seven aspects. As noted above, the letter follows up on two compliance orders the Department issued in the fall of 2015 requiring New Hope to submit a revised reclamation plan that would timely reclaim the quarry, restore the hydrologic balance in the area, and abate the public nuisance being caused by the quarry's lowering of the groundwater table, but this appeal is not from those orders; New Hope withdrew its appeals from those orders.

Thus, because the Board's role in hearing an appeal is necessarily circumscribed by the action under appeal, *Love v. DEP*, 2010 EHB 523, 530; *Winegardner v. DEP*, 2002 EHB 790, 793, the focus of this case is narrowly confined to the letter and the modifications to New Hope's reclamation plan made by the letter. Our role will be to decide whether the Department, in determining that New Hope's reclamation plan was deficient and modifying the plan in the way that it did, acted reasonably and in accordance with the law, whether its decision is supported by the facts, and whether the decision is consistent with the Department's obligations under the Pennsylvania Constitution. *See Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op at 12 n.2 (Adjudication, Feb. 29, 2016); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.

Any attempt by New Hope to contest what has already been determined by the underlying orders is outside the scope of this appeal. The doctrine of administrative finality precludes a future attack on an action that was not challenged by a timely appeal. *Kalinowski v. DEP*, EHB Docket No. 2016-032-R, slip op. at 3 (Opinion, Jun. 28, 2016) (citing *Dep't of Envtl. Res. v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977)). "It is well-settled that a party may not use an

appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action." *Love v. DEP*, 2010 EHB 523, 525. By the same token, if a party appeals an order and then later withdraws that appeal before it is adjudicated, that order becomes final and cannot be attacked in another, separate appeal. *White Glove, Inc. v. DEP*, 1998 EHB 372. New Hope withdrew its appeals of the October and November orders and these orders are now final. Every aspect of the underlying orders has now been established and cannot be attacked in the current appeal of the letter.

Because the underlying compliance orders are final, the factual predicate giving rise to New Hope's submission of a revised reclamation plan is now beyond the purview of this appeal. Therefore, that New Hope's existing reclamation plan was in violation of the Noncoal Surface Mining Act and that it was required to revise its reclamation plan in a way that more expeditiously abated the nuisance being caused by the quarrying are determinations that are now final. New Hope can no longer contest that its prior reclamation plan was deficient in the ways that the Department found in its two orders. New Hope can no longer challenge whether it had to submit a new reclamation plan. New Hope cannot challenge that it had to submit a reclamation plan that timely abates the public nuisance. It cannot contest that the restoration of the water table underneath the School must occur with all deliberate speed concurrently with reclamation. All that remains, then, is the specifics of the reclamation plan, including the pumping schedule. The operative question being: Do the details of the plan as modified by the Department reflect a lawful and reasonable exercise of the Department's discretion? Accordingly, to be relevant, all discovery in this matter must be geared toward answering this question.

The doctrine of collateral estoppel further restricts what is relevant and open to discovery in this appeal. Collateral estoppel is designed to prevent parties from being forced to relitigate the same static issues over and over again. *Lucchino v. DEP*, 1998 EHB 473, *aff'd*, No. 1730 C.D. 1998 (Pa. Cmwlth. Dec. 4, 1998). The doctrine "relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication." *Shaffer v. Smith*, 673 A.2d 872, 875 (Pa. 1996) (citing *Allen v. McCurry*, 101 S. Ct. 411, 415 (1980)). Collateral estoppel applies when:

> (1) The issue decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action;
>
> (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and
>
> (5) The determination in the prior proceeding was essential to the judgment.

Borough of St. Clair v. DEP, 2015 EHB 290, 310; *Kuzemchak v. DEP*, 2010 EHB 564, 566 (citing *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50-51 (Pa. 2005); *Church of God Home, Inc. v. Dep't of Pub. Welfare*, 977 A.2d 591, 593 (Pa. Cmwlth. 2009); *Emp'rs Mut. Cas. Co. v. Boiler Erection and Repair Co.*, 964 A.2d 381, 394 (Pa. Super. 2008)). Regarding the fifth element, the key is that the issue must have been put to the test. "A finding that was of no consequence in the first case should not be given immutable weight in another case where it could have determinative consequences." *Sedat, Inc. v. DEP*, 2000 EHB 927, 939-40.

Collateral estoppel has considerable application here. Many of the facts and legal conclusions underpinning the Department's letter cannot be relitigated in this appeal. For example, although we did not specifically direct the Department to do anything in our Adjudication, we did find that it had the legal authority, and indeed a duty, not to allow a

noncoal operator to perpetuate an ongoing threat to the public's health and safety. We held that New Hope was perpetuating such a threat by continuing to draw down groundwater, which was in turn causing hazardous sinkholes on an ongoing basis. We held that the only way to abate the threat was to allow the groundwater to return to normal levels. These matters were all essential to our conclusion that a rescission was needed, which we decided in the course of rendering a final decision on the merits in a case vigorously disputed by the same parties in this case.

With these concepts of relevance, administrative finality, collateral estoppel, and proportionality in mind, we turn to New Hope's disputed discovery requests. The School argues that most if not all of New Hope's discovery requests are improper and burdensome because they seem to be aimed at the issue of sinkhole causation, and specifically New Hope's efforts to attribute causation to the School's use of its own property. The School contends that not only is sinkhole causation not relevant to the narrow appeal of the Department's letter modifying the quarry's reclamation plan, but that causation has already been conclusively established by our 2014 Adjudication and the Department's compliance orders. The School says that causation has been attributed to the quarry's pumping, and New Hope is barred from relitigating this in the current appeal.

New Hope responds that its discovery requests are not seeking information regarding causation, but rather its discovery is necessary to assess the effects of the Department's letter on the School. New Hope reiterates slight variations of this rather vague statement throughout its response. ("The desired discovery will assist [New Hope] in the important task of insuring that the Letter's requirements properly impact the area of the quarry"); ("discovery is needed for evaluation of the Letter's requirements related to the response at the quarry"); (discovery will "help us determine what advances safety and health at the School"); (discovery will "help [New

Hope] determine how the requirements of the Letter affect the environmental conditions in the area of the quarry, the School, and the vicinity"); ("help determine the effect of the letter"); ("help assess the safety of the School"); and ("assess…whether the actions that are currently being taken are having any impact on the School"). We are certainly receptive to explanations of why discovery is relevant when the relevance is not obvious to us, but these vague statements are not particularly helpful. We have already held that the School grounds are unsafe because of the ever present threat of collapse sinkholes being caused by the quarry's groundwater pumping, and that the only way to make the School safe again is to allow groundwater levels to return to normal. Again, although we did not specifically require it to do so, the Department took our findings to heart and is requiring New Hope to immediately allow groundwater levels to gradually recover so that the School can, some day, eventually return to providing a safe environment for the children and faculty that live on and use its grounds. New Hope withdrew its appeals from the compliance orders requiring it to allow groundwater levels to begin to recover, and it signed a consent assessment promising not to challenge the Department's findings.

The basic flaw in New Hope's response is that it never truly articulates how the School's building records, historical construction of buildings and stormwater facilities since 1978, geotechnical studies, sinkhole remediation efforts, and groundwater use relate to any of the requirements of the letter. New Hope never tells us, for example, that if the School's gymnasium was built in such a way that it will exacerbate sinkhole formation, it somehow follows that the Department's limitation on the quarry's groundwater pumping should be lower or higher. The only reason we can think of why information regarding construction of the gymnasium would be relevant is if we were trying to determine what is causing sinkholes to form on the campus, but

that issue is off the table. We simply cannot imagine how details regarding the School's gymnasium could possibly relate to the Department's modifications, nor should we need to. New Hope has not supplied an explanation.

New Hope never explains why it needs, say, a detailed history of the School's sinkhole repairs in order to be able to challenge the requirement that the quarry devote a certain number of man-hours per week to reclamation. It never connects the dots between the School's management of sewage going back to 1978 and the requirement to place a minimum of 200 cubic yards per hour of backfill material for reclamation purposes during highwall reclamation. We could go on along these lines, but the point is that we agree with the School's conclusion that the only logical reason for inquiring into these matters is to relitigate the sinkhole causation issue, and that we will not allow.

New Hope says that it "is attempting to address health and safety. It is attempting to determine the effect of the Letter's requirements on that health and safety and whether the requirements are arbitrary and capricious. Details relating to construction and safety will be able to determine whether the Department's requirements in the Letter are appropriate. Therefore, the information is relevant." We have a difficult time following New Hope's chain of deductive reasoning. While safety was of particular concern the last time around, and while that case serves as important context, this appeal is really about whether the Department's modifications to the reclamation plan are reasonable to bring about a goal that is no longer subject to challenge. New Hope never tells us how it reaches the conclusion that the information it seeks is relevant apart from stating it as self-evident when its relevance is in fact not readily apparent.

At one point New Hope argues that it "is not re-litigating the cause of the sinkholes—it is attempting to determine the effect of the Letter. Even if it were at this time, this would not be

barred by collateral estoppel." Once again, we are not sure what this means. To the extent New Hope is arguing that, while collateral estoppel may bar issues from being relitigated at trial it does not operate to bar *discovery* on these issues, New Hope offers no support for this argument, and it is deeply flawed. If an issue is barred from being litigated at trial, we do not see how it can possibly be relevant to the subject matter of the appeal, and thus a proper topic of discovery.

The only provision in the letter that at all relates to the School as far as we can tell is the final requirement, which provides that New Hope must install a monitoring well on the School's campus. It appears to us that the monitoring well requirement would support a site inspection strictly limited to finding an appropriate location for the well, but it does not justify New Hope's broadly worded request to inspect the entire campus or any of New Hope's other discovery requests. The Rules of Civil Procedure allow a party to request entry upon another party's property for purposes of inspection as a component of the discovery process. Pa.R.C.P. Nos. 4009.31 and 4009.32. However, Rule 4009.31 provides that such entries must be within the scope of discovery under Rules 4003.1 – 4003.6. In other words, a threshold consideration for determining whether to permit an entry for inspection, and defining the scope of that inspection, is whether the inspection is relevant to the appeal. Here, that relevant discovery is limited to devising a plan and determining an appropriate location for the installation of a monitoring well. We will permit entry onto the School's property for this purpose alone.

Regarding two somewhat outlier discovery requests, New Hope offers no explanation for why any trespassing policy the School may have developed is relevant to this appeal. New Hope has also not explained why any air, water, or biological sampling conducted by the School is relevant to the appeal. Without any explanation from New Hope, the relevance of these requests escapes us.

Considerations of proportionality also come into play. The School is supposed to be in the business of educating students, but instead it has been forced at what we expect has been enormous expense to litigate before the Environmental Hearing Board in a continuing and undoubtedly frustrating effort to protect its campus from the never-ending assault of sinkholes. Indeed, we were told at the supersedeas hearing that several new sinkholes have emerged since our Adjudication. The School has already been subjected to comprehensive discovery in the prior case regarding its construction activities on its campus as well as all of the matters that New Hope is attempting to reopen. We agree with the School's complaint in its motion that it is being subjected to an unreasonable level of annoyance, oppression, burden, and expense. New Hope's discovery requests, other than its limited need for site access to determine the appropriate location for a monitoring well, go well beyond any demonstrable need to ascertain facts relevant to its challenge of the Department's modification letter. New Hope's discovery clearly retreads old ground. Allowing New Hope to once again subject the School to spending significant resources relitigating these issues would be entirely unfair to the School and amount to an abuse of the judicial process.

Finally, the School seeks a protective order from New Hope's discovery that requests information, documents, and deposition testimony regarding communications about the quarry between the School and the Department occurring after the date of the letter under appeal, January 29, 2016.[4] The School says that it has already provided New Hope with communications between the School and the Department occurring before the date of the letter. The School argues that any communications occurring after the date of the letter are irrelevant for determining whether the Department's issuance of the letter can be supported. The School

[4] The School does not appear to have moved for a protective order with respect to the School's communications with the Township.

cites a federal case for the precept that judicial review of agency actions should focus on the reasoning of the agency at the time it made its decision, and argues that the Board should not concern itself with what the School calls after-the-fact communications. This is the School's only basis for a protective order regarding those communications.

Here, the School is incorrect. We are not like a federal court reviewing an agency action to determine whether the record that existed at the time the agency undertook the action supports the agency's decision. Our review is *de novo*, meaning we decide an appeal of a Department action based on the record that is developed before us. *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 12 n.2 (Adjudication, Feb. 29, 2016); *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Young v. Dep't of Envtl. Res.*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). We do not step into the shoes of the Department to second-guess its decision based upon the record it had before it. Instead, we make our own decision based on a record created entirely before us that is not limited in either time or scope by what the Department considered. *Tri-Realty Co. v. DEP*, 2015 EHB 184, 188. *See also Pa. Trout v. Dep't of Envtl. Prot.,* 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472. Importantly, no action of the Department adversely affecting a person is final until that person has had the opportunity to appeal the action to the Board, meaning subsequent events are often relevant. 35 P.S. § 7514(c); *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472. Indeed, we can consider evidence up until the time of the hearing on the merits. *See Borough of St. Clair v. DEP*, EHB Docket No. 2015-017-L, slip op. at 25 (Adjudication, Jun. 6, 2016). Therefore, because we consider documents created after the point in time that the Department took its action, and the School has not argued that communications between the School and the

Department regarding the quarry are irrelevant for some other reason, the School's motion for protective order is denied with respect to those communications.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	

O R D E R

AND NOW, this 12th day of September, 2016, it is hereby ordered that Solebury School's motion for protective order is **granted in part and denied in part**. The School is not excused from providing responsive discovery regarding communications between the School and the Department occurring after January 29, 2016, and the School shall allow New Hope access to its campus for the discrete purpose of facilitating the development of a plan for the installation of the monitoring well on the School's campus. The motion is in all other respects granted. The parties on or before **September 22, 2016** may submit a proposed plan for completing any remaining discovery beyond the existing discovery deadline which does not result in an extension of the hearing date.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 12, 2016

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

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Jordan B. Yeager, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDALL BENSINGER	:	
	:	
v.	:	**EHB Docket No. 2015-201-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION	:	**Issued: September 14, 2016**
and HEISLER'S EGG FARM, INC.,	:	
Permittee	:	

OPINION AND ORDER ON THE PENNSYLVANIA STATE CONSERVATION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Pennsylvania State Conservation Commission's motion for summary judgment. The Appellant has the burden of proof in this appeal, and he failed to respond to the SCC's motion for summary judgment. His failure to respond and identify evidence of facts essential to his appeal entitles the Department to judgment under Pa R.C.P. 1035.2(2).

O P I N I O N

This is an appeal filed by Randall Bensinger from the approval of an Odor Management Plan ("Plan") for the Heisler's Egg Farm, Incorporated ("Heisler's Egg Farm") on November 25, 2015 issued by the Pennsylvania State Conservation Commission ("SCC"). In his Notice of Appeal ("NOA"), Mr. Bensinger listed three items as objections in responses to the directions to Paragraph 3 of the Board's Notice of Appeal Form as follows:

1. Heisler's Egg Farm Inc. Farm Facility Layout Map

2. Odor Management Plan Map

3. Existing Facility Description

Bensinger's NOA Paragraph 3. Other than these brief hand-written listings, Mr. Bensinger provided no further detail regarding the nature or scope of his objections to the SCC's approval of Heisler's Egg Farm's Plan.

On July 26, 2016, The SCC filed a motion for summary judgment in which it argues that it is entitled to summary judgment under Rule 1035.2(1) and (2) of the Pennsylvania Rules of Civil Procedure, which are incorporated by reference in the Board's Rules. *See* 25 Pa. Code § 1021.94a(a) and Pa.R.C.P. 1035.2. According to the SCC, the SCC served discovery on Mr. Bensinger and Mr. Bensinger never responded to discovery.[1] According to the Department, its discovery requests made inquiries in the following areas:

1. Identification of witnesses
2. Factual basis for contentions in appeal
3. Clarification of the nature of the appeal
4. Identification of general objections to the SCC's approval
5. Identification of specific objection to the SCC's approval
6. Identification of record evidence
7. Identification of relief requested from the Board

SCC's Statement of Undisputed Material Facts, Paragraphs 10-16.

Before the SCC filed its motion for summary judgment, the Board scheduled a conference call on July 28, 2016 with the Parties to discuss the status of the appeal after the close

[1] The Board only just learned of Mr. Bensinger's failure to respond to the SCC's discovery request when the SCC filed its motion for summary judgment. When Mr. Bensinger failed to respond to the SCC's discovery requests, the SCC did not file a motion to compel or a motion for sanctions which would have presented the Board with notice of the discovery disputes and the opportunity to address them earlier in the proceedings.

of the dispositive motion deadline on July 26, 2016. The SCC's motion was filed on July 26, 2016 after the conference call was scheduled. Mr. Bensinger did not participate in the Board's scheduled conference call on July 28, 2016, even though he was contacted directly by the Board regarding the call and was provided with all necessary information to participate in the conference call. Mr. Bensinger also did not respond to the SCC's motion for summary judgment within 30 days of the SCC's filing of its motion as required by the Board's Rules at 25 Pa. Code § 1021.94a. To date, Mr. Bensinger has made no attempt to respond in any manner or to communicate with the Board to explain the reason for his failure to respond to the SCC's motion or to participate on the Board's scheduled conference call. If Mr. Bensinger had participated in the conference call scheduled for July 28, 2016, the Board was prepared to explain to Mr. Bensinger that he was required to respond to the SCC's motion and that there were consequences under the Board's Rules for failure to respond to a motion for summary judgment.[2]

Mr. Bensinger's response to the SCC's motion for summary judgment was due on or about August 26, 2016. To date, Mr. Bensinger has not filed a response required by Section 1021.94a(g). Under Section 1021.94a(1), summary judgment may be entered against a party who fails to respond to a motion for summary judgment. 25 Pa. Code § 1021.94a(1). For the purposes of the relief sought in a motion, a party's failure to respond to a motion will be deemed an admission of all properly-pleaded facts in the motion. 25 Pa. Code § 1021.91(f). The Board will therefore view Bensinger's failure to respond to the SCC's motion for summary judgment as an admission of all the properly pleaded facts in the SCC's motion.

[2] Under the Board's Rules, "If the adverse party does not so respond, summary judgment may be entered against the adverse party." 25 Pa. Code § 1021.94a(1).

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP* and *MarkWest Liberty Midstream and Resources, LLC,* 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *See* 25 Pa. Code § 1021.94a(a), (h); Pa.R.C.P. 1035.1.

The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a); *Donald E. Longenecker v. DEP*, EHB Docket No. 2015-163-L, slip op. at 2-4 (Opinion and Order, August 9, 2016). There are two ways to obtain summary judgment on the substance of the motion. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1); *Id.* Second, summary judgment may be available:

> [I]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence

> of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2); *Id.* Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2; *Id.*

In this appeal, the SCC asserts that it is entitled to summary judgment under each of the ways to obtain summary judgment. The SCC asserts that Mr. Bensinger's NOA is deficient because it fails "to provide any specific, or even general, objection to the Commission's OMP Approval." In addition, the SCC argues that Mr. Bensinger's failure to respond to the SCC discovery request prevents Mr. Bensinger from disputing the SCC's motion or from alleging a disputed issue of material fact. The SCC claims it is entitled to summary judgment under these facts pursuant to Pa.R.C.P. 1035.2(1).

In this appeal, Mr. Bensinger has the burden of proof under the Board's Rules. 25 Pa. Code § 1021.122(c)(2). Without specific objections in his NOA or evidence produced during discovery, the SCC asserts that Mr. Bensinger cannot meet his burden of proof, and the SCC is entitled to summary judgment under Pa.R.C.P. 1035.2(2); *Casey v. DEP,* 2014 EHB 439, 443. In addition, Mr. Bensinger did not file a response to the SCC's motion and his failure to respond presents the Board with a barren record to support his appeal.

The Board agrees with the SCC that it is entitled to summary judgment under Pa.R.C.P. 1035.2(2).[3] Mr. Bensinger filed a third-party appeal of the SCC's approval of the Plan submitted by Heisler's Egg Farm. Under Section 1021.122(c)(2), Mr. Bensinger has the burden of proof.

[3] The SCC is also entitled to summary judgment under the Board's Rules at 25 Pa. Code § 1021.94a(1). Mr. Bensinger did not file a response to the SCC's motion for summary judgment, and on this fact alone the Board is authorized to grant the SCC's motion.

Mr. Bensinger, as an adverse party, failed to respond to the SCC's motion and produce any facts essential to his appeal. Mr. Bensinger did not respond to the SCC's discovery requests and he has failed to produce any evidence to support his brief allegations in his NOA. Obviously, with no response, there is insufficient evidence for Mr. Bensinger to make out a *prima facie* case. *Casey,* 2014 EHB at 443. The SCC is therefore entitled to summary judgment under Rule 1035.2(2).

The Board is not as certain that the SCC is entitled to judgment under 1035.2(1) because the Board disagrees with the SCC that Mr. Bensinger did not list any objections in his NOA. Mr. Bensinger, in the most general of terms, listed three items in response to Paragraph 3 of the Board's Notice of Appeal Form, which requests that appellants provide objections to the challenged actions. Mr. Bensinger listed the Facility Layout Map, the Odor Management Plan Map and the Existing Facility Description. Other than these very general headings, Mr. Bensinger supplied no specific objections to the listed items. The SCC attempted to secure more detailed responses during discovery, but as previously mentioned, Mr. Bensinger failed to respond in any manner to the SCC's discovery requests. Because the SCC is entitled to summary judgment under Rule 1035.2(2) and under Section 1021.94a(1), the Board need not resolve the more complicated question whether the SCC is also entitled to judgment under Rule 1035.2(1).[4]

In addition, the Board should mention Mr. Bensinger's failure to comply with the Board's Order scheduling the conference call and Rules governing motions for summary

[4] The complications arise from the fact that there may be issues of material fact concerning the existence or nature of the Appellant's objections. Mr. Bensinger did list three general items in Paragraph 3 of his NOA. In addition, the SCC did not file a motion to compel or a motion for sanctions regarding Mr. Bensinger's failure to respond to discovery, and the Board has not had an opportunity to fully evaluate the consequences for Mr. Bensinger's failure to respond to the SCC's discovery requests.

judgment. Mr. Bensinger failed to participate in a Board scheduled conference call regarding his appeal, and to date, Mr. Bensinger has failed to contact the Board to explain his absence during this mandatory conference call. Mr. Bensinger also failed to respond to the SCC's motion for summary judgment as required by the Board's Rules.

The Board has the power to impose sanctions, including dismissal of an appeal for failure to comply with Board Order. 25 Pa. Code § 1021.161; *Martin v. DEP*, 1997 EHB 158. Failure to comply with Board Orders or Rules clearly demonstrates a lack of intent to pursue an appeal and dismissal is warranted. *Scottie Walker v. DEP*, 2011 EHB 328; *K H Real Estate, LLC v. DEP,* 2010 EHB 151; *Pearson v. DEP*, 2009 EHB 628, 629 (citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54). Where a party has evidenced a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *See Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzsche v. DEP*, 2013 EHB 861, 862. Mr. Bensinger's failure to comply with the Board's order and Rules is evidence of Mr. Bensinger's disinterest in proceeding with his appeal. The Board does not have to resolve whether Mr. Bensinger has evidenced a sufficiently "demonstrable disinterest in proceeding" because the Board has already decided to grant the SCC's motion for summary judgment as set forth above.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDALL BENSINGER	:	
	:	
v.	:	**EHB Docket No. 2015-201-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION	:	
and HEISLER'S EGG FARM, INC.,	:	
Permittee	:	

O R D E R

AND NOW, this 14th day of September, 2016, it is hereby ordered that the Board **grants** the SCC's Motion for Summary Judgment.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 14, 2016

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

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(*via electronic filing system*)

For Appellant, *Pro Se*:
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For Permittee:
Aaron S. Marines, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN SNYDER, STEPHANIE SNYDER, MARIE COHEN, ALEX LOTORTO, GREG LOTORTO, BESS MORAN, MARIE LIU AND ROBIN SCHNEIDER	:	
v.	:	**EHB Docket No. 2015-027-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION, LLC, Permittee	:	**Issued: September 16, 2016**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment in a third-party appeal from the issuance of a plan approval for a compressor station because there are genuine issues of material fact regarding the Department's analysis of best available technology for greenhouse gases that will be emitted from the facility.

O P I N I O N

The Appellants are appealing the Department of Environmental Protection's (the "Department's") issuance of Plan Approval 52-00001A to Columbia Gas Transmission, LLC ("Columbia"), which authorized Columbia to upgrade its existing compressor station in Milford, Pike County. The Appellants have filed a motion for summary judgment. They allege errors with respect to (1) best available technology (BAT) for greenhouse gas emissions (GHGs), (2) fugitive emissions, and (3) Article 1, Section 27 of the Pennsylvania Constitution.

With respect to BAT, in simple terms, the plan approval process starts with an application, which is subject to public review and comment after notice. The Department completes its review of the application and comments and the plan approval is (in this case) issued. The Appellants argue that there were errors at each of these steps. They say that Columbia's application should have, but did not, analyze BAT for GHGs. They then say that the Department did not perform a BAT analysis for GHGs, and finally, they say that the plan approval as issued does not impose BAT for GHGs.

We do not think that Columbia's application can fairly be characterized as having contained an analysis of BAT for GHGs. There does not appear to be any dispute that it should have. A plan approval applicant must show that the emissions from the new source will be the minimum attainable through the use of best available technology. 25 Pa. Code § 127.12(a)(5). Neither the Department nor Columbia has questioned that this requirement applies to greenhouse gases. It does not necessarily follow, however, that a remand is necessary. As we have said many times, we are more concerned with the Department's final action than with the details of how it got there. *See, e.g., Chester Water Authority v. DEP*, EHB Docket No. 2015-064-L (Opinion and Order, May 11, 2016); *R.R. Action Comm. v. DEP*, 2009 EHB 472, 476. We do not review permit applications; we review permits.

The Appellants point out that the application is the main source of information that the public gets to review and comment on. They argue that a remand is necessary because the public was deprived of a meaningful opportunity to provide comment on the BAT issue. However, a remand for additional public comment should not be viewed as automatic simply because one aspect of the application under review is deficient. *See Big Spring Watershed Ass'n v. DEP*, 2015 EHB 100, 106 (in considering the remedy for inadequate notice, we consider a number of

factors). We note that there was considerable public participation with respect to Columbia's application and there was no real mystery regarding what Columbia proposed to do with respect to its air pollution controls. The motion for summary judgment contains no explanation for why a remand would be productive in this case.

The Appellants next contend that the Department did not conduct a BAT analysis, or if it did, it did not reveal it in a manner that allowed for meaningful public comment. They ask that we remand the plan approval with instructions to perform such an analysis, or at least to allow further public comment on what the Department now says constitutes its BAT analysis.

If the Department failed to perform a BAT analysis for GHGs *in advance* of issuing the plan approval, that would indeed be troubling. However, the record is not clear on exactly what the Department did. The Appellants point to the fact that the Department's technical review memorandum does not even mention GHGs. They point out that both Columbia and the Department in their responses to the motion for summary judgment rely heavily on Columbia's expert report that was prepared *after* the plan approval was issued. In response, the Department among other things says that it has developed model BAT conditions for GHGs for compressor stations generally in connection with a general permit, GP-5, and it imposed those model conditions in Columbia's plan approval. Columbia and the Department also argue that, regardless of what analysis the Department performed before issuing the plan approval, the plan approval as issued requires BAT, and that is what matters.

If the Department hid the ball or simply did not do an analysis that it should have done, our concern regarding public notice and comment is greater. *See id.* (failure to issue draft permit requires remand for comment). However, a pointless remand is still not automatic. We would like to see the record developed further on this point. A remand in the context of a summary

judgment motion directing the Department to conduct an analysis that it may have already albeit belatedly performed may not be appropriate, even if the Department erred. It might be, for example, that the BAT analyses that were performed for other air contaminants (e.g. NOx) resulted in controls that constitute the BAT for GHGs.[1]

The last aspect of the Appellants' claim regarding BAT is that the plan approval as issued does not in fact impose BAT for GHGs. They offer very little in support of this claim. They do criticize Columbia's leak detection program, which the Department has cited as a component of BAT, but that is hardly enough to support summary judgment. Whether the plan approval imposes BAT is at the very least the subject of genuinely disputed material facts and an incomplete discussion of the law. It is a central issue in this case and it is not ripe for determination on the summary judgment motion.

The Appellants argue next that summary judgment in their favor is appropriate because 25 Pa. Code § 123.1 prohibits a plan approval recipient from emitting fugitive air contaminants unless it is an exempt source or the Department determines its fugitive emissions are of minor significance. They argue that Columbia will admittedly produce such fugitive emissions, yet it is not an exempt source and the Department has not determined that the emissions will be of minor significance.

Columbia and the Department respond that this objection regarding fugitive emissions was not included in the Appellants' notice of appeal, and therefore, cannot serve as the basis for summary judgment. The Appellants have little to say in response, other than a suggestion without explanation that their fugitive emissions argument is encompassed within the genre of

[1] It is perhaps worth noting that, apparently as a result of removing the existing equipment and installing new, more efficient equipment, the facility will become a minor source of emissions. We are told the new sources will be subject to, *inter alia*, NSPS Subparts KKKK, JJJJ, 40 CFR 63 Subpart ZZZZ, and 25 Pa. Code §§ 127.12, 123.13, and 123.21.

their BAT objection. In the alternative, they request that we allow an amendment to the notice of appeal to add the objection if we disagree it is a component of the BAT objection.

We agree with Columbia and the Department that the Appellants' argument regarding fugitive emissions cannot fairly be said to be covered by the Appellants' objection regarding BAT. Fugitive emissions are not mentioned or even alluded to anywhere in the notice of appeal. It is not self-evident that the objection in the notice of appeal regarding BAT and the summary judgment argument regarding fugitive emissions overlap. The Appellants have made no attempt to explain why we should view the two issues as being within the same genre. If the Appellants wish to add that objection, they need to file an appropriate motion pursuant to the Board's rules. *See* 25 Pa. Code § 1021.53. In the meantime, the Appellants' motion for summary judgment cannot be granted based on the issue.[2]

Lastly, the Appellants allege in their motion for summary judgment that the Department fell short of its duty under Article I, Section 27 of the Pennsylvania Constitution because it failed to ensure that there had been compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. This allegation derives from the Appellants' claims regarding BAT and fugitive emissions. As discussed above, we are not able to conclude at this time that there has been a material failure to comply with applicable laws. Therefore, the Appellants' derivative constitutional claim must also fail for the time being.

Accordingly, we issue the Order that follows.

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[2] We note that there is a genuine dispute regarding the extent to which the facility will have fugitive emissions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN SNYDER, STEPHANIE SNYDER, MARIE COHEN, ALEX LOTORTO, GREG LOTORTO, BESS MORAN, MARIE LIU AND ROBIN SCHNEIDER	:	
v.	:	**EHB Docket No. 2015-027-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION, LLC, Permittee	:	

O R D E R

AND NOW, this 16th day of September, 2016, it is hereby ordered that the Appellants' motion for a summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 16, 2016

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

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For Permittee:
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Daniel J. Deeb, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	**Issued: September 19, 2016**

OPINION AND ORDER ON
MOTION FOR SANCTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for sanctions related to supersedeas proceedings because the appellant did not file its petition for supersedeas in bad faith or on frivolous grounds.

O P I N I O N

New Hope Crushed Stone & Lime Company ("New Hope") is appealing the Department of Environmental Protection's (the "Department's") letter modifying its reclamation plan. Among other things, the Department's letter limits New Hope to pumping no more than 500,000 gallons per day out of its pit. New Hope needs to pump two to three million gallons per day to keep the bottom of the pit dry. Therefore, the effect of the Department's letter is that the quarry is gradually filling up with water while this appeal is underway.

New Hope filed an application for a temporary supersedeas and a petition for supersedeas asking us to supersede the limitation on its pumping. After a telephone conference on the temporary supersedeas and an evidentiary hearing on the petition for supersedeas, we denied them both. We held that we are unable to issue a supersedeas in cases such as this one where

pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b). We added that New Hope's claim that it would suffer immediate, extreme, irreparable financial harm was not well substantiated, that there was significant ongoing harm to the public, and that New Hope had a very low likelihood of succeeding on the merits. We noted that New Hope admittedly had 2.18 million tons of mineable resources that were available during the pendency of this appeal and that New Hope would be able to pump out the pit if it ultimately prevails in the case. We also scheduled a hearing on the merits on a relatively expedited basis.

Solebury School, an intervenor in this appeal, played an active role in the supersedeas proceedings. It has now filed a motion for sanctions related to the supersedeas proceedings. It argues that New Hope filed for a supersedeas in bad faith and on frivolous grounds. It asks us to dismiss this appeal or at least award the School its attorneys' fees and costs incurred in opposing the supersedeas.

The Board may impose costs or other appropriate sanctions on parties or attorneys who, in the Board's opinion, have filed requests for supersedeas in bad faith or on frivolous grounds. 25 Pa. Code § 1021.61(e). Grounds are frivolous if they are entirely without merit. *Herr v. DEP*, 1997 EHB 977, 980 (citing *Cy. Of Delaware v. WCAB*, 649 A.2d 491 (Pa. Cmwlth. 1994)). Bad faith is associated with fraud, dishonesty, or corruption. *Twp. of Lower Merion v. QED, Inc.*, 762 A.2d 779, 781-82 (Pa. Cmwlth. 2000).

We do not agree that New Hope filed its petition for supersedeas in bad faith or on frivolous grounds. The School's primary complaint is that New Hope painted a picture of dire financial harm as a basis for supersedeas, and argued that the impending financial harm would prevent it from reclaiming the quarry in accordance with its permit, a consent order related to the

restoration of Primrose Creek, and the law. Yet, in response to the School's discovery requests following the supersedeas proceedings, New Hope responded that it "is no longer asserting its inability to pay as a basis for the Appeal." The School equates New Hope's withdrawal of its financial harm argument to an admission that its claim was untrue. However, New Hope correctly points out that, while individual financial harm to an order recipient can be highly relevant in a supersedeas proceeding, it is almost always completely irrelevant in the underlying appeal from a Department order. *See Ramey Borough v. DEP*, 351 A.2d 614, 615 (Pa. Cmwlth. 1976); *Weaver v. DEP*, 2013 EHB 486, 494; *Perano v. DEP*, 2011 EHB 298, 310. There is no basis for concluding that such evidence would be relevant in this appeal.

Given the circumstances of this case, including the threat of serious ongoing harm to the public, there is little doubt that New Hope's case for a supersedeas was weak. Nevertheless, we cannot say that New Hope was unreasonable in perceiving that the Department's pumping restriction posed a significant threat to its ongoing operations pending our Adjudication, and a weak case is not the same as a frivolous one devoid of all merit. We also detect no bad faith or frivolity here.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
	:	
v.	:	**EHB Docket No. 2016-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	

O R D E R

AND NOW, this 19th day of September, 2016, it is hereby ordered that Solebury School's motion for sanctions is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 19, 2016

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

GLENN J. MORRISON, M.D.	:	
	:	
v.	:	**EHB Docket No. 2016-009-L**
	:	**(Consolidated with 2016-024-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and INSURANCE AUTO	:	**Issued: October 4, 2016**
AUCTIONS, INC., Permittee	:	

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part and denies in part motions for summary judgment filed by the Department and a permittee. Summary judgment is granted where an appellant has failed to respond to certain challenges raised in the motions. Summary judgment is denied with respect to an appellant's technical objections to the approval of coverage under a general permit because it is not out of the question that the appellant could prevail on those objections without an expert. Summary judgment is also denied where it is not clear as a matter of law that a permittee obtained coverage under the appropriate permit for the stormwater discharges associated with its site. Summary judgment is likewise denied on a claim of the sufficiency of the public notice associated with the coverage determination.

O P I N I O N

The Adams County Conservation District approved after-the-fact coverage under a PAG-02 NPDES general permit for stormwater discharges associated with a site operated by Insurance Auto Auctions, Inc. in Latimore Township, Adams County. Earlier inspections by the

Conservation District revealed that Insurance Auto Auctions conducted earth disturbance activities in 2013 and 2014 without first obtaining an NPDES permit for the stormwater discharges. Pursuant to a Consent Order and Agreement with the Department of Environmental Protection (the "Department") in October 2015, Insurance Auto Auctions sought an NPDES permit for the work it had performed at the site. On December 26, 2015, the Conservation District approved coverage retroactively under PAG-02 for stormwater discharges associated with construction activities. Glenn J. Morrison, M.D., proceeding *pro se*, appealed that approval of coverage at EHB Docket No. 2016-009-L. Morrison also requested that the Department conduct an informal hearing on the Conservation District's approval pursuant to 25 Pa. Code § 102.32(c).[1] After receiving comments from both Morrison and Insurance Auto Auctions at the informal hearing, the Department determined that the Conservation District acted appropriately and affirmed the approval of coverage. Morrison appealed the result of the informal hearing at EHB Docket No. 2016-024-L. We consolidated the two cases into the earlier docket number on February 26, 2016.

Morrison lives at the property adjacent to the Insurance Auto Auctions site. His notices of appeal each contain 12 objections to the PAG-02 coverage approval. The objections are essentially the same across both of his appeals, although at certain points he expounds on his objections in the second notice of appeal. Among other things, he contends that the public notice provisions contained in Chapter 92a of the Department's regulations were not followed

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[1] That regulation provides:

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

25 Pa. Code § 102.32(c).

(Objection 1). He argues that Insurance Auto Auctions should have been required to obtain a PAG-03 permit relating to stormwater associated with industrial activities instead of the PAG-02 permit (Objection 2). He asserts that the Department failed to consider local zoning ordinances, or alternatively, that the Department approved coverage in the face of legitimate zoning issues (Objection 3). He contends that the permit authorizes Insurance Auto Auctions to install a drain pipe across his property that he has not consented to (Objection 10). He argues that the Department is incapable of regulating the type of business operated by Insurance Auto Auctions, and that Insurance Auto Auctions has violated the law on several prior occasions (Objection 11). Morrison also makes several technical challenges to the PAG-02 coverage, many of which express concerns of potential groundwater pollution and the contamination of his water well (Objections 4-9, 12).

Insurance Auto Auctions and the Department have now both filed motions for summary judgment seeking judgment on all 12 of Morrison's objections. Their motions rest on similar arguments. They both argue that Morrison cannot meet his burden of proof without expert testimony with respect to his technical objections—Objections 4-9, and 12—and they say that Morrison has stated in response to discovery that he does not intend to call any expert witnesses. They also generally contend that Morrison's remaining objections are without legal merit. They argue that: the public notice requirements for the PAG-02 general permit were satisfied; PAG-02 was the appropriate permit for this activity; the zoning issue has been mooted by a decision of the Adams County Court of Common Pleas; the approval of coverage does not convey any property rights with respect to any drain pipe; and the Department is fully capable of regulating Insurance Auto Auctions and other similar operations.

The Board is empowered to grant summary judgment in appropriate cases. 25 Pa. Code § 1021.94a; *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, Jun. 6, 2016). The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106. Indeed, the Board tends to grant summary judgment only in the "clearest of cases." *PWIA v. DEP*, EHB Docket No. 2014-175-M, slip op. at 5 (Opinion and Order, Aug. 31, 2016)

Morrison failed to address all of the issues raised in the summary judgment motions. His responses deal with the challenges to Objections 1 and 2, and the technical Objections 4-9 and 12, but he does not respond in any way to the challenges to Objections 3, 10, and 11. His responses incorporate by reference his notices of appeal and their attachments, but our rules clearly state that a party opposing a motion for summary judgment may not rest merely on the allegations contained in the notice of appeal. 25 Pa. Code § 1021.94a(l). Instead, an adverse party must come forth with specific facts showing there is a genuine issue for a hearing. *Id.* Even if we were to look at the notices of appeal, they have not anticipated the arguments put forth by the Department and Insurance Auto Auctions. There is no responsive argument, for instance, to the contentions that the zoning issue is moot or the permit does not convey property rights. Having not addressed all of the arguments from the Department and Insurance Auto Auctions, it appears that Morrison has abandoned those challenged objections. We may enter summary judgment against a party who does not adequately respond to a proper motion, 25 Pa. Code § 1021.94a(l), and we do so here for Objections 3, 10, and 11. For the remainder of the objections, we deny summary judgment.

With respect to Morrison's technical objections, both Insurance Auto Auctions and the Department argue that summary judgment is appropriate because Morrison has not identified an expert witness to support his technical challenges to the PAG-02 approval. They say that as a third-party appellant he has the burden of proof in this case, 25 Pa. Code § 1021.122(c)(2), and he will not be able to sustain his burden of proof without expert testimony. Morrison responds that he does not need an expert because he will substantiate his objections by using statutes, regulations, and applicable technical guidance manuals.

In *Casey v. DEP*, 2014 EHB 439, we rejected an argument similar to the one now advanced by the Department and Insurance Auto Auctions. In *Casey*, we had previously granted a permittee's motion in limine precluding the appellant from introducing any expert testimony due to his failure to identify any expert witnesses in response to discovery. However, when the permittee came back and argued that summary judgment should be granted because the appellant could not meet his burden of proof without an expert, we declined to grant summary judgment because there were aspects of the appellant's case that could proceed without an expert. Namely, the appellant had the right to call witnesses from the conservation district, the Department, and the permittee who were involved in the application process and permit review to ensure that all statutory and regulatory requirements were satisfied. Specifically, we found:

> Without his own experts, Mr. Casey cannot offer an opinion as to whether the proposed mitigation measures are insufficient or inadequate to guard against any adverse impact to the EV wetlands. He cannot pick apart Pennsy Supply's detailed proposal of swales and infiltration beds and claim that they will not work or that better options exist. He cannot contest the underlying hydrologic study that grounds all of Pennsy Supply's assertions regarding the wetlands and the proposed mitigation measures. However, Casey can question witnesses involved in the permit application and its review to test whether all of the regulatory requirements were satisfied. In this respect, Casey does not need to disprove any of the conclusions in the permit application regarding the hydrology, or dispute the data upon which Pennsy Supply's study relies, but rather confirm that the Department conducted the analysis that it was required to conduct under the regulations and that the permit application and the permit itself satisfy those requirements under the law.

Casey v. DEP, 2014 EHB 439, 453. Morrison has indicated that he intends to pursue a similar approach. This is undoubtedly a challenging road to take and ultimately prevail on at the hearing on the merits. *See, e.g., Chester Water Auth. v. DEP*, EHB Docket No. 2015-064-L, slip op. at 10 (Opinion and Order, May 11, 2016) (quoting *Shuey v. DEP*, 2005 EHB 657, 711 ("appellants

may not raise an issue and then speculate that all types of unforeseen calamities may occur.”)); *Borough of St. Clair v. DEP*, 2015 EHB 290, 314. However, since we are required to view the record in the light most favorable to Morrison, *PWIA v. DEP, supra*, slip op. at 5, at this point, in the context of motions for summary judgment, it is not clear as a matter of undisputed fact that Morrison’s technical objections will fail without the support of expert testimony. Neither the Department nor Insurance Auto Auctions has convinced us in their motions as a matter of undisputed fact that Morrison’s technical objections are entirely without merit.

Morrison alleges in his notice of appeal that Insurance Auto Auctions should have obtained coverage under a different general permit than the one under which it did obtain coverage—PAG-03 instead of PAG-02. The PAG-02 permit covers stormwater associated with construction activities, while the PAG-03 permit covers stormwater associated with ongoing industrial activities.[2] Morrison alleges in his appeal that Insurance Auto Auctions was required to obtain coverage under PAG-03 because he says that Insurance Auto Auctions is operating an automobile salvage yard. We have little information from the parties regarding what exactly goes on at the site in terms of day to day operations. For purposes of discussion we will accept Morrison’s characterization as the non-moving party.

Insurance Auto Auctions and the Department move for summary judgment on this objection because they say that the appropriate permit was indeed the PAG-02 permit. Insurance Auto Auctions tells us the work involved grading and repairing its parking lots. The Department and Insurance Auto Auctions argue that the PAG-02 permit covers stormwater associated with earth disturbance of an area greater than or equal to one acre of land, which, they continue, is

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[2] An updated and revised PAG-03 permit became effective on September 24, 2016. 46 Pa.B. 6083. The draft of the updated PAG-03 was published in the *Pennsylvania Bulletin* last year and opened up for public comment. 45 Pa.B. 6245 (Oct. 17, 2015). After the close of the public comment period, the PAG-03 permit in effect at the time was extended for one year, pending finalization of the revised PAG-03 permit. 45 Pa.B. 6859 (Nov. 28, 2015).

exactly what happened at this site. They argue that the site's characterization as a salvage yard is irrelevant to the determination of whether a PAG-02 permit was required for the project because PAG-02 coverage would be required for this work regardless of whether or not the site was industrial.[3] They add that, if anything, the PAG-03 permit would be *in addition to* the PAG-02 permit, not in place of it. They argue that PAG-02 is for the distinct purpose of construction activity, while PAG-03 is for ongoing and continued operation of a site.

We find it is very unclear from the parties' filings and the existing record exactly what sort of construction activity occurred on the site. Insurance Auto Auctions tells us, in its reply brief, that the construction activity involved grading and repair work on its parking lots, but that statement contains no citation to the record. To our knowledge, this is the only mention anywhere in the movants' filings of what sort of work was done at the site. Our own review of the record, and specifically Insurance Auto Auctions' notice of intent for coverage (NOI)[4] under PAG-02, reveals a rather vague statement on the scope of work: "The previously existing gravel was re-surfaced with additional millings in order to accommodate and safely handle the heavy loader equipment used and automobiles that would be present at the property under the new operator." (IAA Ex. I.) Beyond this single reference there is little if any information that we can

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[3] Both the Department and Insurance Auto Auctions also deny that Insurance Auto Auctions is operating an industrial site.

[4] NOI is defined as "[a] complete form submitted for NPDES general permit coverage which contains information required by the terms of the permit and by § 92a.54 (relating to general permits). An NOI is not an application." 25 Pa. Code § 92a.2.

When an NOI is submitted to the Department the NOI must

> identify each point source for which coverage under the general permit is requested; demonstrate that each point source meets the eligibility requirements for inclusion in the general permit; demonstrate that the discharge from the point sources, individually or cumulatively, will not cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) and include other information the Department may require. By signing the NOI, the discharger agrees to accept all conditions and limitations imposed by the general permit.

25 Pa. Code § 92a.23.

discern from the record before us regarding the construction that necessitated the PAG-02 permit. As far as we can tell, the majority of the construction actually appears to be related to the stormwater management system itself, not any construction work for the site:

> Supplemental site improvements to address stormwater impacts include soils amendment and restoration, the removal of existing impervious surface to construct vegetated swales, and filter strips restored with native landscape materials, a multiple celled subsurface extended detention stormwater management facility, a dry extended detention basin, and hydrodynamic separators at the discharge end of the extended detention facilities.

No party has explained why what seem to be somewhat extensive stormwater controls are needed for the placement of "additional millings" on an existing gravel parking lot. Any temporary stormwater controls appear to have been previously installed pursuant to the Conservation District inspections and the COA, not the PAG-02 permit.

The information contained in Insurance Auto Auctions' NOI discusses what, without further explanation from the parties, look to be permanent controls for the ongoing operation of the facility. For example, in response to a request in the NOI form for information regarding naturally occurring geologic features or soil conditions that could result in pollution during earth disturbance activities, Insurance Auto Auctions discusses protocols it has in place to deal with fluid spills from the vehicles and BMPs installed for that purpose. The NOI states:

> Site-specific protocols for storage of vehicles and responding to spills were created for this site and are implemented by staff. In response to DEP's requests, IAA has reviewed and enhanced its procedures, and detailed information is provided herewith to the Department regarding how materials and fluids are handled at the site.
>
> ….
>
> As an additional precaution and to help ensure the potential pollutants are controlled on site, the proposed project includes various water quality BMPs (including hydrodynamic separator treatment units) that are intended to address any incidental release(s) that may occur at the property, which BMPs will be

further supported with the required water quality testing and DMR reporting as suggested by DEP.

(IAA Ex. I.) Insurance Auto Auctions here seems to acknowledge that it has constructed BMPs that go beyond the handling of stormwater associated with the earth disturbance at the site and may be primarily designed to handle spills and incidental releases of potential pollutants. No party explains why these BMPs are being permitted under a PAG-02, which we are told applies strictly to "construction" activities. No party has told us what "construction" means or encompasses in the context of the PAG-02 permit. No party has presented any legal argument as to whether controls for ongoing operations and their associated pollutants may be included in PAG-02 coverage, or whether those controls are more appropriately within the realm of PAG-03. We suspect that the type of analysis for PAG-02 coverage is different than the analysis for PAG-03 coverage. The legal analysis on these points in the movants' papers is rather limited.

The movants' primary position as we understand it is that the PAG-03 issue is a red herring: even if Insurance Auto Auctions needs a PAG-03 going forward, it does not follow that the PAG-02 was issued in error. As noted above, the Board only tends to grant summary judgment in the clearest of cases, and given the limited factual and legal discussion in the parties' respective filings, we are not entirely certain that the movants are correct. By only approving coverage under PAG-02, the Department at least arguably is sending a signal that *only* that permit coverage is required. It is difficult to imagine that Insurance Auto Auctions would propose and the Department would approve comprehensive stormwater controls that satisfy a PAG-02 but then later require something different under a PAG-03.

Along these same lines, Morrison seems to suggest that characterizing Insurance Auto Auctions' work in the public notice of coverage as construction, which sounds relatively innocuous compared to industrial activity, was misleading to him and the public at large. While

Morrison's regulatory analysis on the issue is, perhaps, less than refined, he may have a point if the underlying permitting question turns out to have merit. Given the uncertainty regarding the appropriate permit for the site discussed above, we cannot say at this juncture that the public notice in this case was adequate as a matter of law.

If Morrison is correct that the PAG-03 permit was required for this site instead of the PAG-02 permit, then the sufficiency of the public notice may also be called into question. Public notice must be fairly calculated to apprise the public of the nature of the activity being undertaken or permitted. While notice of the approval of coverage under PAG-02 may apprise interested persons of construction activity nearby, it would not raise the potential flag that notice under a PAG-03 permit might in terms of ongoing industrial operations. If the wrong permit was issued, then the public notice provided pursuant to that permit is almost necessarily deficient. *See generally, Throop Prop. Owner's Ass'n v. DEP*, 1998 EHB 618, 625 (stating in the context of municipal waste permits, "It is axiomatic that, in order to reap the benefits underlying the public comment policy, the notice to the public must be crafted so as to inform the ordinary citizen of what is being sought in the application and then published in a newspaper likely to reach those targeted citizens."); *PRIZM Asset Mgmt. Co. v. DEP*, 2005 EHB 819; *Stedge v. DEP*, 2015 EHB 31. Although public notice for coverage under NPDES general permits is not as robust as that for individual permits, the notice provisions still serve at least one important function—to notify persons of Department actions that may adversely affect them. If coverage under the wrong permit is issued, one may not have reason to suspect that an action would have an adverse effect, which may in turn suppress one's due process rights.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 4th day of October, 2016, it is hereby ordered that the Department's and Insurance Auto Auctions' motions for summary judgment are **granted in part and denied in part**. Summary judgment is granted with respect to Morrison's Objections 3, 10, and 11, and those objections are dismissed. The motions are in all other respects denied.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 4, 2016

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

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-011-L**
	:	**(Consolidated with 2015-123-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 11, 2016**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion for partial summary judgment in an appeal from the Department's comments regarding a PPC plan. Assuming it was appropriate for the Department to opine on the plan, it did not err to the extent that it concluded that it cannot grant Merck up-front absolution from the requirements of 25 Pa. Code § 91.33 in the context of its review of a PPC plan.

O P I N I O N

The Department of Environmental Protection (the "Department") prepared a draft individual industrial stormwater NPDES permit for stormwater discharges at the West Point facility of Merck Sharp & Dohme Corp. ("Merck") in Upper Gwynedd Township, Montgomery County. Merck submitted comments on the draft permit on September 30, 2014. Among other things, Merck submitted the following comment at Paragraph 8.b:

> In accordance with its update obligation, Merck has recently prepared an update to its spill response practices referenced in Part C, section 11.6.3 of the Draft Permit. A copy of the updated Clean Streams Law spill response section is attached to these comments as Exhibit "B" and hereby submitted for the Department's review.

> The updated plan is consistent with 25 Pa. Code § 91.33 by requiring immediate notification of the Department in the event of a spill that reaches or might reach the waters of the Commonwealth and pose a danger to downstream users, cause or create a danger of "pollution" as defined in Section 1 of the Clean Streams Law, or damage property. As discussed in comment 2 above, this is all that the law requires.
>
> Merck is currently following the Department's instructions to Merck to report all spills to the detention basins regardless of the quantity of the spill or its impact. This instruction, which goes beyond legal requirements, creates administrative burdens to Merck and the Department, and may create a misimpression to third parties that all reported spills created pollution or a danger of pollution, when this is far from the case. The spills that Merck reported at the Department's insistence and not pursuant to a regulatory obligation also have served as the basis for the unnecessary chemical additives monitoring requirement in the Draft Permit. As discussed in comment 2 above, other companies are not reporting spills that pose no danger of causing harm. Merck would like to return to employing the regulatory standard when it evaluates whether a spill triggers the notification requirement of § 91.33. Merck is therefore requesting Department approval of the enclosed EERP update enclosed as Exhibit "B" pursuant to Section B ("The permittee must develop and implement a PPC Plan….").

The parties have not supplied us with a copy of the "comment 2" referenced in the above comment, but the Department told us in one of its earlier filings in this case that comment 2 said something to the effect that Merck was, under protest and only as an accommodation to the Department, reporting to the Department de minimus spills that it did not think should be treated as reportable events under 25 Pa. Code § 91.33.[1]

---

[1] 25 Pa. Code § 91.33(a) reads as follows:

> **§ 91.33. Incidents causing or threatening pollution.**
>
> (a) If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters [of the Commonwealth], or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning

Merck's comments relate to a section titled "Spill Policy (Clean Streams Law portion)" in the Preparedness, Prevention and Contingency Plan ("PPC Plan") section of its Environmental Emergency Response Plan (EERP). The EERP is a consolidated plan that brings together all of the various emergency response-type plans that Merck needs to have on hand pursuant to the various statutes, permits and regulations that apply to its operations. Merck's PPC plan contained a detailed discussion of its opinion regarding what Section 91.33 requires in the way of reporting leaks and spills. Among other things, Merck devised its own personal definition of what constitutes "pollution" as that term is used in Section 91.33. It unilaterally set "thresholds" that needed to be exceeded (or that had a danger of being exceeded) before Merck would consider a given spill reportable.[2]

In a certified letter dated January 20, 2015, the Department sent Merck its final permit. In addition to enclosing the permit, the Department in its letter also responded to the comments Merck had submitted regarding the draft permit. Of note here, the Department said:

> or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonable possible to do so, to notify known downstream users of the waters.

[2] Merck's proposed triggers were as follows:

a. Requirements of permits held by the [West Point] facility including discharge limits and requirements relating to physical criteria such as sheens or visible foam
b. Applicable POTW NPDES permit limits (for spills to wastewater system)
c. Regulatory requirements including Chapter 93 and any other applicable Water Quality Standards for receiving waterbody, Pretreatment Standards (for spills to wastewater system), Local Ordinances applicable to the receiving waterbody, and requirements relating to physical criteria such as sheens.
d. Aquatic toxicity thresholds or criteria for chemicals that do not have permit limits, water quality standards, or pretreatment standards.
e. Bacterial toxicity criteria (i.e. activated sludge, ASRIT, etc. for receiving wastewater treatment facilities)
f. Biodegradation and/or activated sludge removal data (for receiving wastewater treatment facilities)
g. Applicable aquatic life effect levels and human safe usage concentrations established and published formally or informally by PADEP

2. Merck is not making an "accommodation" to the Department by reporting spills. 25 Pa. Code § 91.33 requires immediate reporting of spills. Of the spills reported by Merck since 2010, all were appropriate to report under § 91.33. § 91.33 does not contemplate calculations or other efforts to quantify the incident because to do so would conflict with immediate notification. § 91.33 is a reporting requirement that covers pollution and potential pollution.

....

8.b. The revised EERP does not comply with § 91.33 and, therefore, the Department cannot approve it.

Two points are worth noting regarding this response. First, the Department issued Merck's permit even though it decided that the PPC plan that goes with it could not be approved. Second, the Department's response to Merck's comment 8.b did not say that Merck's plan was disapproved; it said "the Department cannot approve it." In an earlier Opinion in this case, we treated the Department's comment as the same as a disapproval, but now with the benefit of a more complete record, we see that our characterization may have been too imprecise. *See Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543.

Merck filed this appeal not only from the permit itself, but also from the Department's unwillingness to approve the EERP plan as well. Merck objects that the Department should have blessed its EERP. Merck says 25 Pa. Code § 91.33 does not require it to report "de minimus spills" that do "not exceed the reporting thresholds or triggers or otherwise meet the criteria in 25 Pa. Code § 91.33 for providing mandatory notice to the Department." It says the Department is wrongfully requiring Merck to give "notice of every drop spilled at a facility, even if it poses no threat of pollution," and that the Department cannot "classify every molecule of every substance spilled as 'pollution'."

The Department has now filed a motion for partial summary judgment. The Department asks us to dismiss the objections in Merck's notice of appeal to the Department's decision to

withhold approval of Merck's PPC plan and it asks us to hold as a matter of law that Merck's PPC plan failed to comply with 25 Pa. Code § 91.33. The Department's motion for partial judgment does not relate to Merck's objections to the permit itself. Nothing that we do here today is intended to affect the permit itself, which remains in place and which will be subject to our further review as the case proceeds. The Department argues in its motion that withholding approval was appropriate because the Department cannot grant absolution from the requirements of 25 Pa. Code § 91.33 by approving a PPC plan. The Department goes one step further by also arguing that Merck's interpretation of Section 91.33 is in fact incorrect.

Partial summary judgment can be granted when it is clear as a matter of law and undisputed fact that a party is entitled to judgment in its favor on a particular issue. Pa.R.C.P. No. 1035.2. The Board reviews the Department's actions to ensure that they are lawful, reasonable, supported by the facts, and consistent with the Department's constitutional responsibilities. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 249. Using this standard, although we think the Department may have gone too far by opining on Merck's interpretation of Section 91.33 in the context of reviewing a PPC plan, we nevertheless conclude that the Department reached the correct result in declining to approve Merck's plan. Therefore, we grant summary judgment in its favor on that objection in Merck's notice of appeal. In doing so we express no opinion regarding the parties' varying interpretations of Section 91.33.

We reject the idea that the Department can be maneuvered into approving or disapproving a PPC plan prepared in connection with an NPDES permit. There is no statute or regulation that expressly grants the Department the authority to approve or disapprove PPC plans or requires the Department to review PPC plans. The requirement in Merck's permit that it must

have a PPC plan in place is based on 25 Pa. Code § 91.34.[3] Neither Section 91.34 nor Merck's permit provides for the Department's review or approval of PPC plans. We have previously held that PPC plans need not be submitted to the Department for approval. *O'Reilly v. DEP*, 2001 EHB 19, 29. Even if we assume that the Department had the authority to pass upon Merck's plan, it also had the authority to decline to do so.

In a recent case involving the spill prevention response plan (SPRP) that Merck was required to prepare pursuant to the Storage Tank and Spill Prevention Act, 35 P.S. §§ 6021.101-6021.2104, we held that the Department erred by disapproving Merck's permit for an aboveground storage tank because Merck had submitted an inadequate SPRP. *Merck Sharp & Dohme Corp. v. DEP*, EHB Docket No. 2015-170-L (Opinion and Order, Jun. 29, 2016). As distinct from this case, there was no question in that case that the Department had a duty to approve or disapprove that SPRP. *See* 35 P.S § 6021.903.

Assuming the Department has the authority to approve or disapprove PPC plans, we conclude that it was reasonable and appropriate for the Department to decline to approve Merck's PPC plan. We see no basis for the proposition that a discussion of Section 91.33

[3] Section 91.34 reads as follows:

§ 91.34. Activities utilizing pollutants.

(a) Persons engaged in activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

(b) The Department may require a person to submit a report or plan for activities described in subsection (a). Upon notice from the Department and within the time specified in the notice, the person shall submit to the Department the report or plan setting forth the nature of the activity and the nature of the preventative measures taken to comply with subsection (a). The Department will encourage the use of pollution prevention measures that minimize or eliminate the generation of the pollutant over measures which involve pollutant handling or treatment. The Department will encourage consideration of the following pollution prevention measures, in descending order of preference, for environmental management of wastes: reuse, recycling, treatment and disposal.

belongs in a PPC plan. Although we think the Department reached the correct result, we disagree with its assertion that a PPC plan must "comply" or "comport" with Section 91.33. A discussion of Section 91.33 seems out of place in a PPC plan. The foundational regulation for PPC plans, 25 Pa. Code § 91.34, does not contemplate a discussion of Section 91.33. Neither Merck's permit nor the Department's technical guidance document regarding emergency response plans says that a party's thoughts regarding the meaning of Section 91.33 need to be or should be included in a PPC plan. (*See* Section C.II.B of Merck's permit, incorporating DEP's "Guidelines for the Development and Implementation of Environmental Emergency Response Plans (ID 400-2200-001)). Section 91.33 is not even mentioned. By the same token, there is nothing in Section 91.33 that mentions PPC plans.

Section 91.33 is a regulation that imposes a freestanding duty to report spills under certain circumstances. We have not been told why a discussion of what those circumstances should be belongs in a PPC plan. We have not been told why a debate regarding what those circumstances should be belongs in the context of the Department's review of a PPC plan. If there is a future spill, whether it must be reported will turn on Section 91.33, not Merck's PPC plan. Merck does not get to define its regulatory duties under Section 91.33 in advance by expressing its opinion or coming up with its own reporting thresholds and putting them in its PPC plan. Even if the Department had approved it, we are not convinced that the approval would have constrained the Department in the event of a future spill. To have suggested otherwise would have been unfair and improper. Although the Department went too far by taking the bait offered by Merck and engaging in a discussion regarding the meaning of Section 91.33, it reached the correct result by refusing to approve the plan. We emphasize that, by

granting the Department's motion, we are neither endorsing nor rejecting its interpretation or Merck's interpretation of Section 91.33.

We observed in our earlier Opinion in this case that a party has a duty to comply with its own PPC plan, but it does not follow that a party can define the limits of its independent regulatory duty to report releases or constrain the Department's future actions simply by including its interpretation in its plan. A party has a duty to comply with its PPC plan and all applicable regulations, including Section 91.33. Compliance with a PPC plan that is less stringent than Section 91.33 does not excuse compliance with the regulation itself.

Merck says someone from the Department at some point told it "verbally" that it needed to give notice of "all spills." We have no details regarding this verbal exchange. Regardless of what was said, whether Merck is compliant with the Section 91.33 notification requirements will not turn on such an informal verbal exchange any more than it would have turned on anything said in connection with the review of the PPC plan. A Department employee's verbal instruction, if that is what it was, does not amount to a formal, final, binding order or other appealable action.

Once again, this case can be distinguished from our recent holding regarding Merck's SPRP under the Tank Act. In that case, not only was the Department required to approve or disapprove the SPRP, the applicable standard of review expressly included the reporting obligations regarding releases in 35 P.S. § 6021.904. *See* 25 Pa. Code § 245.512 (SPRP must address the requirements of 35 P.S. §§ 6021.901-6021.904). As discussed above, there is no similar requirement in Section 91.34 or the permit that the PPC plan address the reporting requirements of Section 91.33. That is not particularly surprising because Section 91.33 is not

specific to the NPDES program. Rather, it is a regulation that potentially applies to any number of activities involving the potential for water pollution.

The Department's review and its position as advocated in its motion goes beyond the conclusion that it could not bless any interpretation of Section 91.33 in the context of reviewing a PPC plan and delved into the merits of Merck's interpretation. Among other things, it concluded that Merck's interpretation would prevent Merck from reporting reportable spills immediately. It has also engaged in what we think was an unnecessary and perhaps inappropriate debate about the meaning of "pollution." We do not need to get into the specifics because the Department reached the correct result when it declined to approve the plan based on the fact that any analysis of Section 91.33 has no home in reviewing a PPC plan. In other words, we do not need to get into a discussion of the meaning of Section 91.33 in this case. We simply hold that such a discussion does not belong here. We reject Merck's admittedly manufactured attempt to obtain an advisory opinion in an improper regulatory context.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MERCK SHARP & DOHME CORP.	:	
	:	
v.	:	**EHB Docket No. 2015-011-L**
	:	**(Consolidated with 2015-123-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 11th day of October, 2016, it is hereby ordered that the Department's motion for partial summary judgment is **granted**. Merck's objections in Paragraph 5(h) of its amended notice of appeal in Docket No. 2015-011-L (incorporated by reference in Paragraph 14 of the notice of appeal in Docket No. 2015-123-L) objecting to the Department's decision to withhold approval of Merck's PPC plan are **dismissed**. The Department's request that we hold as a matter of law that Merck's revised PPC plan fails to comply with 25 Pa. Code § 91.33 is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 11, 2016

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

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	**Issued: October 11, 2016**

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion for reconsideration of an Opinion and Order granting in part and denying in part an intervenor's motion for a protective order from discovery requests served on the intervenor by the permittee. The permittee has not addressed the standard established in the Board's rules governing reconsideration of interlocutory orders, and the permittee has not otherwise detailed any extraordinary circumstances justifying reconsideration.

O P I N I O N

On September 12, 2016, the Board issued an Opinion and Order granting in part Solebury School's motion for a protective order from the discovery requests served on it by New Hope Crushed Stone & Lime Company ("New Hope"). New Hope operates a limestone quarry in Solebury Township, Bucks County. Solebury School is a private school with a campus immediately adjacent to the quarry property. In 2014 we issued an Adjudication rescinding a depth correction to New Hope's mining permit because New Hope was causing sinkholes to form on the School's campus and in the general surrounding area. *Solebury School v. DEP*,

2014 EHB 482. We found that the continuing occurrence of sinkholes presented an unreasonable threat to the health, safety, and welfare of the children and faculty that lived on and used the campus, and that condition constituted a public nuisance.

In our most recent Opinion, we found that New Hope failed to justify the relevance and proportionality of many of its discovery requests in its response to the School's motion for a protective order. This appeal is an appeal of a Department letter disapproving and making seven revisions to a reclamation plan submitted to the Department by New Hope. The letter followed up on two prior Department compliance orders that required New Hope to revise its reclamation plan to address outstanding issues with respect to reclaiming the quarry. New Hope had appealed those orders to the Board, but then later withdrew the appeals after entering into a Consent Assessment of Civil Penalty with the Department.[1] Accordingly, we found that the scope of this appeal is actually quite narrow:

> Because the underlying compliance orders are final, the factual predicate giving rise to New Hope's submission of a revised reclamation plan is now beyond the purview of this appeal. Therefore, that New Hope's existing reclamation plan was in violation of the Noncoal Surface Mining Act and that it was required to revise its reclamation plan in a way that more expeditiously abated the nuisance being caused by the quarrying are determinations that are now final. New Hope can no longer contest that its prior reclamation plan was deficient in the ways that the Department found in its two orders. New Hope can no longer challenge whether it had to submit a new reclamation plan. New Hope cannot challenge that it had to submit a reclamation plan that timely abates the public nuisance. It cannot contest that the restoration of the water table underneath the School must occur with all deliberate speed concurrently with reclamation. All that remains, then, is the specifics of the reclamation plan, including the pumping schedule. The operative question being: Do the details of the plan as modified by the Department reflect a lawful and reasonable exercise of the Department's discretion? Accordingly,

[1] New Hope has now also appealed a more recent Department compliance order. *See* EHB Docket No. 2016-132-L. New Hope has not argued that that order relates to its request for reconsideration.

> to be relevant, all discovery in this matter must be geared toward answering this question.

New Hope Crushed Stone & Lime Co. v. DEP, EHB Docket No. 2016-028-L, slip op. at 20 (Opinion and Order, Sep. 12, 2016).

In light of the scope of the appeal, we found that the fundamental shortcoming in New Hope's response to the School's motion for a protective order was that it did not explain how its very broad discovery requests involving such things as the School's building records, historical construction of buildings and stormwater facilities since 1978, geotechnical studies, sinkhole remediation efforts, and groundwater use related to the requirements of the letter under appeal. We largely agreed with the School that New Hope's discovery requests instead appeared to be aimed at relitigating the issue of sinkhole causation from the case that culminated in the 2014 Adjudication.

New Hope has now filed a motion for reconsideration of our September 12 Opinion and Order. The School opposes the motion. The Department and Solebury Township have not weighed in. The standard for reconsideration of interlocutory orders, such as the discovery order at issue here, is even higher than that for final orders. *Kiskadden v. DEP*, 2014 EHB 737, 738 (quoting *Rural Area Concerned Citizens (RACC) v. DEP*, 2013 EHB 374, 375). A party seeking reconsideration of an interlocutory order must meet the criteria established under 25 Pa. Code § 1021.152 for final orders and also demonstrate "extraordinary circumstances." *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23, 26-27. *See also DEP v. Danfelt*, 2012 EHB 519, 520 (quoting *Earthmovers Unlimited, Inc. v. DEP,* 2003 EHB 577, 578-79 ("Reconsideration of an interlocutory order must not only be based upon 'compelling and persuasive reasons,' it must also be clear that 'extraordinary circumstances' require the Board to reconsider the matter immediately, despite the fact that it is merely an interlocutory ruling.")). Our rule on

reconsideration of final orders provides in part:

> Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:
>
> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition:
>
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a). A motion or petition for reconsideration of an interlocutory order "must demonstrate that extraordinary circumstances justify consideration of the matter by the Board." 25 Pa. Code § 1021.151(a). The comment to this rule states that "[r]econsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings issued by the Board." Specifically with respect to reconsideration of discovery orders, we have previously held that parties are very unlikely to get more than one chance to make their case on a discovery dispute. *Berks Cnty. v. DEP*, 2012 EHB 38, 40.

Our primary issue with New Hope's motion for reconsideration is that New Hope never cites to or otherwise addresses what it is required to show under our rules on reconsideration of final or interlocutory orders. New Hope never discusses the extraordinary circumstances it believes justifies reconsideration of our Opinion and Order. It never cites to any case in support of its position. In fact, the motion does not contain any legal authority apart from a somewhat errant reference to the Department's authority under the Noncoal Act to issue orders to abate nuisances. *See* 52 P.S. § 3311(b). Our rule permits a party seeking reconsideration to file a memorandum of law with its motion or petition, but no memorandum of law was filed here. Our

Order did not rest on a legal ground or a factual finding that had not been proposed by any party. New Hope presents no new crucial and inconsistent facts.

In fact, New Hope has not presented anything new at all. New Hope essentially does nothing more in its motion for reconsideration than repeat the same vague assertions that it made in its original response to the School's motion for a protective order that it needs the discovery to assess the "effect of the letter."[2] It continues to fail to explain what that means or why, say, building plans from the 1970s would help it assess those effects in the narrow appeal before us. New Hope understandably disagrees with our earlier decision, but mere disagreement is not an appropriate basis for reconsideration. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 118. Reconsideration of interlocutory orders demands extraordinary circumstances because it asks for extraordinary relief. *Harriman Coal Corp. v. DEP*, 2001 EHB 1, 5. New Hope has failed to allege, let alone demonstrate, that any such circumstances exist.

Accordingly, we issue the Order that follows.

[2] At one point in its motion New Hope addresses Interrogatories 14 and 16 from its discovery served on the School. However, those interrogatories were not among the ones that were the subject of the School's motion for a protective order and thus were not covered by our Opinion and Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HOPE CRUSHED STONE & LIME COMPANY	:	
v.	:	**EHB Docket No. 2016-028-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLEBURY SCHOOL and SOLEBURY TOWNSHIP, Intervenors	:	

O R D E R

AND NOW, this 11th day of October, 2016, it is hereby ordered that New Hope's motion for reconsideration of the Board's Opinion and Order of September 12, 2016 is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 11, 2016

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PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2014-154-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and DISTRICT TOWNSHIP, and LONGSWAMP TOWNSHIP, Permittees	:	**Issued: October 21, 2016**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses a citizens group's appeal from the Department's approval of a Township Act 537 plan revision because, among other things, the plan satisfies the antidegradation requirements as a matter of law, and the Department acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

FINDINGS OF FACT

1. The parties have stipulated that the following Findings of Fact from this Board's Adjudication in *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, are not in dispute:

 a. Pine Creek Valley Watershed Association, Inc. ("Pine Creek") is a non-profit corporation based in Oley, Pennsylvania. (Finding of Fact No. ("FF") 1.)

 b. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act. 35 P.S. §§ 750.1 – 750.20a, the Clean Streams Law, 35 P.S. §§ 691.1 –

691.1001, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (FF 2.)

c. Jeffrey Lipton is the developer of the Fredericksville Farms subdivision. (FF 3.)

d. The site that is the subject of this appeal is the Fredericksville Farms subdivision, which is primarily located in District Township with a small section in Longswamp Township, both in Berks County. The lots that are in Longswamp Township are not the subject of this appeal. (FF 5. *See also* Joint Stipulation of Facts No. ("Stip.") 3.)

e. The site consists of 74.44 acres divided into 9 residential lots numbered 1, 2, 3, 4A, 4B, 5, 6, 7, and 8. (FF 6.)

f. The residences that will make up the subdivision will be served by on-lot septic systems. (FF 7.)

g. District Township on behalf of Lipton previously submitted an Act 537 planning module to develop the subdivision, which the Department approved on November 26, 2006. Pine Creek appealed, and ultimately the Department withdrew its approval on January 16, 2008 in order to determine whether the planning module complied with antidegradation regulations. (FF 8.)

h. This Board upheld the Department's withdrawal of its approval of the planning module, agreeing that the antidegradation regulations apply to the on-lot system discharges into the Exceptional Value (EV) waters on the site. (FF 9.)

i. Lipton then submitted a new planning module to District Township, which the Township approved on July 16, 2009. (FF 10.)

j. The 2009 planning module submitted by District Township/Lipton to the Department was similar to the 2006 submittal except that it included an

antidegradation analysis of the anticipated impacts of the proposed development on the EV stream and EV wetland. (FF 11.)

k. On November 19, 2009, the Department approved the official plan revision. The appeal docketed at EHB Docket No. 2009-168-L was Pine Creek's appeal from the Department's approval of the 2009 plan revision. (FF 12.)

l. The site of the proposed development looks like a horseshoe-shaped bowl, or shallow basin, with gentle slopes on all sides (except for a small portion of Lot 8) draining into a wetland roughly at the center of the bowl. Out of the wetland emerge the headwaters of a small unnamed tributary of Pine Creek, the receiving stream, which flows down the middle of the wetland gathering flow as it exits the site. (FF 13.)

m. The 11 or so acres of wetland on the site as well as the receiving stream are designated as EV waters of the Commonwealth. (FF 15. *See also Lipton v. DEP*, 2008 EHB 223.)

n. Shallow groundwater flow on the site mimics the surface topography, with the flow draining toward the wetland and the receiving stream. (FF 29.)

2. The Board incorporates herein the following additional findings and conclusions from our 2011 Adjudication:

a. The effluent plumes from the on-lot systems at issue will flow toward the wetland and the receiving stream until the groundwater emerges onto the surface in the wetland or enters directly into the receiving stream. (FF 30.)

b. Although there is no question that the effluent plumes from the on-lot systems proposed for the subdivision will emerge at the surface in the wetland and/or the

receiving stream, it is not known exactly where in the wetland or in the stream that will occur. (FF 39.)

3. In our prior Adjudication, we held that, consistent with antidegradation requirements in place at the time, the Department did not show that the receiving stream's water quality would be maintained, as it was required to do, and that the method of sewage treatment that was selected pursuant to the alternatives analysis required by 25 Pa. Code § 71.52 was consistent with antidegradation requirements. (Conclusions of Law 8, 9.) The Board, therefore, rescinded the Department's approval of the plan revision.

4. Following the Board's rescission of the Department's approval of District Township's plan revision, the Sewage Facilities Act was amended. Section 5(e)(4) of the Act now provides:

> For official plans and official plan revisions for individual on-lot sewage systems and community on-lot sewage systems, the use of such systems when designed and approved in accordance with the requirements of this act and the regulations promulgated under this act satisfies the antidegradation requirements of the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," and the regulations promulgated under that act.

35 P.S. § 750.5(e)(4). Similarly, Section 7(a.3) of the Act provides:

> For permits for individual on-lot sewage systems and community on-lot sewage systems, the use of such systems when designed and approved in accordance with the requirements of this act and the regulations promulgated under this act satisfies the antidegradation requirements of the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," and the regulations promulgated under that act.

35 P.S. § 750.7(a.3). These amendments were added on July 2, 2013 pursuant to P.L. 246, No. 41 ("Act 41").

5. Following the passage of Act 41, District Township (and Longswamp Township) submitted a new plan revision to the Department for approval for the Fredericksville Farms subdivision. (Commonwealth Exhibit No. ("C. Ex.") 1.)

6. On October 3, 2014, the Department approved the plan revision with the following comments:

> 1. The plan provides for the on lot sewage disposal systems for Lots 2, 3, and 8 to be located in the cross hatched areas identified on the plot plan dated August 24, 2014, submitted on September 24, 2014.
>
> 2. Lots 4b, 5, and 7 shall utilize a nitrate reduction system as part of the on lot sewage treatment system. Lot 6 shall utilize such a system if it can be added onto the already installed on lot system.
>
> 3. The plan recognizes the establishment and protection of a wetland buffer zone as shown on the plot plan and approved by the US Fish and Wildlife Service and the PA Fish and Boat Commission. The wetlands and the associated buffer zone may not be encroached upon as required by the jurisdictional agencies.
>
> 4. The proposed onlot sewage systems are located in an exceptional value watershed. As a potential nonpoint pollutant source, the proposed systems must achieve cost-effective and reasonable best management practices to protect and maintain water quality under 25 Pa. Code Chapter 93. The planning, permitting and design requirements in DEP's regulations at 25 Pa. Code Chapters 71-73 provide the applicable best management practices to be utilized in the Commonwealth for onlot sewage systems. The systems as proposed will achieve those best management practices.
>
> 5. Permitting of onlot sewage systems by the municipal certified sewage enforcement officers (SEOs) may proceed.
>
> 6. District and Longswamp Townships should ensure that protective measures are taken to prevent and prohibit any disturbance to primary and replacement absorption areas that would render them unsuitable for their intended purpose.
>
> 7. Properly designed and installed onlot sewage disposal systems rely on continuing operation and maintenance to ensure longevity. Water conservation, site inspections, and regular septic tank pumping are all part of the operation and maintenance of your system.

(C. Ex. 2; Stip. 17.)

7. Lots 1 and 4A have already been developed and they have on-lot systems. The approved location for the on-lot systems for Lots 2, 3, and 8 were moved so that effluent from those systems will not flow toward the wetlands. (T. 140; C. Ex. 1.)[1]

8. Denitrification systems are to be used on Lots 4B, 5, and 7, as well as Lot 6 so long as the existing system on the site can be retrofitted. (T. 140-41; C. Ex. 1.)

9. Pine Creek filed this appeal from the Department's approval on November 3, 2014. (EHB Docket Entry No. 1.)

10. The revised plan and the on-lot systems described in the plan met all of the regulatory requirements of 25 Pa. Code Chapters 71 and 73. (T. 156-57.)

DISCUSSION

This is Pine Creek's third appeal from a Departmental approval of District Township's Act 537 Official Plan Revision for the Fredericksville Farms development. Pine Creek appealed an earlier plan revision for the same development in 2006. After a hearing but before the Adjudication, the Department withdrew its approval of the plan revision because it had failed to require an antidegradation analysis pursuant to 25 Pa. Code Chapter 93. We later upheld that action in a subsequent appeal by the developer. *Lipton v. DEP*, 2008 EHB 223. District Township then resubmitted the plan revision with an antidegradation analysis. The Department approved it, and Pine Creek appealed again. We rescinded the approval, holding that the antidegradation and alternatives analyses were inadequate. *Pine Creek Watershed Ass'n v. DEP*, 2011 EHB 761.

Thereafter, three things happened. First, Act 41 was passed, which made it clear that an analysis of the actual impact on the water chemistry of any nearby special protection waters of

[1] Pine Creek has withdrawn its appeal as it relates to Lots 2, 3, and 8. (Stip. 2.)

the Commonwealth of on-lot systems that meet all regulatory design requirements need not be performed in order for a planning module to be approved. Second, contrary to what Pine Creek has been telling us in this appeal, significant changes were made to the Fredericksville Farms plan revision. The location of on-lot systems were moved to minimize their potential impact, Lots 4B, 5, and 7 must now utilize nitrate reduction systems, and Lot 6 must utilize such a system if it can be added to the already installed on-lot system. Third, in defending this appeal, the Department, in what it described as a belt-and-suspenders approach, conducted an analysis of the loading of nitrate on the watershed from the Fredericksville Farms development as revised, and its expert witness, Thomas Starosta, P.E., credibly opined that the on-lot systems will have a negligible impact on the watershed.

Although one would have guessed that Act 41 would have put this matter to rest, Pine Creek has nevertheless pursued the appeal. Pine Creek first argues that the Township's alternatives analysis was inadequate because the Township did not consider alternatives to on-lot systems. As we recently said in *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 14 (Adjudication, Feb. 29, 2016), and *Northampton Township v. DEP*, 2008 EHB 563, 567, "[n]either 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." 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. In light of Act 41, it is difficult to believe that on-lot

systems that comply with the standards set forth in Chapters 71-73 are anything other than an "acceptable" alternative at this site. Given its mission, Pine Creek's focus in this case has not surprisingly been on the relative merits of treatment alternatives as they relate to nearby surface waters, but that basis for comparison has been taken off the table. Pine Creek has not shown that on-lot systems that satisfy the requirements of Chapters 71-73 cannot be installed on this site. The Department acted reasonably and lawfully in concluding that District Township has selected an alternative that is "technically, environmentally and administratively acceptable."

Pine Creek argues that the Department has an overarching duty to prevent pollution of streams under multiple statutes, including the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001. This is somewhat of an oversimplification. "A permit, at its most basic, is permission from the state to undertake activities that may impact the environment and cause pollution." *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 8 (Opinion and Order, June 6, 2016). As we said in *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016),

> The point of the environmental laws is not to prohibit the discharge of all pollutants, but to intelligently regulate such activity so that regulatory standards are met, environmental incursions are minimized, and any remaining harms are justified.
>
> Permits exist to provide a limited allowance of what might otherwise constitute an unlawful activity. The majority of environmental permitting regimes contemplate some amount of environmental impact.

2015 EHB 221, 243 (internal citations omitted). Although we were speaking of permits in *Brockway*, the same may be said of sewage treatment systems contemplated in an Act 537 plan revision. The Department interprets Act 41 as having established that an unknown amount of pollution is allowable as a matter of law, so long as the standards of Chapters 71-73 are met. (T. 182.) That interpretation is consistent with the statutory language. The Department's duty to

regulate pollution in the context of sewage facilities planning vis-à-vis antidegradation requirements has been constrained by Act 41, and the Department acted consistently with that statute in this case.

Pine Creek next argues that the Department's approval of District Township's plan revision was inconsistent with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. That provision reads as follows:

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

PA. CONST. art. I, § 27.

In carrying out our responsibility to ensure that the Department has acted consistently with its constitutional responsibilities, we must recognize and respect basic policy choices expressed by the Legislature. *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L, slip op. at 11 (Opinion and Order, Sept. 2, 2016) (quoting *Funk v. Wolf*, 144 A.3d 228, No. 467 M.D. 2015, slip op. at 6 (Pa. Cmwlth. July 26, 2016) (quoting *MCT Transp., Inc. v. Phila. Parking Auth.*, 60 A.3d 899, 904 (Pa. Cmwlth.), *aff'd*, 81 A.3d 813 (Pa.) and 83 A.3d 85 (Pa. 2013))). Act 41 has unequivocally expressed a basic policy choice that on-lot sewage disposal systems that meet the design requirements of regulations promulgated pursuant to the Sewage Facilities Act may be installed regardless of any actual degradation they may cause to High Quality or Exceptional Value waters of the Commonwealth. The Department should act consistently with the legislative mandate expressed in Act 41. Making approval of the plan revision contingent upon whether the Fredericksville Farms on-lot systems will actually degrade the special protection waters of the Commonwealth would not be consistent with the legislative mandate.

Although we must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in Act 41, that is not to say that the Department is entirely relieved of its constitutional responsibility to comport its actions with Article I, Section 27. In *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), the Commonwealth Court established a three-fold test to determine whether a government decision complies with Article I, Section 27:

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

Id., 312 A.2d at 94. The *Payne* test is particularly applicable in situations where, as here, a person challenges a government decision or action. *Funk, supra*, slip op. at 5. *See also Logan v. DEP*, EHB Docket No. 2016-091-L, slip op. at 4 (Opinion and Order, Aug. 2, 2016) (citing *Brockway, supra*, 2015 EHB at 249; *Pa. Envtl. Def. Found v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015)).

Act 41 has simplified the first step in the *Payne v. Kassab* analysis by essentially superseding all other applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. The second step in the analysis is for us to determine whether the record demonstrates that there has been a reasonable effort to reduce the environmental incursion to a minimum. Pine Creek argues that the Department could have done more to protect the environment. We suspect that it will nearly always be possible to show that the Department could have done more, but that is not the proper question. The proper question

to be answered is whether there has been a reasonable effort to reduce the environmental incursion to a minimum, not to zero.

Here, we find that the Department acted reasonably. The Department's discretion has, of course, been somewhat constrained by Act 41. Nevertheless, although perhaps not strictly required, the Department has added conditions to its approval. The locations of on-lot systems have been moved to what the Department has determined to be more environmentally advantageous positions. Nitrate reduction systems are required for Lots 4B, 5, and 7, and conditionally required for Lot 6. No encroachments are allowed into the wetlands and the associated buffer zone. The potential "environmental incursion" has been reduced since our prior Adjudication, and we find that effort to have been reasonable. These are precisely the sort of measures contemplated under the second step of the *Payne* test. The Department's action passes muster under the second step.

The third step in the *Payne v. Kassab* analysis is a determination of whether the environmental harm that will result from the challenged decision or action so clearly outweighs the benefits to be derived therefrom that to allow it to proceed would be an abuse of discretion. Even before the additional measures that were taken to reduce the environmental incursion at the Fredericksville Farms development to a minimum, we held in our prior Adjudication that the development of the site as originally proposed would not have interfered with the functions and values of the wetland on the site. *Pine Creek Valley Watershed Ass'n*, 2011 EHB at 764. We see no credible basis in the record for changing that finding now, when even less nitrates will be entering the system. With respect to Pine Creek itself, the Department has now shown that the additional nitrate loading to Pine Creek from the project, as modified, will be no more than 150 pounds a year or less than 7 ounces per day, which will have a negligible impact on the stream as

a whole. (T. 221, 239-40, 251-52, 256, 259.) Pine Creek's expert witnesses, although sincere and credible, were not able to directly contradict this testimony. Instead, the thrust of their testimony is that more study is called for, but the Department's expert credibly opined that further study would add no value to the analysis of the effect on the stream as a whole because he assumed all of the nitrates from the systems would reach the stream. (T. 240.)

Given the credible testimony that there will only be a negligible impact of the project on the wetland and stream, it cannot be said that the harm associated with the addition of pollutants so clearly outweighs the benefits to be derived from the project that to allow the project to go forward would be an abuse of discretion. The Department has satisfied its responsibility to conduct an informed balancing under the third step of the *Payne* test.

CONCLUSIONS OF LAW

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

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

3. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

4. 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). *See also Noll v. DEP*, 2004 EHB 712, 721-22.

5. “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.” *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 14 (Adjudication, Feb. 29, 2016); *Northampton Twp. v. DEP*, 2008 EHB 563, 567.

6. The revised plan and the on-lot systems described in the plan met all of the regulatory requirements of 25 Pa. Code Chapters 71 through 73.

7. In carrying out our responsibility to ensure that the Department has acted consistently with its constitutional responsibilities, we must recognize and respect basic policy choices expressed by the Legislature. *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L, slip op. at 11 (Opinion and Order, Sept. 2, 2016) (quoting *Funk v. Wolf*, 144 A.3d 228, No. 467 M.D. 2015, slip op. at 6 (Pa. Cmwlth. July 26, 2016) (quoting *MCT Transp., Inc. v. Phila. Parking Auth.*, 60 A.3d 899, 904 (Pa. Cmwlth.), *aff'd*, 81 A.3d 813 (Pa.) and 83 A.3d 85 (Pa. 2013))).

8. Act 41 has expressed a basic policy choice that on-lot sewage disposal systems that meet the design requirements of the regulations promulgated pursuant to the Sewage Facilities Act may be installed regardless of any actual degradation they may cause to High Quality or Exceptional Value waters of the Commonwealth. 35 P.S. § 750.5(e)(4); 35 P.S. § 750.7(a.3).

9. The three-part test established by the Commonwealth Court in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976), is the standard by which we

determine whether a government decision complies with Article I, Section 27 of the Pennsylvania Constitution.

10. The *Payne* test is particularly applicable in situations where, as here, a person challenges a government decision or action. *Funk v. Wolf*, 144 A.3d 228, No. 467 M.D. 2015, slip op. at 5 (Pa. Cmwlth. July 26, 2016). *See also Logan v. DEP*, EHB Docket No. 2016-091-L, slip op. at 4 (Opinion and Order, Aug. 2, 2016) (citing *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 249; *Pa. Envtl. Def. Found v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015)).

11. The Department's approval of District Township's plan revision was lawful, reasonable, supported by the facts, and consistent with its duties under the Pennsylvania Constitution. *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 12 n.2 (Adjudication, Feb. 29, 2016); *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2014-154-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and DISTRICT TOWNSHIP, and LONGSWAMP TOWNSHIP, Permittees	:	

O R D E R

AND NOW, this 21st day of October, 2016, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 21, 2016

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

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

For Appellant:
John Wilmer, Esquire
(*via electronic filing system*)

For Permittee, District Township:
Eugene Orlando, Jr., Esquire
(*via electronic filing system*)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITEHALL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2015-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COPLAY AGGREGATES, INC., Permittee	:	**Issued: October 24, 2016**

OPINION IN SUPPORT OF ORDER GRANTING AND DENYING MOTION TO COMPEL DISCOVERY

By: Richard P. Mather, Sr., Judge

Synopsis

The Board grants in part and denies in part Permittee, Coplay Aggregates, Inc.'s ("Permittee" or "Coplay Aggregates") second motion to compel responses to its second request for production of documents, to conduct a forensic examination of Appellant's computer(s) and for an extension of time of pre-hearing deadlines. The Board denies the request to conduct a forensic examination of Appellant's computers because the permittee did not establish a basis to justify this extraordinary type of discovery relief requested. The Board agreed with Permittee to require a follow up search of Mayor Hozza's computer by the Appellant. The Board also grants Permittee's request to extend the deadlines to complete discovery on or before October 28, 2016 and to file dispositive motions on or before November 29, 2016.

O P I N I O N

Whitehall Township ("Whitehall" or "Appellant") filed an appeal of the Department's decision to grant coverage under general permit No. WMGR096-NE005 for the beneficial use of regulated fill to Coplay Aggregates, Inc. ("Permittee"). On or about May 12, 2016, Permittee

served upon Appellant its second request for production of documents ("Discovery Requests"). On June 17, 2016, Permittee notified Appellant that its discovery requests were past due. On June 20 and 27, 2016, Appellant provided Permittee with some documents related to its discovery request.

It is the Permittee's view, based upon previous discovery, that Whitehall Township Mayor, Edward Hozza, is the Township's most actively opposed official to the Department's issuance of the beneficial use general permit. Request for production of documents, one through five of the discovery request, specifically sought documents to and from Mayor Hozza and other township officials and others regarding the Permittee or its beneficial use general permit. Permittee asserts that no document from Mayor Hozza was included in the materials the Appellant provided in response to the discovery request. Permittee suspects that there are additional documents that were not provided.[1]

Coplay Aggregates filed a Motion to Compel Responses to Discovery Requests, to Conduct a Forensic Examination of Appellant's Computer(s) and for Extension of Time of Pre-Hearing deadlines on September 14, 2016. The Appellant filed an Answer and New Matter to Permittee's motion to compel on September 23, 2016. The Appellant responded that it "has produced all non-privileged documents in response to the Permittee's discovery request." In addition, the Appellant asserted that it did not believe that the Permittee had alleged sufficient

[1] The Permittee also referenced an ongoing matter before the Office of Open Records involving an appeal of a Right to Know Law request as support its claim that there are documents related to communication to and from Mayor Hozza regarding the beneficial use general permit.

material facts to support its request for the extraordinary relief in the nature of forensic examinations of Mayor Hozza's computers and cell phones.[2]

The Department did not file a response to Permittee's motion and did not object to the Permittee's filing of the motion. The Board scheduled a conference call with the parties to discuss Permittee's motion on October 11, 2016. At the end of the call, the Board indicated that it would grant the motion in part and deny it in part in an order issued the next day with an opinion to follow. This is the opinion to follow concerning the Board's October 12, 2016 Order to grant the motion in part and to deny it in part.[3]

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. No. 4003.1. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa. R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205. We must also keep

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[2] In addition, Appellant objected to Permittee's discussion of certain aspects of a mediation between Permittee and the Appellant regarding the appeal of the Right to Know Law request. The discussion related to the mediation played no part in resolving the Permittee's motion to compel.

[3] Coplay Aggregates previously filed a Motion to Compel Responses to Discovery Requests, to Conduct a Forensic Examination of Appellants Computers and for Extension of Time of Prehearing Deadlines on June 27, 2016. After a conference call with the parties, the Board granted the motion in part and denied it in part. On the issue of a forensic investigation of appellant's computer or cell phones, the Board denied the motion. Coplay Aggregates second motion asserts that the deposition of Mayor Hozza revealed new support for its request for a forensic investigation of Mayor Hozza's computer and cell phone. For the reasons set for in this opinion, the Board disagrees that these new allegations support its request for a forensic investigation.

in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517.

The Board denies the Permittee's request to compel a forensic investigation of Mayor Hozza's computers and cell phone for two reasons. First, the Permittee has asked the Board for extraordinary relief based upon its assertion that Appellant "has not provided all of the emails and/or text messages of Mayor Hozza…" Permittee's Motion, Paragraph 36 at 6. The Appellant asserts that it has produced all non-privileged documents and records in response to discovery request. The Board does not believe that the Permittee is entitled to a forensic examination of Mayor Hozza's computers and cell phone based upon these facts and its suspicions that more discoverable material exists.

Second, the request to compel a forensic examination of Mayor Hozza's computers and cell phone is inconsistent with the proportionality standard that the Board follows. *Tri-Realty Company v. DEP*, 2015 EHB at 525-26. Under appropriate circumstances, the Board agrees that it has the authority to order a party to allow the forensic investigation of another parties computer.[4] In Pennsylvania, with the exception of the "proportionality standard" in the explanatory comment accompanying the 2012 amendments to Pa. R.C.P. No. 4009.1 discussed in *PTSI, Inc., v. Haley*, 71 A.3d 304, (Pa. Super. 2013), there is an absence of appellate precedent addressing electronic discovery in civil litigation. The explanatory comment to Rule 4009.1, in pertinent part, states:

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[4] *It's All Wireless v. Fisher*, 2016 Pa. Super. Unpub. Lexis 3487 (September 23, 2016) (Court entered order directing party to deliver his computer, I-Phone and all other devices in which ESI may be stored for forensic investigation).

> As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (1) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

Pa. R.C.P. No. 4009.1, Explanatory Comment (2012); *See also Brogran v. Rosenn, Jenkins & Greenwald*, 32 Pa. D & C 5th 454, (Common Pleas Court of Lackawanna County, 2012).[5] Under this proportionality standard, Coplay Aggregates has not established a basis to grant its request for the extraordinary relief of allowing a forensic examination of Mayor Hozza's computer and cell phone. Mayor Hozza is an elected official and serves as chief executive or manager of the Appellant, Whitehall Township. According to Coplay Aggregates, he is the "primary official of the Appellant who has been most actively opposed to the Department's beneficial use approval" under appeal. The Township is the Appellant, and the decision to challenge the approval was not made by Mayor Hozza. It was made by the Township. Coldplay Aggregates suspects that Mayor Hozza has not produced all discoverable materials from his computer and cell phone. Appellant's

[5] Rule 34 of the Federal Rules of Civil Procedure discusses confidentiality and privacy concerns with allowing a party to inspect another party's electronically stored information and the explanatory note to that rule contains a caution against undue intrusiveness resulting from inspecting or testing such system. Fed. R. Civ. P. 34 (explanatory note); *Beanco v. GMAC Mortgage Corp.*, 2008 U.S. Dist. LEXIS 84950 (E.P. Pa. 2008). (Court concluded it was loathe to sanction intrusive examination of an opponent's computer as a matter of course or on the mere suspicion that the opponent may be withholding discoverable information.) The Board will follow a similar cautionary approach here.

counsel represents that discoverable materials have been produced. Coplay Aggregates' suspicion is not a basis for its request for extraordinary relief.

Coplay Aggregates has not made a compelling argument to conduct a forensic examination of Mayor Hozza's computer and cell phone under the proportionality standard set forth in the explanatory comment to Rule 4009.1. The nature and scope of an appeal of a beneficial use general permit do not support Coplay Aggregates' request. In a challenge to a waste permit approval, the Permittee did not provide any compelling justification to examine Mayor Hozza's computer and cell phone other than that he was a Township official opposed to the approval. No party disputes this statement, but it does not explain why a search of his devices is important or relevant to the Board's ultimate disposition of the appeal. The cost and burden to Mayor Hozza would be significant if these devices were examined, and there are the privacy and confidentiality concerns that could further adversely affect Mayor Hozza. Finally, the Appellant made Mayor Hozza available for deposition, and this deposition allowed Coplay Aggregates to directly examine Mayor Hozza concerning his personal opposition to the approval under appeal and the steps he personally took in support of the Township's challenge. For these reasons, the Board denies Coplay Aggregates second request to conduct a forensic examination of Mayor Hozza's computer and cell phone.

Coplay Aggregates took Mayor Hozza's deposition after the Board denied its first motion to compel a forensic examination, and it filed its second motion to compel after learning the specifics of Mayor Hozza efforts to search his computer for discoverable materials. Coplay Aggregates' second motion to compel is no more compelling than the first. The Board is loath to authorize a forensic inspection of Mayor Hozza's computer and cell phone on Coplay Aggregates' suspicion that there are discoverable materials on these electronic storage systems.

In addition, there is no evidence that the Appellant has intentionally withheld material. Mayor Hozza, following his deposition, indicated he would again search his devices to determine if there were materials that were previously missed. Upon learning of this commitment during the conference call with the Parties, the Board directed the Appellant to complete this task by Friday, October 14, 2012. The Board also granted Coplay Aggregates request to extend the discovery and dispositive motion deadlines.

To an extent, the problems that Coplay Aggregates has had securing electronically stored information ("ESI") from mayor Hozza's computer and cell phone could have been identified and addressed earlier in this litigation. The Board is aware that there are sometimes issues with electronic discovery, and that is why the Board, as a general rule, includes specific instructions for parties in its Prehearing Order No. 1 regarding electronic discovery. The Board issued its standard Prehearing Order No. 1 in this appeal on August 4, 2015, and paragraphs 11-13 of this Order provide specific instructions for the parties in this appeal that "[i]f the parties believe discovery of electronically stored information is reasonably likely to be sought in this matter…" Prehearing Order No. 1, Paragraph 11. Parties are instructed to confer and discuss a plan for conducting electronic discovery. *Id*. Paragraph 12 instructs the parties to submit their plan for conducting electronic discovery and it lists what should be included in the parties' plan. After the Board receives the parties' proposed plan, the Board will issue an order governing ESI upon consideration of the parties' plan. It does not appear that the Parties in this appeal followed these instructions.

The Parties in this appeal did not submit a plan to the Board for consideration pursuant to paragraphs 11-13 of Prehearing Order No. 1. Coplay Aggregates' motions to compel specifically identified ESI that it wants to receive. It would have been better to identify and

address the parties' ESI disputes in this appeal pursuant to the identified procedures in Prehearing Order No. 1 rather than in the context of a motion to compel at the end of the time for discovery.

The Board previously issued the following order that this opinion supports.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 24, 2016

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

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

For Appellant:
Christopher W. Gittinger, Esquire
(*via electronic filing system*)

For Permittee:
David J. Gromelski, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITEHALL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2015-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COPLAY AGGREGATES, INC., Permittee	:	

ORDER

AND NOW, this 12th day of October, 2016, following a conference call with the Parties and upon consideration of Permittee's Motion to Compel Responses to Discovery Requests, to Conduct a Forensic Examination of Appellant's Computer(s), and for Extension of Time of Pre-Hearing Deadlines, it is hereby ordered that Permittee's Motion is **granted** in part and **denied** in part. It is further ordered that:

(a) Appellant shall notify Permittee whether Mayor Hozza has identified any documents upon his further review of his computer, responsive to Permittee's discovery requests, and shall provide them to the Permittee by October 14, 2016.

(b) Permittee's request to conduct a forensic examination of Mayor Hozza's computer and cell phone is **denied**.

(c) All discovery in this matter shall be completed on or before **October 28, 2016**.

(d) All dispositive motions in this matter shall be filed on or before **November 29, 2016**.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 12, 2016

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

For Appellant:
Christopher W. Gittinger, Esquire
(*via electronic filing system*)

For Permittee:
David J. Gromelski, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD RALPH FEUDALE	:	
	:	
v.	:	**EHB Docket No. 2016-110-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AQUA PENNSYLVANIA, INC., Permittee	:	**Issued: October 25, 2016**

OPINION AND ORDER ON
PETITION TO APPEAL NUNC PRO TUNC

By Michelle A. Coleman, Judge

Synopsis

The Board denies a petition to appeal nunc pro tunc where the petitioner has not demonstrated fraud, breakdown in the administrative process, or any unique and compelling non-negligent circumstances justifying the allowance of an untimely appeal of an NPDES permit that was issued in 2013.

O P I N I O N

Richard Ralph Feudale has petitioned the Board for permission to appeal nunc pro tunc the Department of Environmental Protection's (the "Department's") issuance of an NPDES permit to Aqua Pennsylvania, Inc. ("Aqua") for the replacement of a 100-year old waterline running through a forested tract of land in Northumberland and Columbia counties—the Roaring Creek Tract of the Weiser State Forest. The Department issued NPDES Permit PAI044912001 to Aqua on April 11, 2013. (Feudale Ex. A.) Feudale filed his petition to appeal nunc pro tunc on July 22, 2016. We issued an order requiring Aqua and the Department to file responses to

Feudale's petition, and we permitted Feudale to file a reply to those responses.[1] The Department and Aqua, of course, oppose Feudale's nunc pro tunc petition.

Our rules for the most part provide that an appeal must be filed with the Board within 30 days of notice of the action:

> [J]urisdiction 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, as follows, unless a different time is provided by statute:
>
> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*.
>
> (ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin*.

25 Pa. Code § 1021.52(a). As a general matter, "[t]he untimeliness of the filing deprives the Board of jurisdiction." *Rostosky v. Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976). *See also Mon View Mining Corp. v. DEP*, 2003 EHB 542. 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. Good cause is determined in accordance with "the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." *Id.* A nunc pro tunc appeal will only be allowed when there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. *Grimaud v. Dep't of Envtl. Res.*, 638

[1] Before filing their responses, Aqua and the Department filed a joint motion to stay the deadlines imposed by our Pre-Hearing Order No. 1. After considering the motion and Feudale's response in opposition, we granted the motion and stayed the pre-hearing deadlines pending our decision on the nunc pro tunc petition.

A.2d 299, 303-04 (Pa. Cmwlth. 1994) (quoting *Falcon Oil Co. v. Dep't of Envtl. Res.*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992)). *See also Bass v. Cmwlth.*, 401 A.2d 1133 (Pa. 1979); *Barchik v. DEP*, 2010 EHB 739, 742; *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391.

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.

Bureau Veritas N. Am., Inc. v. DOT, 127 A.3d 871, 879 (Pa. Cmwlth. 2015). However, 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 761, 763 (Pa. Cmwlth. 1976). "Allowing an appeal nunc pro tunc is a recognized exception to the general rule prohibiting the extension of an appeal deadline…. '…[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.' *Commonwealth v. Stock*, 545 Pa. 13, 19, 679 A.2d 760, 764 (1996)." *Union Elec. Corp. v. Bd. of Prop. Assessment*, 746 A.2d 581, 584 (Pa. 2000).

Feudale has petitioned this Board for nunc pro tunc appeal after his earlier efforts in Pennsylvania's courts terminated, not in his favor. We have the benefit of a Commonwealth Court opinion to help explain the context of this matter. *Feudale v. Aqua Pa., Inc.*, 122 A.3d 462 (Pa. Cmwlth. 2015). In that opinion, issued July 22, 2015, exactly one year prior to Feudale petitioning the Board, the Court explained:

> On May 23, 2014, Feudale filed a complaint and motion for preliminary injunction in the Court of Common Pleas for Northumberland County against Aqua and [the Department of Conservation and Natural Resources (DCNR)]. Aqua provides

> water services to more than 1.4 million residents in 30 counties, including the residents of its Roaring Creek/Susquehanna division in parts of Adams, Bradford, Columbia, Cumberland, Juniata, Northumberland, Schuylkill, and Snyder Counties. DCNR is the administrative agency charged with maintaining, preserving, and managing state parks and state forests, among other duties. The Commonwealth acquired the Roaring Creek Tract of Weiser State Forest in 2003, and DCNR now manages it as part of the state forest system. Aqua acquired the water rights in the Roaring Creek Tract prior to the Commonwealth's acquisition of the property and now holds an easement for those water rights on the Roaring Creek Tract.
>
> ….
>
> By order dated June 18, 2014, this matter was transferred from the Court of Common Pleas for Northumberland County to this Court's original jurisdiction. Both Aqua and DCNR separately filed preliminary objections on June 23, 2014.

Feudale, 122 A.3d 462, 464 (Pa. Cmwlth. 2015). Commonwealth Court held a hearing on Feudale's motion for a preliminary injunction on August 19, 2014 and subsequently denied the motion. The Court later sustained the preliminary objections filed by Aqua and DCNR, finding that Feudale did not exhaust his administrative remedies through an appeal to this Board and was therefore barred from challenging Aqua's permit in Commonwealth Court. *Feudale*, 122 A.3d at 466. The Court held:

> At its core, Feudale's claim against Aqua is that the DEP improperly granted the NPDES permit. He cites a long list of challenges to the issuance of the permit, from failure to properly consider the project's aesthetic impact to the inclusion of allegedly false and misleading information in the permit application. The omphalus of this action, however, is a challenge to Aqua's waterline replacement project, for which Aqua sought and received the appropriate permit from the DEP. As such, Feudale was required to exhaust his administrative remedies before seeking redress through this Court. Because Feudale did not appeal to the EHB, he has not exhausted his administrative remedies and is, thus, barred from challenging that action in this Court.

Id. (footnote omitted). Feudale then appealed the Commonwealth Court decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed per curium in an order dated April 25, 2016. *Feudale v. Aqua Pa., Inc.*, 135 A.3d 580 (Pa. 2016).

Feudale asserts in his nunc pro tunc petition that his time to petition for a writ of certiorari to the United State Supreme Court would expire on July 24, 2016, and instead of pursuing that avenue Feudale decided to come to the Board. He says that only upon the conclusion of his appellate litigation "was the way made plain that he would receive no relief or legal protection except through revocation of the permit in question."

Aqua submitted its permit application to the Department on May 25, 2012. Notice of the Department's receipt of the permit application was published in the *Pennsylvania Bulletin* on June 30, 2012. The notice provides basic information on the permittee and the proposed receiving streams:

Northcentral Region: Waterways & Wetlands Program Manager, 208 West Third Street, Williamsport, PA 17701

Northumberland County Conservation District: RR 3, Box 238-C, Sunbury, PA 17801, (570) 286-7114, X 4

NPDES Permit No.	*Applicant Name & Address*	*County*	*Municipality*	*Receiving Water / Use*
PAI044912001	Aqua PA Inc 204 E Sunbury St Shamokin PA 17872	Northumberland	Coal & Mount Carmel Townships	Trout Run CWF, MF S B Roaring Creek HQ-CWF, MF

42 Pa.B. 3763 (Jun. 30, 2012). This notice appears to satisfy the regulatory requirements for public notice of individual NPDES permit applications outlined in 25 Pa. Code § 92a.82(a).[2]

[2] That regulation provides:

> (a) Public notice of every complete application for an NPDES permit will be published in the *Pennsylvania Bulletin*. The contents of public notice of applications for NPDES permits will include at least the following:
>
> (1) The name and address, including county and municipality, of each applicant.
> (2) The permit number and type of permit applied for.
> (3) The stream name of the waterway to which each discharge is proposed.

At the beginning of the NPDES applications section in the *Pennsylvania Bulletin* is information outlining how the public may participate in the application review process:

> Persons wishing to comment on NPDES applications are invited to submit statements to the contact office noted before the application within 30 days from the date of this public notice….Comments received within the respective comment periods will be considered in the final determinations regarding the applications. A comment submittal should include the name, address and telephone number of the writer and a concise statement to inform the Department of the exact basis of a comment and the relevant facts upon which it is based.
>
> The Department will also accept requests for public hearings on applications. A public hearing may be held if the responsible office considers the public response significant. If a hearing is scheduled, a notice of the hearing will be published in the *Pennsylvania Bulletin* and a newspaper of general circulation within the relevant geographical area. The Department will postpone its final determination until after a public hearing is held.

42 Pa.B. 3753. Feudale did not submit any comments or request a public hearing on Aqua's permit application. *Feudale*, 122 A.3d at 465-66.

Aqua's initial permit application indicated that its proposed project would disturb 20 acres for the replacement of approximately 40,000 feet of watermain line within township and state roads. (Aqua Ex. A.) The Department and the Northumberland County Conservation District submitted comments to Aqua on the application noting technical deficiencies, and Aqua responded to those comments through its consultant on February 23, 2013. (Aqua Ex. C.) Aqua's response amending the application, states, among other things, that the total disturbed area is actually 30.2 acres and that much of the work would occur along private roads, not township or state roads.

> (4) The address of the State or interstate agency premises at which interested persons may obtain further information, request a copy of the NPDES forms and related documents.

25 Pa. Code § 92a.82(a).

The Department issued the permit to Aqua on April 11, 2013. Feudale filed his action in the Northumberland County Court of Common Pleas on May 23, 2014. Notice of the issuance of the permit was published in the *Pennsylvania Bulletin* on August 23, 2014. The notice of the permit issuance is essentially identical to the notice of the application:

Northumberland County Conservation District: RR 3, Box 238-C, Sunbury, PA 17801, (570) 286-7114, X 4

NPDES Permit No.	*Applicant Name & Address*	*County*	*Municipality*	*Receiving Water / Use*
PAI044912001	Aqua PA Inc 204 E Sunbury St Shamokin PA 17872	Northumberland	Coal & Mount Carmel Townships	Trout Run CWF, MF S B Roaring Creek HQ-CWF, MF

44 Pa.B. 5605 (Aug. 23, 2014). There are no standards outlined in the regulations governing notice of the Department's final action on NPDES permits, only that notice of the final action must be published in the *Bulletin*. 25 Pa. Code § 92a.86. No party provides any explanation on why the notice of the final action was not published for more than a year after the permit was issued. As a general matter, we think it would be in the interest of all parties to have notice of the final action published close in time to when the action is taken.

The *Bulletin* issue containing the notice of Aqua's permit issuance fully explains how one may appeal a Departmental action to the Environmental Hearing Board:

> Persons aggrieved by an action may appeal that action to the Environmental Hearing Board (Board) under section 4 of the Environmental Hearing Board Act (35 P. S. § 7514) and 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law). The appeal should be sent to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, (800) 654-5984. Appeals must be filed with the Board within 30 days of publication of this notice in the *Pennsylvania Bulletin* unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board.

> The appeal form and the Board's rules of practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at (717) 787-3483. This paragraph does not, in and of itself, create a right of appeal beyond that permitted by applicable statutes and decisional law.
>
> For individuals who wish to challenge an action, the appeal must reach the Board within 30 days. A lawyer is not needed to file an appeal with the Board.
>
> Important legal rights are at stake, however, so individuals should contact a lawyer at once. Persons who cannot afford a lawyer may qualify for free pro bono representation. Call the Secretary to the Board at (717) 787-3483 for more information.

44 Pa.B. 5603. The notice identifies the section of our enabling act providing the contours of our jurisdiction. The notice provides the Board's address and telephone number if one wishes to obtain a notice of appeal form or contact the Board to get any other information. Importantly, the notice also advises prospective appellants in two different places that they have 30 days to file an appeal.

Feudale argues in his petition that he was misled about the true scope of the project. Feudale asserts that "the notices circulated to the public participation entities" disclosed only 8.33 acres of earth disturbance, not the 20 acres detailed in Aqua's initial application, or the 30.2 acres of actual disturbance reflected in its amended application. He also contends that Aqua's NPDES permit on its face indicates that only a small amount of area would be disturbed. On the first page of the permit a box is checked next to text indicating "1 acre to less than 5 acres of earth disturbance with a point source discharge." (Feudale Ex A.) Immediately below this, next to an unchecked box, is the text "5 or more acres of earth disturbance." Feudale argues in his reply brief that these are misrepresentations that constitute fraud.[3]

[3] At one point Feudale claims that the alleged misrepresentation of the project scope amounts not only to fraud, but to a breakdown in the administrative process. However, the focus of any breakdown in operations is on the tribunal itself—here, the Board—not on the agency taking the action under appeal. There was no breakdown in the operations of the Board, nor does Feudale make any claim to that effect.

Regarding the "municipal notifications," we are not sure to what Feudale is referring. He has not explained what these notifications are or attached any of the notifications to his nunc pro tunc filings. In his reply brief Feudale contends that the "municipal notification" misrepresented the project scope in contravention of Chapter 287 of the Department's regulations. However, Chapter 287 deals with residual waste, and we are not sure why these provisions have any applicability to the NPDES permit that was issued in this matter or to Aqua's project more generally. Feudale has not told us why Chapter 287 matters here. As noted above, the public notice provisions for NPDES permits are located at Chapter 92a. Feudale does not direct us to any provision of the Chapter 92a regulations that requires municipal notification, specifies what must be contained in that notification, or explains whether that notification comes from the Department or the prospective permittee. Along the same lines, he never explains where the figure of 8.33 acres of disturbance derives from, although a review of the transcript excerpts from the Commonwealth Court hearing that Feudale has attached to his petition (Feudale Ex. B) suggests that it may have been contained in Aqua's PNDI search, which Feudale has also failed to provide in support of his filings.

Notably, neither the *Pennsylvania Bulletin* notice of the application nor the notice of issuance of the permit identify the area of disturbance for Aqua's project at all, and this appears consistent with all the other notices published of this same type. Yet the Commonwealth Court already opined that the *Bulletin* notice here was sufficient without containing information on the extent of the disturbance:

> To the extent Feudale suggests that publication in the *Pennsylvania Bulletin* is insufficient to apprise interested parties of NPDES permit application and approvals, we note that this Court has

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See C & K Coal Co. v. DER, 1986 EHB 1149, 1151 ("C & K has alleged no conduct *on the part of the Board* which led C & K to believe that it was not necessary to exercise its appeal rights.") Feudale hand-delivered his petition and it was promptly time-stamped and docketed.

> previously determined such notice to be sufficient. *See Grimaud v. Dep't of Envtl. Res.*, 161 Pa. Commw. 647, 638 A.2d 299, 301-02 (Pa. Cmwlth. 1994) (rejecting argument that notice of NPDES permit published in Pennsylvania Bulletin was insufficient because "it is a 'fiction' that the public reads that publication").

Feudale, 122 A.3d at 466 n.4. Had Feudale read the *Bulletin* notices there would be nothing there to mislead him in terms of the disturbance, but he could have sought out more information from the Department. Further, the final notice provides detailed information on how one can file an appeal with the Board, which Commonwealth Court has previously looked at in response to a petitioner's claim of being misled in a case appealing a Board decision denying a request to appeal nunc pro tunc:

> This is not a case where the Petitioner has been actively misled or misinformed *as to the forum or time for taking an appeal*. Each of the compliance orders contained a notice provision to alert Petitioner to the possibility of an appeal to the Board within 30 days of the receipt of written notice of the DER's action.

C & K Coal Co. v. Dep't of Envtl. Res., 535 A.2d 745, 747 (Pa. Cmwlth. 1988) (emphasis added).

Importantly, Feudale does not explain how allegedly being misled connects to his failure to file a timely appeal, or to his failure to petition to appeal until now. Feudale says he first became aware of Aqua's project on an undisclosed date when during a hike in the Roaring Creek Tract he noticed trees that were marked for cutting. In the notice of appeal he seeks to file, which is attached to his petition (Feudale Ex. G), he says he had notice of the issuance of the NPDES permit through informal discussions with Aqua in the fall of 2013. He does not tell us what his conception of the area of disturbance was after this discussion. Yet he clearly believed that Aqua's project would adversely affect him when he filed his action in common pleas court on March 23, 2014 regardless of how many acres he thought at that point were going to be

disturbed. Presumably Feudale could have sought relief from the Board on May 23, 2014 instead of going to common pleas court. He arguably would have been in a stronger position then if he told us that the Department had not at that point published notice of its final action on the permit as it was required to do under 25 Pa. Code § 92a.86. By filing his action in common pleas court he evidently had the wherewithal to initiate legal proceedings; he simply chose the wrong forum.

Feudale does not explain why he did not come to the Board initially in lieu of his action in common pleas court, but we are able to glean some insight from Commonwealth Court's opinion:

> Feudale argues that he was not required to appeal to the EHB because the EHB cannot grant a permanent injunction. This Court, however, has held that "where the legislature has provided an administrative procedure to challenge and obtain relief from an agency's action, failure to exhaust that remedy bars this Court from hearing claims for declaratory or injunctive relief with respect to that agency action." *Funk*, 71 A.3d at 1101. Thus, Feudale's request for a permanent injunction does not eliminate his responsibility to appeal the DEP's issuance of the permit to the EHB.
>
> To the extent Feudale contends he was not required to appeal to the EHB because his claims against Aqua originate in the Environmental Rights Amendment or the History Code, these claims are without foundation, as Aqua is not a Commonwealth entity and thus not a trustee under the Environmental Rights Amendment or owner of a historic resource and thus subject to the History Code. The plain language of the Environmental Rights Amendment charges the Commonwealth, as trustee, with the duty to conserve and maintain Pennsylvania's public natural resources, and we are unaware of any case law applying this duty to non-Commonwealth entities. *See Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 953 (Pa. 2013) (plurality) (noting that Environmental Rights Amendment "protects the people from governmental action").

Feudale, 122 A.3d at 466. To this we would add that we have procedures for the filing of petitions for supersedeas and applications for temporary supersedeas, 25 Pa. Code §§ 1021.61 –

1021.64, which, if successful, could have suspended the Department's issuance of the permit pending the outcome of the appeal. We also note that we are fully capable of determining whether *the Department* has fulfilled its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution in any given appealable action. *See Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L, slip op. at 9-13 (Opinion and Order, Sep. 2, 2016).

Further, Feudale says that he conducted a file review on June 10, 2014. If Feudale had any doubt at that point as to the area of disturbance, it seemingly would have been clarified after seeing the contents of the application identifying 20 acres of disturbance, and the correspondence between the Department, the Conservation District, and Aqua indicating 30.2 acres of actual disturbance. In addition, Feudale attaches several excerpts of the transcript from Commonwealth Court's August 19, 2014 hearing. (Feudale Ex. B, C, D, E.) Although the transcript is not complete, it is clear that Feudale knew about the 30.2 acres of disturbance for Aqua's project at the time of the hearing. Aqua's application amendment disclosing the 30.2 acres of disturbance was used by Feudale during his examination of multiple witnesses. (Feudale Ex. B, C.) The hearing preceded publication of the notice of the final action by four days, meaning Feudale was fully aware of the scope of the project before the 30-day appeal window began under our rules at 25 Pa. Code § 1021.52(a)(2)(i). The more than one-year delay of publication of notice of the final action adds an odd wrinkle to this matter, but if anything it gave Feudale another opportunity to make a timely appeal. Feudale could have still filed a timely appeal of the permit within 30 days of notice of the final action on August 23, 2014, but he chose not to.

Again, Feudale's claims of misrepresentation do not hold up to scrutiny because he never explains how these supposed misrepresentations prevented him from filing a timely appeal. When we sift through the facts, it becomes clear that if Feudale ever were truly misled about the

scope of Aqua's project, for however long that might have been, it really does not have much of a relationship to his untimely appeal. His arguments instead appear to be post hoc justifications for his lack of diligence in taking appropriate action to protect his rights. He now asks us to excuse his oversight and grant an untimely appeal at least two years after it should have been filed, but nunc pro tunc petitions are not be granted simply because a petitioner did not do his homework and figure out how and where to properly appeal.

The second element a petitioner must show in a nunc pro tunc petition is that the petitioner acted within a short time after the deadline or the date that he learned of the untimeliness of an appeal. *Bureau Veritas N. Am., supra*, 127 A.3d 871, 879 (Pa. Cmwlth. 2015). In *Grimaud, supra*, 638 A.2d 299 (Pa. Cmwlth. 1994), the Court repeatedly emphasized that the landowners seeking to appeal nunc pro tunc waited six months from when they had actual notice of the NPDES permit to when they sought leave to appeal nunc pro tunc: "Where, as here, the parties sat on their rights for almost six months *after* learning about the DER's issuance of the NPDES permit before filing their petition for allowance of appeal nunc pro tunc, their argument that individual notice would have made a difference lacks merit." 638 A.2d 299, 303 (emphasis in original). *See also Pickford v. Dep't of Envtl. Prot.*, 967 A.2d 414, 419 (Pa. Cmwlth. 2008) (analyzing *Grimaud* and noting that Pickford likewise waited months before filing her appeal without any explanation for the delay; also noting that Pickford failed to appeal within thirty days of receiving actual notice); *Bass, supra*, 401 A.2d at 1135 (Pa. 1979) ("Without doubt the passage of any but the briefest period of time during which an appeal is not timely filed would make it most difficult to arrive at a conclusion that the failure to file was non-negligent.").[4]

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[4] *Compare Croft v. Bd. of Prop. Assessment*, 134 A.3d 1129, 1136:

> Although time is certainly a factor, our cases addressing due diligence do not rest on the specific amount of time that lapses between a petitioner gaining knowledge of the need to

Apart from suggesting that he thought the Pennsylvania Supreme Court would overrule Commonwealth Court and find that he did not have to exhaust his administrative remedies before the Board, Feudale offers little explanation for the lapse of time in his nunc pro tunc petition. Even if Feudale were initially unclear about the scope of the project, we have difficulty accepting that he waited so long before coming to the Board after he obviously did know the true scope of the project.

Feudale casts his decisions regarding his choice of legal fora for his challenges in binary terms. He asserts that after being unsuccessful in Pennsylvania's appellate courts, he could have either gone on to our nation's highest court or come to the Board. However, not wanting to attempt to take one's case to the United States Supreme Court does not constitute good cause for a nunc pro tunc appeal. Feudale frames the Board as a court of last resort, when it is in fact the first step in a challenge to a final Department action. We see no reason why Feudale could not have sought relief from the Board in conjunction with his other efforts at any time during the last two-plus years. There is no reason he would be precluded from initiating a parallel proceeding. The most prudent course of action would have been to initiate an appeal with the Board as soon as Feudale discovered that Aqua's permit had been issued. He certainly did not have to wait to hear from the Supreme Court before coming to the Board. Instead, Feudale persisted with his efforts in the courts without employing any sort of contingency plan even after being ruled against by Commonwealth Court and being explicitly told by the Court that he should have come to the Board in the first instance. Feudale's approach boils down to little more than not wanting to walk and chew gum at the same time.

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act and a petitioner filing for nunc pro tunc relief. In *Kaminski*, we held that the taxpayers had failed to establish a right to appeal nunc pro tunc not because of the length of time that had passed but because "[t]axpayers have not attempted to explain the reason for this lapse of time." *Id.* at 1032.

To sum up, Feudale did not appeal to the Board within 30 days of the permit being issued in April 2013. He did not appeal after he says he received notice through a discussion of the project with Aqua in the fall of 2013. He did not come to the Board on May 23, 2014 when he filed his action in common pleas court or after his file review at the Department on June 10, 2014. He did not come to the Board after the August 19, 2014 hearing before Commonwealth Court. He did not appeal within 30 days of the *Bulletin* notice published August 23, 2014. He did not seek to appeal after Commonwealth Court held on July 22, 2015 that he failed to exhaust his administrative remedies and he should have appealed the permit to the Board. Instead, he waited for nearly three months after the Pennsylvania Supreme Court affirmed the holding in Commonwealth Court to finally petition the Board nunc pro tunc. Based upon the series of missed opportunities Feudale had to seek relief from us, we cannot say that non-negligent circumstances caused his untimely filing.

Regarding the incorrect checkbox on the permit, the Department and Aqua acknowledge that there was an error on the face of the permit and that the permit should have indicated that more than five acres of earth disturbance would occur. They refer to this as merely a typographical error. The Department tells us that the first page of the permit was corrected after the error was brought to the Department's attention by Aqua in January 2016. The Department nevertheless contends that it was at all times aware that the project would disturb more than 5 acres and it reviewed the project accordingly. The Department issued a new first page of the permit to Aqua correcting the error on February 18, 2016. (Aqua Ex. G.)

Given what we have already discussed above, it does not appear that the checkbox played any role in Feudale not appealing earlier, nor does he even claim that it did. Feudale never says that he relied on the permit in any way. He does not say, for instance, that he looked at the

permit's first page, believed Aqua's project to be relatively innocuous, and decided not to pursue the matter further based on that information. The checkbox issue also runs counter to his assertions regarding his alleged earlier impression of 8.33 acres of disturbance. If he at all times knew more than five acres would be disturbed, then the checkbox is inconsequential for the purposes of his petition. It instead appears to be another distraction to deflect from Feudale's negligence in ascertaining the appropriate channel for his legal challenge. The checkbox, on its own or in conjunction with any other alleged misrepresentation, does not excuse his tardy filing.

Feudale's petition also rests on what he argues are unique and compelling factual circumstances. He generally asserts that Aqua's project will allegedly impact a pristine area of nature and this implicates important issues involving Article I, Section 27 of the Pennsylvania Constitution. Feudale details the history of the area of the Roaring Creek Tract and the recreational opportunities it now affords. He says that Aqua's project will result in large-scale timbering that will impact the aesthetic value of the area. He contends that the Department made no effort to reduce to a minimum the environmental harm of Aqua's project as required under Article I, Section 27. *See Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973) (detailing the three-part test assessing whether a government decision complies with Article I, Section 27).

On these points, Feudale's argument goes to the merits of issuing the permit and whether it was reasonable for the Department to do so. However, we are not concerned with a petitioner's arguments on the merits in assessing a nunc pro tunc petition. The unique and compelling factual circumstances must go to the reasons why a timely appeal was not filed, not to the allegedly compelling circumstances of the challenged activity itself. *See Paradise Twp. Citizens Comm. v. DER*, 1992 EHB 668 (denying petition to appeal nunc pro tunc where petitioners addressed merits of the Department action instead of the reasons for allowing an

untimely appeal). Although Feudale essentially argues that we should allow an untimely appeal because important issues are at stake, "[e]very case that comes before the Board involves important issues, at least to the parties in that case." *Kleissler v. DEP*, 2002 EHB 737, 739. Feudale has not shown any unique and compelling factual circumstances demonstrating why his untimely filing was not a product of his own negligence.

Feudale also has not demonstrated that Aqua and the Department will not be prejudiced by allowing his appeal now years after notice of the permit issuance was published. We generally disfavor protracted litigation and we do not counsel the initiation of litigation years after the action being taken absent a strong showing of good cause. "Aside from the fact that it is rarely in the public interest to leave Departmental actions in limbo for years, the longer a case drags out, the greater the likelihood that witnesses will forget things, or worse, become unavailable." *Shenango Inc. v. DEP*, 2005 EHB 941, 946-47.

As something of a final effort, Feudale in his reply brief cites to the Rules of Appellate Procedure, Pa.R.A.P. 751, and somewhat in passing asserts that a case filed in an improper forum should not be dismissed, but rather transferred to the correct forum—apparently transferred to the Board but from where is unclear. The Rules of Appellate Procedure do not govern proceedings before the Board, nor do the Rules of Civil Procedure except where explicitly incorporated by our own rules. Nevertheless, Commonwealth Court has explicitly held that the analogous forum transfer rule in the Rules of Civil Procedure does not apply to us so we have no reason to believe that Pa.R.A.P. 751 has any bearing:

> The Township also contends that Pa. R.C.P. No. 126, as well as Pa. R.C.P. No. 213(f), provide for the transfer of an erroneously filed matter to a rightful court, and that the EHB is a rightful court. However, pursuant to Section 3(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7513(a), the

> EHB is established as an independent quasi-judicial agency, and as such, is not a rightful court as envisioned by Pa. R.C.P. No. 213(f).

West Caln Twp. v. Dep't of Envtl. Res., 595 A.2d 702, 706 n.4 (Pa. Cmwlth. 1991).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD RALPH FEUDALE	:	
	:	
v.	:	**EHB Docket No. 2016-110-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AQUA PENNSYLVANIA, INC., Permittee	:	

O R D E R

AND NOW, this 25th day of October, 2016, it is hereby ordered that Richard Ralph Feudale's petition to appeal nunc pro tunc is **denied**. This matter is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 25, 2016

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

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For Appellant, *Pro Se*:
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(*via electronic filing system*)

For Permittee:
Paul J. Bruder, Jr., Esquire
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(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; PERDUE AGRIBUSINESS LLC, Permittee; and CONOY TOWNSHIP AND LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY, Intervenors	:	**Issued: October 27, 2016**

OPINION AND ORDER ON
AMENDED MOTION TO STRIKE OBJECTIONS TO SUBPOENAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's amended motion to strike appellants' objections to nonparty subpoenas because it is in substance a petition for reconsideration of an interlocutory order and the permittee has failed to justify reconsideration.

O P I N I O N

On May 5, 2016, the Pennsylvania Department of Environmental Protection (the "Department") issued Air Quality Plan Approval No. 36005158A to Perdue Agribusiness, LLC ("Perdue"), authorizing Perdue to construct a soybean processing facility in Conoy Township, Lancaster County. Annette Logan, Patty Longenecker, and Nick Bromer filed this appeal from the issuance of the plan approval. The Appellants allege among other things that they were denied due process by the Department, the plan approval did not comply with the Department's requirements for using best available technology ("BAT"), Perdue failed to perform an adequate alternative site analysis based upon the harms/benefits of the project, the Department's

determination that fugitive emissions are insignificant was erroneous, and the plan aproval does not meet Lowest Achievable Emissions Rate ("LAER") requirements.

On July 21, 2016, Perdue served on the other parties in this matter Notices of Intent to Serve Subpoenas on nonparties Lynnette Mackley, Citizens Against Perdue Pollution ("CAPP"), Fred Osman, and Mike Martin for the production of documents and things. Pursuant to Pa.R.C.P. No. 4009.21, the notices were served at least 20 days before the subpoenas would be served on the nonparties. In accordance with the Rules, the appellants filed Objections to Perdue's Notices of Intent to Serve Subpoenas. In support of their objections to the subpoenas, the appellants alleged among other things that compliance with the subpoenas would result in unreasonable annoyance, expense, embarrassment, burden, and oppression to the nonparties, and particularly would do so with respect to documents concerning the financing of the appeal. They also alleged that the subpoenas were seeking information irrelevant to the issues in the notice of appeal, and that requested documents related to communications between the appellants' counsel and Ms. Mackley, CAPP, Mr. Osman, and Mr. Martin are protected by the attorney-client privilege and attorney work-product doctrine.

Perdue filed its opposition to the appellants' objections, styled as a Motion to Strike Appellants' Objections to Subpoenas. The appellants responded to Perdue's motion to strike, alleging among other things, that Perdue had failed to comply with the Board's rules in several respects, and that Perdue failed to address the objections that the discovery sought irrelevant information and was calculated to cause unreasonable annoyance, etc. We agreed with the appellants and on September 12, 2016 we issued an order denying Perdue's Motion to Strike Appellants' Objections to Subpoenas. Twenty-one days after our Order, on October 3, 2016, Perdue filed what it has styled as an "Amended Motion to Strike or Otherwise Overrule

Appellants' Objections to Subpoenas," which is now supported by a 24-page memorandum of law.

What Perdue has styled an "amended motion" is in actuality a petition for reconsideration of an interlocutory order. While it is sometimes assumed, perhaps somewhat presumptuously, that a motion that is denied purely on procedural grounds is denied without prejudice to the right to refile using proper procedures, the appellants correctly point out that Perdue's original motion was denied on both procedural and substantive grounds. Appellants complain that they should not be required to respond to what is essentially the same motion twice. They complain that a pattern has emerged on the part of Perdue and the Intervenors of an inability or unwillingness to comply with the Board's rules, which is causing the Appellants to incur unwarranted burden and expense, and that Perdue's latest motion is consistent with that pattern.

Reconsideration of an interlocutory order is an "extraordinary remedy" that will rarely be granted. 25 Pa. Code § 1021.151; *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Opinion and Order, Oct. 11, 2016). Perdue has made no effort to explain why it believes it is entitled to file a significantly expanded motion to strike the appellants' objections. It has failed to explain why reconsideration is appropriate, such as that there are new facts or law inconsistent with our ruling that could not have been presented earlier with the exercise of due diligence. If Perdue believed that the discovery it sought was relevant, there is no reason why it could not have made the appropriate arguments in its original motion. Furthermore, a petition for reconsideration must be filed within ten days of the order in question; Perdue's motion was not. There is simply no basis for granting reconsideration in this case, and Perdue's motion is denied on that basis alone.

We would add that the only conceivable basis we see for allowing discovery against these nonparty citizens and citizens group is that they also opposed Perdue's project as approved. The mere fact that a citizen exercises his or her right to participate in the public review process or otherwise publicly expresses opposition to a project is not, without more, a basis for subjecting that person to discovery in someone else's case. Perdue says that the nonparties are "orchestrating this proceeding," that they are the "real parties in interest," that they have "purposefully engaged in a coordinated effort to kill the project," and that they are "feeding appellants various technical arguments." There seems to be very little to support these accusations, but even if they are true, glaringly absent from Perdue's motion is any explanation of why any of that matters. The operative inquiry in this appeal is not whether some sort of conspiracy is afoot; the operative inquiry is whether the Department acted lawfully and reasonably in issuing the plan approval. Whether the Department acted lawfully and reasonably will turn on the highly technical objections raised in the notice of appeal, such as whether the facility is designed to meet LAER, BAT, and fugitive emission requirements. Perdue never explains how Ms. Mackey for example could help us in our analysis of the LAER requirements.

Perdue says discovery of the nonparties might uncover "statements against interest" by the appellants, and it speculates that the appellants might be caught in some document as having said the project is a great idea. This without more seems to be a rather far-fetched justification for the Board to exercise its subpoena power, but putting that aside, we are left to wonder how an appellant's opinion at one time that the project is a great idea would play any meaningful role in our review. To our knowledge the appellants have not identified the nonparties as potential witnesses. No one has signaled that any of them have unique access to plant processes or air

pollution controls at the facility. We see no basis for allowing the discovery, even if Perdue's arguments had been properly presented.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; PERDUE AGRIBUSINESS LLC, Permittee; and CONOY TOWNSHIP AND LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY, Intervenors	:	

O R D E R

AND NOW, this 27th day of October, 2016, it is hereby ordered that the permittee's amended motion to strike is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: October 27, 2016

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

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Matthew J. Creme, Jr., Esquire
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For Intervenor, Lancaster County
Solid Waste Management Authority:
C. Edward Browne, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; PERDUE AGRIBUSINESS LLC, Permittee; and CONOY TOWNSHIP AND LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY, Intervenors	:	**Issued: October 28, 2016**

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's motion to compel third-party appellants to provide additional responses to interrogatories and a document request because the responses they already provided are adequate.

O P I N I O N

This is the appeal of three Commonwealth citizens from the Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval No. 36005158A to Perdue Agribusiness, LLC ("Perdue") to construct and temporarily operate a soybean processing facility in Conoy Township, Lancaster County. Perdue served its first set of interrogatories and a document request on each of the three appellants. The appellants responded with what Perdue believes were insufficient responses. Perdue has, therefore, filed a motion to compel what Perdue believes would be better responses. The appellants oppose the motion, arguing that their responses are sufficient.

The Board recently discussed its rules governing discovery in *Clean Air Council v. DEP,* EHB Docket No. 2016-073-L (Opinion and Order on Motion to Compel, Aug. 18, 2016), where we wrote the following:

> Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 1003.1. Since it can be difficult to tell early on in a case what is relevant in a matter, we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant. *Cabot Oil & Gas Corp. v. DEP*, EHB Docket No. 2015-131-L, slip op. at 5 (Opinion, Feb. 3, 2016); *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (*citing T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 610); *Parks v. DEP*, 2007 EHB 57. We do not need to get into whether the material will ultimately be determined to be admissible at this point, Pa.R.C.P. No. 4003.1(b), but we do need to make an assessment of relevancy, Pa.R.C.P. No. 4003.1(a). No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP,* 2009 EHB 202, 205. We must also keep in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517.

Slip op. at 4-5.

We agree with the appellants that their discovery responses are adequate, at least for now. As we have previously recognized in the context of third-party appeals of Department actions, often "the individual appellants have little to offer in the way of relevant testimony of their own

beyond their basis for standing and their knowledge of the surroundings, nor do we expect otherwise. These cases ultimately usually seem to turn on a battle of the experts." *Sludge Free UMBT v. DEP*, 2014 EHB 939, 945. With that being said, we note that the appellants have not identified their lay or expert witnesses and will need to do so in a timely manner. The parties should not take it for granted that the discovery deadline will be extended in this matter. The appellants are also cautioned that their ability to present evidence at the hearing on the merits will be constrained by their fair disclosures in response to discovery. *DEP v. Columbo,* 2012 EHB 370.

Having found the appellants' responses generally adequate, we do not see a need to go through each one of Perdue's discovery requests and the responses thereto. However, a few points are worthy of some discussion. The first point deals with the appellants' standing. Perdue says in its motion to compel that it needs to find out who the individuals with a "vested interest" are in this appeal. It alleges that persons other than the appellants may be funding this appeal and it needs to know who they are. Similarly, in its companion amended motion to strike objections to subpoenas, Perdue says it needs to determine who the "real parties in interest" are in this appeal. It refers us to Pa.R.C.P. No. 2002, which provides that civil actions are to be prosecuted by and in the name of the real party in interest.

The first problem with Perdue's argument is that, with the exception of the Rules of Civil Procedure that relate to discovery and a few other minor exceptions, the Rules do not apply in Board proceedings. The Board is an administrative agency that operates under its own set of rules. *See* 25 Pa. Code §§ 1021.1 – 1021.201. Although our rules are quite comprehensive, the default rules for any matter not addressed in our rules are the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II, not the Pennsylvania Rules of Civil Procedure. *See* 25

Pa. Code § 1021.1(c). Secondly, participation in Board proceedings is not dependent on whether a person has a "vested interest" or is a "real party in interest." Several statutes and regulations describe who may appeal a Department action to this Board, including of course the Environmental Hearing Board Act, 35 P.S. § 7511 *et seq*. We have no interest in adding a judge-made gloss regarding "real parties in interest" to those standing requirements.

To the extent Perdue's discovery requests are designed to uncover the basis for the appellants' standing, we see very little if any need to obtain much information on that subject. Standing, already quite broad in Board proceedings, *see Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Opinion and Order, Sept. 2, 2016), is particularly broad in appeals from a plan approval such as this one because Section 10.2 of the Air Pollution Control Act, 35 P.S. § 4010.2, provides that aggrieved persons "or any person who participated in the public comment process for a plan approval or permit" has a right to appeal to the Board. So long as an appellant has standing because the appellant submitted comments, further inquiry into the person's actual aggrievement seems to be largely redundant and a waste of resources. They are not deprived of standing because other persons who did not appeal may also have standing. By the same token, assuming that a person who is secretly supporting a named appellant and "hiding" behind a named appellant lacks standing of his or her own, it does not follow, as Perdue incorrectly suggests, that a named appellant lacks standing in his or her own right.

If the identity of "real parties in interest" is not relevant with respect to an appellant's standing to appeal, why else would it be discoverable? Perdue says the "real parties" may be in possession of communications from the appellant, but it fails to explain why such communications could help the Board decide whether the Department acted lawfully and reasonably. We review the Department's actions to determine whether they are lawful,

reasonable, supported by the facts, and consistent with its constitutional responsibilities. *Borough of Kutztown v. DEP*, EHB Docket No. 2015-087-L, slip op. at 12 n.2 (Adjudication, Feb. 29, 2016); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Gadinski v. DEP*, 2013 EHB 246, 269. Therefore, in order to be relevant, information sought in discovery must have a reasonable potential to shed light upon whether the Department's action was lawful, reasonable, supported by the facts and consistent with its constitutional responsibilities. Information sought in discovery might also be available for impeachment purposes, but even impeachment evidence is limited to attacking the credibility of otherwise relevant evidence or testimony.

The closest that Perdue comes to explaining with any specificity why the discovery it seeks is relevant is that knowing the identity of the "real parties in interest" "could lead to the discovery of relevant communications or documentation regarding the appeal based on the identity of any such individual(s)." The possible relevance is not apparent to us. Nor is it our job to imagine possible relevance. We would need more than this vague statement to justify granting Perdue's motion to compel. *See New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L, slip op. at 23 (Opinion and Order, Sept. 12, 2016) ("We are certainly receptive to explanations of why discovery is relevant when the relevance is not obvious to us, but these vague statements are not particularly helpful.") How, for example, could communications with a person named Lynette Mackley help us decide whether Perdue's plan approval is consistent with Lowest Achievable Emissions Rate (LAER) or Best Available Technology (BAT) requirements or the prohibition against unauthorized fugitive emissions? Perhaps future discovery will reveal that Ms. Mackley has potentially helpful information regarding these highly complex legal and technical issues, but all we have now is that Ms.

Mackley is opposed to the project as currently approved and may or may not be friends with the appellants.

There is also some truth to the appellants' contention that seeking the identity of nonparties when there is no apparent relevance is not unlike parties' efforts to obtain membership lists of citizen-group appellants, which we have soundly rejected. *See Friends of Lackawanna, supra*; *Sludge Free UMBT, supra*, 2014 EHB at 950; *Hanson Aggregates, PMA, Inc. v. DEP*, 2003 EHB 1. Whether intended or not, such discovery requests have the tendency to intimidate, harass, and chill the exercise of constitutional rights and we need to be shown why such unavoidable negative consequences are justified by the need to make one's case. There has been no such showing here.

The next point that we want to make with respect to this discovery dispute relates to Perdue's request for the appellants' health records. The appellants justifiably refused to turn over those records. Perdue presses the point in its motion but makes no attempt to explain why the appellants' health records might be relevant. In the absence of an explanation, this request strikes us as an example of overreaching on Perdue's part. This not a tort case. The appellants are not plaintiffs in a civil suit. This is an administrative appeal narrowly focused on the lawfulness and reasonableness of a Department action. We see no obvious connection between the appellants' health and that narrowly focused inquiry. This appeal is not an occasion to attack the appellants personally.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANNETTE LOGAN, PATTY LONGENECKER AND NICK BROMER	:	
v.	:	**EHB Docket No. 2016-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; PERDUE AGRIBUSINESS LLC, Permittee; and CONOY TOWNSHIP AND LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY, Intervenors	:	

O R D E R

AND NOW, this 28th day of October, 2016, it is hereby ordered that the Permittee's motion to compel is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: October 28, 2016

c: For DEP, General Law Division:
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Matthew J. Creme, Jr., Esquire
(*via electronic filing system*)

For Intervenor, Lancaster County Solid Waste Management Authority:
C. Edward Browne, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANTHONY LIDDICK	:	
	:	
v.	:	**EHB Docket No. 2016-051-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 3, 2016**

OPINION AND ORDER ON
MOTION TO COMPEL

By: Judge Richard P. Mather, Sr.

Synopsis

The Board grants the Department's motion to compel Appellant to provide responses to interrogatories and the Department's first request for production of documents. Because Appellant has failed to respond to either the Department's initial discovery requests or its motion to compel, the Board views all properly pleaded facts in the motion as admissions. These deemed admissions support the Department's motion. Additionally, the Board grants the Department's request to extend by 60 days the discovery and dispositive motion deadlines in the Board's Pre-Hearing Order No. 1.

O P I N I O N

Anthony Liddick ("Appellant") filed an appeal of the Department's compliance orders requiring him to cease activity in wetlands located on his property. On or about April 27, 2016, the Department served upon Appellant its first set of interrogatories and a request for production of documents ("Department's Discovery Request"). The Appellant failed to respond, even following several attempts on the part of the Department to request that he do so. Therefore, on

October 17, 2016, the Department filed a motion to compel responses from the Appellant. In its motion, the Department seeks to compel a response to the Department's Discovery Request.

The Department's motion complied with the Board's rules. It contained a certification that the Department attempted to resolve the discovery dispute in good faith, and an exhibit documenting the discovery requests giving rise to the dispute. 25 Pa. Code § 1021.93(b). The Board issued an order directing the Appellant to respond to the motion to compel by October 25, 2016. No response was filed.

A party's failure to respond to a motion may be deemed to be an admission of all properly pleaded facts contained in the motion. 25 Pa. Code § 1021.91(f). *Beaver Falls Mun. Auth. v. DEP*, 2000 EHB 1026; *Buddies Nursery, Inc. v. DEP*, 1999 EHB 885; *Enterprise Tire Recycling v. DEP*, 1999 EHB 900; *Concerned Citizens v. DEP*, 1999 EHB 167; *Smedley v. DEP*, 1998 EHB 1281. The Appellant was required to file answers and/or objections to the Department's Discovery Requests within 30 days after service – by May 30, 2016. *See* 25 Pa. Code § 1021.102(9); Pa. R.C.P. 4006; 4009.1.2. He did not do so. The Appellant had until October 25, 2016 to respond to the Department's motion to compel. 25 Pa. Code § 1021.93(b). He did not. Under the Board's Rules, the Appellant's failure to respond may be deemed an admission of all of the Department's properly pleaded facts in its motion to compel.

The Board recently offered a comprehensive discussion of its discovery rules in *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L (Opinion and Motion to Compel, Aug. 18, 2016), where we stated the following:

> Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.C.P. No. 1003.1. Since it

> can be difficult to tell early on in a case what is relevant in a matter, we tend to interpret the relevancy requirement broadly at the discovery stage, and we will generally allow discovery into an area so long as there is a reasonable potential that it will ultimately prove to be relevant. *Cabot Oil & Gas Corp. v. DEP*, EHB Docket No. 2015-131-L, slip op. at 5 (Opinion, Feb. 3, 2016); *Borough of St. Clair v. DEP*, 2013 EHB 177, 179 (*citing T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608, 610); *Parks v. DEP*, 2007 EHB 57. We do not need to get into whether the material will ultimately be determined to be admissible at this point, Pa.R.C.P. No. 4003.1(b), but we do need to make an assessment of relevancy, Pa.R.C.P. No. 4003.1(a). No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.C.P. No. 4011. "[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP,* 2009 EHB 202, 205. We must also keep in mind that discovery is governed by a proportionality standard, and discovery obligations must be "consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." 2012 Explanatory Comment Prec. Rule 4009.1, Part B. *See also Friends of Lackawanna v. DEP*, 2015 EHB 785; *Tri-Realty Co. v. DEP*, 2015 EHB 517.

Slip op. at 4-5.

Based upon the allegations in the motion to compel, the Department's discovery requests are relevant to this appeal and there is no evidence of bad faith or undue burden at play here. Further, it appears that none of the Department's requests fall outside of the proportionality standard. While the Board is sensitive to the Appellant's status as a pro se party, his status does not excuse him from complying with the Board's Rules, which incorporate certain Pennsylvania Rules of Civil Procedure. The Appellant is required to respond to the Department's Discovery Request.

While there are circumstances in which an untimely response may not result in its rejection, none applies here. For example, striking a response that is late by a day and causes no

prejudice may be too harsh a sanction. *Beaver Falls Mun. Auth. v. DEP*, 2000 EHB 1026, 1028. Similarly, the Board may choose to extend the time for filing a response upon receipt of a motion for good cause. *Id*. The Appellant has neither filed a late response nor requested an extension. In fact, the Appellant made clear to the Department that he had no intention of responding to the Department at all. Department's Motion to Compel, Paragraph 10. Thus, it is apparent that the Appellant has not taken any steps to respond to the Department's Discovery Request or to explain why no response is required.

The Board grants the Department's motion to compel. Based upon the Department's motion, its discovery requests are relevant, cause no undue burden, and are well within the proportionality standard. Because the Appellant failed to respond to either the Department's Discovery Requests or its motion to compel as required by the Board's Rules, which incorporate the Pennsylvania Rules of Civil Procedure, the Department is entitled to the relief it requested. Similarly, the Board grants the Department's request for an extension of 60 days for all discovery and dispositive motion deadlines in the Board's Pre-Hearing Order No. 1.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANTHONY LIDDICK	:	
	:	
v.	:	**EHB Docket No. 2016-051-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of November, 2016, in consideration of the Department's Motion to Compel, it is hereby ordered that the Motion and an extension to the litigation schedule established by Pre-Hearing Order No. 1 are granted as follows:

1) Appellant shall provide a full and complete response to all outstanding Department Discovery Requests by no later than **November 17, 2016.**

2) All discovery in this matter shall be completed by **December 19, 2016.**

3) All dispositive motions shall be filed by **January 17, 2017.**

ENVIRONMENTAL HEARING BOARD

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

DATED: November 3, 2016

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

FRIENDS OF LACKAWANNA	:	
	:	
v.	:	**EHB Docket No. 2015-063-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, INC., Permittee	:	**Issued: November 4, 2016**

OPINION AND ORDER ON
MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's motion in limine seeking to prevent a landfill's expert from opining regarding the application of a harms-benefit analysis to a permit renewal.

O P I N I O N

This is Friends of Lackawanna's ("FOL's") appeal from the Department of Environmental Protection's (the "Department's") issuance of a solid waste management permit renewal (Permit No. 101247) to Keystone Sanitary Landfill, Inc. ("Keystone") for the continued operation of a municipal waste landfill in Lackawanna County for another 10 years. The hearing on the merits is slated to begin on November 14, 2016. FOL has filed a motion in limine asking us to exclude all testimony of William S. Tafuto, P.E., Keystone's proposed expert witness on the application of the constitutional harms-benefits test to Keystone's permit renewal. FOL's main argument is that Tafuto's expert report reveals that he intends to give legal opinions, which is not allowed. Keystone responds that we should not be conducting a harms-benefits analysis at all in an appeal from a permit renewal, but if we are to conduct such an analysis Tafuto's

testimony will be very helpful to the Board. We agree that Tafuto's testimony will be helpful and will not necessarily intrude on the Board's exclusive prerogative to decide issues of law, and therefore, we deny the motion in limine.

Preliminarily, we see from Tafuto's expert report that he will only be offered to provide testimony on the *constitutional* harms-benefits test. There is also a *regulatory* harms-benefits test. 25 Pa. Code § 271.126. The two tests are stated differently. FOL does not appear to be arguing that the *regulatory* harms-benefits test applies in this appeal from a permit renewal. In fact, it criticizes Tafuto for conflating the two tests. That is, FOL criticizes Tafuto for simply assuming that the Department's application of the regulatory test in the past is pertinent to the Department's compliance with the constitutional test here. The Department did not weigh in on the motion in limine, but in its prehearing memorandum it appears to agree that the regulatory test is not applicable but the constitutional analysis does apply.[1] As mentioned above, Keystone believes that neither test applies.

We do not accept FOL's initial criticism as valid. Tafuto has not opined that the regulatory and constitutional tests are the same. Rather, he has merely noted his *understanding* that the regulatory test does not apply, and since there is really very little else to go on, he has referred to past practices related to the regulatory test in forming his opinion regarding the constitutional test. While it is true that experts may not give legal opinions, *Rhodes v. DEP*, 2009 EHB 237; *Wheeling-Pittsburgh Steel Corp. v. DEP*, 2008 EHB 338; *Shenango, Inc. v. DEP*, 2006 EHB 783, Tafuto has actually steered clear of giving a legal opinion on this issue. We see nothing wrong with Tafuto's properly qualified reference to the regulatory test in opining on the constitutional test.

---

[1] If the Department does refer us to 25 Pa. Code § 271.126(c), which limits the scope of the regulatory test in certain cases.

We also need to deal with Keystone's preliminary point that even the constitutional harms-benefits test does not apply in this case.[2] We understand that Keystone wants to avoid being seen as having waived the issue, and we agree that it has been properly preserved, but we have already rejected Keystone's contention. In ruling on Keystone's earlier motion for summary judgment, we held as follows:

> Our role is not restricted to ensuring that there has been compliance with the regulatory minimums. Our role is to consider the "environmental effect of any proposed action." *Feudale, supra*, 122 A.3d at 467. We have now been repeatedly instructed that the way to do that when a Department action is challenged is to apply the three-pronged test set forth in *Payne*.

FOL v. DEP, EHB Docket No. 2015-063-L (Opinion and Order, Sept. 2, 2016).

Thus, regardless of whether the *regulatory* harms-benefits analysis set forth at 25 Pa. Code § 271.127 applies to permit renewals, the Department nevertheless has an independent obligation to ensure that its action comports with Article I, Section 27 of the Pennsylvania Constitution. As we very recently held in *Pine Creek Watershed Ass'n v. DEP*, EHB Docket No. 2014-154-L (Adjudication, October 21, 2016),

> Although we must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in Act 41 [35 P.S. § 750.5(e)(4)(relating to on-lot sewage systems)], that is not to say that the Department is entirely relieved of its constitutional responsibility to comport its actions with Article I, Section 27. In *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), the Commonwealth Court established a three-fold test to determine whether a government decision complies with Article I, Section 27:
>
> > (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the

[2] We are aware that Keystone has raised reasons why the constitutional test should not be applied in this case that go beyond the regulatory/constitutional dichotomy, but those issues go beyond FOL's motion in limine and we do not address them here.

> benefits to be derived therefrom that to proceed further would be an abuse of discretion?
>
> *Id.*, 312 A.2d at 94. The *Payne* test is particularly applicable in situations where, as here, a person challenges a government decision or action. *Funk, supra*, slip op. at 5. *See also Logan v. DEP*, EHB Docket No. 2016-091-L, slip op. at 4 (Opinion and Order, Aug. 2, 2016) (citing *Brockway, supra*, 2015 EHB at 249; *Pa. Envtl. Def. Found v. Cmwlth.*, 108 A.3d 140 (Pa. Cmwlth. 2015)).

Slip op. at 10.[3]

Of course, this appeal is from the renewal of a permit for an existing facility. Therefore, we need to be careful and precise about the scope of our inquiry. We are not evaluating whether the environmental harm of the facility outweighs its benefits; we are evaluating whether the harm associated with the *continued operation* of an existing facility pursuant to its existing permit without any changes for another 10 years is outweighed by the benefits of the *continued operation* of the existing facility. This appeal does not present an occasion for a reexamination of whether the landfill should have been permitted in the first place. *Solebury School v. DEP*, 2014 EHB 482; *Love v. DEP*, 2010 EHB 523; *Wheatland Tube Co. v. DEP*, 2004 EHB 131; *Winegardner v. DEP*, 2002 EHB 790. Whether this distinction makes any practical difference with respect to the presentation of evidence or more generally remains to be seen, but it is important to keep in mind as we consider FOL's motion.

With respect to the scope of the appeal more generally, we had this to say in another of the earlier Opinions in this case:

> We have now repeatedly held that a permit renewal not only creates an opportunity for the Department to assess whether continued operation of the permitted facility is appropriate, it creates a duty to do so. *See Solebury School v. DEP*, 2014 EHB 482, 526; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 216-17; *Love v. DEP*, 2010 EHB 523, 528-29; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359;

[3] *See also* 25 Pa. Code § 271.201, which, if it applies here, establishes the criteria for a landfill permit issuance and states that a permit application will not be approved unless the applicant affirmatively demonstrates, among other things, that the requirements of the environmental protection acts, Title 25 of the Pennsylvania Code, *and* PA. CONST. art. I, § 27 have been complied with. 25 Pa. Code § 271.201.

> *Wheatland Tube v. DEP*, 2004 EHB 131, 135-36; *Tinicum Twp. v. DEP*, 2002 EHB 822, 835. Permits are issued with limited terms for precisely that reason. Indeed, even without a renewal application pending, the Department is required to "from time to time, but at intervals not to exceed 5 years, review permits issued under [the municipal waste] article." 25 Pa. Code § 271.211(d).
>
> Keystone directs us to *Wheatland Tube Co. v. DEP*, 2004 EHB 131, in support of its argument that Friends of Lackawanna's discovery requests are overly broad. However, in *Wheatland Tube* we again reiterated our support for our holding in *Tinicum Township* that the Department, and in turn the Board, must ensure that the continuation of a permitted activity is still appropriate in the context of current information and standards:
>
>> The Department argued [in *Tinicum Township*] that the Board was only permitted to consider whether the permit limits had changed, and if so, whether the changes were appropriate. We rejected the argument. We explained that, even in the absence of changes to permit terms, the five-year renewal requirement required the Department to ensure that a permit issued years earlier was still appropriate based upon what was known at the time of the proposed renewal. The determinative issue was *not* whether the permit was appropriate in the first place; it was whether it should have continued in place for another five years. Challenges related to the former were barred; challenges related to the latter were held to be properly the subject of Departmental consideration and Board review.
>
> *Wheatland Tube*, 2004 EHB at 135-36.

FOL v. DEP, 2015 EHB 785, 788-89. Thus, in this case we face the challenge of implementing the harms-benefits analysis in a way that recognizes that renewals require something more than the mindless application of a rubber stamp but something less than an a reexamination of the merits of any earlier permitting decisions regarding the landfill.

Thus, our review in this case necessarily includes a *de novo* analysis of whether the environmental harm which will result from the renewal of Keystone's preexisting permit for 10 years so clearly outweighs the benefits to be derived therefrom that allowing the renewal to stand would be an abuse of discretion. The question remains: How do we do that? Although the courts have freely repeated the test, they have offered scant guidance on how it is to be applied to

the facts of a given case. Indeed, the Pennsylvania Supreme Court in the course of rejecting a challenge that the regulatory test is unconstitutionally vague acknowledged that, although the terms “harms,” “benefits” and “outweighs” are not defined, there will be “ample opportunity to clarify the meaning of the test” in future permitting cases. *Eagle Envtl. II, L.P. v. Commonwealth*, 884 A.2d 867, 882 (Pa. 2004).[4] The undersigned has written in the past about the difficulties inherent in applying an abstract and subjective balancing test to actual facts. *See, e.g., Eagle Environmental II, L.P. v. DEP*, 2002 EHB 335, 393-94 (Labuskes, dissenting); *County of Berks v. DEP*, 2005 EHB 233 (Labuskes, dissenting). Some things are obvious harms or benefits, such as increased jobs (a benefit) or “locating a landfill within eyesight of the Gettysburg battlefield” (a harm), according to the Supreme Court. *Eagle Envtl.,* 884 A.2d at 882. Other things are off the table. *Borough of St. Clair v. DEP*, 2014 EHB 76, 91-95 (landfill’s potential profits and losses). Other things, we think, could go either way, such as backup alarms on equipment, which are important to onsite workers but can be annoying to neighbors. *See generally BFI v. DEP*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Borough of St. Clair, supra*; *County of Berks v. DEP*, 2005 EHB 233; *Exeter Citizens’ Action Com. v. DEP*, 2005 EHB 306.

Given the difficulty in defining harms and benefits and the concept of weighing the two, we believe Tafuto’s proposed testimony as described in his report would be helpful. As we said in *Blythe Twp. v. DEP*, 2011 EHB 433,

> Finally, the primary purpose of expert testimony is to assist the trier of fact in understanding complicated maters. *Rhodes v. DEP*, 2009 EHB 237, 239 (quoting *Bergman v. United Services Auto Ass’n*, 742 A.2d 1101, 1105 (Pa. Super. 1999)). The harms/benefits test requires this Board, which is a quasi-judicial agency focused on *environmental* concerns, to review whether the Department, which is the Commonwealth agency focused on *environmental*

[4] Justice Castille in a Concurring Opinion noted that the concern of the dissenting Justices that the application of the terms allowed for the weighing of inappropriate harms and benefits was legitimate but premature and could be addressed in future cases.

> protection, acted lawfully and reasonably in assessing the *social* and *economic* harms and benefits of a proposed landfill project. In performing this complicated task, we can certainly use all the help we can get.

Id., 2011 EHB at 437-38. *See also* Pa.R.Ev. 704 (testimony otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact); Comment, Pa.R.Ev. 704 (helpfulness to the trier of fact is a key criterion). Indeed, we accepted Tafuto's expert testimony regarding a harms-benefits test in a previous landfill case. *County of Berks*, *supra*.

Whether defining things as harms or benefits and weighing them is a "factual" or "legal" exercise may have more philosophical rather than practical significance in this case. We think the application of the harms-benefits test is factual enough that we will err on the side of allowing Tafuto's opinions as more factual than legal. Unlike a jury, which might be unduly influenced by a witness giving legal opinions, we are capable of affording Tafuto's testimony appropriate weight. To the extent Tafuto's actual testimony encroaches too far into the forbidden territory of purely legal opinion, we can better control that at the hearing in response to specific questions and answers, as necessary. *Blythe Twp.*, 2011 EHB at 433.

There is no reason that the perspective offered by the landfill's expert on the balancing of harms and benefits is any less entitled to our consideration then the perspective of the Department's or FOL's experts. We would not be interested in Tafuto (or any other witness for that matter) getting on the stand to randomly opine that he or she personally thinks that the landfill is a good or a bad idea, but Tafuto's report is based on facts and data as required by Pa.R.Ev. 703, such as specific harms and benefits. Although difficult, we need to strive for objectivity, and Tafuto's report is not inconsistent with that goal. Without objectivity, the harms-benefits test is too easily subject to abuse based on criteria that have nothing to do with

the safe and environmentally sound operation of a facility. *Eagle Envtl., supra*, 884 A.2d at 887-88 (Newman, J., dissenting); *Eagle Envtl. v. DEP*, 818 A.2d 574, 584 (Pa. Cmwlth. 2003) (Friedman, J., dissenting).

FOL in its motion to some extent conflates regulatory *interpretation* with the *application* of regulations. As we have discussed in the past in the context of our need to defer to the agency, the extension of deference is "not warranted in situations where the Department has simply applied various regulations to a set of facts when making a particular decision." *Wilson v. DEP*, 2015 EHB 694, 712-13. *See also Gadinski v. DEP*, 2013 EHB 246, 294-95. Again, although there admittedly is no clear line of demarcation in this case between application and interpretation, we see Tafuto's testimony as going more to the application of the harms-benefits test than the interpretation of the meaning of the words that make up the test.

To a limited extent, FOL goes beyond its complaint that Tafuto's opinions are inadmissible legal opinions in its motion and argues that Tafuto is simply wrong. For example, FOL takes issue with Tafuto's statement that the Department does not consider existing or potential groundwater contamination to be an environmental harm in its analysis. It also says that Tafuto is wrong in asserting that the Department's standard practice is to limit permit renewals to 10 years as opposed to something less. Whether Tafuto is wrong on these issues is not the proper subject of a motion in limine. The purpose of a motion in limine 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 the hearing on the merits. *Kisdadden v. DEP*, 2014 EHB 634, 635; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *RESCUE Wyoming v. DER*, 1994 EHB 1324, 1325-26. A motion in limine should generally

only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237.

FOL also argues that Tafuto is not qualified to testify about so broad a subject as the harms and benefits of renewing a landfill permit. In Board cases, the way that we typically address a proposed expert's qualifications is to allow the witness's proponent to elicit testimony describing the witness's qualifications at the hearing and then offer him or her up as an expert in specifically stated areas. After offering the opposing parties an opportunity for voir dire and/or object, we then rule on the ability of the individual to give expert opinion testimony. Although in a blatant case a motion in limine based on lack of qualification might be appropriate, this is clearly not such a case based on our review of Tafuto's report and resume´.

FOL argues that Tafuto's opinions are "unnecessary" because we only need to look at the Department's guidance document on the regulatory harms-benefits test and the relevant case law. First, this argument is inconsistent with FOL's position at other points in its filings that the regulatory test is not necessarily coextensive with the constitutional test. Second, the test for admissibility is helpfulness, not necessity. Third, we are in no way bound in our *de novo* review by a nonbinding Departmental guidance document that even the Department appears not to have applied in this case.

FOL complains that Tafuto has been too selective and/or vague in his comparisons between the Keystone facility and the Department's review thereof, and other landfills and the Department's review of those. FOL cites examples related to other facilities that are more supportive of its position. FOL's criticism goes to the merits and weight of the opinions, not their admissibility. Therefore, it is not the appropriate subject of a motion in limine. That said, FOL's argument touches upon a concern that we have that comparisons with other landfills risk

taking up a great deal of time if the comparison is to be done fairly, yet they tend to have very limited probative value. As a matter of simple logic, the fact that the Department did X at one site and Y at another does not tell us whether it is X or Y that was correct, even in the extremely unlikely event that the sites are identical. Each site must stand or fall based on its own merits. At the forthcoming hearing, we will need to be convinced that the probative value of evidence regarding other landfills outweighs the danger of unfair prejudice, confusion of the issues, undue delay, etc. Pa.R.Ev. 403.[5]

Accordingly, we issue the Order that follows.

[5] FOL makes a related complaint that Keystone objected at depositions when it tried to elicit testimony regarding what has happened at other landfills. It says that Tafuto is now doing the same thing. FOL does not follow up its observation with an explanation of how Keystone's objections during depositions should factor in our analysis of the motion in limine.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 4th day of November, 2016, it is hereby ordered that the Appellant's motion in limine is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 4, 2016

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

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 17, 2016**

OPINION AND ORDER ON
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal of a civil penalty assessment under the Air Pollution Control Act, the Board grants in part and denies in part a motion for partial summary judgment filed by the Department regarding a permittee's liability for the violations giving rise to the penalty where, among other things, the permittee has not contested its liability for certain violations. The Board denies a permittee's motion for partial summary judgment where the permittee has not established that the Department's penalty assessment is unreasonable as a matter of law.

O P I N I O N

PQ Corporation ("PQ") is appealing the Department of Environmental Protection's (the "Department's") civil penalty assessment of $1,545,741 for violations at its facility in Chester, Delaware County.[1] The violations pertain to PQ's #4 Furnace (Source ID No. 102), which it operates pursuant to Title V Operating Permit No. 23-0016. The Department's penalty under the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, encompasses October 2011 through June

[1] The Department's penalty had previously totaled $1,739,392, but the Department subsequently revised it down because some of the penalties had already been resolved through a consent assessment of civil penalty in 2014. (PQ Ex. 24.)

2013 and involves violations related to exceedances of yearly and hourly emissions limitations for nitrogen oxide ("NOx") and carbon monoxide ("CO"), opacity requirements, and data availability requirements regarding PQ's emissions reporting.

The violations at issue arise from the emissions data that PQ collects and reports to the Department quarterly. Pursuant to a consent order and agreement (CO&A) from 2009, PQ was required to install continuous source monitoring equipment on its #4 Furnace for NOx, CO, and opacity. Systems designed for continuous source monitoring are referred to as continuous emissions monitoring systems (CEMS).[2] The CEMS program is detailed extensively in a Department guidance document entitled the "Continuous Source Monitoring Manual." Compliance with the Manual is required by the stationary source monitoring regulations at 25 Pa. Code §§ 139.101 and 139.102, and at least to some extent by PQ's permit.

Any CEMS system must undergo a certification process with the Department, which consists of three phases—an initial application, performance testing, and final approval.[3] The CO&A required PQ to submit an initial application by June 18, 2009. Performance testing was

[2] The regulations define CEMS as "[a]ll of the equipment that may be required to meet the data acquisition and availability requirements established under the act or the Clean Air Act to monitor, measure, calculate, sample, condition, analyze and provide a record of emissions from an affected unit on a continuous basis." 25 Pa. Code § 121.1.

[3] The three CEMS phases are generally described in the Manual. The initial application contains a monitoring plan where the permittee identifies, among other things, specifications on the instrumentation and equipment the permittee intends on using at its facility, the parameters it will be measuring, the locations of the monitoring points, a quality assurance plan, and an explanation of record keeping procedures. After the Department approves the application, the permittee must purchase and install the equipment and move on to the performance testing phase. The permittee must develop a testing protocol and advise the Department at least 45 days in advance of testing. The Department may observe or participate in the testing. The performance testing phase must be completed within 210 days of startup and 60 days of achieving normal process capacity. The Manual states that the testing should be reflective of the source operating under normal conditions. Within two months following the completion of performance testing, the permittee must submit a report to the Department containing all raw data and calculations from the testing and demonstrating the monitoring system's compliance with all regulatory requirements. (PQ Ex. 8.)

to begin within 180 days of the Department approving the CEMS application, and the final report was to be submitted to the Department no later than 60 days after the completion of testing.

PQ submitted its initial CEMS application to the Department on June 8, 2009. PQ installed its CEMS on the #4 Furnace in August 2011. PQ completed its performance testing on October 31, 2011, and the Department approved PQ's CEMS performance testing on May 5, 2014, retroactive to November 1, 2011. According to the Department, it typically takes eight months to a year for a CEMS to be certified from the time the initial application is submitted to the time the Department approves it. It is not entirely clear why the process took as long as it did here or how that delay should figure, if at all, into our review of the Department's civil penalty assessment.

On February 10, 2014, PQ and the Department entered into a consent assessment of civil penalty (CACP) to resolve violations of the 12-month rolling NOx emission limits for April through November 2011, and for September through December 2012. (PQ Ex. 31.) The monthly NOx emissions levels in the CACP were derived from one-hour source tests (i.e. stack tests) on the #4 Furnace. At the time of the CACP the Department had not yet certified PQ's CEMS data, which occurred three months later in May 2014.

The 12-month rolling NOx penalties in this case span from January to June 2013. The 12-month rolling emissions total involves taking the emissions obtained in the month at issue and adding them to the emissions obtained in the previous 11 months. This yields a continually annualized amount of emissions in each successive month. By way of example, to calculate the annualized emissions for January 2013 would require looking back at the emissions beginning in February 2012 and tallying them up while moving through January 2013. Emissions for the months of September through December 2012 are used in calculating the rolling total of

emissions for each of the months January through June 2013 that are the subject of the current civil penalty assessment.

Both the Department and PQ have now moved for partial summary judgment. The Board is empowered to grant summary judgment or partial summary judgment in appropriate cases. 25 Pa. Code § 1021.94a; *Merck Sharp & Dohme Corp. v. DEP*, EHB Docket No. 2015-011-L, slip op. at 5 (Opinion and Order, Oct. 11, 2016); *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B, slip op. at 3 (Opinion and Order, Jun. 6, 2016). The standard for considering summary judgment motions is set forth at Pa.R.C.P. No. 1035.2, which the Board has incorporated into its own rules. 25 Pa. Code § 1021.94a(a). There are two ways to obtain summary judgment. First, summary judgment may be available if the record shows that there are no genuine issues of any material fact as to a necessary element of the cause of action or defense and the movant is entitled to prevail as a matter of law. Pa.R.C.P. No. 1035.2(1). Second, summary judgment may be available

> [i]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893. Summary judgment usually only makes sense when a limited set of material facts are truly

undisputed and the appeal presents a clear question of law. *Citizen Advocates United to Safeguard the Env't, Inc. ("CAUSE") v. DEP*, 2007 EHB 101, 106.

The Department's Motion

The Department's motion seeks summary judgment on the issue of liability. The Department argues that PQ's violations of the Air Pollution Control Act are conclusively established through the emissions data that PQ submitted to the Department, and which PQ verified as being accurate when it submitted the data.

PQ does not dispute its liability for the NOx hourly emissions exceedances, opacity exceedances, and the data availability violations. In particular, PQ does not dispute its liability for the following violations for NOx hourly emissions exceedances:

a. During the Third Quarter 2012, PQ violated its NOx emission standard for pounds per hour on 2 days;

b. During the Fourth Quarter 2012, PQ violated its NOx emission standard for pounds per hour on 11 days;

c. During the First Quarter 2013, PQ its NOx emission standard for pounds per hour on 21 days; and

d. During the Second Quarter 2013, PQ its NOx emission standard for pounds per hour on 3 days.

PQ does not dispute its liability for the following violations for opacity exceedances:

a. In the Fourth Quarter 2011, PQ violated its 20% opacity standard on 23 days and 60% opacity standard on 1 day;

b. During the First Quarter 2012, PQ violated its 20% opacity standard on 73 days and the 60% opacity standard on 3 days;

c. During the Second Quarter 2012, PQ violated its 20% opacity standard on 47 days and the 60% opacity standard on 3 days;

d. During the Third Quarter 2012, PQ violated its 20% opacity standard on 18 days and the 60% opacity standard on 1 day;

e. During the Fourth Quarter 2012, PQ violated its 20% opacity standard on 15 days and the 60% opacity standard on 4 days;

f. During the First Quarter 2013, PQ violated its 20% opacity standard on 47 days and the 60% opacity standard on 1 day; and

g. During the Second Quarter 2013, PQ violated its 20% opacity standard on 40 days.

PQ also does not dispute its liability for the following violations of the data availability requirements:

a. In November 2011 and the Fourth Quarter 2011, the #4 Furnace had 88.06% valid hours and 93.52% valid hours, respectfully, for opacity;

b. In July 2012, PQ had 80.24% valid 4-hour averages and 80.51% valid hours for NOx. In August 2012, it had 68.68% valid 4-hour averages and 68.95% valid hours for NOx. During the Third Quarter 2012, PQ had 80.43% valid 4-hour averages and 80.43% valid hours for NOx;

c. In July 2012, PQ had 85.48% valid 4-hour averages and 86.02% valid hours for CO. In August 2012, PQ had 69.89% valid 4-hour averages and 70.3% valid hours for CO. In September 2012, PQ had 87.92% valid 4-hour averages and 81.39% valid hours for CO. During the Third Quarter 2012, PQ had 81.39% valid hours and 81.39% valid hours for CO;

d. In October 2012, PQ had 58.88% valid 4-hour averages for NOx and 59.54% valid hours for NOx and 82.53% valid 4-hour averages and 83.06% valid hours for CO. In November 2012, PQ had 67.5% valid 4-hour averages and 68.61% valid hours for NOx and 79.44% valid 4-hour averages and 79.44% valid hours for CO. In December 2012, PQ had 62.77% valid 4-hour averages and 62.77% valid hours for NOx and 88.31% valid 4-hour averages and 88.31% valid hours for CO. During the Fourth Quarter 2012, PQ had 62.77% valid 4-hour averages and 62.77% valid hours for NOx and 83.65% valid 4-hour averages and 83.65% valid hours for CO;

e. In January 2013, PQ had 70.03% valid 4-hour averages and 71.64% valid hours for NOx and 77.82% valid 4-hour averages and 78.63% valid hours for CO. In February 2013, PQ had 63.69% valid 4-hour averages and 64.88% valid hours for NOx and 72.47% valid 4-hour averages and 72.77% valid hours for CO. In March 2013, PQ had 84.68% valid 4-hour averages and 85.48% valid hours for NOx and 87.23% valid 4-hour averages and 88.17% valid hours for CO. During the First Quarter 2013, PQ had 74.31% valid 4-hour averages and 74.31% valid hours for NOx and 80.09% valid 4-hour averages and 80.09% valid hours for CO;

f. In January 2013, PQ had 84.01% valid hours for opacity. In February 2013, PQ had 79.46% valid hours for opacity. In March 2013, PQ had 87.37% valid data for opacity. During First Quarter 2013, PQ had 83.75% valid hours;

g. In April 2013, PQ had 88.61% valid 4-hour averages and 89.17% valid hours for NOx. In May 2013, it had 83.87% valid 4-hour averages and 84.68% valid

hours for NOx. During the Second Quarter 2013, PQ had 90.84% valid 4-hour averages and 90.84% valid hours for NOx; and

h. In May 2013, PQ had 69.49% valid hours for opacity. In June 2013, PQ had 3.47% valid hours for opacity. During Second Quarter 2013, PQ had 57.74% valid hours for opacity.

PQ contests its liability for hourly CO, yearly CO, and yearly NOx exceedances.

Liability for the Hourly Limit for CO

The Department argues that PQ exceeded its 1.16 pounds-per-hour emission limit for CO as follows:

a. During the Fourth Quarter 2011, PQ violated its CO emission standard for pounds per hour on 12 days;

b. During the First Quarter 2012, PQ violated its CO emission standard for pounds per hour on 84 days;

c. During the Second Quarter 2012, PQ violated its CO emission standard for pounds per hour on 89 days;

d. During the Third Quarter 2012, PQ violated its CO emission standard for pounds per hour on 82 days;

e. During the Fourth Quarter 2012, PQ violated its CO emission standard for pounds per hour on 70 days;

f. During the First Quarter 2013, PQ violated its CO emission standard for pounds per hour on 51 days; and

g. During the Second Quarter 2013, PQ violated its CO emission standard for pounds per hour on 78 days.

PQ does not dispute any of these averments. Instead, it argues that its permit limit was unfair and that PQ would have taken steps to apply for a higher limit sooner had the Department not asked it to hold off doing so pending the installation of new NO_X controls, which are not related to the control of CO emissions.

The time for PQ to argue that its permit limit was unreasonable was when the limit was imposed. PQ did not do so. A permittee is required to comply with its permit unless and until it is modified. *Greif Packaging, LLC v. DEP*, 2012 EHB 85, 87. The fact that the permit was amended after the period in question to raise the emission limit is not relevant to the question of liability during the time before the limit was raised. Similarly, even if it is true that Department employees encouraged PQ to postpone applying for a higher limit, PQ has not referred us to any case where the government has been estopped from enforcing the law such that PQ would be excused from liability for violating its permit. Estoppel might lie in cases where the government is seeking the return of some benefit that should not have been received, but Department employees are not authorized to excuse PQ's liability for violating its permit. *See Paul Lynch Investments v. DEP*, 2012 EHB 191, 202-03; *Rhodes v. DEP*, 2009 EHB 599, 614-15.[4] Therefore, the Department's motion for partial summary judgment is granted with respect to PQ's liability for violating its hourly permit limit for CO. That said, PQ is not precluded from presenting its equitable and other arguments in support of its position that no (or a lower) civil penalty was appropriate for the violations of the hourly CO limit.

To the extent PQ disputes liability for its violations of its permitted 12-month emission limit of 5.08 tons per year because that limit was also unreasonable and because the Department encouraged PQ to delay seeking to have the limit raised, we reject the defenses to *liability* for the

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[4] We note that PQ's estoppel argument does not in any event extend to the violations that occurred before July 5, 2012, when PQ says it first started its effort to have the limit changed.

same reasons. Again, however, the defenses remain available with respect to the amount of the civil penalty, and as discussed below, liability remains an open issue for the yearly CO limit for other reasons.

Liability for Yearly Limits for CO and NOx

The Department says that PQ's violations of its 12-month rolling emission limits for CO and NOx are shown unquestionably in PQ's own submissions. It is true that PQ has not disputed the accuracy of its own test results. PQ has also not disagreed with the Department's assertion that PQ's violations can be conclusively established based upon its own stack test and CEMS data. PQ's defenses go more to the way the Department has used the data rather than the accuracy of the data itself, which is not surprising since PQ attested to the accuracy of the data when it submitted it to the Department.

The problem here is that the Department has simply not given us enough information or explanation to rule in its favor on this issue in the context of its motion for partial summary judgment. The Department says that PQ's own admissions establish liability, but the Department relies on its own employee's expert report, affidavits of its own employees, and brief reference without any explanation to several reports that appear on their face to say they were prepared by the Department. For example, the Department in Paragraph 19 of its Statement of Undisputed Material Facts avers that PQ violated its 12-month rolling NOx emissions limit for the #4 Furnace during ten months between the fourth quarter of 2011 through the second quarter of 2013. PQ specifically denied the averment in Paragraph 19 of its response. We see nothing in the exhibits relied upon by the Department that was obviously prepared by PQ itself, except perhaps a spreadsheet of stack test calculations. In the face of PQ's denial, the lack of any explanation regarding the exhibits, and given the significance of the issue, we do not feel

comfortable resolving this issue on summary judgment. A hearing would allow us to gain a better understanding of this issue. If there is no genuine dispute regarding the raw data, we would encourage stipulations to that effect.

Furthermore, the Department says that there is no doubt that PQ violated its yearly permit limits for CO and NOx *to some extent*, and the bulk of PQ's responses do not seem to disagree with that. Even if we assume that the Department is correct, however, concluding that PQ to some undefined extent violated its permits does not add any significant value in terms of streamlining the litigation, which is the point of partial summary judgment. The amount of the civil penalty, at least using the Department's approach, is a function of the amount of PQ's exceedances, and the Department in its reply concedes that that is disputed.

PQ's Motion

PQ's motion for partial summary judgment challenges the reasonableness of the civil penalty. PQ asks the Board to hold as a matter of law that PQ's permit allows it to use a particular method of data substitution for when its monitoring equipment does not record valid data for NOx emissions. This method of data substitution derives from the federal regulations at 40 CFR, Part 75 and is referred to by the parties as the Part 75 method. The data substitution method that was used to determine the violations for both NOx and CO is a method outlined in the Department's Continuous Source Monitoring Manual, dubbed the default method by the parties. PQ asks that we hold, as a matter of law, that the Department's default data substitution method has unreasonably inflated the penalties for NOx and CO, and also that the Department is impermissibly using emissions values that are different than the ones agreed to in the 2014 CACP. PQ contends that the Department's penalty is therefore necessarily unreasonable.

We review the Department's civil penalty assessment to ensure that there is a reasonable fit between the violations and the amount assessed. *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 198-99. The Air Pollution Control Act authorizes the Department to assess a penalty of up to $25,000 per violation per day. 35 P.S. § 4009.1(a). The Act lays out the following criteria that must be considered in assessing a civil penalty:

> the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department; the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

Id. Thus, the assessment of a civil penalty is an expansive inquiry that includes "other relevant factors." Other relevant factors include specific and general deterrence. *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 457, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008); *Keinath v. DEP*, 2003 EHB 43, 53; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796, 814. The Board has repeatedly held that cost savings to the violator is a particularly important criterion because it should never be cheaper to violate the law than to comply with it. *See DEP v. Breslin*, 2006 EHB 130; *DEP v. Leeward Construction*, 2001 EHB 870, 910. And while we appreciate the Department's efforts to rationalize and objectify its assessment process with guidance documents, the Board is not bound by them, will not defer to them, and may not even follow them. *Winner v. DEP*, 2014 EHB 1023, 1036; *United Refining Co. v. DEP*, 2006 EHB 846, 850. An overly formulaic approach to assessing a penalty is not necessarily consistent with the duty to consider the statutory criteria.

Initially we note that where, as here, the Department's discretion is involved, it will be the rare case indeed where we can say that the Department exercised that discretion unreasonably "as a matter of law." *Snyder v. DEP*, 2015 EHB 857, 875 (quoting *Tri-County Landfill v. DEP*, 2015 EHB 324, 333) ("[O]nce we enter the world of reviewing the Department's discretion, we tend to exit the world where summary judgment is appropriate."). PQ seeks to overcome this hurdle by arguing more specifically that the civil penalty is necessarily unreasonable because the Department used a formula to calculate the penalty that in turn relied upon a data substitution method known as the default method rather than what it believes is a more appropriate data substitution method for calculating PQ's permit exceedances. This resulted in a penalty that is too high according to PQ. PQ says that the use of one of those other methods would have resulted in a lower penalty for PQ's exceedances of its yearly CO and NOx limits. It says that the default method is not reflective of actual emissions from glass melting furnaces such as PQ's #4 Furnace. It says that the Department has conceded as much in the context of a general rulemaking process as well as in discussions between PQ and the Department.

Given the Department's broad discretion in assessing civil penalties of less than $25,000 per violation per day, we are not prepared to hold as a matter of law that the Department was precluded from using the default data substitution method to arrive at an appropriate penalty. Therefore, the question reverts back to whether the use of that method in this particular case was reasonable. Whether it was reasonable in turn depends on any number of factors which cannot be properly evaluated in the context of summary judgment.

The parties genuinely disagree whether the default method is in fact unreasonable, which essentially puts an end to our inquiry for purposes of summary judgment. The Department disputes that it ever determined that the default method is necessarily inappropriate. It concedes

that other methods (albeit *not* a so-called Part 75 method) may also be reasonable, but it does not follow that the default method is unreasonable for use in calculating a civil penalty. The Department argues that there is a balance between substituting data fairly for a permittee that has failed to comply with its recordkeeping obligations while ensuring and encouraging the protection of air quality for the public health and the environment. Using a data substitution method that is not appropriately conservative arguably removes some of the incentive to comply with a permittee's recordkeeping obligations. The Department says that data substitution should neither overly punish nor overly reward permittees who fail to keep appropriate records.

It is important to keep in mind that this is a civil penalty appeal, not an appeal from a Departmental permitting action. The issue before us is not what data substitution method was or should have been incorporated into the permit; it is whether the Department has assessed a reasonable penalty given PQ's violations in light of the statutory criteria. Unlike cases where the Board assesses a penalty, when we review the Department's assessment of a civil penalty, all we are looking for is a reasonable fit. *Whiting v. DEP*, 2015 EHB 799, 805-06; *Paul Lynch Investments, supra*, 2012 EHB at 199; *Eureka Stone Quarry, Inc. v. DEP,* 2007 EHB 419, 449. The extent to which PQ deviated from its permit requirements is obviously relevant, but it is not the only pertinent factor. It is premature to simply assume that consideration of the particular method used, if any, will predominate in our review of whether there is a reasonable fit between the penalty and the violations.

Whether PQ's permit required PQ to use the default data substitution method when reporting its own emissions is a relevant but not a conclusive factor. If the permit had required PQ to use the method, that would have supported a finding that the Department's use of the method in calculating the civil penalty was reasonable. If the permit did not require the use of

that method, and it appears that it did not,[5] it does not necessarily follow that the Department's selection of that method for purposes of calculating a civil penalty was unreasonable. Even if the permit did not require any data substitution for reporting purposes during the period in question, it was incumbent upon the Department to come up with a reasoned basis for calculating a fair penalty.

Similarly, whether and when PQ itself used or petitioned to use any particular data substitution method for reporting purposes and whether and how the Department responded to that use may be relevant but, again, those facts do not strike us as dispositive. PQ is not somehow estopped from disputing the suitability of the use of any particular method for our current civil penalty purposes based on what appears to be a convoluted and extraordinarily protracted history between PQ and the Department regarding PQ's reporting requirements. In light of this history, we do not view any of the Department's responses relating to reporting during the penalty period as having risen to the level of a final action protected from challenge by the doctrine of administrative finality. Indeed, while it may have some relevance who said what when and to whom, that relevance will need to be better explained as we move forward in deciding whether the Department imposed a reasonable penalty relative to PQ's violations. Our present sense is that neither party should be viewed as having definitively conceded anything with respect to how the Department should substitute data when calculating a reasonable civil penalty.

PQ also argues that the Department's penalty is necessarily unreasonable because the Department is basing the penalty in part on emissions levels for months that were previously the

[5] PQ's permit, by incorporating the "Record Keeping and Reporting" section in Revision No. 8 of the Department's Continuous Source Monitoring Manual, said that "DEP will notify sources when data substitution is required." There is no record that the Department ever gave PQ that notice relative to the penalty period.

subject of the 2014 CACP. PQ complains that in the current penalty the Department has used different and higher emissions numbers for NOx for four months in 2012—September through December—than were used in the CACP. PQ asserts that the higher emissions values have resulted in increased penalties because those four months are being used to calculate the 12-month rolling NOx penalties for January to June 2013. PQ argues that the Department is bound by the agreed-to emissions levels for those four months in 2012 that are contained in the CACP. PQ asks that we hold, as a matter of law, that the Department is bound by way of contract to use the CACP emissions numbers.

The Department acknowledges that it is using different values in the current penalty than it used in the CACP. The Department contends that the CEMS data it is using now for the four months in 2012 are more accurate than the data used in the CACP, which were derived from one-hour stack tests, and which the Department says provide only a snapshot of what the source was emitting for one hour out of the day. PQ disputes that the CEMS data is more accurate, and it refers us to its argument regarding the use of data substitution that it asserts has resulted in improperly inflated emission levels.

PQ has not provided a detailed analysis of the law to support its argument that the Department is contractually obligated to use the CACP emissions numbers. PQ cites to two cases involving subsequent challenges to facts agreed to by parties in consent order and agreements, but PQ does not provide much of an explanation of how those situations should control the outcome of this matter involving a CACP and a subsequent enforcement action for penalties. *See Robinson Coal Co. v. DEP*, 2015 EHB 130; *F.R.&S., Inc. v. DEP*, 1998 EHB 336. The Department, for its part, argues that only PQ is bound to the terms of the CACP and that the

agreement does not reflect that the Department intended to be legally bound in future enforcement actions by the emissions levels contained in the CACP.

While we will not hold as a matter of law that the Department is bound to use the CACP emissions values in this proceeding, we certainly understand PQ's concerns regarding the fairness of the Department using one set of emissions numbers in what is essentially a negotiated settlement document, and then using a different set of numbers in a future penalty action. We cannot help but wonder if the CEMS data revealed emissions levels lower than those used in the 2014 CACP if the Department would take the opposite position and steadfastly hold PQ to the higher CACP calculations. Insofar as PQ's motion seeks summary judgment that we *must* use the numbers in the CACP, the motion is denied. However, we will look to it as a factor to consider in assessing the reasonableness of the Department's civil penalty.

Moreover, regardless of what the emissions numbers are, even employing the ones from the CACP, it appears that there are still violations, and therefore, potential liability. PQ has not argued that using the CACP emissions numbers in the 12-month rolling penalty here would result in PQ coming under its permit limit for NOx emissions. For instance, PQ has not told us that by using the CACP numbers for September through December 2012 in calculating the 12-month rolling NOx level for January 2013, or any other month, would mean that PQ emitted less than 275 tons per year for that month. Instead, as far as we can tell from the parties' briefing on the point, using the CACP numbers would only result in, perhaps, a less significant exceedance of PQ's permit limits. Accordingly, using the CACP numbers would potentially only affect the amount of the penalty the Department calculated and our assessment of the reasonableness of that penalty.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PQ CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2015-198-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of November, 2016, it is hereby ordered as follows:

1. The Department's motion for partial summary judgment is **granted in part** in terms of PQ's liability for hourly CO exceedances, hourly NOx exceedances, opacity exceedances, and data availability violations.
2. The Department's motion is in all other respects **denied**.
3. PQ's motion for partial summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 17, 2016

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

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

For Appellant:
Mark K. Dausch, Esquire
Chester R. Babst III, Esquire
Varun Shekhar, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 21, 2016**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's Motion for Partial Summary Judgment where the Appellant has failed to file any response to the Motion as required by Board Rules at 25 Pa. Code § 1021.94a. In the alternative, the Board also finds that the Department is entitled to a Partial Summary Judgment because there are no disputed material facts and judgment is proper as a matter of law.

O P I N I O N

Introduction

On December 30, 2015, the Pennsylvania Department of Environmental Protection ("the Department" or "DEP") assessed a civil penalty of $9,000 against Paul Lynch Investments, Inc. ("Lynch Investments") under Section 1307 of the Storage Tank Act. 35 P.S. § 6021.1307. The Assessment of Civil Penalty ("Assessment") asserted that Lynch Investments owned and operated an underground storage tank that it failed to inspect on or before March 7, 2011 as required. The Assessment further stated that once the required inspection was conducted in January 2012, the Department determined that Lynch Investments was in violation of several

provisions of the storage tank regulations. In September 2012, the Department issued an administrative order requiring Lynch Investments to address the violations. The administrative order was not appealed by Lynch Investments and the storage tank that was at the center of the dispute was permanently closed by removal in July 2013 according to the Assessment. The Assessment concludes by stating that the listed violations constitute a public nuisance, are unlawful conduct and subject Lynch Investments to civil penalties under the Storage Tank Act. The Department assessed the $9,000 civil penalty at issue in this matter as a result of the violations identified in the Assessment.

Lynch Investments filed a Notice of Appeal ("NOA") challenging the Assessment on January 27, 2016. In its NOA, Lynch Investments stated numerous objections including disputing that it was notified or received service of the notices of violation and the administrative order referenced in the Assessment, that the amount of the penalty was not appropriate and was contrary to both the Pennsylvania and United States Constitutions as well as Department guidance and that the civil penalty was barred by the statute of limitations. Lynch Investments also asserted that any issues with the failure to operate the monitoring system were the result of vandals removing the electrical wiring, that the tank was emptied as quickly as possible and that the civil penalty assessment was the result of the Department seeking to penalize its attorney, Paul Lynch, for his representation in other matters before the Board.

Following an initial delay necessitated in part by a hearing on Lynch Investments' claim that it lacked the ability to prepay the civil penalty or post the required bond[1], discovery in this matter closed on or around August 12, 2016. On October 11, 2016, the Department filed a

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[1] On June 16, 2016, the Board issued an Opinion and Order holding that Lynch Investments failed to demonstrate that it lacked the ability to prepay the penalty or post an appeal bond and ordered that Lynch Investments prepay the $9,000 civil penalty or post the appeal bond in the required amount.

Motion for Partial Summary Judgment ("Motion") along with a Statement of Undisputed Material Facts and a Brief in Support of Its Motion. In its Motion, the Department seeks summary judgment on Lynch Investments' liability on the violations identified in the Assessment and on Lynch Investments' claim that the civil penalty is barred by the statute of limitations. The Department argues that it is entitled to summary judgment on these issues and therefore, the hearing should be limited to whether the amount of the civil penalty is reasonable and appropriate. Lynch Investments failed to file a response to the Motion.

Standard of Review

The Board may grant a motion for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742. Summary judgment, including partial summary judgment, may only be granted in cases where the right to summary judgment is clear and free from doubt. *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources, LLC*, 2013 EHB 346, 352. In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubt as to the existence of a genuine issue of material fact against the moving party. *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81. The record on which the Board decides a summary judgment motion consists of any pleadings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. See 25 Pa. Code §1021.94a(a), (h); Pa.R.C.P. 1035.1.

The Board's rules governing motions for summary judgment generally require that parties file a response to the summary judgment motion within 30 days of the filing of the

motion. See 25 Pa. Code §1021.94a(g). A party opposing a motion for summary judgment shall file a response to the motion stating why the motion should not be granted, a response to the statement of undisputed material facts either admitting or denying or disputing each of the facts in the moving party's statement and a brief setting forth its legal argument opposing the motion. *Id.* Summary judgment may be entered against a party who fails to respond to a summary judgment motion. 25 Pa. Code §1021.94a(l).

Discussion

Lynch Investments failed to file any response to the Department's Motion. That alone is a sufficient basis for the Board to grant the Department's request that it be granted partial summary judgment pursuant to the Board's authority under 25 Pa. Code §1021.94a(l) on the issues of Lynch Investments' liability and whether the civil penalty is barred by the statute of limitations. As Judge Labuskes pointed out in *Stedge et. al. v. DEP and Chesapeake Appalachia, LLC*, 2015 EHB 19, 21, the Board has dealt with the failure to file a response on numerous occasions and has frequently granted summary judgment against a party who has failed to follow the requirement to file a response, citing the following cases: *Morris v. DEP*, 2012 EHB 65; *Langille v. DEP*, 2010 EHB 516; *Thornberry v. DEP*, 2010 EHB 61; *Koch v. DEP*, 2010 EHB 42; *J&D Holdings v. DEP*, 2009 EHB 15; *Lucas v. DEP*, 2005 EHB 913*; Brian E. Steinman Hauling v. DEP*, 2004 EHB 846; *Hamilton Bros. Coal, Inc. v. DEP*, 2000 EHB 1262; *Kochems v. DEP*, 1997 EHB 428, *aff'd*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997) (Board permitted to grant summary judgment solely upon a party's failure to respond to a summary judgment motion). We see no reason in this matter to deviate from this practice and, therefore, we grant the Department's Motion.

We do not intend to engage in a long analysis given our decision set out above, but, in the alternative, we also find that the Department's Motion should be granted because it appears that there are no disputed material facts and the Department is entitled to its requested partial summary judgment as a matter of law. Based on a close review of the objections listed in the NOA filed by Lynch Investments, it does not appear that it is contesting liability. None of the 11 listed objections directly challenge the Department's determination that the alleged violations took place. Two of the objections offer justification for the violations ("2) Any non-operation of the monitoring system was caused by vandals removing all electrical wiring at site" and "6) Tank was emptied as quickly as possible") but do not assert that the violations did not occur. The remaining objections address legal or equitable issues with the penalty itself or issues regarding notice. At no point in its filings with the Board does Lynch Investments say that the violations did not occur or that it is not the party responsible for those violations. Given Lynch Investments' apparent failure to contest liability in the NOA combined with its failure to file a response that disputes any of the facts set forth in conjunction with the Department's Motion, we think partial summary judgment on liability is proper as a matter of law.

The second issue on which the Department seeks summary judgment is Lynch Investments' assertion in its NOA that the civil penalty is barred by the statute of limitations. Lynch Investments raised the issue but failed to provide any further argument regarding what is the applicable statute of limitations for a civil penalty under the Storage Tank Act. The statute of limitations governing civil penalties under the Storage Tank Act is found at 35 P.S. § 6021.1314 and states as follows: "[T]he provisions of any other statute to the contrary notwithstanding, actions for civil or criminal penalties under this act may be commenced at any time within a period of 20 years from the date the offense is discovered." A review of the Assessment makes

clear that the oldest violation for which the Department is seeking a penalty dates from March 2011. Therefore, the Assessment that was issued on December 30, 2015, was commenced well within the 20 year statute of limitations governing civil penalty actions under the Storage Tank Act and is not barred. The Department is clearly entitled to summary judgment on Lynch Investments' statute of limitations objection.

Conclusion

Lynch Investments failed to file any response to the Department's Motion for Partial Summary Judgment. Under longstanding Board jurisprudence and consistent with Board Rules, we may grant the requested summary judgment in such cases and choose to do so in this case. In the alternative, we find that the record available to the Board at this point adequately demonstrates that there are no material factual issues and the Department is entitled to partial summary judgment as a matter of law on Lynch Investments' liability and its claim that the civil penalty is barred by the statute of limitations. Therefore, if we proceed to a hearing in this matter, the only issue for further consideration is whether the Department's civil penalty assessment of $9,000 is reasonable and appropriate and in compliance with the relevant law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2016-014-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 21st day of November, 2016, it is hereby ordered that the Department's 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/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: November 21, 2016

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

For the Commonwealth of PA, DEP:
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Douglas G. Moorhead, Esquire
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For Appellant:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
v.	:	**EHB Docket No. 2016-099-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	**Issued: December 1, 2016**

OPINION AND ORDER ON
MOTION TO DISMISS

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies an Intervenor's motion to dismiss where the limited record before the Board does not establish that there are no material facts in dispute and that the Intervenor is entitled to judgment as a matter of law. A review of the limited record before the Board at this preliminary stage of the appeal in a light most favorable to the Appellants indicates that the matter is not free from doubt.

O P I N I O N

On June 29, 2016, Robert W. Diehl, Jr., and Melanie L. Diehl ("Appellants") filed an appeal from a Department letter dated June 6, 2016 in which the Department informed the Appellants that it had completed its investigation of the Appellants' spring on their property. In the letter, the Department stated that it had determined that the spring was only temporarily affected by pipeline construction activities occurring on their property and that the spring was returning to expected conditions. The Department conducted its investigation as a result of a complaint made by the Appellants that pipeline construction activities undertaken by Angelina

Gathering Company, LLC ("AGC") had disrupted the flow of water to the spring on their property. As a result of its investigation and determination, the Department stated in its letter that it "does not plan to require further action regarding this matter."

AGC filed a Petition to Intervene in the appeal that the Board granted on August 30, 2016. On September 16, 2016, AGC filed a Motion to Dismiss alleging that the Board lacks jurisdiction because the Department's June 6, 2016 letter is not an appealable action. In support of its Motion, AGC argues that the Department's letter constitutes an exercise of its prosecutorial discretion, which is not appealable as a general rule. *See, e.g., DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005).

The Appellants filed a Response and a Brief in Opposition to AGC's Motion to Dismiss. The Appellants argue that the Department's June 6, 2016 letter is a final appealable action under 35 P.S. § 7514(a) because the letter contains a final Department determination that directly affects the Appellants' property rights regarding a spring on their property that they use as a water supply. In the letter, the Appellants assert that the Department had determined that AGC's pipeline construction activities only had temporary impacts on the Appellants' spring and that the spring was returning to expected conditions. The Appellants assert that the letter does more than state that the Department will not pursue enforcement action against AGC. They argue that the Department's determination, that the adverse impacts to their spring are temporary, affects their property interests to use the water from the spring located on their property.

The Department did not file any response to AGC's Motion to Dismiss. The Board issued an order directing the Department to file a response to AGC's Motion on or before October 25, 2016. On October 25, 2016, the Department filed a response in which it agreed with AGC that part of its letter was not appealable, specifically its decision *not* to pursue further

action for the reasons set forth by AGC that the Board has no jurisdiction to review the Department's exercise of its enforcement discretion. The Department, however, also agreed with the Appellants, in part. The Department asserts that its determination, that AGC's pipeline construction activities only had a temporary impact on the Appellants' spring and that the spring would soon return to expected condition, was a final appealable action of the Department.

AGC filed a Reply Brief on November 1, 2016 in which it responded to the Appellants' and the Department's arguments. AGC disagrees with the Department that the Department made a final appealable determination regarding Appellant's spring. According to AGC, the Board should evaluate the Department's so called "determination" in the context of its decision not to pursue further enforcement action. Because AGC believes that the Board lacks jurisdiction to direct the Department to reopen an investigation the Department previously closed or to take an enforcement action, AGC asserts that the Board lacks jurisdiction.

Finally, AGC asserts that the effect of the Department's letter on a pending lawsuit between the Appellants and AGC is irrelevant for purposes of assessing the Board's jurisdiction. The Appellants have a civil action pending in the Court of Common Pleas of Susquehanna County against AGC. The Appellants believe that the letter containing the Department's determination regarding its spring will have "a negative impact on the pursuit of private civil claims against Angelina [AGC] by the Diehls [Appellants]." Appellants' Brief at 4. AGC argues that this pending civil action is not relevant for assessing the Board's jurisdiction.

Standard of Review

The Board is receptive to a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *West Buffalo Twp. v. DEP*, 2015 EHB 780, 781; *Brockley v. DEP*, 2015 EHB 198, 198-99; *Blue Marsh Labs., Inc. v.*

DEP, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Motions to dismiss will only be granted when a matter is free from doubt when viewed in the light most favorable to the nonmoving party. *Brockley, supra*; *see also Hanover Twp. v. DEP*, 2010 EHB 788, 789-90; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Cooley v. DEP*, 2004 EHB 554, 558. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving a motion to dismiss we accept the nonmoving party's version of events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 117, 122-23, *aff'd*, *Consol Pa. Coal Co. LLC v. Dep't of Envtl Prot*., 129 A.3d 28 (Pa. Cmwlth. 2015); *Ehmann v. DEP*, 2008 EHB 386, 390.

Although the Board agrees with AGC that as a general rule the Board lacks jurisdiction over a challenge to the Department's exercise of its prosecutorial discretion,[1] the Board declines the opportunity to resolve the jurisdictional issue based upon the limited record before the Board at this early stage of litigation. There are several reasons for the Board to proceed cautiously at this stage of litigation, and these reasons prevent the Board from concluding that the matter is free from doubt when viewed in the light most favorable to the Appellants.

First, it is not clear what authority the Department used to conduct its investigation and make the determination set forth in its June 6, 2016 letter. The Board anticipated that the Department would address this outstanding issue about its legal authority to investigate the Appellants' complaint, but the Department's response to AGC's Motion to Dismiss is as silent as its letter regarding the source of its legal authority to conduct an investigation and make a

[1] There are exceptions to the general rule about the lack of Board jurisdiction regarding the Department's exercise of its prosecutorial discretion, but no Party has raised an issue in their Briefs about the exceptions to the general rule. *See Ballas v. DEP*, 2009 EHB 652, 653 ("Where, however, a letter does no more than describe the outcome of the Department's investigation of a third-party complaint and reports that the Department will not pursue enforcement action against the object of the complaint, the letter is generally not appealable absent a claim of bias or corruption or perhaps other unusual circumstances.")

determination regarding impacts to the Appellants' spring from AGC's pipeline construction activities.

In the Notice of Appeal, the Appellants identify the Oil and Gas Act, 58 Pa.C.S. §§ 3201-32-74 and the Clean Streams Law, 35 P.S. §§ 691.1-1001 and the regulations promulgated thereunder as the regulatory authority involved in this appeal. The Department has broad authority to protect the waters of the Commonwealth under the Clean Streams Law, which includes the Appellants' spring,[2] but unlike other state environmental statutes, the Clean Streams Law lacks specific authority regarding protection of water supplies.[3]

The Appellants also identified the statutory provisions in Chapter 32 of Part III of Title 58 of the Pennsylvania Consolidated Statutes, 58 Pa. C.S. §§ 3201-3274 as authority for the Department's action under appeal. The Appellants refer to these provision as the Pennsylvania Oil and Gas Act.[4] Chapter 32 of Title 58 of the Pennsylvania Consolidated Statutes was enacted in 2012 as a part of Act 13. Act 13 contains express provisions concerning the protection of water supplies in Section 3218. 58 P.C.S. § 3218. The Board has determined that a Department determination under this provision is appealable by a property owner who believes the Department erred when it investigated its water supply complaint and determined that the oil and gas activity did not adversely affect the property owner's water supply. *Kiskadden v. DEP and Range Resources-Appalachia, LLC*, 2012 EHB 171, 177-78. In *Kiskadden*, the Board

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[2] The Department also has broad authority under Section 1917A of the Administrative Code to protect the public from nuisances. See 71 P.S. 510-17.

[3] For example, in the mining laws the General Assembly has provided the Department with express authority to require the protection of water supplies affected by mining activities. 52 P.S. 1396.4b (Surface Coal Mining); 52 P.S. 33 § 3311 (Non Coal Mining); 52 P.S § 1406.5c (Underground Bituminous Coal Mining).

[4] The Pennsylvania Oil and Gas Act was enacted in 1984 and codified at 58 P.S. §§ 601.101 et seq., and the short title of the Act was set forth in Section 601.101. See Act of December 19, 1984 (P.L. 1140, No. 223). The Oil and Gas Act was repealed and replaced in 2012 by the Act of February 14, 2012 (P.L. 87 No. 13) (hereinafter Act 13.)

distinguished the earlier *Schneiderwind* decision based upon the particular language of Section 3218 of Act 13 and the affirmative duty imposed upon the Department to make a determination in response to a complaint about a water supply loss.

At this preliminary stage of the appeal and with only a limited record before the Board, the Board is not aware of how or whether Section 3218 of Act 13 is implicated in this appeal involving pipeline construction activities and a water loss complaint. The Appellants have identified the provision in Chapter 32, which includes 3218, as applicable to the Department's investigation and determination. Because the Board is required to evaluate AGC's Motion to Dismiss in the light most favorable to the Appellants, the Board is not able to grant AGC's Motion with the outstanding questions regarding the Department's statutory or regulatory authority for its investigation and determination. The Department did not address this uncertainty in its Response to AGC's Motion, and in light of the doubts about the applicability of Section 3218 of Act 13 to this appeal, AGC is not entitled to judgment as a matter of law.

There is a second general area of uncertainty that also supports the Board's denial of AGC's Motion to Dismiss at this time. The main thrust of AGC's Motion is that the Board lacks jurisdiction to order or compel the Department to exercise its enforcement or prosecutorial discretion. The Department agrees with this assertion, but it further asserts that its underlying determination that the Appellants' spring was only temporarily affected by AGC's pipeline construction activities is a final appealable action even if the Appellants are not seeking further Department action.[5]

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[5] AGC asserts that the Appellants are, in fact, seeking to compel the Department to take an enforcement action against AGC or to reopen its closed investigation. At this preliminary stage of the appeal, it is not clear to the Board that the Appellants are seeking this additional relief beyond merely overturning the Department's determination.

The limited record before the Board suggests that the Department may have a point based upon the unusual facts of this appeal. AGC and the Appellants have identified an ongoing civil litigation matter before the Court of Common Pleas of Susquehanna County in which the Appellants are seeking damages for claims against AGC. The Appellants, in their Response to AGC's Motion, raised concerns with AGC's ability to use the Department's determination as a weapon to defeat some or all of the Appellants' claims.

If the Appellants are correct and AGC intends to use the Department's June 6, 2016 letter containing its determination in the pending civil litigation to help defeat the Appellants' claims, the Board has some concerns. First, it is unfair for AGC to argue that the Department's determination is not reviewable by the Board if AGC intends to use the Department determination to help defeat the Appellants' claims. Second, civil litigation in courts of common pleas is not the best forum to evaluate final Department determinations of a highly technical nature such as an investigation of a water loss complaint and a determination of no permanent impacts. The Board has both the expertise over environmental matters and the jurisdiction over Department actions to be the best forum in which to examine the merits of such highly technical Department determinations. Finally, if the Appellants are truly not seeking further Department action, but they are pursuing their claims in their civil litigation, the issue of prosecutorial discretion does not arise. Under these facts, the issue before the Board is a narrower issue about the merits of the Department's determination, and its effect on the pending civil litigation. The limited record before the Board does not allow the Board to address these concerns at this preliminary stage of the appeal.

For the reasons set forth above, the Board denies AGC's Motion to Dismiss and enters the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
	:	
v.	:	**EHB Docket No. 2016-099-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	

O R D E R

AND NOW, this 1st day of December, 2016, the Intervenor's Motion to Dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: December 1, 2016

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

For the Commonwealth of PA, DEP:
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For Intervenor:
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Mark A. Lazaroff, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2015-111-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHELL CHEMICAL APPALACHIA, LLC	:	**Issued: December 2, 2016**

OPINION AND ORDER
GRANTING MOTION TO COMPEL AND
DENYING MOTION FOR PROTECTIVE ORDER

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board grants the Appellants' Motion to Compel. The Board denies the Permittee's Motion for Protective Order without prejudice, and provides the parties with an opportunity to craft a more narrowly drawn protective order which ensures that the rights of the public are protected.

O P I N I O N

Background

Presently before the Pennsylvania Environmental Hearing Board is Permittee Shell Chemical Appalachia, LLC's (Shell Chemical or Shell) Motion for Protective Order Regarding Trade Secrets, Confidential Business Information, and Other Confidential Business Information, and Other Confidential Materials (Motion for Protective Order) pertaining to discovery requested by Appellants Clean Air Council and Environmental Integrity Project. Appellants have also filed a Motion to Compel regarding specific discovery requests that they have propounded to Shell

Chemical. This Appeal involves the Air Quality Plan Approval which was issued to Shell Chemical by the Pennsylvania Department of Environmental Protection (Department) on June 18, 2015 (Motion for Protective Order, Paragraph 1). The Plan Approval authorizes Shell Chemical to construct a petrochemical complex that will produce ethylene and polyethlene from ethane.

This facility will be the first major project of its type outside the Gulf Coast in twenty years and is expected to employ thousands of workers in the construction phase and up to 600 employees during operation. Shell Chemical contends the Appeal raises various objections which fall into two general categories: (1) the Plan Approval's requirements related to the control of air emissions through the use of flares and (2) compliance with the lowest achievable emissions rate (Motion for Protective Order, Paragraph 2). Shell Chemical indicates that in identifying electronically stored information responsive to Appellants' discovery requests, it engaged outside attorneys who spent over 1,300 hours reviewing electronically stored information. Shell Chemical also contends that it "considers virtually all of the electronically stored information identified as responsive to the discovery requests to be trade secrets and/or confidential business information which, if publicly disclosed, could substantially harm Permittee's business interests." (Motion for Protective Order, Paragraph 6).

Shell Chemical seeks to limit all discovery against it, and as to the discovery that the Board allows it seeks strict and detailed procedures to shield its answers and documents. Shell requests that the Board set up various tiers applicable to its confidential business information. (In its Motion for Protective Order Shell sets forth three tiers but in later filings mentions a fourth tier). Clean Air Council and Environmental Integrity Project oppose Shell Chemical's Motion for a Protective Order, while at the same time filing their own Motion to Compel Full

and Complete Discovery Response to Interrogatories Nos. 2 b, 5 a-e, 6 & 7, and Requests for Production Nos. 2, 3, 4, 5, 6 & 7. Following the filing of these Motions and Responses, the Board held a prehearing conference in Pittsburgh on September 20, 2016. Counsel advised the Board that they were attempting to resolve their discovery disputes and were confident that they could resolve at least some of their issues prior to the Board's ruling on the Discovery Motions. They asked for an opportunity to draft a mutually agreeable Protective Order. Since that time, although Counsel have worked diligently, they have not been able to fully resolve their disputes.

In addition, the Department filed comments on the proposed Protective Order and identified various problems including the following: (1) the Department has not been involved in the lengthy discussions about how to protect documents that Shell regards as confidential,[1] (2) the Department is not included in the definition of the parties even though it has Shell documents in its possession that have been requested by the Appellants, (3) the Protective Order refers to Tiers 0-3 documents but does not identify which documents are in each Tier, (4) the Protective Order generally prohibits the use of any covered documents in any other litigation even though the documents upon which the Department relied in issuing the Plan Approval are official files of the Department and may be necessary for use in the future regarding matters between the Department and Shell, (5) any Protective Order would be easier to craft if the Board first ruled on the Discovery Motions, and (6) the Department may need to enter into a separate Order regarding discovery with Shell. (Department's Comments on the proposed Protective Order, Paragraphs 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, & 14). The recent filings with the Board, which indicate various issues of disagreement between the Appellants and the Permittee, indicate that the proposed Protective Order under negotiation would only cover Tiers 2 & 3.

[1] We find this very surprising, and in the future we urge counsel to include all parties in such negotiations.

We think that the Department's suggestion that we rule on the Discovery Motions is a wise one. Despite their efforts, Counsel have been unable to reach agreement on a workable Protective Order. Moreover, the recent draft orders that have been shared with us and for which they will eventually seek the Board's imprimatur strike us as problematic, unworkable, and far too restrictive.

The Pennsylvania Rules of Civil Procedure together with the Board's Rules of Practice and Procedure govern discovery before the Board. "A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery." Pa.R.Civ.P. 4003.1(a). As we have said numerous times, "relevancy for the purposes of discovery is to be broadly construed." *Consol Pennsylvania Coal Company, LLC v. DEP,* 2015 EHB 505, 505-507. Pennsylvania Rule of Civil Procedure 4012 permits the Board to grant a protective order following a showing of good cause that specific information is either not discoverable or should be produced under specific conditions because it is a trade secret or otherwise confidential.

Indeed, in a Board case, the Commonwealth Court set forth a test that the party claiming that information is not discoverable or should be otherwise protected must meet regarding the production of documents that are claimed to be confidential and/or trade secrets. *MarkWest Liberty Midstream & Resources, LLC v. Clean Air Council,* 71 A.3d 337, 344 (Pa. Cmwlth. 2013). Even if the party makes such a showing and convinces the Board that the information is a trade secret or confidential, the Board may still require disclosure if the requesting party can demonstrate that its necessity for the information outweighs the harm of disclosure. *MarkWest,* 71 A.3d at 344.

Shell Chemical's Motion for Protective Order

We will first address Shell Chemical's Motion for Protective Order. Shell contends that many of the documents and information sought by Clean Air Council and the Environmental Integrity Project involve confidential business information and trade secrets. Although it cites the *MarkWest* case it does not explain specifically why any document meets the test. The Commonwealth Court enunciated what a party needs to do when seeking a protective order as follows:

> Accordingly, we hold that a party seeking a protective order under Rule 4012(a)(9) *must initially establish* that the information it seeks to protect is a trade secret or confidential business information. The following factors are to be considered in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the party to guard the secrecy of the information; (4) the value of the information to the party and to its competitors; (5) the amount of effort or money expended by the party in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Mark West, 71 A.3d at 344 (emphasis added) (citing *Crum v. Bridgestone/Firestone North American Tire, LLC,* 907 A.2d 578, 585 (Pa. Super)).

The crucial criteria for determining whether information constitutes a trade secret are substantial secrecy and competitive value to the owner. *Id.* Once a party establishes that the information sought is a trade secret, the burden shifts to the requesting party to demonstrate, by competent evidence, that there is a compelling need for that information and that the necessity outweighs the harm of the disclosure. *Id.* at 587. The trial court or administrative agency may then order disclosure or disclosure only in a designated way. *MarkWest,* 71 A.3d at 344.

Shell Chemical has not demonstrated that any of the information for which it seeks a protective order is confidential according to the six-part test set forth in *MarkWest*. In fact, it does not identify a single document, much less explain how it meets the six-part test. We, therefore, can stop our analysis at this point since the Permittee has not established that it is entitled to a Protective Order based on what it has set forth in its Motion for a Protective Order. Moreover, the Motion for a Protective Order and related documents set forth multiple tiers of documents without setting forth any specific criteria which delineate each tier. It also does not specifically include the Department as a party, nor does it address the issues the Department has in dealing with documents as a public agency. It also proposes that the Board appoint a neutral to review the most sensitive documents without any explanation as to why this is necessary or who would pay the neutral's fees and expenses.

The proposed Protective Order is also silent about the use of such documents at a hearing or as exhibits to a motion. It is one thing to keep a limited number of exhibits confidential during discovery; it is quite a different matter to do so during a hearing. The draft protective orders are silent on these issues but have detailed provisions about the return or destruction of such materials after Board proceedings and any subsequent appeals are concluded. As correctly noted by Appellants, the *MarkWest* Commonwealth Court case involved 60 documents at issue. Although Shell Chemical has not identified the number of documents it wishes the Board to protect as confidential business information or trade secrets, we assume, based on the papers filed, that it is more than 60. Nevertheless, as Shell Chemical itself acknowledges, it must meet the legal criteria set forth in *MarkWest,* which it has not done.

Appellants' Motion to Compel

We next address Clean Air Council's and Environmental Integrity Project's Motion to Compel. They seek answers and documents to discovery requests that are narrowly drafted regarding their main objections to the Air Quality Plan Approval. Shell itself has concisely categorized the discovery which is the subject of the Motion to Compel, which we quote below:

> (1) the fenceline monitoring installation at the Deer Park integrated refinery and petrochemical facility in Houston, Texas (the "Deer Park Facility") [footnote omitted] (Interrogatory No. 2.b., Request for Production No. 7); (2) the documents Shell reviewed to determine control requirements for fugitive volatile organic compound emissions used in its Plan Approval Application (Request for Production No. 2); and (3) the design of Shell's proposed Petrochemicals Complex and analyses Shell used to determine control efficiency and calculate the potential volatile organic compound emissions that will be released from each of the flares of the proposed Petrochemicals Complex (Interrogatories Nos. 5.a.-e, 6,7 and Requests for Production Nos. 3-6).

Shell Chemical's Memorandum of Law in Opposition to the Motion to Compel, page 2.

We find that Shell Chemical's argument - that the fence line monitoring at another Shell facility at Deer Creek is not relevant to compliance with a lowest achievable emissions rate - is premature at this point. We need a much more developed record than what is available now to decide that issue. Robust discovery will help develop and better formulate the respective positions of the parties. In addition, although Shell Chemical has not identified the documents, we infer from its argument and from what the Department has filed, that Shell now claims that documents produced by it and reviewed by the Department in granting the Air Quality Approval, are not relevant to the issues in this case. It is long established law that the Board is not bound by what was before the Department when it reached its decision. This usually results in a much larger record than what was originally before the Department, as it often includes what was before the Department and additional information added by all parties. Shell has not specifically

identified any of the documents in question, but we would be hard-pressed to exclude documents from discovery based on relevance if they were reviewed by the Department in reaching its decision.

Assuming that Shell eventually meets the legal criteria for the Board to grant a Protective Order, such an order needs to be much more narrowly drafted. Interestingly, Shell rejected the Appellants' suggestion that the parties simply enter into an agreement regarding discovery. Shell candidly stated that it wanted an order instead. Our review of the orders proposed by the parties leads us to conclude that none of them would be issued by the Board.

We are certainly aware that the Motion to Compel involves non-electronically stored information. However, we infer from the papers that similar discovery was promulgated regarding electronically stored information. Indeed, we are very sympathetic to Appellants' position that where electronically stored information is in play, as it is here, discovery should proceed on a single track. This case stands as a textbook example of the needless complexity that ensues when the parties segregate their discovery in this manner. Even though the Motion to Compel involves non-electronically stored discovery, we note that the parties crafted a Joint Proposed Order regarding electronically stored information. This Joint Proposed Order, which was adopted by the Board with minor modifications, has a detailed provision setting forth how a party is to respond to discovery seeking privileged information. According to Paragraph 10(g) of the Order, a party is to establish a privilege log with specific steps to identify the withheld information or document based on specific criteria. Shell Chemical, rather than creating a privilege log, simply argued its defenses to the discovery in broad terms without identifying the documents at issue.

The interrogatories and requests for production at issue in the Motion to Compel are proper and seek information relevant to the subject matter of this appeal. We will afford Shell, in the interest of justice, a full thirty days to answer the interrogatories and respond to the requests for production. If Shell Chemical contends that a document or information is protected from discovery because it is confidential or a trade secret, it should set forth why pursuant to the six factors enunciated in *MarkWest.*

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2015-111-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHELL CHEMICAL APPALACHIA, LLC	:	

O R D E R

AND NOW, this 2nd day of December, 2016, following review of the Motion to Compel, Motion for Protective Order, and opposing papers, it is ordered as follows:

1) The Motion to Compel is *granted*.

2) Shell Chemical shall serve Appellants with full and complete answers and responses to the Interrogatories and Requests for Production which were the subject of the Motion to Compel on or before **January 3, 2017.**

3) The Motion for Protective Order is *denied* without prejudice as premature.

4) Shell Chemical is afforded a second opportunity to demonstrate that the information for which it seeks a protective order is in fact confidential pursuant to the six-part test set forth by the Commonwealth Court in *MarkWest Liberty Midstream and Resources, LLC v. Clean Air Council*, 71 A.3d 337 (Pa. Cmwlth. 2013). It should make such a showing on or before **January 3, 2017.**

5) All of the parties, including the Department, are afforded another opportunity to fashion a protective order that is more narrowly drafted and which, in the Department's words, will be "clear, comprehensive, and workable" and will also

protect the rights of the public. Any proposed order should be submitted to the Board on or before **January 3, 2017.**

6) Such a proposed order should clearly indicate that it does not apply to hearings or motions but is limited to discovery, unless otherwise ordered by the Board after a showing of good cause.

7) If the parties are unable to draft a joint proposed order, each party may submit a proposed order on or before **January 3, 2017.**

ENVIRONMENTAL HEARING BOARD

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

DATED: December 2, 2016

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

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
v.	:	**EHB Docket No. 2015-163-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees	:	**Issued: December 7, 2016**

OPINION AND ORDER ON APPLICATION FOR FEES AND COSTS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's application for fees and costs under Section 307(b) of the Clean Streams Law because the underlying appeal of the Department's approval of a joint Act 537 plan was not a proceeding pursuant to the Clean Streams Law.

O P I N I O N

Donald E. Longenecker and Maria J. Kawulych (hereinafter collectively referred to as "Longenecker") appealed the Department of Environmental Protection's (the "Department's") September 29, 2015 approval of a joint Act 537 plan submitted by East Earl Township and the Borough of Terre Hill in Lancaster County (the "Municipalities"). The purpose of the joint plan was to address the sewage needs in and around the Village of Goodville in East Earl Township, which we are told has malfunctioning on-lot disposal systems, and to upgrade Terre Hill's existing wastewater treatment plant. In the joint plan the Municipalities elected to provide public sewer to Goodville. The sewage will be transmitted to a new sewage treatment plant that will be owned and operated by a newly formed municipal authority. This sewage treatment plant will

also serve the Borough of Terre Hill and allow the closure of its existing aging facility. In addition, two other package sewage treatment plants will be discontinued.

On August 9, 2016, we issued an Opinion and Order denying a motion for summary judgment Longenecker had filed. *Longenecker v. DEP*, EHB Docket No. 2015-163-L (Opinion and Order, Aug. 9, 2016). Longenecker sought judgment on the issues of the completeness of the Municipalities' plan submission, the Municipalities' commitment to implement the plan and the ability of the plan to be implemented, and whether comments on the plan were adequately considered. On August 31, 2016, shortly after our Opinion was issued, Longenecker withdrew his appeal. The hearing scheduled to begin on October 17, 2016 was cancelled. No pre-hearing memoranda were filed before the appeal was withdrawn.

The Borough of Terre Hill has now filed an application seeking fees and costs from Longenecker under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). (East Earl Township is not seeking fees and costs.) The fees application was briefed by Longenecker and the Borough. The Department filed a response indicating that it did not take a position on the application.

Section 307(b) of the Clean Streams Law provides in part that the Board, "upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in *proceedings pursuant to this act*." 35 P.S. § 691.307(b) (emphasis added). Section 307(b) provides the Board with broad discretion to award fees in appropriate proceedings. *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1003 (Pa. 2007); *Lucchino v. Dep't of Envtl. Prot.*, 809 A.2d 264, 285 (Pa. 2002). We generally employ a three-step analysis in deciding an award of costs and fees under Section 307(b): (1) whether the fees have been incurred in a proceeding pursuant to the Clean Streams Law; (2)

whether the applicant has satisfied the threshold criteria for an award;[1] and (3) if the first two steps are satisfied, we then determine the amount of the award. *Crum Creek Neighbors v. DEP*, 2013 EHB 835, 837; *Hatfield Twp. Mun. Auth. v. DEP*, 2013 EHB 764, 774-75, *aff'd*, No. 66 C.D. 2014 (Pa. Cmwlth. Dec. 23, 2014); *Angela Cres Trust v. DEP*, 2013 EHB 130, 134.

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

- The reason the appeal was filed, i.e., the purpose of the litigation
- Whether the notice of appeal raised objections related to the Clean Streams Law
- Whether the party pursued the Clean Streams Law objections through the trial and in post-hearing briefing
- Whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law
- Whether the case implicates discharges to waters of the Commonwealth

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

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

The Borough argues that Longenecker's appeal was indeed a proceeding pursuant to the Clean Streams Law. The Borough contends that, if Longenecker had been successful in his appeal, the joint plan would not be implemented and ongoing water quality issues would persist from the malfunctioning on-lot systems and the aging wastewater treatment plant. The Borough asserts that Clean Streams Law contentions formed the foundation of Longenecker's appeal and that these contentions were pursued by him throughout the litigation. Longenecker counters that the Borough is not entitled to recover any fees and costs because his appeal did not involve the Clean Streams Law. Longenecker instead argues that the crux of his appeal involved the requirements of the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, which does not contain a provision for the recovery of fees and costs. Longenecker argues that the Borough should not be permitted to use Longenecker's negligible references to the Clean Streams Law to transmogrify a Sewage Facilities Act challenge into a Clean Streams Law proceeding. We agree with Longenecker.

The Clean Streams Law played almost no role in this case. The Borough points to three cursory references to the Clean Streams Law in Longenecker's 95-paragraph notice of appeal as support for the Borough's argument that the appeal implicated water quality issues. These paragraphs in the notice of appeal state:

> [3A.] The Department has the obligation to establish policy and priority including the feasibility of joint treatment facilities, scientific and technological knowledge and immediate and long range economic impact on the Commonwealth and its citizens. 35 P.S. § 691.5(a)(3)(4)(5).
>
> [3B.] The Plan as said plan [sic] does not meet the goals of 35 P.S. § 691.5(a)(3)(4)(5).
>
> ….
>
> 73. A fundamental aspect of the Clean Streams Law is ensuring the protection of Pennsylvania streams and waters and economic impact on citizens. See generally, 35 P.S. §§ 691.4 and 691.5.

(Notice of appeal ¶¶ 3A, 3B, 73.) The cited sections of the Clean Streams Law refer to broad declarations of policy regarding the importance of unpolluted waters and the powers and duties of the Department to further these policies when taking actions pursuant to the Clean Streams Law. *See* 35 P.S. § 691.5(a).

These amorphous references to the Clean Streams Law are reminiscent of the ones we found inadequate to support a fees application in *Borough of Kutztown v. DEP*, EHB Docket No. 2014-064-L (Opinion and Order, Mar. 29, 2016). That appeal involved a challenge by Kutztown to the Department's granting of a sewage facilities planning exemption to a neighboring municipality. We found that Kutztown's largely catch-all, boilerplate contention in its notice of appeal that the Department's approval of the exemption violated the Clean Streams Law and the regulations promulgated thereunder, which was reiterated in its pre-hearing memorandum and post-hearing brief, did not turn a straight-forward sewage planning case into a Clean Streams Law proceeding. *Borough of Kutztown v. DEP*, slip op. at 4-5.

Apart from Longenecker's brief references to the Clean Streams Law in his notice of appeal to what essentially amount to policy statements, we have no indication that Longenecker pursued any Clean Streams Law issues over the course of his appeal. This matter was withdrawn before going to a hearing so we do not have pre-hearing memoranda, hearing transcripts, or post-hearing briefs to analyze for this purpose. No portion of Longenecker's motion for summary judgment touches on issues related to the Clean Streams Law. Instead, looking at the notice of appeal and the summary judgment filings reveals that the vast majority of Longenecker's case centers on alleged technical and administrative deficiencies in the joint plan submission. For example, Longenecker alleged in his appeal that the cost estimates of alternatives were inconsistent throughout the plan; he argued that the plan's economic data improperly relied

exclusively on unfeasible future growth; he asserted that the plan could not be implemented because of conflicting data regarding user billing arrangements; and he said the plan did not address comments from the county. These allegations are fully within the ambit of the Sewage Facilities Act.

In an attempt to support its argument, the Borough refers to our Opinion and Order denying summary judgment as containing language that the Borough says recognizes that water quality concerns are "material issues" to the appeal. However, the discussion from which those words were picked involved a facet of one of Longenecker's overarching arguments that the plan was incomplete. The full passage follows:

> A review of the joint plan finds that the Municipalities appear to have not included the preliminary effluent limits in the plan itself. However, it appears that the preliminary effluent limits were considered by the Municipalities as they drafted the joint plan. In the Department's view, the Municipalities' failure to include the preliminary effluent limits in the plan itself does not strike a fatal blow to the plan or justify a remand. The material issues, i.e., antidegradation, Chesapeake Bay requirements, and the preliminary effluent limitations, were clearly analyzed from a planning perspective, and that is the key.

Slip op. at 11. Longenecker did not contest an antidegradation analysis or the consideration of Chesapeake Bay requirements in and of themselves; rather, he challenged the completeness of the plan because it did not explicitly identify preliminary effluent limits as required by the planning regulations. *See* 25 Pa. Code § 71.21(a)(5)(iii). The antidegradation analysis and the Chesapeake Bay requirements were only brought up by the Department in its response in opposition to Longenecker's motion for summary judgment to argue that preliminary effluent limits were evaluated in the planning process. Longenecker did not raise any substantive challenges to the preliminary effluent limits in his motion or in his notice of appeal.

Contrary to the Borough's claims, our Opinion instead summarized Longenecker's appeal as containing the

> fundamental criticism…that the Municipalities' plan is incomplete. It is so incomplete in his view that it shows that the Municipalities are not really committed to implementing the plan, and the lack of detail shows that there is no proof that this plan can be implemented, even if the Municipalities had the will to implement it.

Slip op. at 4-5. Whether a municipality is able to implement its plan is, of course, one of the considerations the Department must account for in deciding whether to approve or disapprove a plan or plan revision under the sewage facilities regulations. 25 Pa. Code § 71.32(d)(4). Whether a municipality is committed to implementing its plan is another aspect of the planning regulations. 25 Pa. Code § 71.31(f). In *Wilson, supra*, these exact provisions were at issue. We sustained a consolidated appeal of the Department's approval of a township's update to its Act 537 plan because the update did not reflect the township's true intentions with respect to its implementation of the update. We found in our Adjudication that the township was not committed to implementing the plan in contravention of 25 Pa. Code §§ 71.31(f) and 71.32(d)(4). *Wilson v. DEP*, 2010 EHB 827. We then denied the subsequent fees application because the underlying proceedings were not pursuant to the Clean Streams Law—"they were without a doubt proceedings pursuant to the Sewage Facilities Act and nothing else." *Wilson*, 2010 EHB 911, 915. The same holds true here.

Finally, the Borough asserts that the regulations in 25 Pa. Code Chapter 71 were promulgated in part pursuant to the Clean Streams Law. The Borough does not identify any specific regulation that it believes was crucial to Longenecker's appeal and involves water quality. As we have said before, "[i]t is a long reach to say that an appeal is a proceeding pursuant to the Clean Streams Law simply because it cites a regulation which names the Clean

Streams Law as one of a number of promulgating authorities." *Angela Cres Trust*, 2013 EHB at 139.

Although the Borough contends that this case was all about protecting water quality, there is nothing that distinguishes this case from the other sewage facilities planning cases that have come before the Board and in which we have denied fees. At this point in the sewage facilities program, and its maturation over the last several decades, plans and plan revisions are almost always undertaken to resolve some problem with existing sewage facilities, but that does not automatically implicate genuine issues of water quality at the planning stage. Unlike in *Pine Creek Valley Watershed, supra*, 2008 EHB 237, where the appellant primarily focused on a planning module's impact on Exceptional Value waters and the violation of the antidegradation requirements at 25 Pa. Code §§ 93.4a, 93.4b, and 93.4c, Longenecker's appeal focused on the technical and administrative requirements in the planning regulations that yield a complete plan, and whether such a plan was able to be implemented. As we said in *Wilson*, reiterated in *Borough of Kutztown*, and which once again holds true here, nothing about this case "inures to the benefit of clean streams, except in the remote and indirect sense that informed sewage planning tends generally to result in better water quality, but so does effective air pollution control, safe mining, and proper hazardous waste management." *Borough of Kutztown*, slip op. at 7 (quoting *Wilson*, 2010 EHB at 916). The Borough of Terre Hill is not entitled to recover any fees and costs under Section 307(b) because Longenecker's appeal of the joint plan was not a proceeding pursuant to the Clean Streams Law. Our analysis does not need to go any further.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD E. LONGENECKER AND MARIA J. KAWULYCH	:	
v.	:	**EHB Docket No. 2015-163-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST EARL TOWNSHIP and BOROUGH OF TERRE HILL, Permittees	:	

O R D E R

AND NOW, this 7th day of December, 2016, it is hereby ordered that the Borough of Terre Hill's application for fees and costs is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 7, 2016

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CALEB I. LUCEY	:	
	:	
v.	:	**EHB Docket No. 2016-134-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 7, 2016**

OPINION AND ORDER ON
MOTION TO QUASH APPEAL FOR LACK OF JURISDICTION

By Steven C. Beckman, Judge

Synopsis

The Board grants a Motion to Quash Appeal for Lack of Jurisdiction when the record reflects that the Notice of Appeal was filed beyond the 30 day-appeal period provided for at 25 Pa. Code § 1021.52 (a)(1).

O P I N I O N

The Notice of Appeal ("NOA") in this matter challenges the Department of Environmental Protection's ("DEP" or "Department") denial of a mine subsidence damage claim. The Appellant, Caleb I. Lucey ("Mr. Lucey"), filed a damage claim form with the Department asserting that longwall mining at the Bailey Mine operated by Consol Pennsylvania Coal Company resulted in the presence of wet areas on the hillside behind his home located in Richhill Township, Greene County. The Department investigated the damage claim and concluded that the alleged damage was not caused by mine subsidence and it is that conclusion that is challenged in the NOA. The Department has now filed a Motion to Quash Appeal For Lack of Jurisdiction ("Motion)[1] asserting that the NOA was untimely because it was received by

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[1] The Department's Motion is termed a motion to quash the appeal, but we will treat it as a motion to dismiss, since our standard of review is generally identical for both of these types of motions. See *Bucks*

the Board beyond the 30 day appeal period established in 25 Pa. Code § 1021.52 (a)(1). Mr. Lucey did not file a response to the Department's Motion.

The Board has routinely dismissed cases where the NOA was filed beyond the 30 day appeal period provided for in the Board's Rules. *Mark Stash v. DEP*, EHB Docket No. 2015-125-M, slip op. at p.2 (Opinion issued July 22, 2016); *Melvin J. Steward v. DEP*, EHB Docket No. 2015-137-L, slip op. at p.3 (Opinion issued April 5, 2016); *Boinovych v. DEP*, 2015 EHB 566; *Damascus Citizens for Sustainability v. DEP*, 2010 EHB 756; *Spencer v. DEP*, 2008 EHB 573; *Weaver v. DEP*, 2002 EHB 273. It is clear that we lack jurisdiction in such cases. *Rostosky v Dep't of Envtl. Res*., 364 A.2d 761 (Pa. Cmwlth. 1976); *Ametek, Inc. v. DEP*, 2014 EHB 65; *Burnside Twp. v. DEP*, 2002 EHB 700; *Sweeney v. DER*, 1995 EHB 544. Mr. Lucey failed to file a response contesting the facts set forth in the Department's Motion and, therefore, we deem them admitted. 25 Pa. Code § 1021.91(f); *Mark Stash v. DEP*, EHB Docket No. 2015-125-M, slip op. at p.2 (Opinion issued July 22, 2016); *KH Real Estate, LLC v. DEP*, 2012 EHB 319, 320-21; *Doctorick v. DEP*, 2012 244, 246. The uncontested facts in this case clearly demonstrate that the appeal was untimely and the Board lacks jurisdiction in this matter and, therefore, it should be dismissed.

The untimeliness of the appeal is apparent from the information provided by Mr. Lucey on his NOA. Board Rules provide that when the person filing the appeal is an individual to

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County Water & Sewer Authority v. DEP, 2013 EHB 659, 661, fn. 2 ("Although termed a motion to quash an appeal, the Board's standard of review, for all intents and purposes, comports to that utilized in a motion to dismiss. A motion to dismiss is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335*; Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. Motions to dismiss will be granted only when a matter is free from doubt. *Northhampton Township v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612. The Board evaluates motions to dismiss in the light most favorable to the nonmoving party. *Dobbin v. DEP*, 2010 EHB 852, 857; *Cooley v. D*EP, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.").

whom the Department action was directed, like Mr. Lucey, the 30-day appeal period starts when that person receives notice of the action. 25 Pa. Code § 1021.52 (a)(1). This is why the Board's Notice of Appeal Form requests the Appellant to identify how, and on what date, notice of the Department's action was received. On the NOA he filed in this case, Mr. Lucey stated the following in response to that request: "US Postal Mail – August 23, 2016." Based on the provided date, the Notice of Appeal needed to be received by the Board on or before September 22, 2016 in order to meet the 30-day appeal period. The signature page of the NOA filed by Mr. Lucey states that he served the NOA by first class mail on the Department on September 26, 2016 and is dated September 26, 2016, beyond the 30 day appeal period. Even more compelling is the fact that the Board never actually received a copy of Mr. Lucey's NOA from Mr. Lucey. The first time that the Board became aware of this appeal is when staff at the DEP's central office e-mailed a copy of the NOA to Board staff on October 6, 2016. The e-mail from DEP stated that it had been received by DEP's central office the prior day and Board staff docketed the appeal with the October 5, 2016 date reflecting when it was received by DEP. Board staff docketed the actual physical NOA document on October 7, 2016. Again, looking at all these dates in the light most favorable to Mr. Lucey, it is clear that the appeal was filed beyond the 30 day appeal period based on Mr. Lucey's receipt of the letter docketing the appealable action on August 23, 2016.[2]

Accordingly, we issue the following Order.

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[2] In its Brief in support of the Motion, the Department included a copy of a certified mail receipt signed by Mr. Lucey for the August 11, 2016 determination letter that lists a date of delivery of September 2, 2016. Even if we were to credit September 2nd as the date on which Mr. Lucey received notice of the action as opposed to the August 23rd date identified in his NOA, the earliest possible filing date for the NOA supported in the record, October 5th, is still beyond the 30 day appeal period.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CALEB I. LUCEY	:	
	:	
v.	:	**EHB Docket No. 2016-134-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 7th day of December, 2016, it is hereby ordered that the Department's Motion to Quash Appeal For Lack of Jurisdiction is **granted**. The appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 7, 2016

c: **DEP, General Law Division:**
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