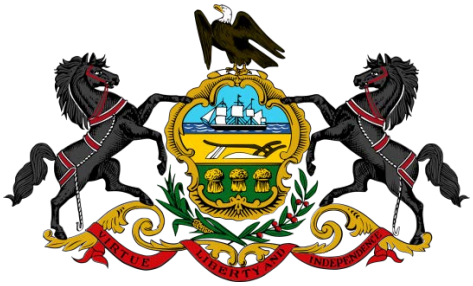
Environmental Hearing Board

Adjudications and Opinions



2018
VOLUME I

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

2018

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: 2018 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2018.

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

ADJUDICATIONS

OPINIONS

ENVIRONMENTAL HEARING BOARD

SUBJECT MATTER INDEX – 2018 EHB DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DICAPRIO HOLDINGS, INC. d/b/a DICAPRIO CLEANING SERVICES	:	
v.	:	**EHB Docket No. 2016-119-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 3, 2018**

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

By Steven C. Beckman, Judge

Synopsis

The appeal of a civil penalty assessment is granted where the Department failed to show by a preponderance of the evidence that DiCaprio Cleaning Services discharged wastewater in violation of the Solid Waste Management Act.

Background

On July 26, 2016, the Pennsylvania Department of Environmental Protection ("Department" or "DEP") issued a civil penalty assessment in the amount of $6,328.00 against DiCaprio Holdings, Inc. d/b/a DiCaprio Cleaning Services ("DiCaprio Cleaning") under Section 605 of the Solid Waste Management Act ("SWMA"), 35 P.S. § 6018.605. The Assessment of Civil Penalty ("Assessment") alleged that DiCaprio Cleaning allowed solid waste to be deposited or dumped onto the surface of the ground without a permit in violation of the SWMA. DiCaprio Cleaning filed a Notice of Appeal challenging the Assessment on August 24, 2016. The Board held a hearing in the matter on July 18, 2017. Following the hearing the Department filed its post-hearing brief on August 30, 2017. On October 2, 2017, the Board issued a Rule to Show Cause after DiCaprio Cleaning failed to file a timely post-hearing brief. DiCaprio Cleaning filed

a post-hearing brief in response to the Rule to Show Cause on October 13, 2017. The Department filed a reply brief on October 30, 2017, and the matter is now ready for a decision by the Board.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 ("Solid Waste Management Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations").

2. DiCaprio Cleaning is a corporation organized and existing under Pennsylvania law. Mr. Louis DiCaprio is the owner of DiCaprio Cleaning. (Hearing Transcript ("T.") 12-13; DEP Ex. D)

3. DiCaprio Cleaning operates a cleaning business that provides residential and commercial janitorial services, including carpet cleaning, at 1103 North Croton Avenue in the City of New Castle (the "Property"). (T. 13)

4. The Property contains three principal buildings along with driveways and parking areas. The area of the Property located between two of the buildings on the north side leading towards the alley is paved but also appears to be covered with broken up blacktop, dirt, gravel, vegetation, and other materials. (T. 38-39, 68; DEP Ex. F, DEP Exs. G1, G2, G3, G4)

5. Water runoff from the roof of one of the buildings has caused staining and the deposition of a white material along the base of the building and driveway/parking area near where the DiCaprio Cleaning van was parked. (T. 86, DEP Ex. G1, G3)

6. A chain link fence and gate exists at the back of the Property and a public alley is located to the north of the Property beyond the chain link fence. (T. 48, DEP Ex. F)

7. The chain link fence and gate at the back of the Property acted as a barrier to water flow off the Property and dirt and leaf material was shown caught up in the gate and fence. (DEP Exs. G1, G4)

8. The alley behind the Property is gravel and dirt and not paved. (T. 96, DEP Ex. G5)

9. Prior to DiCaprio Cleaning occupying the Property, the Property was occupied for 50 years by Crisci Food and Supply, a company that sold industrial chemical supplies, including carpet cleaning supplies. (T. 30, 41)

10. DiCaprio Cleaning maintains and stores four vans at the Property that it uses to provide carpet cleaning services. (T. 14, 40, 44)

11. The carpet cleaning vans have a built in truck mounted extractor system that uses a steam cleaning process to clean carpets. (T. 15)

12. The extractor system includes tanks and hoses. The cleaning process uses two hoses, a water line that introduces the steam into the carpet and a vacuum line that is used to pick up crumbs and other debris on the floor. (T. 15-16)

13. The vacuum line returns to a recovery tank with a filter basket. (T. 16)

14. On June 4, 2013, in response to a complaint filed with the Department, Department Solid Waste Specialist Matthew Cwiklik inspected the Property. (T. 46, DEP Ex. A)

15. Mr. DiCaprio was present for the June 4, 2013 inspection. (T. 47)

16. Mr. Cwiklik did not observe any water being discharged by DiCaprio Cleaning on the day of his inspection. (T. 52)

17. Mr. Cwiklik gathered two soil samples: one from an area of dead vegetation and white precipitate near a telephone pole along the alley beyond the back gate of the Property, and

a comparison sample from an area along the alley with healthy vegetation that appeared not to have been impacted. (T. 46-47, 48-49, 52)

18. Mr. Cwiklik sent the soil samples to the Department's Bureau of Laboratories in Harrisburg, requesting that the samples be tested for basic inorganic chemistry, including phosphorus, chlorides, and sulfates, that he identified as constituents commonly associated with cleaning chemicals, including carpet cleaning chemicals, (T. 52-53)

19. On July 17, 2013 Mr. Cwiklik hand-delivered an inspection report with the soil sampling results to DiCaprio Cleaning and told Mr. DiCaprio that the chlorides, sulfates and phosphorus were elevated relative to background, that the results indicated a manmade source of contamination in the area that had been sampled near the telephone pole, and that DiCaprio Cleaning should cease any dumping of wastewater. (T. 22, 54).

20. Mr. DiCaprio reviewed the inspection report with Mr. Cwiklik and signed it during that conversation. (T. 21-22)

21. Mr. Cwiklik had a follow-up conversation with Mr. DiCaprio at the Property on July 24, 2013 and has not spoken to Mr. DiCaprio since that time. (T. 56, 61)

22. On June 4, 2015, Department Solid Waste Specialist Deborah Santilo inspected the Property in response to a complaint received by the Department that DiCaprio Cleaning was dumping wastewater onto the ground of the Property and it was running into the alley. (T. 65, 80-81, DEP Ex. B)

23. When she approached the Property along the alley, Ms. Santilo observed a DiCaprio Cleaning service van parked on the Property with hoses extending from the van including an orange[1] hose. (T. 65)

[1] The color of the hose was at various times in the hearing described as orange and as yellow. All parties agreed that regardless of the color designation, the orange hose and the yellow hose were the same hose.

24. The driveway and the parking area between the buildings contained puddled water that was backed up against the chain link fence at the back of the Property. (DEP Exs. G1-G4)

25. Water from the Property flowed into the alley behind the Property. (DEP Ex. G5)

26. Ms. Santilo left the alley and entered the Property from the front and met with Mr. DiCaprio. (T. 71)

27. Ms. Santilo did not look in or enter the vehicle storage garage to observe whether there were other vehicles in the garage on the day of her inspection that would have prevented Mr. DiCaprio from accessing the floor drain in the garage. (T. 90-91)

28. Ms. Santilo did not observe where the orange hose was attached so was unable to testify as to the specific source of any discharge from the orange hose. (T. 96)

29. Ms. Santilo did not collect a sample of nor test any water she observed during her inspection, including any water discharged from the orange hose. (T. 82-83)

30. On June 9, 2015, the Department completed and sent an inspection report to DiCaprio Cleaning documenting the June 4, 2015 inspection by Ms. Santilo. (T. 66, 73, DEP Ex. B)

31. Photographs depicting the conditions at the Property on the day of the inspection and taken by Ms. Santilo were attached to the inspection report and presented as exhibits at the hearing. (DEP Ex. B, Ex. F, Exs. G1-G5)

32. On June 11, 2015, the Department sent a Notice of Violation to Mr. DiCaprio. (T. 76, 77)

For the sake of consistency, and because in the pictures admitted as exhibits in this case, the color of the hose appears to us to be orange, we will refer to it as the orange hose.

33. On July 26, 2016, the Department assessed at civil penalty in the amount of $6,328.00 against DiCaprio Cleaning for violating Section 610(1) of the SWMA. (DEP Exhibit D)

DISCUSSION

Standard

The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). In an appeal from a civil penalty assessment, the Board first determines whether the underlying violations that gave rise to the assessment occurred. *The Pines at West Penn, LLC v. DEP*, 2010 EHB 412; *Most Health Services, Inc. v. DEP*, 2008 EHB 174, 179; *B & W Disposal, Inc. v. DEP*, 2003 EHB 456, 467-68; *Stine Farms and Recycling, Inc. et al., v. DEP*, 2001 EHB 796, 812; *Farmer v. DEP*, 2001 EHB 271, 283. The Department must prove by a preponderance of the evidence that the violations occurred. 25 Pa. Code § 1021.122(b)(1); *The Pines at West Penn*, 2010 EHB at 419; *Most Health Servs.*, 2008 EHB at 179. A preponderance of the evidence means that the evidence in favor of the proposition must be greater than the evidence opposed to it. *United Refining v. DEP*, 2016 EHB 442, 449; *Perano v. DEP*, 2011 EHB 623, 633. If the Board is satisfied that the Department has met its burden of proof regarding the violations, we next review the penalty assessment to ensure that the penalty is lawful and that the amount is reasonable and appropriate. *The Pines at West Penn*, supra; *B & W Disposal*, 2003 EHB at 468; *Stine Farms and Recycling*, 2001 EHB at 812.

Analysis

DiCaprio Cleaning challenged both the alleged violation of the SWMA and the amount of the penalty assessed by the Department. The Department is required to prove the violation that formed the basis of its penalty assessment. In this case, the Department alleged that on June 4, 2015, DiCaprio Cleaning violated Section 610(1) of the Solid Waste Management Act, 35 P.S.

§6018.610(1), by allowing solid waste to be deposited or dumped on the ground without a permit. The factual basis for this violation was the Department's allegation that DiCaprio Cleaning was discharging wastewater from a van used in its carpet cleaning operations through an orange hose. At the hearing, the Department presented testimony and exhibits to support its factual allegation concerning the violation, but after a careful review of that testimony and the exhibits, we find that the Department has not satisfied its burden of proof regarding the alleged violation.[2]

The Department presented three witnesses concerning the alleged violation, two Department inspectors, and Mr. DiCaprio, the owner of DiCaprio Cleaning.[3] The Department called Mr. DiCaprio as its first witness. Mr. DiCaprio's initial testimony concerned his general business operations including his carpet cleaning business and the type of equipment in his vans. He explained that his business used vans with truck mounted extractors consisting principally of a series of tanks and hoses that generate steam for use in cleaning carpets. The carpet cleaners take two hoses in to the job site in order to clean the carpets, one a water line and the other an extraction line. The extraction line is hooked to a recovery tank and Mr. DiCaprio testified that at most only a small amount of water is returned and collected in the recovery tank. Mr. DiCaprio was specifically asked whether any of the tanks in the vans need to be emptied when they return to the shop after cleaning jobs and he stated no. Mr. DiCaprio stated that he cleans his vehicles every time they are out including hosing out the interior of the vehicle if it is dirty.

Mr. DiCaprio was asked several questions regarding the activities at the Property on the day that the Department alleges the violation took place, June 4, 2015. He repeatedly denied

[2] Because we conclude that the Department did not prove the alleged violation, our analysis stops there and we do not address whether the penalty amount was lawful, reasonable and appropriate.

[3] The Appellant did not present any witnesses.

dumping or discharging wastewater on that date. He claimed that the van in question had a mechanical problem that caused it to leak, most likely from the cleaning system, and that is why there was water visible on the ground at the Property. Mr. DiCaprio further testified that in order to find the leak, he was unloading clear water from the van through the orange hose. While viewing the photographs from the day of the alleged violation, he was asked by the Department: "And there is some sort of wastewater or water coming out of that orange hose, isn't there?" (T. 36). He answered "That's just mud. There is nothing really coming out. I was hosing the floor out and hosing things out that day there trying to get things manageable to see where I was 'cause I had a mess." (T. 36). One question later, Mr. DiCaprio was again asked "Well, but there was some sort of water/wastewater coming out of that orange hose that day, wasn't there?" (T. 36). This time he answered "There was, you know, a little bit from cleaning the carpet next door; but like I said, nothing intentional." (T. 36-37). The Department failed to follow up on this testimony and clarify Mr. DiCaprio's ambiguous answer. This is as close as Mr. DiCaprio came to acknowledging that he was dumping wastewater through the orange hose on the day of the alleged violation, but given the repeated denials in the rest of his testimony and the ambiguous nature of the question and its reference to "water/wastewater", we are hesitant to put too much weight on this one statement. Overall, Mr. DiCaprio's testimony had some inconsistencies and contradictions that raised concerns for the Board but he consistently and repeatedly denied that he was discharging any wastewater from his tanks through the orange hose as claimed by the Department.

The first Department inspector to testify was Department Solid Waste Specialist Matthew Cwiklik. Mr. Cwiklik's testimony was not helpful in establishing the June 4, 2015 violation for the simple reason that he was not present on that day and did not participate in the inspection that

gave rise to the alleged violation. All of Mr. Cwiklik's testimony concerned an inspection of DiCaprio Cleaning's activities and the Property that he conducted in July 2013. Mr. Cwiklik testified that the last time he spoke to Mr. DiCaprio was July 24, 2013 and there was no testimony presented that he had any dealings with Mr. DiCaprio, DiCaprio Cleaning or the Property after that date. Mr. Cwiklik's testimony would certainly have been relevant if the Board reached the issues of the lawfulness and reasonableness of the penalty assessment in this matter, but testimony concerning discrete events that took place almost two years prior to the alleged violation do not constitute proof of the violation.

The Department's main witness at the hearing regarding the occurrence of the violation was Solid Waste Specialist Deborah Santilo. Ms. Santilo went to the Property on June 4, 2015 in response to a complaint received by the Department that DiCaprio Cleaning was dumping wastewater on the Property and the wastewater was running into the alley behind the Property. Upon her arrival, she observed water, that she concluded was wastewater, being discharged from an orange hose emanating from a DiCaprio Cleaning van. This initial observation was made from the alley behind the Property at a distance of fifty feet. She stated that the water being discharged from the orange hose was milky, opaque, contained sludge and was discoloring the parking lot. She testified that this water and sludge ran across the Property through the back gate area and into the unpaved alley. After she observed the situation, she left the alley and entered the front of the Property and met with Mr. DiCaprio. She testified that Mr. DiCaprio told her that he was discharging wastewater from the van because he did not have room to take it into one of his buildings to access the sanitary sewer floor drain. Mr. DiCaprio denies making such a statement.

The Department's main evidence that the discharge was wastewater ultimately consists of two points: Ms. Santilo's observation that the water discharging from the orange hose was milky, opaque, contained sludge and was discoloring the parking lot and her disputed testimony that Mr. DiCaprio told her he was discharging wastewater because he was unable to access the sanitary sewer floor drain. Ms. Santilo's initial observation of the discharge was made from her vehicle in the alley at a distance of 50 feet. Ms. Santilo testified that DEP Exs. G1 and G2 (G2 is simply an enlarged and cropped copy of G1) show the wastewater discharging out of the orange hose but we found it difficult to see any water directly discharging from the orange hose in those photographs and certainly could not make any judgment on the water's appearance or whether it contained any sludge. None of the photographs (DEP Exs. G1-G5) show the hose and/or its direct discharge from any closer vantage point.[4] We are unclear whether Ms. Santilo observed the direct discharge from the hose up close because her testimony on this point was limited to one equivocal question and a one word response ("Q: And just to clarify, back to the discharge from the yellow hose, you actually saw the water when you were closer to the yellow hose being the wastewater discharging from the hose; is that correct? A: Yes.") (T. 94). No photographs or other evidence were presented clearly showing the nature or quality of the water as it was discharging from the orange hose.

A main component of the Department's evidence are the photographs that were taken by Ms. Santilo on the day of the inspection and which were attached to the inspection report. Unfortunately these photographs focus on the water after it came into contact with the ground and it is difficult to draw the conclusions about the nature of the discharge that the Department is

[4] One photograph (labeled as 1) attached to the inspection report (DEP Ex. B) and presented as part of DEP Ex. F shows a small area of cloudy water among clear water on a fully paved area, but it does not appear to be in the area of the alleged wastewater discharge from the orange hose and no testimony was presented by the Department discussing the significance of that photograph.

advocating from these photographs. As is evident from the photographs, the orange hose was lying on the ground in a section of the Property that consists of pavement covered by dirt, gravel, leaf litter, broken up pavement/blacktop, trash, vegetation and roof runoff from adjacent buildings. The water appears to have exited the orange hose and come into immediate contact with the material on the ground. It then flowed across the ground, where it clearly picked up dirt, leaves, trash etc. before backing up against a pile of leaves and mud trapped along the chain link fence line. (DEP Ex. G4). Water eventually flowed into the dirt and gravel alley behind the Property. The photographs presented by the Department do not show milky or opaque water but instead appear to show muddy and leaf strewn water consistent with water flowing across the unclean parking area and a dirt and gravel alley. The Department presented one photograph (DEP Ex. G5) depicting the water in the alley that Ms. Santilo testified showed suds and the milky color of the wastewater. At the point of the photograph, the water had traveled more than fifty feet through a dirty driveway and parking area into a dirt and gravel alley. We think it is difficult to draw any meaningful conclusions about the initial discharge from the appearance of the water in the alley as shown by the photograph. The water in the photograph does not appear to us to be milky or opaque or particularly sudsy but simply dirty which is not surprising given the distance traveled and the nature of the ground over which it had flowed. Any discoloring of the parking lot appears to be because of the water on the ground picking up dirt and other materials as it flowed across the area. Further, we are not convinced the pictures show the alleged sludge that Ms. Santilo stated was being discharged with the wastewater. The material Ms. Santilo pointed out in the pictures as discharged sludge, in particular the picture showing the alleged sludge built up against the chain link back gate (DEP Ex. G4), appears to be dirt, leaves, trash and other materials collected as the water flowed across the parking lot and driveway area.

Given the overall distance involved in Ms. Santilo's initial observation of the discharge from the orange hose, the lack of testimony or exhibits focused on any up close observations of the hose discharge, the extremely limited time in which she could observe the discharge before it came into contact with the unclean ground, and the lack of visual evidence of the milky or opaque nature of the water in the Department's photographs, we are not convinced that this part of Ms. Santilo's testimony offers sufficient evidence of the disposal of wastewater by DiCaprio Cleaning.

Turning to the other main evidence offered by the Department to prove the violation, we next examine the statement that Ms. Santilo claims Mr. DiCaprio made to her acknowledging the discharging of wastewater. Ms. Santilo testified as follows: "Q: And what was his explanation as to why they were discharging outside? A: Mr. DiCaprio indicated that at the end of the day, if the garage is full with his other vehicles and he didn't have access to the sanitary sewer floor drain that they would often discharge in the parking lot to prepare vehicles for the following day." (T. 72). On her inspection report, dated five days after the inspection, Ms. Santilo included the following: "I met with L. DiCaprio who escorted me to the area outside where the van had been noted discharging. L. DiCaprio indicated that they had to discharge/clean out the vans outside when there were too many vehicles that returned from jobs to discharge/clean in the garage and discharge to the sanitary sewer as authorized by the facility's NPDES permit."[5] (DEP Ex. B). Mr. DiCaprio flatly denied making this statement to Ms. Santilo and there was no testimony that anyone but Mr. DiCaprio and Ms. Santilo were present during their conversation. The Department attempts to bolster the credibility of this statement by pointing out that Mr. DiCaprio did not contact the Department to contest it after he received a copy of the inspection

[5] No NPDES permit for the facility was in evidence in this case.

report in the mail or when he later received the Notice of Violation (NOV). We would first note that the NOV makes no mention of this contested statement and that Mr. DiCaprio testified to having only a vague recollection of receiving the inspection report that was likely received by him no earlier than a week after the inspection.[6] The inspection report was clearly not presented to Mr. DiCaprio at the time of the inspection and he testified that no one from the Department, including Ms. Santilo, came to discuss the inspection report with him. We are not convinced that Mr. DiCaprio's failure to respond to or otherwise challenge that statement in the inspection report can stand as evidence of the truthfulness of the statement under these facts. We do know that on the day of the inspection, Ms. Santilo did not determine whether there were other vehicles in the vehicle storage building that were preventing Mr. DiCaprio from accessing the sanitary sewer floor drain. She was asked on cross-examination whether she had observed any other vehicles in the building and she answered that she did not enter the building and that the door was not open. (T. 90-91). This is in contrast to Mr. DiCaprio who testified that there was not another truck in the building preventing him from accessing the floor drain and that, but for the mechanical issues with the van in question, it would have been inside the building. (T. 40). We are left with uncertainty about this statement and therefore, we cannot assign it the significant evidentiary weight that the Department would like us to in supporting a finding about the alleged violation.

The evidence of the violation presented through Ms. Santilo's testimony has several gaps that undercut a finding that the alleged violation took place. While Ms. Santilo consistently referred to the discharge as wastewater, she did not collect or test any samples of the water that was being discharged from the orange hose. We are not saying that sampling of the water as it

[6] The inspection report was dated June 9, 2015 and we presume at least a few additional days passed by between the mailing, delivery and receipt of the report by Mr. DiCaprio.

was discharged and subsequent testing is required to prove the violation but it would have been extremely helpful in supporting the Department's claims. Further, Ms. Santilo apparently did not view the interior of the van in question and did not observe the source of the water that was being discharged through the orange hose. As a result, she was unable to testify whether the orange hose was hooked up to the recovery tank as the Department implied or some other tank or water source in or adjacent to the van. The failure to observe the source of the alleged wastewater discharge and the lack of any sampling or testing of the alleged wastewater created gaps in the evidence in this case.

This case is a classic burden of proof case. The Department had the burden to prove by a preponderance of the evidence presented at the hearing through testimony and exhibits that DiCaprio Cleaning violated the Solid Waste Management Act by discharging wastewater at its Property on June 4, 2015. Ultimately, after carefully reviewing all of the testimony and the exhibits admitted at the hearing, we conclude that the Department has failed to meet its burden to prove the alleged violation. There were inconsistencies in the testimony of both Mr. DiCaprio and Ms. Santilo. The Department failed to take any samples or test the alleged wastewater and did not observe the source of the alleged wastewater and therefore could not testify whether the discharge was coming from the recovery tank or some other source. In addition, the photographic evidence presented by the Department did not adequately support the Department's conclusion that the discharge was wastewater. Because the Department failed to prove the violation that underlies the civil penalty assessment, we rule in favor of DiCaprio Cleaning and dismiss the civil penalty assessment issued by the Department.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 4006; 35 P.S. § 7514.

2. The Department bears the burden of proof in an appeal from an assessment of civil penalty. 25 Pa. Code § 1021.122(b)(1).

3. The Department must prove by a preponderance of the evidence that the underlying violations of law giving rise to the civil penalty in fact occurred, that the civil penalty is lawful, and that there is a reasonable fit between the violations and the penalty amount. *Paul Lynch Investments, Inc. v. DEP*, EHB Docket No. 2016-014-B (Adjudication, Aug. 29, 2017); *Whiting v. DEP*, 2015 EHB 799, 805; *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 198-199; *Taylor Land Clearing, Inc. v. DEP*, 2012 EHB 138, 147-148 (citing *Eureka Stone Quarry, Inc. v. DEP*, 2007 EHB 419, 449, *aff'd*, 957 A.2d 337 (Pa. Cmwlth. 2008)).

4. Any violations must have a factual basis and be in accordance with the law for a penalty to be assessed. *Boyertown Sanitary Disposal Co. v. DEP*, 2010 EHB 762, 775; *Gordon v. DEP*, 2007 EHB 264, 271.

5. The Department did not meet its burden of proof that DiCaprio Cleaning committed the alleged violation of the SWMA that was the basis for the civil penalty assessment.

6. The civil penalty assessment against DiCaprio Cleaning is dismissed because the Department failed to prove the underlying violation of the SWMA.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DICAPRIO HOLDINGS, INC. d/b/a DICAPRIO CLEANING SERVICES	:	
v.	:	**EHB Docket No. 2016-119-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 3rd day of January, 2018, it is hereby ordered that DiCaprio Cleaning Services appeal is sustained and the civil penalty assessment 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/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

Statement of Judge Bernard A. Labuskes, Jr.

I concur in the result. Although I would have found that the Department established liability, I would have found that the Department failed to prove that the $6,328 penalty, or anything approaching that amount, was reasonable.

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

DATED: January 3, 2018

c: **DEP, General Law Division:**
Attention: Maria Tolentino
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Hope C. Campbell, Esquire
Angela N. Erde, Esquire
(via electronic filing system)

Appellant:
Paul Lynch, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
	:	
v.	:	**EHB Docket No. 2016-099-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	**Issued: January 3, 2018**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By: Judge Richard P. Mather, Sr.

Synopsis

The Board denies the Intervenor's Motion for Summary Judgment because the Appellants have produced sufficient evidence to support a *prima facie* case and because there are genuine issues of material fact regarding whether the Department's determination was reasonable and in accordance with the law.

O P I N I O N

On June 29, 2016, Robert W. Diehl, Jr., and Melanie L. Diehl ("Appellants") filed an appeal from a Department letter dated June 6, 2016 in which the Department informed the Appellants that it had completed its investigation of the Appellants' spring on their property. In the letter, the Department stated that it had determined that the spring was only temporarily affected by pipeline construction activities occurring on their property and that the spring was returning to expected conditions. The Department conducted its investigation as a result of a complaint made by the Appellants that pipeline construction activities undertaken by Angelina Gathering Company, LLC ("AGC") had disrupted the flow of water to the spring on their

property. As a result of its investigation and determination, the Department stated in its letter that it "does not plan to require further action regarding this matter."

AGC filed a Petition to Intervene in the appeal that the Board granted on August 30, 2016. On September 16, 2016, AGC filed a Motion to Dismiss alleging that the Board lacks jurisdiction because the Department's June 6, 2016 letter is not an appealable action. In support of its Motion, AGC argued that the Department's letter constitutes an exercise of its prosecutorial discretion, which is not appealable as a general rule. *See, e.g., DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005). The Appellants filed a Response on October 17, 2016 and, after prompting by the Board, the Department also filed a Response on October 25, 2016. On December 1, 2016, the Board issued an Opinion and Order denying the Intervenor's Motion, finding that the limited record before the Board did not allow the Board to address the concerns raised by the Parties at that preliminary stage of the appeal.

On October 23, 2017, the Intervenor filed a Motion for Summary Judgment. In it, the Intervenor advanced three arguments: first, that the Appellants lack scientific baseline evidence to meet their burden of proof; second, that the Department's determination was reasonable; and third, that the hearing is unnecessary. It is for these three reasons that the Intervenor argues that the Appellants' appeal should be dismissed.

In its first argument, the Intervenor contends that the Appellants do not meet their burden of proof – more specifically, the Intervenor states that at a minimum, the Appellants must support their claims with scientific evidence that establishes what the hydrogeologic conditions of the spring were prior to the start of the Intervenor's pipeline activities. According to the Intervenors, the Appellants do not do this. The Intervenor draws comparisons between the circumstances here and those in *Kiskadden v. DEP*, 149 A.3d 380 (Pa. Cmwlth. 2016), arguing

that like Kiskadden, Appellants have failed to prove a hydrogeological connection between the Intervenor's operations and the change in water flow in Appellants' spring. The Intervenor asserts that the Appellants must prove with scientific evidence that the conditions of the spring's flow before the Intervenor began its pipeline construction activities were different than they are now.

In its second argument, the Intervenor states that the Department acted reasonably and, therefore, the Appellants will be unable to prove that the Department erred, acted unreasonably, or abused its discretion in making its determination that any impact to the spring was temporary. The Intervenor argues that there is no dispute of material fact regarding the Department's investigation, evaluation, and responses to the Appellants' complaint. They further argue that these undisputed facts show that the Department was reasonable. Linking back to its first argument, the Intervenor asserts that without a before-after scientific evaluation of the effect of the pipeline construction on the spring, the Appellants will be unable to establish that the Department erred or acted unreasonably by coming to a different conclusion.

Finally, the Intervenor argues that the Board should dismiss this appeal because a trial is unnecessary. It is the Intervenor's position that the Appellants lack evidence to state a prima facie case and, as such, a trial is a waste of time and resources.

The Appellants filed their Response to the Motion for Summary Judgment on December 6, 2017, in which they refuted the Intervenor's arguments. They argue that they have presented sufficient evidence to make out a *prima facie* case that the Intervenor's pipeline construction caused the loss of flow to Appellant's spring; that there are genuine issues of material fact in dispute that preclude the Board from granting the Intervenor's Motion for Summary Judgment;

and that a hearing is necessary to determine whether the Department's determination under appeal was reasonable.

The Appellants contend that the Intervenor's use of *Kiskadden* in support of its argument that Appellants have not met their burden of proof is misplaced. Appellants point out that *Kiskadden* did not address a motion for summary judgment, but rather addressed a multi-day hearing on the merits of the appeal. It is the Appellants' position that the comparison between the *Kiskadden* appeal and this appeal is not analogous, in large part because the Intervenor [according to the Appellants] misapplies and mischaracterizes the facts and law as set forth in *Kiskadden*. Chiefly, the Appellants argue *Kiskadden* requires expert testimony in those cases that require scientific or specialized knowledge and that this appeal is one such case. Therefore, the Appellants assert that a motion for summary judgment is inappropriate where expert testimony has not yet been given and the Board has not yet had an opportunity to assess the credibility of the parties' respective expert witnesses. Additionally, the Appellants argue that there are genuine issues of material fact in dispute that require a hearing in order to be resolved and for the Board to determine whether the Department acted reasonably.

On December 15, 2017, the Intervenor filed its Reply to the Appellants' Response. In it, the Intervenor makes two arguments: First, that the Oil and Gas Act and the Department regulations that were in effect at the time the Appellants made their complaint do not apply; and second, that the Appellants' evidence concerning the conditions of their spring prior to pipeline construction are insufficient to create a genuine issue for trial.

The Intervenor asserts that the statute and regulations in effect at the time of the Appellants' complaint applied only to oil and gas well operators. As the Intervenor is not a "well operator" under the Oil and Gas Act or applicable Chapter 78 regulations that were in effect at

the time of the complaint, the Board should not have jurisdiction over the appeal.[1] The Intervenor argues that this point is underscored by the fact that the Appellants are not asking for any administrative relief from the Board beyond finding that the Department's letter (and determination therein that the spring's flow was affected only temporarily by pipeline construction).

The Intervenor also takes issue with the quality of evidence presented by the Appellants and insists that the lack of "actual measurements of the spring's flow immediately before pipeline construction activities began" coupled with a dearth of evidence regarding whether the spring is the only water sources that fills the sump hole and pond is insufficient for the Appellants to meet their burden. Intervenor's Reply Brief at 3. Further, the Intervenor argues that Appellants rely on conjecture, rather than data, along with hearsay, which is inadmissible. For these reasons, the Intervenor asserts that the Board should grant its Motion for Summary Judgment. We disagree, as set forth below.

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*

[1] While we are sensitive to this argument regarding applicability of statute and regulations – and addressed the timing of both the amendments to the statute and regulations in our Opinion denying the Department's Motion for Summary Judgment/Motion to Dismiss – the Department itself appears to state that it has applied the amended statute and regulations to the Appellants' appeal. See Department's Motion for Summary Judgment/Motion to Dismiss at 3, ¶ 11. Where it appears that the Department does not contest the applicability of its oil and gas regulations, the Board will not finally resolve the issue raised by the Intervenor in the context of the Intervenor's Motion.

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.

There are two ways that a Motion for Summary Judgment may be granted. First, it may be granted when (1) the pleadings, depositions, answers to interrogatories and admissions, and, if available, affidavits, show that there is no genuine issue of material fact, and (2) that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(a), (b)(iv), (d), (i); Pa.R.C.P. 1035.1; *Robinson Coal Company v. DEP*, 2011 EHB 895, 905; *Energy Resources, Inc. v. DER*, 1990 EHB 901, 904; *Miller v. DER*, 1988 EHB 538, 541. In coming to its decision, the Board should review the record in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party, and resolving all doubts as to the presence of a genuine issue of material fact against the moving party. *Paul Lynch Investments, Inc. v. DEP*, 2016 EHB 845, 847 (quoting *Perkasie Borough Authority v. DEP*, 2002 EHB 75, 81).

Second, summary judgment may be available

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

25 Pa. Code § 1035.2(2). Under the first scenario, the record must show that the material facts are undisputed. Under the second scenario, the record must contain insufficient evidence of facts for the party bearing the burden of proof to make out a *prima facie* case. *See* Note to Pa.R.C.P. No. 1035.2. The Intervenor asserts that the second scenario applies here and the Board agrees.

Discussion

We think that the Appellants have demonstrated that they have a *prima facie* case in this appeal and find that there are disputed issues of material fact. Although the Intervenor makes much of its argument that the Appellants lack the requisite scientific certainty that the pipeline construction has permanently impacted their spring, that is not the standard used here. The Board will not gauge the quality of evidence in a motion for summary judgment, but will simply determine whether there is enough evidence to form a *prima facie* case. We find that there is.

The Intervenor relies almost completely on the Commonwealth Court's *Kiskadden* opinion, supra, which affirmed the Board's ruling, for its argument that in order to overcome the Motion for Summary Judgment, the Appellants must have expert evidence that establishes the spring's hydrogeologic conditions prior to the start of the Intervenor's pipeline activities. But, as the Appellants point out in their Response, the *Kiskadden* opinion is not a ruling on a motion for summary judgment. Instead, it is the culmination of twenty days of trial that included exhibits and testimony from multiple experts. We do not think the record before the Board in a motion for summary judgment is analogous to the record before the Board in *Kiskadden*.

Most importantly, it bears recognizing that Commonwealth Court merely determined that the appellant in *Kiskadden* failed to meet his burden to demonstrate that contaminants present in his drinking well were the result of gas drilling operations that were half a mile away. The standard, applied by the Board and echoed by Commonwealth Court, was whether the appellant

had shown "by a preponderance of the evidence that a hydrogeological connection existed between his water well and [the intervenor's] operation at the . . . site." *Kiskadden*, 149 A.3d at 386, 400. Commonwealth Court did not state any specific scientific criteria necessary to demonstrate a link between pipeline activity and water deterioration. It merely confirmed the Board's decision that the Appellant had failed to show a link by a preponderance of the evidence. Additionally, *Kiskadden* reiterated that while expert testimony is required when issues demand scientific or specialized knowledge, a party may nonetheless meet its burden of proof with circumstantial evidence:

> Where the issues require scientific or specialized knowledge or experience to understand, such as the intricacies of drilling and the science of hydrogeology, expert testimony is required. *Brockway*, 131 A.3d at 587; *Department of Transportation v. Agricultural Lands Condemnation Approval Boards*, 5 A.3d 821, 828-21 (Pa. Cmwlth. 2010). Notwithstanding, a party may meet its burden of proof with circumstantial evidence if it is so preponderates in favor of a conclusion as to outweigh in the mind of the fact finder any other evidence. *Al Hamilton*, 659 A.2d at 40.

Id. at 385. The Board has long held that where direct evidence is unavailable, circumstantial evidence will suffice. See *Keck v. DEP*, EHB Docket No. 2015-186-B (Adjudication issued April 28, 2017); *ELG Metals, Inc. v. DEP*, 2013 EHB 618; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797. With this in mind, we think the Intervenor here is reaching in its analysis.

In a motion for summary judgment, the responding party does not have to demonstrate that it will eventually win the argument. *Milco Industries, Inc. v. DEP*, 2002 EHB 723, 734. Instead, the party need only "point to enough record evidence to show that it can make out a *prima facie* case." *Id*. We think that the Intervenor has skipped over whether there is evidence in the record that will make up a *prima facie* case and gone straight to the merits of that evidence. A motion for summary judgment is not the appropriate place for this examination.

The Intervenor takes issue with the *quality* of the Appellants' evidence and makes an argument that hinges not on the standard for a motion for summary judgment – that the nonmoving party produce insufficient evidence of facts that support a *prima facie* case – but which hinges on the standard at hearing: preponderance of the evidence. Specifically, the Intervenor argues that "the [Appellants] bear the burden of proving by a preponderance of the evidence that the Department's determination that the pipeline had no permanent effect on the spring is unreasonable, arbitrary, an abuse of discretion, or not in accordance with the law." Intervenor's Motion at 2. This is true – if the Intervenor were writing its post-hearing brief. It is premature to apply this standard now, where the Intervenor has simply moved for summary judgment. It is the Board's job to determine the quality of the evidence presented after hearing the evidence, not prior to testimony from witnesses, expert and lay.[2]

Neither is there an issue here of a lack of expert witness. The matters before us in this appeal – chiefly whether the loss of water in the Appellants' spring is due to the Intervenor's pipeline construction activities – is without a doubt a technical and scientific subject. As is well established, a party must generally produce expert testimony in such a situation. See, e.g., *United Refining Company v. DEP*, 2016 EHB 442; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221. Appellants have supplied an expert in this appeal. The narrow concern the Intervenor raises focuses on the quality of the Appellants' evidence regarding the baseline flow of the spring prior to the start of the pipeline construction activities. The Appellants have identified lay witnesses who will testify about the baseline flow of the spring. If, during the trial,

[2] The Intervenor also makes an argument regarding a fact-finder's inability to rely on inadmissible hearsay to find a genuine issue of material fact. Intervenor's Reply Brief at 5. While "[a] motion for summary judgment cannot be defeated by statements that include inadmissible hearsay evidence," Appellants rely upon more than statements from their contractor, Warren Stone, in this appeal. *Barkman v. DER*, 1993 EHB 738, 752. The Intervenor may raise its hearsay objections during the hearing on the merits.

the Intervenor still wishes to make arguments going to the quality of Appellants' evidence, it may do so. It may revisit these arguments in its post-hearing brief. But we will decide at the culmination of the hearing whether Appellants have demonstrated by a preponderance of the evidence that the water loss in their spring is not temporary and is due to the Intervenor's construction activities. As it stands, we think the Appellants have identified sufficient evidence to comprise a *prima facie* case in this appeal.

In its second argument, the Intervenor asserts that the Department acted reasonably in its determination that the water loss in Appellants' spring is merely temporary. We disagree with this argument as well because we think there are significant disputed issues of material fact on this point. The Intervenor relies on its first argument, that Appellants lack sufficient scientific evidence to meet its burden, to argue that the Appellants will be similarly unable to demonstrate that the Department acted unreasonably or abused its discretion in determining that the effect of pipeline activity, if any, was temporary.

While the Department has wide latitude to act as it deems fit, as the Intervenor points out, the Board may overturn a Department action where it finds that the Department has abused its discretion by acting contrary to law or in an otherwise unreasonable way. *Browning-Ferris Industries v. DEP,* 819 A.2d 148, 152-154 (Pa. Cmwlth. 2003); *Warren Sand & Gravel Co. v. DEP* 341 A.2d 556, 565 (Pa. Cmwlth. 1975). The Intervenor states that among the undisputed material facts of the appeal are that (1) "the Department investigated the Appellants' complaint immediately and thoroughly over the course of almost two years"; (2) "the Department evaluated the pipeline construction activities, other seasonal conditions, and other factors regarding the Appellants' complaint"; (3) the Department provided a reasoned decision and conclusion regarding the Appellants' complaint"; (4) "since the time of the appeal, the Department has

continued to evaluate the Appellants' claims"; and (5) "the Appellants have not come forward with any baseline data to contradict the Department's determination regarding causation." Intervenor's Motion at 5. The Intervenor concludes that these five points are proof positive that the Department acted reasonably and reached a proper conclusion. We disagree.

As the Appellants point out, there are disputes over material issues of fact. The Appellants have identified issues with the spring's current flow – both lack of flow and water streaming out of pipeline borings. Appellants' Brief in Opposition at 8-9. Appellants allege that they were forced to turn off their pump due to lack of spring flow. *Id.* at 9. Further, Appellants have expert testimony that the spring is no longer flowing. *Id*. at 9. If these allegations are true, they cast doubt onto whether the Department behaved reasonably and in accordance with the law. There are disputes that the Board must resolve with a hearing. A motion for summary judgment is not the appropriate place for us to make decisions regarding the quality of evidence when we have not yet heard testimony.

Conclusion

We deny the Intervenor's Motion for Summary Judgment. The proper standard for a motion for summary judgment is whether the nonmoving party has produced sufficient evidence to make up a *prima facie* case. The Board does not concern itself with the quality of the evidence at this juncture, as that falls within the purview of our *de novo* review during a hearing. Further, we find that there are genuine issues of material fact with respect to whether the Department acted reasonably and in accordance with the law when it made its conclusion that the effect to the Appellants' spring was merely temporary. Therefore, we deny the Intervenor's Motion and issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT W. DIEHL, JR. AND MELANIE L. DIEHL	:	
	:	
v.	:	**EHB Docket No. 2016-099-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANGELINA GATHERING COMPANY, LLC, Intervenor	:	

O R D E R

AND NOW, this 3rd day of January, 2018, the Intervenor's Motion for Summary Judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: January 3, 2018

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY ROHANNA	:	
	:	
v.	:	**EHB Docket No. 2016-148-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC	:	**Issued: January 5, 2018**

OPINION AND ORDER ON
DISMISSAL OF APPEAL

By Steven C. Beckman, Judge

Synopsis

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

O P I N I O N

On August 31, 2016, Gary Rohanna filed a claim with the Department of Environmental Protection ("Department") for damage to his property in Franklin Township, Greene County, allegedly due to mine subsidence from mining conducted by Emerald Contura, LLC ("Contura"). By letter dated October 17, 2016, the Department denied the claim, and Mr. Rohanna appealed the denial to the Board on November 18, 2016, as a *pro se* appellant.[1] The matter proceeded and on October 16, 2017, the Board issued Pre-Hearing Order No. 2 ("Pre-Hearing Order"), setting forth the hearing date and deadlines for the filing of pre-hearing memoranda. The Pre-Hearing Order required that Mr. Rohanna submit his pre-hearing memorandum by December 15, 2017. Mr. Rohanna failed to submit a pre-hearing memorandum by December 15, 2017 as required.

[1] Mr. Rohanna's counsel filed a Notice of Appearance in this matter on March 8, 2017.

On December 19, 2017, the Board issued a Rule to Show Cause ordering Mr. Rohanna to explain why his appeal should not be dismissed as a sanction for failing to follow a Board Order, or alternatively, to file his pre-hearing memorandum on or before December 27, 2017. As of the date of this Opinion and Order, Mr. Rohanna has failed to either respond to the Board's Rule to Show Cause or submit his pre-hearing memorandum.

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

As is evident from the facts above, Mr. Rohanna has failed to comply with two Orders of the Board and seems to have lost interest in pursuing his case. Initially, Mr. Rohanna failed to file his pre-hearing memorandum by December 15, 2017. Despite being afforded additional time by the Rule to Show Cause, Mr. Rohanna still has not filed a pre-hearing memorandum as required by our Pre-Hearing Order. Mr. Rohanna did not file a response to the Board's Rule to Show Cause, nor did Mr. Rohanna file a request for more time following either the Pre-Hearing Order, or the more recently issued Rule to Show Cause. An appellant's pre-hearing memorandum is an important step in proceeding to a hearing in front of the Board. Mr. Rohanna's failure to file a pre-hearing memorandum as required by the initial order, or in response to the Rule to Show Cause, shows a clear intent not to proceed with his appeal. When a party demonstrates an intent to no longer continue an appeal, we have found it is appropriate to

consider the dismissal of the appeal. *Nitzschke,* 2013 EHB 861, 862. Mr. Rohanna's apparent lack of interest in proceeding with his case, along with his failure to follow the Board rules and two prior Orders make it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY ROHANNA	:	
	:	
v.	:	**EHB Docket No. 2016-148-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC	:	

O R D E R

AND NOW, this 5th day of January, 2018, it is hereby ordered that the Appeal is dismissed and the docket shall be marked closed.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: January 5, 2018

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

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For Permittee:
Nicole V. Schmitt, Esquire
Kevin K. Douglass, Esquire
(*via electronic filing system)*

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: January 8, 2018**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

In the course of denying a motion for summary judgment, the Board declines to hold that pipelines can never be water-dependent structures barred from being sited in or near exceptional value wetlands. The Board further holds that the protections afforded to EV wetlands by the regulations are sufficiently protective that no further analysis of actual existing uses of each EV wetland is required. Finally, the Board declines to hold that a permittee's failure to obtain all municipal consistency letters regarding local stormwater management and floodplain plans requires rescission of an encroachment permit as a matter of law, even if the Department failed to waive the requirement in writing. For example, reasonable but ultimately unsuccessful efforts to obtain municipal consistency letters regarding compliance with local stormwater management and floodplain plans, coupled with the permittee's analysis and the Department's finding of actual consistency, may dictate against permit rescission depending upon the facts of each case.

O P I N I O N

Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association (hereinafter collectively referred to as the "Council") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of three Chapter 102 and seventeen Chapter 105 permits to Sunoco Pipeline, L.P. ("Sunoco") authorizing it to build the Mariner East 2 pipelines ("ME2 pipeline"), which will transport natural gas liquids across approximately 300 miles in Pennsylvania. The ME2 pipeline will cross 139 exceptional value ("EV") wetlands. The Council has filed a motion for summary judgment. It argues that the Department improperly issued the permits to Sunoco for three reasons: First, structures or activities cannot be permitted in EV wetlands unless they are "water-dependent" and the ME2 pipeline, and in fact all pipelines, are not water-dependent as a matter of law. Second, the Department improperly applied antidegradation requirements in its permit review because it failed to analyze the existing uses of the EV wetlands to be crossed by the pipeline. Third, Sunoco failed to submit the required stormwater management plan consistency and floodplain letters from all municipalities and counties crossed by the pipeline. Sunoco and the Department oppose the motion.

Water Dependency

The Council argues that no pipelines can ever be built in EV wetlands in Pennsylvania as a matter of law. Since it is unlikely that any pipeline of any size could be built without crossing at least one EV wetland in Pennsylvania, it follows from the Council's argument that no pipelines would ever be allowed to be built in Pennsylvania.

The Council gets to this rather extreme conclusion by pointing out, correctly, that under Pennsylvania's regulatory scheme, no encroachment may be permitted in an EV wetland unless

the project is "water-dependent." 25 Pa. Code § 105.18a(a)(2). It then argues that pipelines do not need water to operate. Transporting natural gas liquids in the case of the ME2 pipeline, for example, does not require water. Therefore, the Council says that all pipelines are not water-dependent.

The Department does not take such a categorical approach. The Department says that a pipeline can be water-dependent if there are no practicable alternatives to siting them in EV wetlands. The Council says the Department is improperly intermixing and confusing two separate requirements. The Department in the Council's view must consider whether less intrusive alternatives are available, but only *after* the Department has determined that the project is water-dependent. It says water dependency turns on whether the project needs water to fulfill its basic purpose, not on the fact that there are no alternatives to crossing wetlands. Water dependency in the Council's view should not have anything to do with whether alternatives are available or not, let alone practicable.

The pertinent regulations are codified at 25 Pa. Code §§ 105.14 and 105.18a. Sections 105.18a(a)(2) and (3), which govern "permitting of structures and activities in wetlands," read as follows:

> (a) *Exceptional value wetlands.* Except as provided for in subsection (c), the Department will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise affecting an exceptional value wetland, unless the applicant affirmatively demonstrates in writing and the Department issues a written finding that the following requirements are met:
>
> * * * * *
>
> (2) The project is water-dependent. A project is water-dependent when the project requires access or proximity to or siting within the wetland to fulfill the basic purposes of the project.
>
> (3) There is no practicable alternative to the proposed project that would not involve a wetland or that would have less effect on the wetland, and not

> have other significant adverse effects on the environment. An alternative is practicable if it is available and capable of being carried out after taking into consideration construction cost, existing technology and logistics. An area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed to fulfill the basic purpose of the project shall be considered as a practicable alternative.

25 Pa. Code §§ 105.18a(a)(2) and (3). Section 105.14, which governs the review of permit applications for encroachments more generally, reads in part as follows:

> (a) An application will be reviewed to determine the proposed project's effect on health, safety and the environment, in accordance with prevailing practices in the engineering profession and in accordance with current environmental principles.
>
> (b) In reviewing a permit application under this chapter, the Department will use the following factors to make a determination of impact:
>
> * * * * *
>
> (7) The extent to which a project is water dependent and thereby requires access or proximity to or siting within water to fulfill the basic purposes of the project. The dependency must be based on the demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth.

25 Pa. Code § 105.14.

The Council says Subsection 105.18a(a)(2) is the only applicable section when it comes to water dependency: Subsection (a)(2) creates an absolute, stand-alone requirement. It is true that Subsection (a)(3) discusses the availability of alternatives, but that is an entirely separate requirement, according to the Council. It says that the Department's interpretation effectively eliminates water dependency as a separate requirement.

The flaw in the Council's reasoning is that it ignores Section 105.14(b)(7). That regulation pertains to permitting of all encroachments including encroachments in EV wetlands. Section 105.14(b)(7) clearly says that water dependency is to be based on the unavailability of any alternative location, route, or design that would avoid or minimize the adverse impact of the

encroachment. Regulations must be read together and, when possible, construed in such a way as to render all of the regulations as having meaning and effect. *DER v. Rannels,* 610 A.2d 513, 515 (Pa. Cmwlth. 1992). *Accord* 1 Pa.C.S. § 1921 (statutes); 1 Pa. Code § 1.7 (Statutory Construction Act applies to regulations). When we consider Sections 105.14 and 105.18a together, as we must, it is clear that a project can be water-dependent in Pennsylvania and, therefore, permittable in EV wetlands, upon a demonstration that no less disruptive practicable alternatives are available.

This is also the conclusion reached by the U.S. Court of Appeals for the Third Circuit in *Delaware Riverkeeper Network v. Sec'y of the Pa. Dep't of Envtl. Prot.*, 870 F.3d 171 (3d Cir. 2017). Although we are obviously not bound by that court's holding, we nevertheless find its reasoning persuasive. After quoting 25 Pa. Code § 105.14(b)(7), as we just did, the Court said that that provision endorses a flexible approach to water dependency. *Id.*, 870 F.3d at 181. In interpreting Pennsylvania law, it found that the Department, in reviewing wetland permits for a pipeline, did not act improperly by incorporating an alternatives analysis as part of its water dependency finding. *Id.*, 870 F.3d at 182. It noted that the Department's flexible approach to water dependency is public and longstanding:

> In 1991, when the relevant regulations were first promulgated, PADEP stated its intention to evaluate the water dependency of linear infrastructure projects on a case-by-case basis. For example, in response to a public comment, PADEP stated that "[r]oads may be considered water dependent on a case by case basis." DEP Addendum 12; *see also* DEP Addendum 9 ("[T]he Department believes that haul roads, depending on their location, may be water dependent and will make that determination on a case by case basis."). Such case-by-case analysis belies the categorical approach urged by Riverkeeper.

Id. The "categorical approach" urged by Riverkeeper and rejected in that case is identical to the approach advocated by the Council in this case, which we similarly reject.

In interpreting regulations, we are to assume that the promulgators did not intend a result that is absurd or unreasonable. *See* 1 Pa.C.S. § 1922. The Council has pointed us to federal case law that would support a conclusion that pipelines are not water-dependent as that term is used in federal law. However, under federal law, a project can still be permitted if it is not water-dependent; there is merely a presumption that may be overcome that less disruptive alternatives exist. 40 C.F.R. § 230.10(a); *Del. Riverkeeper, supra*, 870 F.3d at 182. If we adopted the Council's extreme interpretation of the Pennsylvania regulations, it is unlikely that any pipelines, or for that matter transmission lines, highways, or any other linear projects of any size, could be built in Pennsylvania where EV wetlands are ubiquitous. Such a result would be absurd and unreasonable. On the other hand, the Department's interpretation is reasonable and consistent with the regulatory language. *See Tire Jockey Serv. v. DEP*, 915 A.2d 1165, 1186 (Pa. 2007).

The Council argues that, at the very least, the Department should limit itself to a consideration of "available" alternatives, not "practicable" available alternatives. We see this is a distinction without a difference. An alternative is not really available if it is not practicable. Natural gas liquids could be put inside a rocket and transported through space and return to land via touchdown at a new location, but it is disingenuous to say that that alternative is available. In fairness it is not practicable, and therefore, it is not available.

The Council argues that alternatives (if they are to be considered at all) can be considered generically. Since this is the case, and since there are always ways to transport natural gas liquids other than sending them through a pipeline (e.g. train, trucks, ships), all pipelines in EV wetlands are always forbidden. Once again, we must reject the Council's untenable position. The regulations do not contemplate a generic prohibition on all structures or activities of a certain kind. Rather, they speak in terms of a specific project and call for a consideration of the

location, route, design, construction costs, existing technology, and logistics of that project. 25 Pa. Code §§ 105.14, 105.18a. These criteria will vary from project to project, necessitating a case-by-case review. In addition, the practicability of alternatives cannot be assessed without reference to a specific project. Still further, one cannot measure the ability to avoid or minimize impacts without an understanding of the wetlands involved. Thus, the proper question to ask is not whether there are theoretical alternatives to pipelines in general, it is whether actual practicable alternatives were available for the ME2 pipeline as located and designed. This is a case-specific determination, and that is what the Department did.

Accordingly, the Department did not err when it considered whether practicable alternatives were available to siting the ME2 pipeline in some EV wetlands in determining whether the project was water-dependent. This, then, begs the question whether the Department made the correct decision based upon the unique facts and circumstances of this case. Answering that question goes beyond the scope of the Council's motion. Once we enter the realm of case-by-case determinations we tend to exit the realm in which summary judgment is appropriate. Here, as in *Center for Coalfield Justice v. DEP*, 2016 EHB 341,

> [t]he issues in this case are both legally and factually complex. They do not appear to be easily resolved by a straightforward reading of the statutes and regulations or the application of existing case law. Many of the key facts are disputed between the parties. In such cases, the Board generally will not grant summary judgment believing that it is best to hold a hearing to allow the full development of the facts before determining the outcome.

Id., 2016 EHB at 355. Among other things, the Council's motion raises a preliminary question which no party directly addresses but which clearly requires our attention; namely, when deciding whether a structure or activity is water-dependent, how do we define the applicable structure or activity? This question may be easy to answer if, say, the structure is a dock or a house, but what about a 300-mile pipeline? The fact that the Department issued 17 different

permits with 17 different Records of Decision for the ME2 project suggests that some segmentation may be appropriate. If the applicable "structure or activity" is the entire pipeline, it is fair to assume that no 300-mile structure could be ever built in Pennsylvania without proximity to or siting within EV wetlands. The larger the project, all else being equal, the greater the likelihood that wetlands cannot be avoided and no practicable alternatives will exist. On the other hand, it may also be fair to assume that small sections of the pipeline could be built without proximity to or siting within EV wetlands. The parties have not provided us with a sufficient basis for resolving this preliminary issue in their summary judgment papers.

Existing Uses

In support of its motion for summary judgment the Council next argues that the Department and Sunoco failed to identify the "existing uses" of the EV wetlands to be affected by the ME2 pipeline, as it says they were required to do as part of the mandatory antidegradation analysis. Therefore, it says that there was no way the Department could have made the necessary follow-up determination that the existing uses would be maintained and protected.

There are several regulations that seem to apply to the permitting of activities in EV wetlands. EV wetlands are described in the regulations as a valuable public natural resource that deserve "special protection," 25 Pa. Code § 105.17, but it is not entirely clear exactly what that means.

Before issuing an encroachment permit in any wetland, the Department must ensure that the functions and values of the wetland will be protected pursuant to 25 Pa. Code Chapters 93 and 105. *See* 25 Pa. Code § 96.3(g); *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772-73. Wetland functions include, but are not limited to, the following:

(i) Serving natural biological functions, including food chain production; general habitat; and nesting, spawning, rearing and resting sites for aquatic or land species.

(ii) Providing areas for study of the environment or as sanctuaries or refuges.

(iii) Maintaining natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, natural water filtration processes, current patterns or other environmental characteristics.

(iv) Shielding other areas from wave action, erosion or storm damage.

(v) Serving as a storage area for storm and flood waters.

(vi) Providing a groundwater discharge area that maintains minimum baseflows.

(vii) Serving as a prime natural recharge area where surface water and groundwater are directly interconnected.

(viii) Preventing pollution.

(ix) Providing recreation.

25 Pa. Code § 105.1. Wetland "values" are not specifically defined, but they appear to refer to the natural, scenic, historic, or esthetic qualities of the environment secured by Article I, Section 27 of the Pennsylvania Constitution. *See, e.g.*, 25 Pa. Code §§ 105.21(a)(4) (criteria for permit issuance), 105.16(a) (environmental, social, and economic balancing); 105.2(4) (purposes of Chapter 105). Wetlands are considered to have exceptional value if they serve as habitat for threatened or endangered species (or are hydrologically connected to or located within ½ mile of such wetlands and maintain the habitat of the threatened or endangered species within those wetlands), are associated with wild trout streams, EV streams, or a wild and scenic river, support a public or private water supply, or are located in certain designated protected areas such as a "natural" or "wild" area. 25 Pa. Code § 105.17. These characteristics are included among the special functions and values of EV wetlands that must be protected pursuant to 25 Pa. Code § 96.3(g).

In addition to the prohibition against unduly interfering with functions and values, a project in an EV wetland may not be permitted if it will cause or contribute to a violation of an applicable water quality standard, 25 Pa. Code § 105.18a(a)(4), cause pollution or diminution of resources sufficient to interfere with their uses, 25 Pa. Code § 105.18a(a)(5), or the cumulative effect of the project and other projects will result in impairment of the Commonwealth's natural resources, 25 Pa. Code § 105.18a(a)(6). Thus, in considering whether to issue a permit, it is not just functions and values that are protected. The existing uses and the level of water quality necessary to protect the existing uses of the wetland must also be maintained and protected. 25 Pa. Code §§ 93.4a, 105.18a. The "existing uses" of a wetland are "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. There are also "designated uses" for waterbodies, which are listed in Chapter 93, but the Department generally does not directly designate the uses of wetlands, as opposed to streams.[1] Instead, the Department "classifies" wetlands as EV (as opposed to "other wetlands"), and that classification generally takes place as part of a final permit or approval action. 25 Pa. Code § 93.4c(a)(1)(i) and (iv); *Smithtown Creek Watershed Ass'n v. DEP*, 2002 EHB 713, 718. The protected water-quality based uses of waters of the Commonwealth, including EV wetlands, that qualify as designated and existing uses are listed at 25 Pa. Code § 93.3. Somewhat confusingly, one of those uses is "exceptional value."

Notwithstanding the need to generally avoid degradation or interference with functions, values, and uses, under some circumstances, substantial interference, even including elimination of functions, values, and uses, can be permitted subject to adequate mitigation or compensation. 25 Pa. Code §§ 105.18a(a)(7), 105.20a.

[1] Wetlands may in effect be designated EV if they are associated with a stream that is designated EV.

It is not entirely clear exactly how the Department is required to apply all of these regulatory provisions in its review of actual permits, and we are not in a position to resolve that question in the context of the Council's summary judgment motion. Among other things, it is not entirely clear to us how to coordinate the obligation to protect (1) functions and values, (2) uses, and (3) water quality as outlined in Chapter 93. The Council accurately points out that the Department is rather imprecise in its use of these terms in its memorandum in opposition to the motion, casually interchanging "wetland functions" with "existing uses." The Department tells us it will explain how all of this works at the hearing on the merits, and we look forward to that explanation. Among other things, just as we need to understand the proper geographical scope of the inquiry regarding water dependency, we need to understand the proper geographical and temporal scope of the inquiry when it comes to analyzing degradation of water quality and interference with uses, functions, and values. Obviously, every structure or activity causes some disruption of the wetland or there would not be a need for a permit. Presumably, the shorter the period of disruption, the less likely there is an impermissible interference with uses, functions, and values. Similarly, one would expect that the smaller the percentage of the total wetland affected, the less likely there is an unpermittable interference. These are factual questions that cannot be decided generically as a matter of law.

It is clear that, regardless of how these various regulations interact, the Department must have an understanding of the wetland involved before it can evaluate the level of protection it deserves. As previously mentioned, the Department makes that assessment for wetlands in the context of the permitting action itself. The Council's basic complaint for purposes of its summary judgment motion is that the Department, in addition to classifying the wetlands as EV, must also identify the actual "existing uses" of each EV wetland to be affected by the pipeline,

and the Department did not do that in this case. The Council is worried, for example, that if a particular wetland was classified as EV because it supports a water supply, Sunoco can now effectively do anything it wants to the wetland so long as the water-supply function is not disrupted.

The Council's worry is unfounded. It will be recalled that Section 93.3 lists "exceptional value" as a protected use. *All* of the wetlands' functions, values, and the EV use must be maintained and protected. Regardless of why a wetland is classified as EV, once it is so qualified, the stringent regulatory protections set forth in 25 Pa. Code § 105.18a(a) kick in. Permitting consistent with those standards will necessarily ensure that the state's other protected uses will also be protected. Therefore, once the wetland is classified as EV, identifying other uses of the wetland which generally result in the application of less stringent water quality standards would add no value. Preserving an EV wetland as an EV wetland ensures the protection of other existing uses. If that is not possible, and adequate mitigation or compensation is not possible, the project cannot be permitted. Of course, whether the necessary level of protection has in fact been afforded in this case goes well beyond the scope of the Council's summary judgment motion.

The Council complains that, at a minimum, the protection afforded by the regulations does not allow the permanent conversion of forested wetlands into nonforested wetlands that the Department has authorized in this case. Again, to the extent the Council asks us to define the outer limits of what is permittable in its motion, we refuse that invitation in the context of a motion for summary judgment.

The Council relatedly complains that the Department failed to fulfill its responsibilities under Article I, Section 27 of the Pennsylvania Constitution by failing to perform an adequate

analysis of the existing uses of the EV wetlands before issuing the permits to Sunoco. Although it is true that the Department has a constitutional duty to fully consider the environmental effects of any proposed action in advance of proceeding, *Center for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Adjudication, Nov. 8, 2017), identifying whether any possible protected uses are also actual existing uses of EV wetlands once they have been characterized as EV would serve no incremental purpose. The EV classification will ensure the maximum protection afforded by law. Whether the other aspects of the Department's pre-action analysis were sufficiently robust is beyond the scope of the Council's motion.

Consistency Letters

The Council argues that Sunoco's permits should be revoked because Sunoco failed to include in its permit application stormwater management plan consistency letters from all municipalities with stormwater management plans, and letters commenting on an analysis of ME2's impact on the floodway delineation and water surface profiles from all municipalities where the project is located within a floodway delineated on a FEMA map. Section 105.13(e)(1)(v) provides that the following letters must be included in a permit application:

> Stormwater management analysis. If a watershed stormwater management plan has been prepared or adopted under the Storm Water Management Act (32 P.S. §§ 680.1-680.17), an analysis of the project's impact on the Stormwater Management Plan and a letter from the county or municipality commenting on the analysis shall be included.

Section 105.13(e)(1)(vi) provides:

> Floodplain management analysis. If the proposed dam, water obstruction or encroachment is located within a floodway delineated on a FEMA map, include an analysis of the project's impact on the floodway delineation and water surface profiles and a letter from the municipality commenting on the analysis.

The Department may waive these requirements in writing in the Record of Decision. 25 Pa. Code § 105.13(k). The Council says that these letters were not provided in every case where they should have been provided, and therefore, Sunoco's permits must be rescinded.

The Council did not back up its factual claim with sufficient citation to the record in its motion and original supporting papers, although it did add some specificity in its reply brief regarding letters that were not supplied. In any event, there is no dispute that at least some letters that should have been supplied were not supplied. Sunoco argues that Section 105.13(e)(1)(v) and (vi) were not intended to give any one of the 86 municipalities and 17 counties crossed by the pipeline absolute veto authority over the project to be effectuated simply by withholding a consistency letter. The Council answers that this problem is recognized and addressed in Section 105.13(k), which allows the Department to waive the requirement if it does so in writing in its Record of Decision, but again, the Department did not do that in every instance in this case.

We are unable to agree with the Council that failure to obtain one or more letters or a waiver automatically precludes issuance of a permit as a matter of law. Where, for instance, a permittee takes all reasonable steps to obtain such letters and the permittee independently demonstrates and the Department finds that the project is in fact consistent with all applicable local stormwater management and floodplain plans, it is unlikely that any further action on our part would be warranted. Even if the Department erred in this regard, it does not necessarily follow that the permit rescission that the Council has demanded is the appropriate remedy. A case-by-case analysis is appropriate; summary judgment is not.[2]

For all of these reasons, we issue the Order that follows.

[2] The Council adds that, even if we are willing to award points for trying, Sunoco's efforts to obtain the letters were in fact inadequate. That argument raises a question of disputed fact not suitable for resolution at this juncture.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 8th day of January, 2018, it is hereby ordered that the Appellants' 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: January 8, 2018

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN FOUST	:	
	:	
v.	:	**EHB Docket No. 2017-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ELK RESOURCES, INC. Permittee	:	**Issued: January 11, 2018**

OPINION AND ORDER ON
MOTION FOR SANCTIONS

By Michelle A. Coleman, Judge

Synopsis

The Board grants in part an unopposed motion for sanctions following a *pro se* appellant's failure to respond to discovery requests, and to respond to an earlier order granting an unopposed motion to compel. However, due to the Department's failure to provide its full discovery requests in its filings, the Board is unable to impose specific sanctions at this time. Accordingly, the appellant's ability to call any witnesses other than himself will be based on the Department's showing that it in fact requested the appellant to identify any potential witnesses during discovery. The appellant's ability to use documentary evidence at the hearing on the merits will be similarly decided on a case-by-case basis at the hearing. The Board declines to dismiss the appeal at this time.

O P I N I O N

Melvin Foust, proceeding *pro se*, has filed an appeal of a letter sent to him by the Department of Environmental Protection (the "Department") dated May 11, 2017. The letter

consists of one substantive paragraph followed by three paragraphs advising Mr. Foust of his appeal rights to the Board. The substantive paragraph is as follows:

> This is to notify you that Elk Resources, Inc.'s request for a Stage I Bond Release was approved on the above-referenced site. We received a letter from you dated March 3, which requested that your property boundary marker be repaired to original condition. The Department does not have authority under its surface mining program over this issue. The property markers are a civil matter between the landowner and the operator. We have notified the operator of your request.

The surface mine at issue is Elk Resources' Solomon Run No. 2 Mine in Richland Township, Cambria County. Mr. Foust's appeal claims that his permanent property markers were displaced by this mining operation, but he does not elaborate on that claim. We are not sure at this point how Mr. Foust's claim may or may not relate to the bond release.

Shortly after Mr. Foust filed his appeal, we issued an order requiring him to supply missing information to perfect his appeal in accordance with our rules at 25 Pa. Code § 1021.51 (regarding commencement, form, and content of a notice of appeal). In response to this order, on June 19, 2017, Mr. Foust supplied proof of service of his appeal on the Department and on Elk Resources.[1] On July 26, 2017, pursuant to Paragraph 5 of our Pre-Hearing Order No. 1, the Department filed a joint status report certifying that the Department and Mr. Foust spoke regarding possible settlement, but no settlement had been reached at that time. This is the last we are aware of Mr. Foust's participation in this appeal.

On September 25, 2017, the Department filed a motion to compel answers to its interrogatories and requests for production of documents sent to Mr. Foust on July 18, 2017, which the Department asserted had gone ignored. With its motion to compel, the Department attached a follow-up letter it sent to Mr. Foust in August that the Department represented had

[1] To date, no counsel has entered an appearance on behalf of Elk Resources, although we continue to serve Elk Resources with copies of all orders issued in this appeal, as we will do with this Opinion and Order.

also been met with no response. Mr. Foust did not file a response to the motion to compel, and we granted the unopposed motion on October 23, giving Mr. Foust until November 10 to serve his answers on the Department.

The Department has now filed a motion for sanctions for what the Department says is Mr. Foust's continued failure to answer the Department's discovery requests even after our order compelling his answers. The Department seeks a sanction dismissing Mr. Foust's appeal, or in the alternative, precluding Mr. Foust from introducing any evidence or calling any witnesses at the eventual hearing on the merits. Mr. Foust's response to the motion for sanctions was due by December 29, 2017. As of the date of this Opinion and Order, Mr. Foust has not filed any response.

In proceedings before the Board, discovery is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Our rules authorize the imposition of sanctions "upon a party for failure to abide by a Board order or Board rule of practice and procedure." 25 Pa. Code § 1021.161. Any such sanctions "may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters)." *Id.* This Board has wide discretion in fashioning appropriate sanctions for discovery violations on a case-by-case basis based on the magnitude of the violations. *Lebo v. DEP*, 2013 EHB 469, 472. To that end, we generally consider (1) the prejudice caused to the opposing party and whether that prejudice can be cured, (2) the defaulting party's willfulness or bad faith, (3) the number of discovery violations, and (4) the potential importance of the

precluded evidence. *Dirian v. DEP*, 2012 EHB 357, 358; *Envtl. & Recycling Servs., Inc. v. DEP*, 2001 EHB 824, 829 (citing *Hein v. Hein*, 717 A.2d 1053, 1056 (Pa. Super. 1998)).

We have at times been presented with similar patterns of conduct where an appellant has not responded to discovery requests, not responded to a motion to compel answers to those discovery requests, not complied with our order directing the appellant to supply answers to the discovery requests, and not responded to the eventual motion for sanctions. *See, e.g., Liddick v. DEP*, EHB Docket No. 2016-051-M (Opinion and Order, Jan. 23, 2017); *Schlafke v. DEP*, 2013 EHB 678; *DEP v. Colombo*, 2012 EHB 370; *DEP v. Klecha*, 2012 EHB 80. Although we have on occasion dismissed an appeal as a sanction under similar circumstances, *see Swistock v. DEP*, 2006 EHB 398, we decline at this juncture to impose this harsh of a sanction.

With that being said, we agree that some sanctions are warranted, but it is difficult for us to appropriately tailor the scope of the sanctions here because the Department has not provided us with full documentation of the discovery requests it served on Mr. Foust. In connection with its motion to compel, the Department only provided the first page of its interrogatories and requests for production of documents along with a cover letter enclosing the discovery requests. The first page of the interrogatories does not get past the proffered definitions of the terms "communication" and "Department," and it does not reflect any actual interrogatories. (DEP Mot. to Compel, Ex. B.) What we have from the first page of the requests for production of documents is similarly brief:

> 1. All DOCUMENTS identified or otherwise set forth in YOUR responses to the Commonwealth of Pennsylvania, Department of Environmental Protection's First Set of Interrogatories to Melvin Foust, not otherwise previously provided.
> 2. All DOCUMENTS YOU used, consulted, read, or relied on to form YOUR […]

(DEP Mot. to Compel, Ex. C.) The only complete request refers to the interrogatories that were not provided.

Without the full discovery requests we do not know what the Department asked, and therefore, what Mr. Foust did not answer. Presumably the Department served standard discovery requests seeking the identity of persons with knowledge of the appeal and/or any witnesses Mr. Foust intends to call, which would be subject to preclusion under Pa.R.C.P. No. 4019(i),[2] but we do not know that for sure. Any sanction for failure to respond to discovery requests must logically follow from the requests themselves and we should not venture to guess what those requests might be. Therefore, we will reserve the imposition of specific sanctions until the Department makes an appropriate showing on a case-by-case basis at the hearing on the merits. This applies both to the ability of Mr. Foust to call witnesses and his ability to use exhibits or documentary evidence in his case-in-chief. If the Department can show that it requested certain information in discovery we will be inclined to circumscribe the hearing accordingly. Of course, Mr. Foust will still be allowed to testify on his own behalf.

In addition, to the extent there is any ambiguity on the burden of proceeding in this appeal under the Board's rules, 25 Pa. Code § 1021.122, we will affirmatively place the burden of proceeding on Mr. Foust. He will be required to file his pre-hearing memorandum first and present his case-in-chief first at the hearing on the merits.

We issue the Order that follows.

[2] Rule 4019(i) provides: "A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MELVIN FOUST	:	
	:	
v.	:	**EHB Docket No. 2017-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ELK RESOURCES, INC. COMPANY, Permittee	:	

O R D E R

AND NOW, this 11th day of January, 2018, it is hereby ordered that the Department's motion for sanctions is **granted in part**. The imposition of specific sanctions will be reserved until an appropriate showing is made by the Department at the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: January 11, 2018

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

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West Lebanon, PA 15783

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	**Issued: January 12, 2018**

OPINION AND ORDER ON
APPELLANTS' MOTION TO EXTEND DISCOVERY PERIOD

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellants' Motion to Extend the Discovery Period is granted. No prejudice will result to either the Department of Environmental Protection or the Permittee by granting a short extension of the original discovery period set forth in the Board's Pre-Hearing Order No. 1.

O P I N I O N

Introduction

This matter involves an appeal filed by Barry and Brenda Miller, challenging a decision by the Department of Environmental Protection (Department) to relieve RoxCoal, Inc. of its responsibility to provide a temporary source of water to the Millers pursuant to 25 Pa. Code § 89.145a(e) of the mining regulations.[1] By letter dated April 19, 2017, the Department notified the Millers that it had conducted an investigation into their claim of water loss and had agreed

[1] 25 Pa. Code § 89.145a(e) requires a mining operator to provide a temporary water supply whenever contamination, diminution or interruption occurs to a water supply located within the area of rebuttable presumption of underground mining activities.

with RoxCoal's rebuttal that its mining activities at the Geronimo Mine did not affect the Millers' water supply. The Millers appealed the Department's decision on May 17, 2017.

The matter now before the Board is a Motion to Extend the Discovery Period filed by the Millers on December 18, 2017. The original deadline for discovery, established by the Board's Pre-Hearing Order No. 1, was November 20, 2017. The motion states that certain new information came to light during a deposition of the Millers on November 20, 2017, and they request a short extension of the discovery period. The Department objects to the extension. The permittee, RoxCoal, does not object to the extension to the extent that the Millers do not seek to direct additional discovery to RoxCoal.

The Department objects on the basis that the Millers have failed to demonstrate good cause for extending the discovery period. The Department points to the fact that the Millers did not conduct any discovery during the original 180-day discovery period and their motion comes 28 days after the discovery period closed. The Department contends that it will suffer injustice if discovery is extended.

As the Department correctly points out, the Board's Rules of Practice and Procedure and prehearing orders provide detailed timeframes for the conduct of discovery and other prehearing matters. However, these timeframes may be adjusted and extended as necessary to ensure that due process is served. Although the Board's Pre-Hearing Order No. 1 provides for an initial discovery period of 180 days, "in the vast majority of cases the discovery period and other deadlines are extended multiple times at the joint request of the parties, including the Pennsylvania Department of Environmental Protection." *Groce v. DEP*, 2005 EHB 880, 887 (citing *City of Titusville v. DEP*, 2004 EHB 467, 469).[2] In fact, it is a rare case where the

[2] At the time of the *Groce* decision, the initial discovery period was 90 days and was subsequently extended to 180 days after extensive discussion by the Board's Procedural Rules Committee.

discovery period is not extended past the initial 180 days. In many cases, the extension is requested by one or more of the parties, including the Department, in order to allow the parties an opportunity to work on a resolution of the appeal without the need for engaging in discovery or other prehearing matters at the same time. As we stated in *Groce*, " it is imperative that the Board balance the competing interests of the parties in order to assure that the issues are resolved expeditiously [while] assuring that adequate time is allotted to prepare for hearing." *Id*. at 886.

According to the Millers, the Motion to Extend the Discovery Period was not filed sooner due to health issues of their counsel, which included hospitalization. Indeed, the Board recently granted the Millers' unopposed motion to extend deadlines for filing responses to motions that are pending in this matter due to the hospitalization of their counsel. *See* Order dated January 4, 2018. We see no prejudice to either the Department or RoxCoal in granting additional time in which to conduct discovery. This appeal was filed on May 17, 2017. The Board's internal operating procedures strive to resolve appeals within two years of the date of filing. Granting a short extension of discovery at this stage of the proceeding is not likely to delay the resolution of this matter. Moreover, as we have held numerous times, "the Board's primary responsibility is to decide cases on the merits." *Goheen v. DEP*, 2003 EHB 92. As we held in *Goheen*:

> [E]xcluding important evidence that would otherwise assist the Board in making the best possible decision on the merits is a serious sanction that has an undesirable side effect: it impinges upon the function of the Board as much as it eliminates an advantage gained by a discovery violation. It should generally be limited to cases where it is truly necessary to restore a level playing field due to an incurable prejudice . . . *See, e.g., DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133.

Id. at 97-98. Although *Goheen* dealt with a motion for sanctions due to a violation of the discovery rules, the same concern applies here where the Department has objected to further discovery. We see no prejudice to either the Department or RoxCoal by allowing a short

extension of the discovery period, especially at this early stage of the appeal. As we have held many times:

> [P]ractice before the Board is not a giant game of 'gotcha' . . .Nor is it a legal minefield where a technical error or misstep will destroy a party's case. We decide cases on their merits after a hearing and after the parties have had ample opportunity to fully brief and argue their respective positions. These due process protections extend to all parties. . . .

Consol Pennsylvania Coal Co. v. DEP, 2011 EHB 571, 576 (citing *Shuey v. DEP & Quality Aggregates*, 2005 EHB 657, 712). *See also, Concilus v. DEP*, 2012 EHB 60, 62 (citing *Consol, supra*). Ensuring due process for all parties includes allowing ample time for discovery.

Therefore, we issue the following Order granting a short extension of the discovery period.

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	

O R D E R

AND NOW, this 12th day of January, 2018, it is ordered as follows: The *discovery period* is extended through **March 14, 2018**.

ENVIRONMENTAL HEARING BOARD

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

DATED: January 12, 2018

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

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

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

For Permittee:
Christopher Buell, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAMUEL LOPEZ	:	
	:	
v.	:	**EHB Docket No. 2017-035-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 22, 2018**

OPINION AND ORDER
DISMISSING APPEAL AS SANCTION

By: Judge Richard P. Mather, Sr.

Synopsis

Under 25 Pa. Code § 1021.61, the Pennsylvania Environmental Hearing Board dismisses Appellant's Appeal as a sanction for failing to comply with Board Orders. Additionally, Appellant's conduct demonstrates a disinterest in prosecuting his appeal and therefore dismissal of this appeal is an appropriate sanction.

O P I N I O N

On May 2, 2017, Samuel Lopez ("Appellant") filed his Notice of Appeal. However, Appellant failed to provide Proof of Service to the Department's Office of Chief Counsel and include a full copy of the Department action being appealed. On May 3, 2017, the Board issued Pre-Hearing Order Number 1 along with an Order directing the Appellant to perfect his Appeal in accordance with 25 Pa. Code § 1021.51 by filing with the Board: (1) A complete copy of the Department action being appealed, and (2) Proof of service that the proper officials at the Department's Office of Chief Counsel were served with the Notice of Appeal. The Appellant ignored this first Order and, in response, the Board issued a Rule to Show Cause, dated June 9, 2017, directing Appellant to show cause by July 10, 2017 why his appeal should not be

dismissed as a sanction for failing to comply with the Board's Orders and the Board's Rules of Practice and Procedure. The Rule to Show Cause also warned the Appellant that "failure to comply as ordered may result in dismissal of the appeal." Appellant did not respond to this, either.

However, because the Appellant is representing himself *pro se*, the Board took a more understanding view of his adherence to our Rules. Following the Appellant's lack of response to either the Board's Orders or Rule to Show Cause, the Board held a telephone conference with the Parties on August 10, 2017 to address the appeal and the Board's expectations for the Appellant. Upon the culmination of the call, the Board issued an order directing the Appellant to file the missing portions of his Notice of Appeal by August 24, 2017. The Appellant filed the outstanding documents on August 28, 2017 and was not sanctioned for his earlier non-compliance with Board Orders.

On October 5, 2017, the Department filed a Motion to Dismiss due to the Appellant's failure to provide a verified statement of inability to pay, pre-pay the Department's assessed civil penalty, or post a bond within 30 days of the Assessment of Civil Penalty as required by 35 P.S. § 4009.1(b). The Appellant did not respond to the Department's Motion and on October 25, 2017, after communicating with all Parties regarding availability, the Board issued another Order scheduling a conference call for October 27, 2017 to explain the Board's procedure to the Appellant and direct him to file a Response to the Department's Motion.

The call was held on October 27, 2017, with the Appellant joining the call approximately half an hour late after the Board's Assistant Counsel made several attempts to reach him. Once concluded, the Board issued an Order giving the Appellant a one week extension, until November 13, 2017, to file a Response to the Department's Motion to Dismiss. On November 6,

2017, the Appellant filed "Appellant's Statement of Financial Ability to Pay" and "Appellant's Response to Department's Motion to Dismiss." The Appellant's Response was one paragraph asking the Board for a fair trial because he was "misinformed by the auction company and the state of Pa surplus department for listing a [sic] item that contained a lot of asbestos." Appellant's Response. The Response did not address the Department's Motion to Dismiss in any direct manner. On November 8, 2017, the Board ordered the Department to reply to the Appellant's two filings on or before November 22, 2017.

On November 21, 2017, the Department filed its Reply to Appellant's Response in which it drew the Board's attention to the Appellant's failure to submit a verified statement as that term is unambiguously defined under Pennsylvania law and Appellant's continued failure to follow established procedural rules and law. Again, given the Appellant's *pro se* status, the Board was inclined to be understanding and attempted to schedule another conference call in the matter to address three things: (1) explaining the need for a verified statement and the form and content of a verified statement; (2) explaining that the Board does not have jurisdiction over Appellant's alleged contractual disputes, only over final Department actions; and (3) scheduling a hearing in this appeal for the spring.

After a significant number of unsuccessful attempts to contact the Appellant by both telephone and email, the Board scheduled a third conference call with the Parties for December 20, 2017. The Board issued an order which was both mailed and emailed to the Appellant, notifying him of the time of the call and the necessary call-in information to access the Board's teleconference system. Despite this, the Appellant did not join the call on December 20th.

Following the call, the Board's Assistant Counsel emailed the Appellant to provide him with the content of the call along with a copy of the Board's Order, issued following the call. The

Order directed the Appellant to file an addendum to his Statement of Financial Ability to Pay [prepay] the civil penalty in this appeal on or before January 12, 2018 and provided him with the proper language to use. The Order also directed the Appellant to submit to the Department copies of his state and federal tax returns for the past three years by January 12, 2018 in response to a request from the Department's counsel. The Appellant emailed the Board's Assistant Counsel on December 22, 2017 stating "ok I will do that," presumably in response to the directives laid out in the Order.

On Tuesday, January 16, 2018, the Department filed a status report with the Board stating that it had not received any tax information from the Appellant. To date, the Appellant has not submitted to the Board an addendum to his Statement of Financial Ability to Pay [prepay] the civil penalty in this appeal containing the necessary verification. For these reasons, the Board dismisses the appeal for failure to comply with Board rules and Orders.

Caselaw and the Board's Rules provide that it may impose sanctions upon a Party for ignoring Board Orders. *Mon View Mining Corp. v. DEP*, 2005 EHB 937 (where Appellant's Appeal was dismissed after it ignored two Orders to Perfect issued by the Board, despite the Board's warnings that the Appellant stood to have its Appeal dismissed). The Rule is clear:

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

25 Pa. Code § 1021.161. Further, the Board has consistently held that where a party has shown a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Slater*, 2016

EHB 381, citing *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862.

In this case, the Appellant has failed to comply with multiple Orders and demonstrated an intent not to proceed with the appeal. As outlined above, the Board has routinely had to chase after Mr. Lopez to get him to participate in scheduled conference calls or to submit information requested by the Board. As this most recent juncture, Mr. Lopez both ignored an Order form the Board scheduling a conference call in this appeal and a subsequent Order directing him to amend his Statement of Financial Ability to Pay [prepay] the civil penalty in this appeal and to submit to the Department his state and federal tax returns. We have been understanding of the Appellant's *pro se* status, to the point of refusing to grant the Department's Motion to Dismiss, filed on October 5, 2017.

At the time of the Department's filing, the Appellant had not submitted prepayment of the civil penalty or acquired a bond, nor had he claimed an inability to prepay or post a bond for the amount of the civil penalty. The Department argued that the Appellant, at that point, had had five months in which to comply with 35 P.S. § 4009.1, 25 Pa. Code § 1021.51(g), and 25 Pa. Code § 1021.54a, which direct that a person wishing to appeal a civil penalty forward the full amount of the penalty to the Board, post a bond, or submit a verified statement of financial inability at the same time he files his appeal with the Board. The Board has expended considerable time and effort to explain Board Rules and procedures on numerous conference calls. To date, the Appellant still has not submitted a verified statement, despite being given exactly the language to use in such a statement, time to submit the statement, and having acknowledged receipt of the Order directing him to take such an action. We think that dismissing the appeal as a sanction is appropriate now.

Although dismissing an appeal is a drastic sanction, the Board has held that it is an appropriate sanction where a party's conduct evinces an intention to no longer continue with the appeal. See, e.g. *L.A.G. Wrecking, Inc. v. DEP*, 2015 EHB 338, 341; *Casey v. DEP*, 2014 EHB 908, 910-11. The Appellant's lack of response to the Board's Orders is a classic example of the failure to properly prosecute the appeal and demonstrates a clear lack of intent to continue with the appeal. *Id*. For this reason, dismissal under these circumstances is appropriate.

Accordingly, this Appeal is dismissed as a sanction pursuant to 25 Pa. Code § 1021.161 and we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAMUEL LOPEZ	:	
	:	
v.	:	**EHB Docket No. 2017-035-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 22nd day of January, 2018, upon consideration that the Appellant failed to comply with the Board's Orders of December 12, 2017 and December 20, 2017, which required the Appellant to participate in a telephone conference and to submit to the Board an addendum to Statement of Financial Ability to Pay [prepay] the civil penalty in this appeal and to submit to the Department his state and federal tax returns, it is hereby ordered that the appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with 25 Pa. Code § 1021.51 and the Board's Orders.

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: January 22, 2018

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

For the Commonwealth of PA, DEP:
Michael A. Braymer, Esquire
Carl D. Ballard, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Samuel Lopez
(*via electronic mail*)

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: January 29, 2018**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal challenging the Department's issuance of a plan approval to a permittee for the construction of a soybean solvent extraction plant. The Appellants have not met their burden of proof with respect to their claims that the plan approval is not protective of public health, that the Department did not conduct an adequate analysis of pollution controls and alternative facility sizes, that the Department erred in concluding that the facility's fugitive emissions are a source of minor significance, or that the benefits of the project do not outweigh its environmental and social costs.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency entrusted with the duty and authority to administer and enforce the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes.

2. Perdue Agribusiness, LLC ("Perdue") is a corporation with an office located in Salisbury, Maryland. (Appellants' Exhibit Number ("App. Ex.") 1; Perdue Exhibit Number ("Perdue Ex.") 1.)

3. On May 5, 2016, the Department issued Air Quality Plan Approval No. 36-05158A to Perdue for the construction of a 1,750 tons per day (tpd) soybean solvent processing and oil extraction facility located in Conoy Township, Lancaster County. The plan approval is the subject of this appeal. (App. Ex. 1; Perdue Ex. 1.)

4. Annette Logan, Patty Longenecker, and Nick Bromer (the "Appellants"), are individuals who reside near Perdue's facility and are concerned about the potential impacts on their health and community from the facility's air emissions. (Notes of Transcript page ("T.") 25-26, 30-31, 36-38.)

5. The Appellants participated in the public comment process for Perdue's plan approval. (T. 24-26, 29-30, 34, 37; Department Exhibit Number ("DEP Ex.") 2 (at 434-36), 6 (at 244-45, 456, 477).)

6. Intervenor Conoy Township is a township of the second class with its municipal offices located at 211 Falmouth Road, Bainbridge, Pennsylvania 17502.

7. Intervenor Lancaster County Solid Waste Management Authority (LCSWMA) is a municipal authority organized pursuant to the Pennsylvania Municipal Authorities Act, 53 Pa.C.S. §§ 5601 – 5623, with offices at 1299 Harrisburg Pike, Lancaster, Pennsylvania. (T. 2621-22; LCSWMA Exhibit Number ("LCSWMA Ex.") 2.)

8. LCSWMA operates a waste-to-energy facility in Conoy Township located on Pennsylvania State Route 441 immediately adjacent to Perdue's facility that will supply excess

steam generated in the combustion process to Perdue for use at the soybean plant pursuant to an agreement executed in June 2016. (T. 2621-25; LCSWMA Ex. 1, 2.)

9. LCSWMA's waste-to-energy facility and Perdue's soybean plant share a common access driveway off Route 441. (App. Ex. 7.)

10. On August 13, 2012, Perdue submitted an application for a plan approval for a soybean facility processing 1,500 tons per day, or 525,000 tons per year. (App. Ex. 8.)

11. Perdue subsequently submitted a revised plan approval application to increase the facility's processing capacity to 1,750 tons per day, or 638,750 tons per year. (App. Ex. 21; DEP Ex. 6 (at 9).)

12. The plant will produce three principal products: soybean oil, soybean meal, and soybean hulls. (T. 1098; Perdue Ex. 4.)

13. There are two basic methods for producing products from raw soybeans—chemical extraction using commercial hexane as a solvent, and mechanical extraction using pressure and heat. (T. 1026-27; Perdue Ex. 10 (at 4).)

14. About 98% of soybean oil and soybean meal produced globally is accomplished using commercial hexane as an extraction solvent. (T. 1027, 1030; Perdue Ex. 7 (at 5), 9 (at 3).)

15. The commercial hexane solvent for Perdue's facility is comprised of no more than 50 percent of the chemical form known as normal hexane, or n-hexane. (T. 1451; App Ex. 1 (at 74); Perdue Ex. 7 (at 5).)

16. N-hexane is federally classified as a hazardous air pollutant. (T. 387, 1451; Perdue Ex. 7 (at 5), 9 (at 3).)

17. The soybean solvent extraction process involves three basic steps: (1) preparing the soybeans for extraction, including cleaning, cracking, de-hulling, heating, and flaking (a

process of flattening the soybean into flakes about 0.3 mm thick); (2) extracting the oil contained within the soybean flakes; and (3) recovering the solvent from the soybean meal and oil. (T. 1099–1113; Perdue Ex. 4, 7 (at 8-14), 9 (at 4-6).)

18. Because soybeans are an agricultural product, they vary by moisture content, size, and amount of foreign material when they arrive at the processing plant, which can impact the efficiency of the solvent extraction process. (T. 1092-93, 1097, 1113-14, 1772, 2179-80; Perdue Ex. 6 (at 12-13), 7 (at 8).)

Minor Significance

19. Under the air quality regulations, no person may permit the emission of a fugitive air contaminant into the outdoor atmosphere unless the emissions are of minor significance with respect to causing air pollution, and the emissions are not preventing or interfering with the attainment or maintenance of an ambient air quality standard. 25 Pa. Code § 123.1(a)(9).

20. The Department interprets 25 Pa. Code § 123.1 to apply to all pollutants. (T. 2377-78, 2383-84.)

21. Perdue's plant will emit hexane into the outdoor atmosphere. (T. 136-37; App. Ex. 1; DEP Ex. 2, 6.)

22. Hexane is a volatile organic compound (VOC). (Perdue Ex. 7 (at 5).)

23. Of the 208.05 tons of VOC emissions to be emitted at the facility over the course of a year, 118.95 tons are classified as fugitive emissions. (T. 387, 561; App. Ex. 1 (at 20).)

24. Fugitive emissions are emissions that do not pass through a stack, chimney, vent, or other functionally equivalent opening. 25 Pa. Code § 121.1.

25. Fugitive emissions from the facility come from equipment leaks from valves and flanges, hexane that remains bound in the meal and is eventually released, hexane retained in the

soybean oil, and a small amount of hexane in wastewater generated by the facility. (T. 567-68, 2238-39; App Ex. 15 (at 337); DEP Ex. 2 (at 5).)

26. In 2001, EPA promulgated a rule for National Emissions Standards for Hazardous Air Pollutants (NESHAP) in the soybean solvent extraction industry that required the application of maximum available control technology (MACT). *See* 40 CFR Part 63 Subpart GGGG. (T. 2143-45; Perdue Ex. 7 (at 19-23), 9 (at 16).)

27. Pursuant to this rule, EPA designed a model plant for the soybean solvent extraction industry implementing the MACT standards at a production capacity of 2,200 tons per day. This is referred to as the model MACT plant. (T. 2143-47; Perdue Ex. 7 (at 21).)

28. The allocation of fugitive emissions to various sources at Perdue's plant was derived by using EPA's model MACT plant to calculate and apportion the approximately 119 tons per year of total fugitive emissions among the sources based on the relative production capacity. (T. 2221-24, 2439-42; Perdue Ex. 1 (at 00526).)

29. The fugitive emissions are apportioned as follows in tons per year: 81.63 tons from crude meal, 26.87 tons from crude oil, 16.53 tons from equipment leaks, and 0.10 tons from wastewater. (App. Ex. 15 (at 337); Perdue Ex. 1 (at 00526).)

30. The hexane that remains bound in the meal after the extraction process is assumed to be released on site as a conservative estimate of VOC emissions even though it is in reality released gradually during later stages of grinding, sifting, storage, and transport offsite. (T. 1408-10, 1827, 1884-85, 2141-42, 2145, 2194, 2318, 2477, 2479; Perdue Ex. 7, 8, 120.)

31. The Department determined that the fugitive emissions, including the fugitive VOC emissions, remaining after appropriate control at the Perdue facility were of minor significance. (T. 385-86, 562, 572, 2327-43, 2380-84, 2472-77; DEP Ex. 6 (attachments at 38).)

32. As a component of the Department's minor significance determination, the Department conducted a health risk assessment for the Perdue facility to ensure that the emissions remaining after appropriate pollution controls did not present an undue risk to the public. (T. 144-45, 185-86; DEP Ex. 2 (attachments at 321-31, attachments at 705), 6 (attachments at 98-112).)

33. The Department also required Perdue to submit its own health risk assessment for hexane as part of the plan approval application process. (Perdue Ex. 1 (at 00675-790).)

34. Commercial hexane exposure can affect the nasal passages and n-hexane exposure can affect the central nervous system, and cause headaches, dizziness, and nausea. (T. 190-91, 193; DEP Ex. 2 (attachments at 323), 6 (attachments at 100).)

35. Hexane is considered to have a low degree of toxicity by inhalation. (T. 1882-83; Perdue Ex. 9 (Attachment B at 2, 5), 118 (at 11).)

36. The Department's risk assessment analyzed three risk scenarios: (1) acute risk for the maximum exposed individual (MEI), (2) chronic risk for the MEI, and (3) chronic risk for the maximum exposed worker (MEW). (T. 195; DEP Ex. 2 (attachments at 322), 6 (attachments at 99), 13.)

37. The Appellants only challenge the acute risk assessment for the maximum exposed individual. (App. Brief at 67.) (*See also* T. 847.)

38. The MEI is determined by using five years of meteorological data and factoring the highest hour of emissions at the point of maximum concentration and imagining a person standing at that point at that time for the entire hour. (T. 195-96, 891-92, 2557.)

39. The health risk assessments express risk in terms of a hazard quotient (HQ), which is a ratio derived by dividing the maximum modeled exposure concentration of a compound by the reference concentration of that compound. (T. 199, 202.)

40. A reference concentration is an estimate of continuous inhalation exposure for a given duration to the human population that is likely to be without an appreciable risk of adverse health effects over a lifetime. (T. 1879; DEP Ex. 2 (attachments at 323), 6 (attachments at 100, 105-06).)

41. The Department has determined that a hazard quotient of 1.0 or less indicates that a compound poses no appreciable threat of an adverse effect on the public on a continuous exposure basis. (T. 202-03, 1887-88; DEP Ex. 2 (attachments at 323), 6 (attachments at 100), 13; Perdue Ex. 8, 118 (at 19).)

42. The Department does not view a hazard quotient of 1.0 as a bright-line number but rather a target level, in part because the Department has built in conservative measures into its risk assessment over and above EPA benchmarks. (T. 203-04, 2544-46, 2548-49.)

43. For the acute MEI scenario at the facility, the hazard quotient was 0.852 for n-hexane and 0.511 for commercial hexane. (T. 205; DEP Ex. 2 (attachments at 327, 331), 13 (at 7).)

44. Both the Perdue and Department risk assessments demonstrate that maximum impacts from facility-wide hexane emissions are within acceptable health limits. (T. 1871, 2562; DEP Ex. 2 (attachments at 321-31), 6 (attachments at 98-112), 13, 20; Perdue Ex. 1 (at 00675-790), 8.)

45. Malfunctions are somewhat unpredictable, so for a new facility there are no reliable numbers to plug into a model for the duration or emissions levels for such events. (T.

147-48, 1890-92, 1900-01, 2356-57.) Instead, risk assessment modeling is deliberately conservative to account for issues of process variability, upset conditions, and startup, shutdown, and malfunction events. (T. 1886-92, 1898-99, 2141-42, 2355-57.)

46. The risk assessments conducted by Perdue and the Department conservatively assumed that all VOC losses are emitted at the facility, even though approximately 81 tons per year are bound in the soybean meal and gradually emitted later. (T. 1408-10, 1827, 1884-85, 2141-42, 2145, 2194, 2318, 2477, 2479.)

47. The Department consulted with the Pennsylvania Department of Health, which confirmed that the projected hexane emissions from the facility are not expected to cause adverse health effects to nearby residents. (T. 2559-61; DEP Ex. 13, 21.)

48. No unacceptable health risks have been shown to exist from the use of hexane at the Perdue facility. (T. 1871, 1898, 1909, 2562; DEP Ex. 2 (attachments at 321-31), 6 (attachments at 98-112), 13, 20; Perdue Ex. 8, 118.)

49. Pennsylvania is part of a federally designated ozone transport region, and therefore, the entire state is designated as moderate non-attainment for ozone. 42 U.S.C. § 7511c. (T. 92-93, 549; DEP Ex. 19.)

50. Ozone most commonly forms through a complex photochemical reaction between nitrogen oxide (NOx) and VOCs during exposure to sunlight. (T. 86, 549-50, 1903, 2347; DEP Ex. 19 (at 1).)

51. N-hexane has low photochemical reactivity, such that its role in ozone formation is likewise low. (T. 1904-05, 2190-92, Perdue Ex. 7 (at 59), 8 (at 8-9), 118 (at 31).)

52. The fugitive hexane emissions from Perdue's facility are not expected to interfere with the attainment of the ozone National Ambient Air Quality Standards (NAAQS). (T. 1871, 1903-10, 1923, 2190-91, 2348-51, 2569; Perdue Ex. 7 (at 55-59), 8 (at 3, 8-9), 118.)

LAER / BAT

53. Because Lancaster County is designated as being in moderate non-attainment for ozone, the Perdue facility is subject to the Department's requirements for permitting of major VOC sources, including the implementation of the lowest achievable emission rate (LAER) under 25 Pa. Code § 127.205(1). (T. 92-93.)

54. The Department concluded that LAER satisfied the requirements under 25 Pa. Code §§ 127.1 and 127.12(a)(5) that best available technology (BAT) be implemented for VOC emissions at the facility. 25 Pa. Code § 127.205(7). (T. 126-27, 523-24, 1419-20, 1446-47, 2333-36, 2412-15, 2450-52, 2500-01; DEP Ex. 2 (at 4-5), 6 (at 16, 18-24, attachments at 16, attachments at 30); Perdue Ex. 6 (at 6).)

55. The Department's VOC LAER determination consisted of three components: (1) emission limits on each discrete stack; (2) a facility-wide solvent loss ratio (SLR); and (3) a leak detection and repair (LDAR) program for fugitive emissions. (T. 141, 2168-73; DEP Ex. 2 (at 4-5), 6 (at 18-24); Perdue Ex. 120 (at 12-13).)

56. The plan approval establishes both a pounds-per-hour limitation and a tons-per-year limitation on Perdue's four stacks for VOC emissions, which include the mineral oil scrubber vent, the meal dryer stack, the meal cooler stack, and the meal processing building. (T. 2169, 2415-16; App. Ex. 1 (at 73-74); DEP Ex. 2 (at 4-5).)

57. The plan approval imposes a facility-wide limit for VOC emissions of 208.05 tons per year on a twelve-month rolling basis including the startup and shakedown period. (T. 387; App. Ex. 1 (at 14, 73).)

58. In order to establish the individual stack limits, the Department again utilized EPA's model MACT plant to allocate the balance of the 208.05 tons of VOC emissions, less the fugitive emissions, by the appropriate percentages based on the model. (T. 141-43, 207, 2211, 2221-24, 2226-31, 2416, 2439; App. Ex. 15 (at 337); DEP Ex. 2 (attachments at 778-79); Perdue Ex. 1 (at 00526).)

59. The annual VOC stack limits in tons per year are as follows: 7.24 tons from the mineral oil scrubber vent (or main vent), 50.42 tons from the dryer cyclone stack, 25.21 tons from the cooler cyclone stack, and 6.20 tons from the meal processing building. (App. Ex. 1 (at 73-74), 15 (at 337); DEP Ex. 2 (at 4-5).)

60. Perdue's facility must also abide by an overarching SLR limit that is typically required for soybean oil extraction facilities and has been employed under the MACT standard. (T. 1421, 1504-05, 2186-87; App. Ex. 1 (at 73); DEP Ex. 6 (attachments at 54); Perdue Ex. 1 (at 00301-11).)

61. An SLR is an emission limitation that is expressed in terms of gallons of hexane lost per ton of soybeans crushed on a 12-month rolling average basis. 40 CFR § 63.2853. (T. 150-51, 1421-22, 2437; App. Ex. 1 (at 73); Perdue Ex. 1 (at 00306), 6 (at 9).)

62. EPA's model MACT standard sets forth an SLR of 0.2 for soybean oilseed extraction facilities. 40 CFR § 63.2840. (T. 2120, 2144; Perdue Ex. 1 (at 00306), 120.)

63. Perdue initially proposed an SLR of 0.165 in August 2012, but then revised the application in June 2013 to reflect an SLR of 0.140. (T. 501-06, 2162; App. Ex. 18; DEP Ex. 6 (at 32); Perdue Ex. 1 (at 00296-526).)

64. The Department determined through an independent analysis of other soybean oil extraction facilities across the country that an SLR limit of 0.125 gallons per ton of soybeans was appropriate for LAER. (T. 501-06, 2315-17, 2449-50; App. Ex. 1 (at 73), 18; DEP Ex. 2 (at 4-5), 6 (at 22-23).)

65. The 0.125 gallons per ton limit is based on a statistical analysis of the three best performing comparably sized facilities in the nation, and allows for various fluctuations that occur during the oilseed extraction process, such as bean quality and ambient conditions. (T. 501, 505, 2179-80, 2316-17; App. Ex. 18; DEP Ex. 6 (at 22-23); Perdue Ex. 6 (at 12-13).)

66. Although the MACT standard allows an oilseed extraction facility to exclude startup, shutdown, and malfunction events in calculating an SLR, the Department determined that Perdue must include these events in calculating performance under the SLR for its facility. (T. 212, 1449-50, 1834-35, 2163, 2169-70, 2317-18.)

67. The plan approval imposes a progressively more stringent solvent loss ratio depending on the amount of soybeans processed at the facility, with an SLR ceiling of 0.125 gallons per ton that ratchets downward to 0.115 gallons per ton at Perdue's maximum production limit of 638,750 tons per year. (T. 1423-24; Perdue Ex. 50.)

68. The production-based solvent loss ratio emission limitation of between 0.115 gallons per ton to 0.125 gallons per ton is more stringent than any emissions limitation imposed on any other plant in the country in the vegetable oil manufacturing source category. (T. 1447-48, 1449-50, 2169-70; Perdue Ex. 6 (at 15), 7 (at 2, 12).)

69. The Department determined that equipment leaks are 7.59% or 16.53 tons of Perdue's 208.05 ton limit on VOCs for the solvent extraction operations. (T. 2439-40; DEP Ex. 2 (at 5).)

70. The VOC emissions from equipment leaks are minimized through monitoring and work practice standards outlined in an LDAR program, which is a proactive and reactive set of measures to detect and fix leaks and other issues quickly in order to minimize the amount of emissions. (T. 156-57, 2173-77, 2324-25; DEP Ex. 2 (at 5), 6 (at 24).)

71. Perdue is required to develop and implement an LDAR program consistent with the LDAR requirements in the plan approval. (T. 122-23, 372-73; App. Ex. 1 (at 76-78).)

72. The LDAR requirements in the plan approval include a minimum of four fixed flammable gas monitors in the extraction process, a 100 parts per million (ppm) threshold for triggering an audible alarm from the monitors, the monthly use of optical gas imaging monitoring, and a first response to repair leaks must be made within five days, with a leak greater than 25,000 ppm to be repaired within one day. (T. 156-57, 381-382, 1147-50; App. Ex. 1 (at 76-78); Perdue Ex 6. (at 15).)

73. Perdue personnel will also routinely check facility equipment for audio, visual, and olfactory indications of solvent leaks. (T. 381, 1147.)

Regenerative Thermal Oxidizer

74. The Department interprets the LAER analysis to require the consideration of "technology transfer" in determining what satisfies LAER. (T. 132-33, 2310-11, 2312-14; DEP Ex. 26.)

75. If pollution control technology can feasibly be transferred from one type of source to another, then for purposes of determining LAER the Department will consider both types of sources to be in the same class or category of source. (T. 132-33, 2310-11; DEP Ex. 26.)

76. The underlying principle behind technology transfer is to promote the use of effective technologies in appropriate new contexts rather than merely relying on the traditional controls imposed in a given industry. The goal is to ratchet down emissions over time. (T. 665-66, 2313-14, 2316-20.)

77. As part of the technology transfer analysis, the Department and Perdue evaluated the possibility of installing a regenerative thermal oxidizer (RTO) as a pollution control device to further reduce VOC emissions from the facility. (T. 525, 1372-74, 1378, 2426-29; DEP Ex. 2 (attachments at 1-12), 6 (at 19-20); Perdue Ex. 6 (at 10-14).)

78. An RTO is an incinerator with a set of refractory beds that store heat and destroy VOCs through a combustion process. (DEP Ex. 6 (at 19).)

79. Currently, there are no RTOs in operation at any soybean solvent extraction plant in the United States. (T. 240; DEP Ex. 6 (at 20).)

80. If an RTO were installed at the Perdue facility, a maximum of two-thirds of the hexane emissions would be destroyed and approximately one third of the hexane emissions would still be emitted. (T. 2048-52, 2129-30, 2327-28; Perdue Ex. 120 (at 1).)

81. If installed, an RTO would control emissions from the mineral oil scrubber, the dryer vent, and the cooler vent for approximately 56 tons per year of further VOC reduction. (T. 2129-32; Perdue Ex. 120 (at 1).)

82. The Department and Perdue ultimately concluded that an RTO was not a feasible technology in a solvent extraction plant due to its cost and the safety risks associated with the

device as applied to this type of facility. (T. 160, 2285-86, 2419-20, 2426-29, 2458; DEP Ex. 2 (attachments at 745-46, attachments at 755-61), 6 (at 19-20, attachments at 55-57); Perdue Ex. 6 (at 10-14).)

83. Much of the safety risk associated with an RTO in this industrial application stems from the inherent volatility of hexane, which has an autoignition temperature between 437 and 500 degrees Fahrenheit. (T. 1768, 1785, 1799, 1953.)

84. In contrast, the autoignition temperatures of ethanol and natural gas are in the 800 to 900 degree range. (T. 1954.)

85. The autoignition temperature is the temperature at which a substance will catch fire without the need of a spark or flame, which is also known as spontaneous combustion. (T. 1799, 1953.)

86. A spark can cause a substance to ignite even if the temperature is below the autoignition temperature if the fuel to oxygen ratio is between a substance's lower explosive limit and upper explosive limit. (T. 1799.)

87. The range between the lower explosive limit and the upper explosive limit is the concentration of vapors in air where a substance will sustain and continue combustion. (T. 1770, 1951-52.)

88. Hexane has a lower explosive limit of 1.2% and an upper explosive limit of 7.7%. (T. 1798, 1951; Perdue Ex. 9 (at 4).)

89. An upset condition could allow for a fuel to oxygen ratio in the explosive range to make its way to the RTO. (T. 1813, 2732.)

90. Ductwork that would need to be attached to an RTO would provide a direct path of a hexane vapor stream from the dryer/cooler to a source of ignition without being allowed to dissipate. (T. 1786, 1790, 1813-15, 1957-58, 1966.)

91. Although an RTO does not have an open flame, it still provides an ignition source because of typical operating temperatures around 1,500 degrees Fahrenheit. (T. 315, 1767-68, 1966.)

92. It is undisputed that RTOs have caused fires or exploded in other industries. (T. 290, 1961-64; Perdue Ex. 34.)

93. One of the reasons for explosions in other industries is due to an RTO's inability to handle rapid changes in organic levels. (T. 1965.)

94. Soybean processing is prone to fluctuations in organic levels because of the variability in the raw soybeans entering the facility in terms of the grade of soybeans, moisture content, and presence of foreign material. (T. 1092-93, 1772, 1967, 2179-81, 2684; Perdue Ex. 40.)

95. Sticky soybean meal particles would be expected to accumulate within process equipment and ductwork and require periodic removal and cleaning. (T. 353, 1129-30, 1436, 1516, 1814-15, 1987-90, 1994-97, 2286; Perdue Ex. 6 (at 12).)

96. It is undisputed that RTOs pose a risk of a runaway fire event if not properly cleaned and maintained. (T. 350-54.)

97. The soybean industry has never considered solutions to any of the safety problems presented by an RTO, or even defined all of the potential issues with using an RTO. (T. 1948, 1968-69, 1987, 2005, 2028-30, 2159, 2283-84; Perdue Ex. 120 (at 15).)

98. An effective risk management strategy for implementing an RTO at a solvent extraction facility would need to evaluate time periods of operational data in three-to-five second increments to determine if there is a problem and how to react since that is how quickly hexane would move from the dryer/cooler to the RTO via the ductwork. (T. 1956-57, 1977.)

99. The use of an RTO at Perdue's facility currently presents an unreasonable safety risk due to the likelihood that the device would catch fire or explode when employed at a soybean solvent extraction plant. (T. 160-62, 290, 350-54, 1768, 1785-86, 1787-88, 1799, 1813-14, 1825-26, 1835-36, 1856-57, 1858-59, 1947-48, 1953-55, 1957-59, 1961-64, 1966-67, 2000-01, 2028-31, 2032-33, 2158-59, 2183-86, 2267-68, 2428, 2694-99, 2732; DEP Ex. 2, 6; Perdue Ex. 6, 7, 9, 34.)

Alternatives Analysis

100. An alternatives analysis is required under the regulations for the construction of a new major VOC-emitting facility located in an ozone non-attainment area or in an ozone transport region. (T. 92-93.)

101. Under the regulations, the alternatives analysis must examine alternative sites, sizes, production processes, and environmental control techniques, and demonstrate that the benefits of a proposed facility significantly outweigh the environmental and social costs. 25 Pa. Code § 127.205(5).

102. Perdue initially submitted an alternatives analysis on August 13, 2012, and revised that analysis on June 4, 2013. (DEP Ex. 6 (at 27); Perdue Ex. 1 (at 00534-52).)

103. In addition to the Conoy Township site for the proposed facility, Perdue presented to the Department an evaluation of three alternative sites in York County: P.H. Glatfelter in

Spring Grove; Magnesita Refractories in York; and West Manchester Corporate Center in York. (T. 421; DEP Ex. 6 (at 28); Perdue Ex. 1 (at 00535-36).)

104. Perdue sized its facility based on yearly soybean production data from the immediate and surrounding counties. (T. 401-02; DEP Ex. 6 (at 27-28); Perdue Ex. 1 (at 00540).)

105. In assessing whether the particular size of the Perdue Facility was appropriate, the Department compared it to the size of EPA's model MACT soybean extraction plant, and to other soybean extraction facilities across the nation. (T. 98-99, 181-82, 424-25, 2368-69.)

106. The capacity for the Perdue facility of 1,750 tons per day is smaller than the model MACT plant, which has a capacity of 2,200 tons per day, or other plants across the country that have capacities of up to 6,000 tons per day. (T. 181-82, 424-25, 431, 2368-69.)

107. The available non-hexane extraction processes are for smaller sized operations that process less than one million bushels of soybeans per year, as well as intermediate sized operations that process six to twelve million bushels per year. (T. 426, 431-32, 474-75, 2421, 2483-84, 2487-89; DEP Ex. 36 (at 2-4); Perdue Ex. 1 (at 00543-44).)

108. A mechanical pressing plant would need a much larger facility footprint to process the same capacity of soybeans proposed by Perdue. (T. 424-25, 431-32, 2487-89; Perdue Ex. 1 (at 00346, 00543-44).)

109. The primary environmental and social impacts associated with the facility are truck traffic, noise, visual impact, and air emissions. (T. 447, 2203-04; DEP Ex. 2 (at 2-4), 6 (at 29-30); Perdue Ex. 1 (at 00547-51).)

110. Concerns over noise, property value, and visual impact are mitigated through Perdue's compliance with local zoning requirements, including setback requirements, maximum

permitted structural heights, and landscaping such as berms and trees to provide blockage from the highway and neighboring sites. (T. 1160-61, 2600-01; DEP Ex. 2 (at 2-4), 6 (at 29-30).)

111. Perdue's assessment of the amount of truck traffic was based in part on Perdue's soybean solvent extraction facility in Salisbury, Maryland. (T. 46, 455-56, 2069-70; App. Ex. 7; Perdue Ex. 1 (at 00791-864.).)

112. Perdue used a year's worth of data from the Salisbury facility because it reasoned the numbers would be very similar to the facility in Conoy Township since the Salisbury facility has a capacity of 1,600 tons per day. (T. 2069-71, 2101-04.).

113. Perdue's traffic impact assessment assumed worst-case conditions, such as the facility operating only five days a week instead of seven (which means more traffic on a given day), applying the peak seasonal data from the October harvest across the entire year, and assuming that each truck entering the facility did not carry out any finished product when it left. (T. 2070-71, 2108, 2114; Perdue Ex. 1 (at 00791-864.).)

114. Perdue prepared an update to its traffic impact assessment in November 2014 to evaluate any impacts of the increase throughput capacity from 1,500 tons to 1,750 tons per day. (T. 2075; Perdue Ex. 1 (at 00866).)

115. Perdue did not conduct a completely new traffic impact assessment because the initial assessment already conservatively evaluated peak rates. (T. 2075-78.)

116. The increased throughput that was analyzed in 2014 did not increase projected traffic to the extent that LCSWMA's current highway occupancy permit needed to be changed. (T. 2077-78.)

117. The traffic generated by the Perdue facility will not unreasonably impact the operation of the LCSWMA driveway or the flow of traffic along Route 441. (T. 2079-80, 2087; Perdue Ex. 1 (at 00791-864, 866.).)

118. The Board conducted a view of the premises on July 10, 2017. (T. 2752.)

DISCUSSION

Annette Logan, Patty Longenecker, and Nick Bromer (the "Appellants") have appealed the Department's issuance of Plan Approval No. 36-05158A to Perdue Agribusiness, LLC ("Perdue") for the construction of a soybean oil solvent extraction plant in Conoy Township, Lancaster County. The Appellants live near the Perdue facility and have concerns regarding the effects of the facility's emissions on their health. Conoy Township and the Lancaster County Solid Waste Management Authority (LCSWMA) have intervened in this appeal in support of the issuance of the plan approval. The Township's intervention was granted over the objection of the Appellants, *Logan v. DEP*, 2016 EHB 531, and LCSWMA's intervention was unopposed.

Perdue's facility produces soybean meal for consumption in the agriculture industry and crude soybean oil for further refinement by vegetable oil processing facilities. Soybeans are heated, crushed, flaked, and washed in a solvent to extract the oil from the beans. The solvent is commercial hexane comprised of no more than 50 percent n-hexane, which is a certain chemical form of hexane that is federally classified as a hazardous air pollutant. Some of the hexane remains bound in the produced soybean meal and is gradually released over time. Hexane not captured by pollution control technology is emitted from the facility as a volatile organic compound (VOC) in the amount of approximately 208 tons per year. Of this amount, approximately 119 tons are fugitive and are not released from one of the four emissions stacks—

the meal dryer stack, the meal cooler stack, the mineral oil scrubber vent, or the meal processing building.

The Environmental Hearing Board's role in the administrative process is to determine whether the Department's action was lawful, reasonable, and supported by our *de novo* review of the facts. *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Adjudication, Nov. 8, 2017); *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017). In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution. *Ctr. for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). As third-parties appealing the issuance of the plan approval, the Appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(3); *Groce v. DEP*, 2006 EHB 856, 894.

The Appellants have mounted various attacks on the plan approval, alleging that it is not protective of public health, that the Department did not conduct an adequate analysis of pollution controls and alternative facility sizes, that the Department erred in concluding that the facility's fugitive emissions are a source of minor significance, and that the benefits of the project do not outweigh its costs. For the reasons set forth below, the Appellants have not met their burden of proof on these issues.

Minor Significance

The Appellants argue that the Department improperly determined that the approximately 119 tons per year of fugitive VOC emissions (in the form of hexane) remaining after air pollution controls are of minor significance. These fugitive emissions come from crude meal and oil

handling and storage, equipment leaks, and wastewater. Under 25 Pa. Code § 123.1(a) (prohibition of certain fugitive emissions), no person may emit fugitive air contaminants into the outdoor atmosphere from any source other than nine defined exceptions. The final exception, which is at issue here, applies to any source or class of sources

> for which the operator has obtained a determination from the Department that fugitive emissions from the source, after appropriate control, meet the following requirements:
>
> (i) The emissions are of minor significance with respect to causing air pollution.
>
> (ii) The emissions are not preventing or interfering with the attainment or maintenance of an ambient air quality standard.

25 Pa. Code § 123.1(a)(9). The regulation then goes on to outline the procedure by which one obtains a Department determination of whether a source is of minor significance and does not interfere with the attainment of an air quality standard:

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

25 Pa. Code § 123.1(b).

The Appellants complain that Perdue's plan approval application failed to identify Section 123.1 as an applicable requirement to its soybean oil extraction facility, and therefore, according to the Appellants, Perdue could not have made the requisite demonstration under Section 123.1(b). They also point out that the only place where the Department explicitly memorialized a determination that the fugitive hexane emissions were a source of minor

significance not interfering with an air quality standard is in a response to public comments (Comment #348) attached to the Department's February 24, 2015 review memorandum:

> See the responses to Comments 71 (relative increase in ozone precursors), 72 (hexane risk assessment), 80 (BAT/LAER evaluation), 96 (ozone monitoring data) and 208 (hexane emission points). Based on these factors, DEP has determined that the hexane emissions in this case remaining after the imposition of BAT and LAER controls, including facility SLR, mineral oil scrubbers, hexane stack limits and LDAR, are of minor significance with regard to causing air pollution, and will not, on their own merits, be preventing or interfering with the attainment or maintenance of an ambient air quality standard.

(DEP Ex. 6 (attachments at 38).)[1] This determination is not contained in the plan approval itself. (T. 2508-09.)

Perdue first argues that Section 123.1 only applies to fugitive particulates, such as dust, and it does not apply to the fugitive VOCs that are at issue here. Perdue then argues in the alternative that, if Section 123.1 does apply, the Department properly concluded that the fugitive VOC emissions were of minor significance and will not interfere with the attainment or maintenance of an air quality standard. The Department, of course, argues in support of its determination, both in form and in substance. The Department acknowledges that Section 123.1 has historically been concerned with particulate emissions, but asserts that it was appropriate for the Department to apply the regulation to the VOC emissions in this case. Krishnan Ramamurthy, the Director of the Department's Bureau of Air Quality, who has been with the

[1] The Department did, however, include in the text of its 2015 review memorandum a minor significance determination for *particulate* fugitive emissions, which the Appellants have not challenged:

> DEP has determined that the particulate fugitive emissions from the facility are expected to be of minor significance with respect to causing air pollution, due to the fact that the BAT analysis was conducted, and due to the projected $PM_{2.5}$ emissions being small (3.39) in comparison to the major source threshold for $PM_{2.5}$, and due to the plan approval limiting visible fugitive emissions to specific opacity levels based on BAT requirements. Total $PM_{2.5}$ emissions (both fugitive and stack together, including roadway emissions) projected for the soybean oil extraction operations is 8.05 tpy.

(DEP Ex. 6 (at 16).)

Department since 1980, testified that, while Section 123.1 was drafted to address particulates, it literally applies to other pollutants, and that there is no question for him that it applies to VOCs. (T. 2377-78, 2383-84.)

The Department also offered testimony that the historical genesis of Section 123.1(b) was intended to apply to existing sources operating prior to July 1, 1972 that would then request a determination from the Department. (T. 2338-40, 2344-45, 2377-79, 2503-06.) William Weaver, the Department's Air Quality Program Manager for the Southcentral Region, testified that he has never actually seen an application for a request of a determination of minor significance in his more than 20 years in the Department's air quality program. (T. 2503-04, 2506.) Mr. Weaver acknowledged that the Department did not receive a specific request from Perdue for a minor significance determination; the Department made the determination on its own. (T. 2508.) Mr. Ramamurthy testified that the regulation mentions an operating permit instead of a plan approval because a plan approval involves an evaluation of control technology during the proposal to construct a new source.

Indeed, both Weaver and Ramamurthy testified that, for new facilities, the control of fugitive emissions and the determination of minor significance is carried out through the BAT/LAER (best available technology/lowest achievable emission rate) analysis in the Department's evaluation of the plan approval application. (T. 2342-43, 2379-85, 2504-05.) All of the information that the operator of a source is required to supply under Section 123.1(b)—proposed control measures, emissions characteristics and their quantity, and an analysis of the impact on ambient air quality—is provided as a matter of course in the plan approval process. Mr. Ramamurthy explained, and we agree, that the Department is mandated to examine every avenue possible to minimize emissions through the implementation of all reasonable control

measures. Therefore, in the Department's view, any residual fugitive emissions that cannot be captured or controlled after the implementation of LAER or BAT are likely not significant enough to raise a concern with the Department.

We do not need to decide whether Section 123.1 applies to fugitive VOCs because, even if we assume that it applies here, the Appellants have still failed to convince us that the Department acted improperly in concluding that the fugitive emissions would not interfere with the attainment of an air quality standard, that the emissions constituted a source of minor significance, or that the Department otherwise erred in issuing the plan approval in its current form because of the fugitive emissions. The Appellants never dispute that the plan approval application contained the information required by Section 123.1(b) necessary to make a determination. We do not need to elevate form over substance, which is a large portion of the Appellants' argument on this point. Although there may not have been a discrete request and determination as contemplated by the regulation, we are left with no doubt following the hearing that a proper analysis was undertaken and the proper conclusion was reached

The Appellants' argument that more than 100 annual tons of a pollutant should not be considered emissions of minor significance has some intuitive appeal because it seems substantial at first blush. However, the argument falters when stood up against the evidence adduced by Perdue and the Department about the actual impact of those emissions. Importantly, the Appellants never demonstrate that the fugitive emissions to be generated by Perdue's facility will interfere with the attainment of an ambient air quality standard, or that the emissions will otherwise negatively affect the environment or public health. The only ambient air quality standard discussed by the parties pertains to ozone. Ozone most commonly forms through a complex photochemical reaction between nitrogen oxide (NOx) and VOCs during exposure to

sunlight. (T. 2347.) The entire state of Pennsylvania is in a federally-designated ozone transport region and has been designated as being in moderate non-attainment with the National Ambient Air Quality Standard (NAAQS) for ozone. The Appellants offered no evidence to support the suggestion that the emissions from Perdue's facility, even including the stack emissions, would interfere with the attainment of any standard related to ozone. In contrast, the Department offered credible testimony that the addition of Perdue's VOCs to the atmosphere is unlikely to contribute to additional ozone formation. (T. 2347-51.) Notably, Perdue's fugitive emissions constitute approximately two percent of ozone precursor emissions from other nearby sources. (T. 390, 576, 2475-77, 2515; DEP Ex. 16.)

The Department's minor significance determination was based on a number of different factors, but the most important among these was the outcome of the health risk assessments performed by the Department and Perdue, which was a foundational component of the Department's decision to issue Perdue's plan approval. (T. 391, 576, 2517.) As part of Perdue's plan approval application, the Department required it to conduct a health risk assessment, which is an analysis of a facility's impact on public health.[2] Although Perdue prepared and submitted a chronic and acute risk assessment to the Department, the Department conducted its own independent risk assessment for the chronic and acute scenarios to assess the effects on the public from the facility's hexane emissions. The Department analyzed the acute risk for the maximum exposed individual (MEI), the chronic risk for the MEI, and chronic risk for the maximum exposed worker (MEW). The Appellants do not challenge the chronic risk assessment, only the acute scenario for the MEI. (*See* App. Brief at 67.) In fact, the Appellants'

[2] Mr. Ramamurthy testified that there is no specific regulatory provision for the Department to require an applicant to conduct a risk assessment prior to the issuance of a plan approval; the Department simply requires it for certain sources in its discretion as an exercise of its regulatory authority. (T. 144-45, 2391.)

primary expert testified that he believed the chronic risk assessment was well done and protective of public health. (T. 847.)

The acute risk assessment calculates the potential effect on the conceptual maximum exposed individual, which is the person who could potentially be exposed to the greatest concentration of air emissions from beyond the fence line of the facility. Under the acute scenario, the MEI is determined by using five years of meteorological data and factoring the highest hour of emissions at the point of maximum concentration and imagining a person standing at that point at that particular time. (T. 195-96, 891-92.) The MEI is assumed to be standing at the point of maximum emissions being directed by the appropriate meteorological conditions for the entire hour. (T. 2557; DEP Ex. 2 (attachments at 322).) The results of a risk assessment are quantified by a hazard quotient, which is a metric used to measure a certain pollutant compound's effect on public health. The Department considers a hazard quotient below 1.0 to indicate that the compound does not pose an undue risk to public health on a continuous exposure basis. Under the acute assessment, the Department determined that the hazard quotient for n-hexane was 0.852 and 0.511 for commercial hexane. (T. 205-06; DEP Ex. 2 (attachments at 327, 331).)

The Appellants do not devote a significant amount of time to discussing the acute risk assessment in their post-hearing brief, but their main contention seems to be that the Department based its risk assessment on the assumption of steady-state operations at Perdue's facility, and the Department did not properly account for any variability in the solvent extraction process. The Appellants' primary expert, Fred Osman, P.E., opined that, if the acute risk assessment for n-hexane had been done correctly, then the hazard quotient number would exceed 1.0, which he contends should be a bright-line threshold that should not be exceeded. (T. 617-18, 867.) Mr.

Osman opined that the risk assessment should have properly accounted for things like startup and shutdown emissions, upset conditions, malfunctions, and catastrophic events, where emissions are typically much higher, as well as the variability in the extraction process in terms of differences in the soybeans themselves. Regarding the startup and shutdown emissions, which are projected to be 10 tons, Mr. Osman criticized the risk assessment for diluting those emissions by spreading them out across the facility's operation for the entire year instead of accounting for the fact that they would be concentrated into a more confined period. Mr. Osman speculated that the 10 tons of emissions could potentially be emitted in a single hour, although he conceded that he did not think that would be likely to happen. (T. 887.) However, what crucially undermines Mr. Osman's opinions, aside from his limited qualifications regarding risk assessments, is that he did not run his own calculations for the startup/shutdown emissions to substantiate his claim that the 1.0 hazard quotient would be exceeded. (T. 881.) Instead, he simply maintained that the Department should have evaluated it more specifically. In the end, the Appellants presented no concrete evidence to support their argument that startup and shutdown events would significantly change the results of the risk assessment or otherwise render the facility a danger to public health.

The Department argues that there is such a significant amount of conservatism built into its risk assessment that it is confident that, even if the Appellants' unsubstantiated fears did come true, there would be no undue adverse health effects on the public. Craig Evans, the Chief of the Department's Air Toxics and Risk Assessment Section, who ran the Department's risk assessment analysis, credibly opined that there would be no appreciable adverse acute effects even if there were upset conditions or malfunctions because of the extensive level of conservatism built into his assessment, which greatly exceeds EPA's acute benchmarks. (T.

2538-40, 2551.) He testified that the inputs he used were approximately 500 times tighter than those used by the EPA, and that even if upset conditions increased emissions by a factor of ten, he would still have no concern due to the conservatism of his analysis. Mr. Ramamurthy concurred that there was such inherent conservatism built into the Department's risk assessment that if there were to be a malfunction event he was very confident it would not create any potential harm to the public. (T. 146, 2357.)

We find the Department's argument to be persuasive. The Department's risk assessment was carefully done and provides a significant margin of safety even if an upset condition did result in an unanticipated release of emissions. Further, even if the Department did re-run its risk assessment as the Appellants suggest, and even if it did result in a hazard quotient in excess of 1.0, the evidence suggests that this would not necessarily mean that Perdue's facility is unduly harmful to public health or that the plan approval was issued in error. Mr. Evans opined that a hazard quotient of 1.0 was not a bright-line whereby anything below it was automatically acceptable and anything above it was necessarily harmful to the public. Instead, Evans opined that a hazard quotient was a starting point for risk management decisions. (T. 2545, 2565-66.) Perdue's risk assessor, Stanley Hayes, who has been an air quality consultant for 40 years, credibly concurred in this opinion. (T. 1886-88.) Perdue's own risk assessment also found that there were no appreciable risks to the public health from the operation of the facility. (Perdue Ex. 1 (at 00675-790), 8.)

We cannot conclude that the Department acted unreasonably by not specifically including projected malfunctions, including catastrophic events, in its risk assessment over and above the highly conservative assumptions already incorporated into its analysis. As with startups and shutdowns, the Appellants have failed to persuade us that the Department's risk assessment has

an inadequate margin of safety to account for the impact of malfunction events. Risk assessments are to be based on fair projections and cannot be based on pure, unsubstantiated speculation regarding undefined "malfunctions." Speaking more generally, it must be recalled that the minor significance determination relates to fugitive emissions, yet the Department assessed the risk of the total emissions from the plant, including projected stack emissions. In fact, *no* risk assessment was regulatorily required before the Department issued the plan approval. There must be a limit to the assessment process. Evaluating the risk of every conceivable event no matter how far-fetched is not warranted.

LAER

Under the New Source Review regulations, Perdue must comply with lowest achievable emission rate (LAER) requirements. 25 Pa. Code § 127.205(1). LAER is defined as:

> (i) The rate of emissions based on the following, whichever is more stringent:
>
> (A) The most stringent emission limitation which is contained in the implementation plan of a state for the class or category of source unless the owner or operator of the proposed source demonstrates that the limitations are not achievable.
>
> (B) The most stringent emission limitation which is achieved in practice by the class or category of source.
>
> (ii) The application of the term may not allow a new or proposed modified source to emit a pollutant in excess of the amount allowable under an applicable new source standard of performance.

25 Pa. Code § 121.1. The result of the Department's LAER determination consisted of imposing an overall facility-wide VOC emissions limitation of approximately 208 tpy, a limit on fugitive emissions, and limits on individual emissions units. The Department also imposed a solvent loss ratio of 0.125 gallons per ton including startup, shutdown, and malfunction emissions, which decreases to 0.115 as Perdue approaches its maximum production capacity of 638,750 tons per year. A solvent loss ratio (SLR) is a measure of the amount of hexane losses in terms of gallons

of hexane solvent per ton of soybeans processed on a 12-month rolling basis. Therefore, Perdue must capture all but 0.125 gallons of hexane solvent used when processing each ton of soybeans at the facility. The SLR measurement is outlined by the EPA for vegetable oil processors under the maximum available control technology (MACT) standards. *See* 40 CFR § 63.2840. Perdue is also required to develop a stringent plan for Leak Detection and Repair (LDAR) consistent with the conditions of its plan approval to satisfy LAER.

As the primary thrust of their LAER argument, the Appellants maintain that Perdue and the Department should have more extensively considered whether a pollution control technology known as a regenerative thermal oxidizer (RTO) was able to be implemented at the facility to further reduce hexane emissions. An RTO is an incinerator with a set of refractory beds that store heat and destroy VOCs through a combustion process. Currently, no soybean plant in the United States uses an RTO for pollution control. However, the Department interprets the LAER analysis as requiring it to look at pollution control technologies employed in other industries to assess whether those technologies can be feasibly transferred into the industrial application under review. (DEP Ex. 26.) Part of the feasibility consideration must include whether a given technology can be safely implemented.

The Appellants make some telling concessions in their brief. They acknowledge that their only expert to specifically testify on the subject, James Nester, was not particularly suited to opine on whether an RTO can be safely installed in a soybean processing facility.[3] The Appellants tell us in their brief that Mr. Nester, who was one of three vendors Perdue contacted to provide proposals for RTO equipment during the plan approval process, developed proposals

[3] Fred Osman, who is not an expert in RTOs, also testified on their applicability to solvent extraction facilities. Mr. Osman's main critique was that an RTO was not properly evaluated in the application. (T. 595, 920.) However, he would not go so far as to say that an RTO definitely should have been required as a pollution control device in Perdue's plan approval. (T. 673.)

that "were basically budgetary proposals, not engineering designs" on the feasibility of implementing an RTO. (App. Brief at 80.) The Appellants' request for relief on the issue is also revealing: "Appellants request the LAER determination as it applies to add-on air pollution control be remanded to the Department for a more thorough involvement from the RTO industry in conjunction with safety experts such as [Perdue expert] Mr. Corwin to determine whether an RTO can be safely operated in a solvent extraction environment." (*Id.*) The Appellants do not really explain why a remand is necessary to conduct further analysis. We have on occasion remanded a matter back to the Department to conduct a proper analysis, *see, e.g., Berks Cnty. v. DEP*, 2012 EHB 404; *Crum Creek Neighbors v. DEP*, 2009 EHB 548, but here, the Appellants had ample opportunity during eleven days of hearing to show us why an RTO can be safely operated in a soybean plant and they failed to do so. The Appellants had every chance to bring in experts who could testify to that issue and yet they did not.

Instead, what we have from the hearing is a chorus of witnesses who testified that there are significant safety issues that make the prospect of installing an RTO in a soybean solvent extraction facility extremely risky. Chief among these witnesses is Donald Corwin, P.E., who has more than 40 years of experience with combustion and air pollution control systems and conducts forensic evaluations of incineration and combustion equipment when it has caught fire or exploded. Mr. Corwin presented compelling testimony that there exist numerous safety concerns that counsel against installing an RTO in a soybean solvent extraction plant, at least until all appropriate process conditions that could cause a problem have been defined. (T. 1947-48.) Mr. Corwin expressed warranted concern over the extremely flammable nature of hexane, which has inherent risk even without the installation of an RTO. Hexane has a very low autoignition temperature of 437-490 degrees Fahrenheit, which, by comparison, is significantly

lower than the autoignition temperatures of ethanol (upper 800 degrees) and natural gas (over 900 degrees). The lower the autoignition temperature, which is the point at which a substance spontaneously combusts, the less energy is needed from a spark to ignite the material. (T. 1954-55.) An RTO serves as a source of ignition even without a spark due to its exceedance of the autoignition temperature during its normal operation, which is typically around 1,500 degrees Fahrenheit. (T. 315, 1767-68, 1966.)

We place considerable stock in Mr. Corwin's opinion given his expertise and his candid testimony. He testified that his initial reaction was an RTO would surely work as applied to the soybean solvent extraction industry, but later changed his mind after looking into the particulars of a soybean solvent extraction operation. He persuasively testified that many potential avenues for problems have not been fully evaluated. (T. 1947-48, 1987.) For example, he stated that a very large amount of hexane would be in close proximity to the RTO, and with such a small amount of hexane needed to start a fire, no one has even considered how to determine if one is approaching a dangerous condition. (T. 1957-59.) Mr. Corwin credibly estimated that one would only have three to four seconds to determine if there was a problem, react to the problem, and then execute a maneuver to act on and neutralize the problem. (T. 1975-77.) Mr. Corwin also presented photographs of RTOs that have exploded in other industrial applications. (Perdue Ex. 34.) The Appellants' expert, James Nester, did not dispute that RTOs have exploded or caused fires. (T. 290, 350-54.)

Mr. Corwin's safety concerns were echoed by other experts during the proceeding. David Smith, P.E., who has worked in the solvent extraction industry since 1979, testified on the standards set for solvent extraction plants by the National Fire Protection Association (NFPA)

under NFPA 36.[4] (Perdue Ex. 52.) He testified that the standard is geared toward ensuring safety and preventing any explosions within a solvent extraction facility. To this end, solvent extraction facilities are required to perform six air changes within the facility per hour so that any accumulated hexane is dissipated quickly and does not serve as fuel for a source of ignition. (T. 1763-64, 1771.) There is also a required 100-foot buffer to be maintained from the extraction process area to any sources of ignition so that any released hexane has an opportunity to dissipate below the lower explosive limit before coming into contact with a potential ignition source. (T. 1770, 1784.) These measures exist even without the addition of an RTO to the process. Mr. Smith credibly testified that adding an RTO to Perdue's facility would unreasonably increase the existing level of risk at the facility and present an unsafe condition. (T. 1813-14, 1835-36, 1858-59.) He stated that by ducting the facility's dryer/cooler to the RTO there would be a solid conduit from the extraction process to an ignition source, and that it is not hard to imagine a situation where hexane vapors within the explosive range migrate to the RTO. (T. 1786-88, 1813-14.)

Charles Zukor, who has more than 30 years of environmental consulting experience and who developed the EPA MACT for solvent extraction plants, also expressed concern. He testified that there are serious issues with coming up with an engineering design on the fly for using an add-on VOC emission control device for the first time in the soybean industry. (T. 2183-86.) Mr. Zukor credibly opined that the lack of prior design experience within the industry could result in a catastrophic failure.

The significant safety risk associated with an RTO as applied to this industry needs to be balanced against the potential emissions reduction from the device. Mr. Zukor testified that the

[4] Although Mr. Smith acknowledged that he did not have experience with RTOs (T. 1756), he has significant experience in soybean solvent extraction plants and understands the existing risks inherent within plants generating large quantities of hexane.

postulated emissions reductions from an RTO assume that the plant will be operating at the maximum allowable emissions rate and do not account for the variability in facility operations. If the facility were to operate at these conditions, the RTO, controlling VOCs from the main vent, the dryer vent, and the cooler vent, would at an absolute maximum reduce emissions from 82.87 tons to approximately 27 tons. (T. 2127, 2130-32.) Although a reduction of nearly 56 tons per year of VOCs is not an insignificant amount, it does not justify the significant risks associated with the equipment that have not been accounted for. In practice, the emissions reduction would likely be less.

We dealt with a similar situation in *Groce v. DEP*, 2006 EHB 856, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007), where the Board was asked to evaluate whether a pollution control technology called selective catalytic reduction could be implemented into a circulating fluidized bed combustor that was processing waste coal under a LAER analysis. At the time of the adjudication, no circulating fluidized bed combustor in the United States used selective catalytic reduction, which, the third-party appellants in that matter claimed, would further control NOx emissions from the waste coal power plant.

As we noted in *Groce*, as the party bearing the burden of proof, third-party appellants must convince us that a novel pollution control device is "a viable and workable technology at present" in the proposed application. *Groce* at 914-15. In *Groce*, we credited the testimony of the permittee's well-qualified expert that the implementation of selective catalytic reduction technology in circulating fluidized bed combustors burning waste coal could create unpredictable chemical reactions involving arsenic that could potentially poison the catalyst. The appellants' expert was unable to convince us that the technology was safe and technically feasible in the proposed application. It is the same here with the RTO.

The parties spend some time debating the economics of installing an RTO at the facility; however, like in *Groce*, the cost of an RTO does not even need to enter our analysis because the safety issues present serious difficulties that the Appellants have not overcome in demonstrating that an RTO is feasible and can operate at a solvent extraction plant without exploding, or, as Mr. Corwin euphemistically termed it, rapidly disassembling. *See Groce* at 914 ("these costs are irrelevant to our analysis since we do not believe [selective catalytic reduction] technology should be required at the Wellington Facility because of the many technical problems set forth by Mr. Campbell"). Establishing that a certain technology can be implemented safely without undue risk to those operating the facility and to the public is a hurdle that must be cleared before even reaching a cost analysis under LAER.[5]

Although it is conceivable that perhaps someday an RTO could be successfully implemented in a soybean extraction plant, we have not been convinced at this point that an RTO can be safely implemented at Perdue's facility. The Appellants, who bear the burden of proof in this case, have not made the necessary demonstration.

Having determined that the Department did not err in ultimately rejecting an RTO as an add-on pollution control device, we also conclude that the rest of the Department's LAER determination was reasonable and in accordance with the law. The SLR of 0.125 sliding down to 0.115 is the most stringent of any plant in the country, and it is significantly more restrictive than the 0.20 SLR developed for EPA's model MACT plant. Perdue initially proposed an SLR of 0.165 before moving it down to 0.140 in its revised application. The Department then researched the top three performing solvent extraction plants in the country that were comparable to Perdue

[5] There are also issues regarding the nature of processing soybeans that may render an RTO technically unfeasible (i.e. moisture content, protein content, and adhesiveness generally resulting in the need to clean the RTO frequently while still endeavoring to maintain a steady-state process). Once again, because of the safety issues we do not need to go into an analysis of these matters.

and required an SLR ceiling limit of 0.125 under its LAER determination despite some amount of pushback from Perdue. (T. 501-06; App. Ex. 18.) Perdue's SLR must also uniquely include startup, shutdown, and malfunction emissions, which are excluded under the MACT standard.

The LDAR program, while in and of itself does not reduce emissions, nevertheless allows problems and process abnormalities to be detected and corrected sooner than may otherwise occur with less frequent monitoring. (T. 2173-77.) To this end, any equipment leaks detected above 100 parts per million (ppm) will trigger an audible alarm at the facility. (App. Ex. 1 (at 76-77).) Mr. Zukor testified that the leak definition in Perdue's plan approval is very low for any industry. (T. 2167.)

LAER is a technology-forcing standard, *Groce*, 2006 EHB at 914, and the evidence shows that the Department's plan approval forces Perdue to implement measures that exceed current standards for soybean solvent extraction facilities across the country. We find that the plan approval satisfies LAER. We are left with no doubt that the Department has clearly fulfilled its responsibility to ensure that this facility must comply with the lowest achievable emission rate.[6]

[6] The Appellants argue in a paragraph in their reply brief that David Jordan, P.E., one of Perdue's air quality experts who provided testimony on the LAER analysis, among other topics, is not licensed to practice engineering in the state of Pennsylvania, and therefore, his testimony should be given little weight. The Board has no role in policing the practice of engineering in the state of Pennsylvania. Regarding the Appellants' argument that, in our role of weighing the credibility and persuasiveness of expert testimony, we should not lend great weight to Mr. Jordan because of his lack of Pennsylvania licensure, there is no requirement in Pennsylvania that an expert witness in engineering be a licensed engineer in the state of Pennsylvania to offer competent testimony. *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 924 (Pa. 1974) (recognizing that the standard for expert witness testimony is liberal and "an engineer need not be registered as such in order to testify as an expert if his education and experience so qualify him"); *Lance v. Luzerne County Mfrs. Ass'n*, 77 A.2d 386 (Pa. 1950). *See also* Pa.R.E. 702 (expert must possess knowledge beyond that of a layperson, the knowledge must assist the trier of fact in understanding evidence or an issue of fact, and the expert's methodology must be generally accepted in the field). Instead, our assessment of expert testimony depends upon the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data. *Pine Creek Valley Watershed Ass'n, Inc. v. DEP*, 2011 EHB 761, 780 (citing *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa.

BAT

A plan approval applicant must show that the emissions from a new source will be the minimum attainable through the use of best available technology (BAT). 35 P.S. § 4006.6(c); 25 Pa. Code §§ 127.1 and 127.12(a)(5); *Snyder v. DEP*, 2015 EHB 857, 862-63. The Appellants argue first that there should have been a separate BAT analysis for VOCs at the facility, and second, that the Department should have done a facility-wide BAT analysis on the plant.

As to the first point, we are left to wonder what the Appellants think a separate BAT analysis should have looked like or what the point of such an exercise would have been. Under 25 Pa. Code § 127.205(7), the Department may determine that BAT is equivalent to best available control technology (BACT) or LAER. Here, the Department performed an extensive LAER analysis, which is designed to result in the most stringent level of pollution control required under the federally mandated regulations. The Department reasonably determined that BAT was the equivalent of LAER in this case. (Finding of Fact No. 54.) As discussed extensively above, the LAER analysis resulted in the facility's VOC emissions being minimized to the maximum degree possible, which is exactly what BAT requires. 25 Pa. Code § 127.1.

As to the Appellants' second point—that there should have been a facility-wide BAT analysis—we are again left scratching our heads because the Department *did* do a facility-wide analysis here. That analysis resulted in a technology-forcing, industry leading SLR. Under Pennsylvania law, the Department retains the discretion to evaluate BAT as it applies to an entire facility and not just a particular piece of equipment, *Snyder, supra*, and that is exactly what the Department did in this case. To the extent the Appellants argue that the outcome of a BAT

Cmwlth. 2007)). We have no doubt that Mr. Jordan is adequately qualified to offer opinions in this matter after more than 40 years in the air pollution field, and having worked with several soybean solvent extraction facilities. The weight we give to his testimony is not diminished by him not possessing an engineering licensure from Pennsylvania. Since we find the Appellants' point has no merit, we will deny the Department's motion to strike this portion of the Appellants' reply brief.

analysis should have required the use of mechanical processing in lieu of solvent extraction, we agree with the Department's conclusion that the implementation of BAT at this particular facility did not demand that it be configured as something other than a solvent extraction plant. To the extent the Appellants complain that there should have been more specific, enforceable fugitive emissions limits for the four fugitive sources making up the total emissions, the Department's imposition of a facility-wide SLR makes perfect sense to us given the type of facility involved, and this is precisely the sort of choice that the Department may make in its reasoned discretion. *Snyder, supra*.

Alternatives and Cost-Benefits Analysis

As a new facility emitting more than 50 tons per year of VOCs in an ozone transport region, Perdue's facility is subject to the New Source Review regulations. 25 Pa. Code § 127.201. Under 25 Pa. Code § 127.205, in order for a plan approval to be issued, the applicant must engage in an analysis of various alternatives for the proposed facility while also demonstrating that the benefits of the facility significantly outweigh its environmental and social costs:

> 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).[7]

[7] The Appellants have not questioned whether the cost-benefits analysis required under 25 Pa. Code § 127.205(5) is consistent with our Supreme Court's decision in *Pa. Environmental Defense Foundation v.*

In terms of the regulatory cost-benefits analysis, the Appellants concoct a litany of hypothetical harms that they believe the Department should have considered. For instance, during the cross-examination of Brian Wetzel, the main author of the plan approval, the Appellants suggested that the Department should have evaluated the hypothetical scenario of Pennsylvania farmers growing a greater quantity of soybeans at the expense of other crops, i.e. corn, which the Appellants postulated could in turn result in a feed shortage for livestock farmers. (T. 437-38.) Similarly, the Department did not evaluate, as the Appellants suggest they should have, any impact on livestock animals consuming soybean meal that may still contain some amount of bound hexane at the time of consumption. (T. 478.) First, the Appellants did not produce any evidence to substantiate these attenuated parade of horribles scenarios. Second, the type of analysis that the Appellants seek to have the Department undertake is significantly removed from the Department's role of ensuring that the air emissions from this facility are controlled to the maximum extent possible, that it operates in accordance with the law, and that it does not pose a threat to human health or the environment. Although Section 205(5) tasks the Department with assessing the environmental and social costs of a proposed project, we do not believe that such an assessment should devolve into an asymptotic evaluation of any and all conceivable social impacts of a facility, particularly when those impacts are not obvious and the Department does not receive any public comments on the issues. (T. 584-85.) *Cf. Borough of St. Clair v. DEP*, 2014 EHB 76, 91-95 (Department does not have resources or expertise to conduct analysis under 25 Pa. Code § 271.127 to determine whether financing scheme for a proposed landfill is a good business decision; "analysis would take the Department far afield of its core mission of protecting the environment."), *aff'd,* No. 1026 C.D. 2016, 2017 Commw. Unpub.

Commonwealth, 161 A.3d 911 (Pa. 2017), regarding Article I, Section 27 of the Pennsylvania Constitution.

LEXIS 481 (Pa. Cmwlth. Jul. 7, 2017). As Mr. Wetzel pointedly observed, the list of tangential costs and benefits can be almost endless—a trucking company expanding its business, someone sitting a few more minutes in traffic, a farmer being saved time from having to transport soybeans out of state, etc., etc. (T. 481.)

The main issue on which the Appellants provided testimony concerns the anticipated truck traffic from the facility. Tellingly, the Appellants' expert, Fred Osman, testified that he believed everything else pertaining to the facility other than traffic is manageable and he did not disagree with the site selection for the facility. (T. 900, 906.)

We are having some difficulty accepting that truck traffic studies should play anything other than a minor part in the Department's review of an air quality plan approval such as the one at issue here, but be that as it may, Perdue's facility is located in Conoy Township on State Route 441, a two-lane road that is classified by PennDOT as a designated truck route with a road adequate to service 102-inch wide trailers of 48-feet and 50-feet in length. (T. 2078-79; Perdue Ex. 66.) The Perdue facility will share the driveway maintained by the Lancaster County Solid Waste Management Authority (LCSWMA). The Appellants complain that Perdue did not fully update its traffic impact assessment after Perdue had proposed to increase the daily amount of soybeans processed from 1,500 tons to 1,750 tons. Perdue's initial traffic impact assessment was completed in 2012 and derived its numbers from the assumption that the facility would process 1,500 tons of soybeans per day. (App. Ex. 7.) In 2014, Perdue's traffic consultant drafted a one-page memorandum updating the analysis based on the increased tonnage. (App. Ex. 20.) The higher tonnage was projected to increase total daily truck trips from 598 to 842 (421 trucks entering the facility and 421 trucks leaving). The Appellants complain that, despite that increase,

Perdue did not revise its assessment in terms of the level of service on Route 441 during peak hours, the auxiliary turn lane analysis, and the queue analysis.

The primary critique that was offered by the Appellants' traffic expert, Eric Stump, P.E., is that Perdue did not analyze the anticipated trip generation by utilizing three to five comparative sites as recommended by the Institute for Transportation Engineers. Instead, Perdue utilized actual trip generation numbers derived from its soybean plant in Salisbury, Maryland. Mr. Stump opined that the Salisbury site could be an outlier or it may be influenced by certain unique variables that could change the trip characteristics for the site. (T. 61-63.) He said it is always good to have more than one data point when performing a traffic assessment.

While we do not necessarily disagree with Mr. Stump that it is generally a good idea to have additional sites serving as data points in a projection for anticipated traffic at a new facility, the Appellants did not present any evidence that the number of trips being used from Perdue's Salisbury, Maryland facility were, for instance, far too low, or that Perdue's projected trip numbers were otherwise flawed. The Appellants did not present traffic data from any other soybean extraction facilities to support their argument or show that Perdue's projections were off in any way, and the Appellants did not prepare their own traffic impact assessment.

Perdue provided an entire year's worth of data from its Salisbury plant to its transportation planning consultant. John Schick, Perdue's expert witness and one of the people who developed the traffic impact assessment for the site, credibly opined that, given the unique application of the facility and the comparable level of production at the Salisbury plant (1,600 tons per day), he felt confident that the Salisbury plant would operate very similarly to the Conoy plant in terms of truck traffic and that the data from Salisbury was of good quality. (T. 2069-70, 2071, 2101-04.) Mr. Schick also credibly testified that the increase in tonnage from 1,500 to

1,750 did not change the ultimate conclusion of his analysis that the LCSWMA driveway and Route 441 could handle the traffic associated with the facility. Mr. Schick testified that he focused primarily on the effect of the increased truck trips on peak hour traffic and concluded that only 28 additional total trips (14 vehicles in one direction) would result from the increased tonnage during the peak travel period. (T. 2075-76, 2108.)

Perdue's traffic consultant's analysis also assumed worst-case conditions. (T. 2070, 2114.) Mr. Schick took the year's worth of data from the Salisbury facility and, for purposes of projecting trips from the Conoy facility, assumed that the Conoy facility would only be in operation five days per week instead of seven days, meaning more assumed traffic on a given day. He also applied the peak seasonal data from the October soybean harvest across the entire year. He further assumed that each truck entering the facility was a sole-purpose trip, meaning, for instance, a truck carrying soybeans when it entered the facility would not be carrying any finished meal upon exit.[8] The Appellants did not demonstrate, even with the increased tonnage from 1,500 to 1,750 tons, that traffic associated with the facility would cause an unreasonable delay or so impede the flow of traffic in the vicinity of the facility that it renders the Department's issuance of the plan approval unreasonable or contrary to law.

In terms of the alternatives analysis, the Appellants say in their brief that they are not challenging the Department's analysis of alternative sites or production processes, only sizes. (App. Brief at 75.) However, in this case there is a certain amount of overlap in the consideration of alternative sizes and production processes for the facility, primarily in terms of whether the Department should have required Perdue to construct a mechanical press soybean extraction plant in lieu of a solvent extraction plant.

[8] Adam Zel, the plant manager for the Conoy Township facility, testified that approximately 25 percent of the trucks delivering soybeans to the facility will then leave with finished soybean meal. (T. 1249.)

The Appellants criticize the Department for not detailing an analysis of alternative sizes of the facility in its plan approval review memorandum.[9] Presumably, the Appellants desire to have the Department and Perdue evaluate the possibility of having a smaller, not larger, facility. This ties into the Appellants' contention that Perdue and the Department should have more thoroughly evaluated the possibility of a mechanical press plant, which are typically small plants with dramatically less capacity. Brian Wetzel testified on behalf of the Department that several factors were evaluated in determining whether an alternative size would be appropriate. He stated that the solvent loss ratio of 0.125 that the Department required of the facility was a driving factor for the facility as a whole and it in turn influenced the size of the facility, prompting Perdue to increase its capacity from 1,500 to 1,750 tons per day to meet the SLR. (T. 425.) He testified that the evaluation of the mechanical pressing process also inherently influenced the alternative size analysis. (T. 424-26, 2462.) Mechanical processing does not involve any hexane, and instead uses large presses to physically expel the oil from the meal. (T. 442, 578-79.) Although there would be no hexane emissions, mechanical pressing was rejected by Perdue in part because it produces a different type and quality of soybean product for a different market and does not generate the same amount of oil. (T. 578-79.) Tim Kemper, who has worked in the solvent extraction and seed preparation industry for 35 years, confirmed that mechanical presses generate soybean meal with a different protein content than solvent extraction methods, with dairy cattle preferring meal produced by mechanical press and poultry preferring meal produced by solvent extraction. (T. 2690-92, 2708.) The Department ultimately accepted Perdue's view that mechanical processing was untenable because of its energy-intensive nature, the generally smaller capacity of mechanical facilities, and the difference in the

[9] William Weaver testified that the Department considered alternative sizes even though it was not explicitly spelled out in its review memo. (T. 2487-88.)

output product containing a lower protein content than the product generated by a solvent extraction facility. (T. 474-75, 477.) We also heard persuasive testimony that a mechanical pressing plant would require a prohibitively large number of pressing machines in order to obtain the same level of production. (T. 2487-88; Perdue Ex. 1 (at 00345-46, 00543-44).)

Krishnan Ramamurthy testified that the underlying principle of the alternatives analysis is to reduce a facility's emissions footprint to as low as practicable given the individual circumstances and objectives of the proposed project; the size consideration being merely one factor in the overall analysis of a project. (T. 98-100.) We agree. Mr. Ramamurthy also testified that the alternatives analysis is a case-by-case determination, and that in this instance, the Department's size analysis was influenced by the fact that EPA had developed a model facility for purposes of the MACT requirement. (T. 99.) EPA's model MACT facility is sized at 2,200 tons per day, 450 tons greater than the Perdue facility. (T. 2143-44.) In the Department's view, the fundamental question in terms of the size of a facility is whether the applicant has adequately justified the proposed size as to why it has been selected.[10] (T. 105-06.)

Mr. Wetzel testified that he performed some research into the soybean market to verify Perdue's statements as to why it selected the facility size that it did, and in terms of the responsibilities of an air quality engineer reviewing plan approval applications, we believe that is sufficient. As Mr. Wetzel admitted during his testimony, he is not an expert in performing a cost analysis for a facility's business model (T. 435), nor do we believe that the Department should be taking deep dives into the business markets for each facility that proposes to operate in the Commonwealth. *See Borough of St. Clair, supra*. The Department analyzed alternative sizes

[10] There is some uncertainty as to how the Department interprets the "size" of a facility. Mr. Ramamurthy testified that the alternative size analysis relates to the capacity of a proposed project (T. 97-98), while Mr. Wetzel testified that it could mean the production capacity of a facility or it could mean the overall footprint of a facility (T. 476-77). Regardless, we discern no error in the Department's analysis.

from an environmental and public health perspective, and it reasonably concluded that Perdue need not alter the size of the facility. Given the Department's determination in its risk assessment that the facility, after the implementation of controls, did not pose any risk to the public, and the fact that Perdue's facility is considerably smaller than EPA's model MACT plant, Perdue's chosen facility size is appropriate.

Article I, Section 27

The Appellants' argument on Article I, Section 27 consists of two paragraphs in its post-hearing brief and essentially boils down to a contention that, because the Department's approval of Perdue's plan approval was allegedly contrary to the Air Pollution Control Act and its regulations, the Department's action necessarily violated the Constitution.[11] In this regard, the Appellants seem to advance an argument premised on the first prong of the test from *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1978), which was rendered defunct by the Pennsylvania Supreme Court in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). Beyond this, the Appellants never articulate how the Department has, in their view, sanctioned a project that unreasonably degrades the environment and infringes on the Appellants' rights to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. The burden of showing that the Department acted unconstitutionally rests with the third-party appellant. *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 250. Having concluded above that the

[11] Article I, Section 27 reads as follows:

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

PA. CONST. art I, § 27.

Department did not violate the Air Pollution Control Act or any applicable regulations in issuing the plan approval, and being provided with no additional arguments from the Appellants, we dismiss the Appellants' contention that the Pennsylvania Constitution was violated.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 4006; 35 P.S. § 7514.

2. The Appellants bear the burden of proof as a third party challenging the Department's issuance of a plan approval. 25 Pa. Code § 1021.122(c)(2); *Groce v. DEP*, 2006 EHB 856.

3. The Appellants must demonstrate by a preponderance of the evidence that the Department acted unlawfully, unreasonably, or that its action is not supported by the facts. *Friends of Lackawanna v. DEP*, EHB Docket No. 2015-063-L (Adjudication, Nov. 8, 2017); *New Hope Crushed Stone & Lime Co. v. DEP*, EHB Docket No. 2016-028-L (Adjudication, Sep. 7, 2017); *Ctr. for Coalfield Justice v. DEP*, EHB Docket No. 2014-072-B (Adjudication, Aug. 15, 2017); *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

4. As a new facility emitting more than 50 tons per year of VOCs in an ozone transport region, Perdue's facility is subject to the New Source Review regulations. 25 Pa. Code § 127.201.

5. Under the New Source Review regulations, Perdue must comply with the LAER requirements. 25 Pa. Code § 127.205(1); 25 Pa. Code § 121.1 (definition of LAER).

6. The Appellants have not demonstrated that an RTO is a safe and feasible technology that should be required for Perdue's facility under LAER.

7. Perdue's plan approval satisfies the LAER requirements.

8. The Department properly determined that the BAT requirements are equivalent to LAER. 25 Pa. Code § 127.205(7).

9. The Department properly concluded that the fugitive emissions from Perdue's facility, after appropriate control, are of minor significance with respect to causing air pollution, and the emissions will not prevent or interfere with the attainment or maintenance of an ambient air quality standard. 25 Pa. Code § 123.1(a)(9).

10. Perdue properly demonstrated in its analysis of alternative sites, sizes, production processes, and environmental control techniques for the proposed facility that the benefits of the proposed facility significantly outweigh the environmental and social costs. 25 Pa. Code § 127.205(5).

11. The Appellants did not meet their burden of proof in this appeal. *Groce v. DEP*, 2006 EHB 856.

12. The Department's issuance of Plan Approval No. 36-05158A to Perdue was lawful, reasonable, and supported by the facts.

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 29th day of January, 2018, it is hereby ordered that the Appellants' appeal is **dismissed**. The Department's motion to strike portions of the Appellants' reply brief 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: January 29, 2018

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: February 2, 2018**

OPINION AND ORDER ON
PETITION TO AMEND INTERLOCUTORY ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition to amend its prior Opinion and Order denying Appellants' motion for summary judgment to certify the issues for immediate appeal. Certification for immediate appeal of the three issues of mixed fact and law presented in the Appellants' summary judgment motion would not materially advance the ultimate termination of the entire case.

O P I N I O N

Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association (hereinafter collectively referred to as the "Council") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of three Chapter 102 and seventeen Chapter 105 permits to Sunoco Pipeline, L.P. ("Sunoco") authorizing it to build the Mariner East 2 pipelines ("ME2 pipeline"), which will transport natural gas liquids across approximately 300 miles in Pennsylvania. The ME2 pipeline will cross 139 exceptional value ("EV") wetlands.

On January 8, 2017, in an Opinion and Order by the full Board, we denied a motion for summary judgment filed by the Council seeking judgment on three issues: (1) whether the ME2 pipeline is truly "water-dependent" under the regulations as required to be permitted in EV wetlands; (2) whether the Department improperly applied antidegradation requirements in its permit review because it allegedly failed to analyze the existing uses of the EV wetlands to be crossed by the pipeline; and (3) whether Sunoco's failure to submit required stormwater management and floodplain management comment letters from all municipalities and counties to be crossed by the pipeline should have prevented the ME2 permits from being issued. *Clean Air Council v. DEP*, EHB Docket No. 2017-009-L (Opinion and Order, Jan. 8, 2017). The Council has now requested that we amend our Opinion and Order denying summary judgment to certify those three issues for immediate appeal to the Commonwealth Court. The Department and Sunoco oppose certification.

Orders denying summary judgment are interlocutory orders that may only be appealed by permission of the appellate court. *See Waste Mgmt. of Pa. v. Dep't of Envtl. Prot.*, 107 A.3d 273 (Pa. Cmwlth. 2015). Interlocutory orders are by definition an intermediate step in the ultimate resolution of a cause of action. Since they are not final, they are not immediately appealable, except in remarkable circumstances. As we have recognized before, "appeals of Interlocutory Orders are not favored by the law." *Clean Air Council v. DEP*, 2013 EHB 437, 440; *BethEnergy Mines, Inc. v. DEP*, 1987 EHB 941, 943.

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

> When a court or other government unit, in making an Interlocutory Order in a matter in which its Final Order would be within the

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

42 Pa.C.S. § 702(b) (emphasis added). An interlocutory order must first contain the pertinent language of 42 Pa.C.S. § 702(b) before a party may then petition the appellate court to seek permission to appeal. Pa.R.A.P. 1311(b) and 1312. If the order does not contain the requisite language, a party must submit to the lower court or government unit a request to amend the order to include the language contained in Section 702(b), as the Council has done here. *See also* 25 Pa. Code § 1021.153.[1]

In deciding whether to amend an interlocutory order, we are tasked with giving an honest appraisal of whether we believe an immediate appeal to the Commonwealth Court would be worthwhile. *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. We make our determination based on an assessment of the following criteria: (1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter. *Becker v. DEP*, 2016 EHB 65, 70; *Rausch Creek Land, L.P. v. DEP*, 2013 EHB 851, 855; *UMCO Energy*, 2004 EHB at 836. Importantly, a party must satisfy all three criteria in its request. *Clean Air Council*, 2013 EHB at 440. *See also Rausch Creek*, 2013 EHB at 858 (noting that there was no need to evaluate the second and third criteria after finding no controlling question of law). Our decision of whether to amend an interlocutory order is discretionary. *CNG Transmission Corp. v. DEP*, 1998 EHB

[1] The Board's rule on filing motions for the amendment of interlocutory orders was promulgated in October of last year. 47 Pa.B. 6205 (Oct. 7, 2017). Among other things, it requires a motion to amend to be filed within ten days of service of the interlocutory order. 25 Pa. Code § 1021.153(a).

548, 550; *Mercy Hosp. of Pittsburgh v. Pa. Human Relations Comm'n*, 451 A.2d 1357 (Pa. 1982).

The Council argues that all three of its summary judgment issues are pure questions of law that do not require any factual considerations and instead involve only regulatory interpretation. The Council says the issues are controlling questions of law because, if the Commonwealth Court reversed the Board, then, according to the Council, the permits would have to be rescinded (presumably all 20 of them). The Council also asserts that there are substantial grounds for difference of opinion on the issues because the parties are in clear disagreement, and it says we found some of the regulations to be less than clear in our Opinion. Finally, the Council contends that immediate appeal would materially advance the termination of this matter because, if the Commonwealth Court agrees with the Council, the Council says the matter would be decided without the need for a hearing on the merits before the Board.

Sunoco and the Department oppose the Council's request in all aspects in their respective responses. They argue that the three issues are not controlling questions of law because each of them requires an analysis of the facts, and at best they involve mixed questions of law and fact, which is still inappropriate for certification. They also argue that an immediate appeal would not further the resolution of the matter because, even if the three issues were certified, the rest of the issues in the Council's appeal would nevertheless require a hearing. Finally, they push back on the existence of substantial grounds for difference of opinion, with Sunoco arguing that the Council's mere disagreement with the Board's Opinion does not warrant immediate appeal, and the Department contending that a disagreement on how regulations are to be applied to the facts of this case does not justify an interlocutory appeal.

In our opinion, our summary judgment ruling does not meet the criteria for interlocutory appellate review. First, we cannot say that our Opinion involved "controlling" questions. We need to keep in mind the full scope of the Council's appeal. There are 20 separate permits that are involved in the current appeal that were issued under two separate chapters of the regulations. The Council's notice of appeal raises an extensive set of issues that go far beyond the three issues that it has hand-picked for consideration here. (*See* Notice of Appeal ¶¶ 25-64.) For example, the Council argues that the project will adversely affect threatened or endangered species habitats, Sunoco's wetlands mitigation plan is inadequate, the permits improperly authorize backfilling streams, the Department acted unreasonably in waiving requirements to protect riparian buffers, and the Department unreasonably accepted what the Council asserts were incomplete permit applications. According to the Council, *none* of the criteria for permitting a pipeline in exceptional value wetlands have been met. In fact, it says that none of the criteria for siting a pipeline in *any* wetland in Pennsylvania have been met. The project is cited as a substantial threat to health and safety. The project's harms outweigh its benefits. Sunoco has "an atrocious environmental compliance history." The list of objections goes on and on. The Council has not signaled that it will not continue to pursue any of the objections that go beyond the three issues it focused on in its motion for summary judgment.

We do not have the sense at this point that the three issues that the Council has chosen will prove to be the controlling issues in this case. On the one hand, depending upon how we rule on the many other issues raised by the Council, we may never even decide those three issues, or their resolution may play a minor role. On the other hand, it is more likely that we will need to decide the issues, but we will also need to decide the Council's many other claims. Here, as in *Throop Property Owners' Association v. DEP*, 1998 EHB 701,

> Appellants have raised many issues in their Notice of Appeal. The public notice issue is only one of them. An immediate interlocutory appeal of that single issue *might* dispose of it. However, that interlocutory appeal would delay resolution of the many other issues. Thus, the ultimate termination of this appeal would not be materially advanced.

Id., 1998 EHB at 708-09 (emphasis in original). *See also Kensey v. Kensey*, 877 A.2d 1284, 1289 (Pa. Super. 2005) (interlocutory appeal not appropriate where appellate review better served by having all issues reviewed in the first instance by trial court). *Cf. Borough of Danville v. DEP*, 2008 EHB 399, 403 (finding denial of a request for stay not a controlling question of law because it would not eliminate the need for further proceedings before the Board). How the Council's issues are resolved will not control how the many other separate issues in this appeal will be resolved. We simply cannot conclude that the Council's three issues are more or less dispositive than the dozens of other issues in the case, such that they are "controlling."

Nor do we believe our Opinion on summary judgment involved the sort of pure questions of law that lend themselves well to interlocutory appellate resolution. "A pure question of law can be discussed without reference to the facts of the case at hand." *Rausch Creek*, 2013 EHB at 858. "Certification is inappropriate where, as here, factual rather than legal disputes predominate or at least play an important part." *UMCO Energy*, 2004 EHB at 841. The Council characterizes its issues as issues of pure regulatory interpretation, but even if that were true, we at times need to understand how the Department as an institution interprets and applies a regulatory program, and those are questions of fact.

What the Council is really attempting to do is seek appellate review of mixed questions of fact and law. Most obviously, the Council argued in its summary judgment motion that Sunoco and the Department did not identify all of the existing uses of the EV wetlands that will be impacted by the pipeline, as it says they were required to do. We specifically noted that we

need to learn more about how the Department applies the various requirements regarding the protection of functions, values, and uses of wetlands in its review of actual permits, and specifically in the context of the permits that are the subject of this appeal. This can only be done at a hearing on the merits. We do not endorse the Council's desire to address this issue in the relatively abstract vacuum of a summary judgment motion or in an appeal to the Commonwealth Court in the absence of a full evidentiary record.

Much the same can be said with respect to the issue regarding the stormwater and floodplain management comment letters from counties and municipalities. We were not willing at the summary judgment stage to jump to the Council's conclusion that the specific permits covering those counties or municipalities with the missing letters must necessarily be rescinded as a matter of law without a better understanding of the facts surrounding the missing letters. The Council's best argument for certification is on the issue of water dependency, but unless the Council is correct that no pipelines can ever be permitted under any circumstances in any EV wetland in Pennsylvania, an argument which we said in our supersedeas ruling has a low likelihood of success, resolving the issue of whether there is water dependency in this case quickly evolves into a factual inquiry as well.

Finally, an immediate appeal from our summary judgment ruling is unlikely to materially advance the ultimate resolution of this appeal. As previously noted, it is likely that we will need to resolve dozens of issues in this case regardless of how the three issues addressed in our Opinion are resolved. Even if we assumed that there were only three issues left in this case and the Commonwealth Court reversed us on all three without a factual record, further proceedings on those three issues would still be required. A Department error requires us to fashion a corrective order. No further action on our part may be needed if we determine that the error was

harmless, but determining whether the error was harmless would require some fact finding. A partial or total remand of part or all of some or all of the permits may be needed, depending upon the facts. We might decide that it is best in a particular factual scenario to revise the permits ourselves. Deciding which, if any, of these measures is necessary would require further proceedings and factual development regardless of how the Court ruled.

The three issues are not all-or-nothing issues. For example, even if all pipelines are by definition not water-dependent and, therefore, must be excluded from EV wetlands as alleged by the Council, it does not necessarily follow that the project cannot go forward. It may mean that portions of the pipeline need to be rerouted. Similarly, it is not clear why a missing floodplain letter in western Pennsylvania should have any impact on permits covering the project in eastern Pennsylvania.

In considering whether an interlocutory appeal would materially advance the ultimate resolution of this appeal, it is also worth noting that discovery in this case has already been completed. Expert reports have been exchanged. The briefing on another pending motion for partial summary judgment is nearing completion. Rather than the piecemeal approach being advocated by the Council, the best and most efficient way to expeditiously resolve this appeal is to proceed in short order to the hearing on the merits and our adjudication of all the issues in the case. It is inconceivable to us that the resolution of the Council's three issues, even if that were possible without a factual record, would eliminate the need for a hearing. We find no compelling argument that an immediate appeal would materially advance the ultimate termination of this matter. Instead, it would result in protracted, piecemeal litigation that we do not believe is in anyone's interest.

For all these reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 2nd day of February, 2018, it is hereby ordered that the Appellants' petition to amend the Board's interlocutory order denying a motion for summary judgment to certify it for immediate appeal 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: February 2, 2018

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TODD HOMET	:	
	:	
v.	:	**EHB Docket No. 2017-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 2, 2018**
	:	

OPINION AND ORDER ON
MOTION TO DISMISS APPEAL OF TODD HOMET AND CONSOL

By Steven C. Beckman, Judge

Synopsis

The Department's Motion to Dismiss is denied where it is evident that the intent of the appeal was to file on behalf of Consol PA Coal Company. The Department suffers no demonstrated prejudice by allowing the appeal to continue with modifications to the caption and clarification of the named appellant.

O P I N I O N

Background

On September 25, 2017, the Department of Environmental Protection ("DEP" or "Department"), issued a Compliance Order alleging violations of the Bituminous Coal Mine Safety Act by Consol PA Coal Company ("Consol"). The Order lists Consol Energy as the Operator, Bailey Mine as the site, and states that it was "served to" Mr. Todd Homet, a maintenance supervisor at Consol's Bailey mine. The Compliance Order was passed on to Mr. Craig Aaron, Consol's Manager of Compliance. Following receipt of the Compliance Order, Mr. Aaron spoke with a member of the Board's administrative staff to request information on filing an appeal of the Order and subsequently, filed a Notice of Appeal ("NOA") with the Board on

October 23, 2017. In the section of the NOA marked, "Name, address, telephone number, and email address (if available) of the Appellant," Mr. Aaron provided the following information:

> Todd Homet
> Bailey Mine – Crabapple
> 724-428-1203
> 192 Crabapple Road
> Wind Ridge, PA 15380
> ToddHomet@cnxlp.com

On November 7, 2017, counsel for Consol entered its appearance and filed an Amended Notice of Appeal ("Amended NOA") within the twenty-day period allotted for an amendment as of right. The Amended NOA sought to change the name of the Appellant from Todd Homet to Consol PA Coal Company and to clarify the objections to the Compliance Order. The matter currently before the Board is a Motion to Dismiss Appeal as Untimely ("Motion to Dismiss" or "Motion"), filed by the Department on December 5, 2017.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Company, LLC v. DEP*, 2015 EHB 48, 54. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Id*., See also *Bernardi v. DEP, 2016* EHB 580, 581; *West Buffalo Township Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Boinovych v. DEP*, 2015 EHB 566, 567; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. Rather than comb through the parties' filings for factual disputes, for the purposes of resolving motions to dismiss, we accept the nonmoving party's version of events as true. *Id*.; *Ehmann v. DEP*, 2008 EHB 386, 390.

Discussion

In its Motion to Dismiss, the Department contends that Consol's efforts at clarification with the Amended NOA amount to an untimely original appeal of the Compliance Order and a withdrawal of Mr. Homet's appeal. The Department argues that the appeal is untimely because the Amended NOA is the first appeal filed in the name of Consol and was filed on November 7, 2017, 13 days after the end of the 30 day appeal period. The Department also argues that by virtue of the Amended NOA, the original NOA filed in the name of Mr. Homet should be dismissed as Mr. Homet has essentially withdrawn it. In response, Consol argues that its Amended NOA merely corrects the appellant name and clarifies the original objections to the Department action. Consol further contends that both the NOA and Amended NOA were timely filed.

The Department bases its argument on three main cases addressing permissible changes after the filing of an original appeal: *Weaver v. DEP*, 2013 EHB 381, *Stedge v. DEP*, 2014 EHB 549, and *Gemstar Corporation v. DEP*, 1997 EHB 367. The Department relies heavily on *Weaver* to support its position that Consol may not become the named appellant. In *Weaver*, the Department issued an order to husband and wife John Weaver and Laura Weaver. *Weaver*, 2013 EHB 381. John Weaver filed a timely appeal as a *pro se* appellant and subsequently secured legal representation. *Id.* More than 60 days after the filing of the initial appeal, Mr. Weaver filed a motion to amend the appeal seeking to clarify his objections and add Mrs. Weaver to the appeal. *Id.* at 382. The Board held that the motion to amend was valid only with respect to adding and refining Mr. Weaver's objections to the Department's actions. *Id.* at 383. The Board declined to allow Mrs. Weaver to join the appeal, stating it would "effectively vitiate the 30-day jurisdictional requirement," by allowing another party to join. *Id.* at 382.

A similar scenario was seen in *Stedge*. In that case, a number of individuals filed a third party appeal of a Department authorization. *Stedge v. DEP*, 2014 EHB 549. Several weeks after the initial timely appeal was filed, but past the thirty day appeal window, an amended appeal was filed seeking to add additional appellants. *Id.* at 550. The Board held that the new appellants failed to file a timely appeal and could not be added to an existing appeal by way of an amendment. *Id.*

In a third analogous case, *Gemstar*, the Department issued an enforcement order to several entities and individuals. *Gemstar*, 1997 EHB 367. Gemstar filed a timely appeal and later sought to add the remaining entities and individuals named in the enforcement order, as well as additional objections. *Id.* at 368. Again, the Board held that additional appellants could not be added because the 30 day jurisdictional window for appeal had closed. *Id.* The Board further struck objections to the enforcement order included in the amended appeal that applied to the appellants who were not original parties to the appeal. *Id.* at 370.

Each of the aforementioned cases has a central difference to the case at hand. In *Weaver*, *Stedge*, and *Gemstar*, the appellants clearly and unambiguously sought to add additional appellants and new claims by amending the appeal. This case is more akin to *Jamcracker, INC., c/o John Gonsalves v. DEP*, 2002 EHB 244. In *Jamcracker*, the Department suspended a permit issued to Mr. Gonsalves. In a timely appeal of the suspension, Mr. Gonsalves stated that he received the permit on behalf of Jamcracker, INC. *Id.* at 245. Mr. Gonsalves filed a motion to amend the appeal to remove Jamcracker and pursue the appeal in his own name. *Id.* The Department opposed the motion, arguing that it was against Board rules and stating that "allowing Gonsalves to pursue the appeal individually would, in effect, allow a new, late appeal by a new party." *Id.* at 245-246. The Board disagreed with the Department and found there was

ambiguity in the filed appeal as to the named appellant. *Id.* at 246. In making a final determination, the Board considered that Gonsalves' fundamental rights were at stake and noted that the Board "has a preference for deciding cases in a just manner on the merits," leading the Board to resolve the ambiguity in favor of Mr. Gonsalves. *Id.*

Turning to the facts at hand and viewing them in the light most favorable to the nonmoving party, it is clear from a review of the Compliance Order that it was not directed at Mr. Homet as an individual, but rather at Consol, with Mr. Homet being the person charged with the responsibility to accept the Compliance Order on behalf of Consol. Mr. Aaron stated that his intent in filing the Notice of Appeal was to file on behalf of Consol. (Consol Response Exhibit C). Aside from Mr. Homet's name, everything else in the NOA is Consol; the address listed is that of the Bailey Mine-Crabapple, the phone number is a Consol number, and the contact information is a Consol work email address. Mr. Homet has no personal interest in this appeal. The ambiguity in the Notice of Appeal was apparent to the Board from the outset, as evidenced by communications after the NOA was filed where it was clear that the Board understood Consol to be the intended Appellant and advised Mr. Aaron of the Board's rules requiring a corporation to be represented by counsel. (Consol Response Exhibit C).

As stated above, Mr. Homet has no personal interest in this appeal, but Consol is facing a substantial loss of rights if the appeal is dismissed. As the Board noted in *Jamcracker*, the Board has a preference for deciding cases in a just manner on the merits rather than dismissing a case on a technicality in appellant nomenclature. In the Amended NOA, Consol does not seek to add any claims which differ substantially from those in the original NOA, unlike the Appellants in *Weaver, Stedge,* and *Gemstar*. Further, at this early stage of the litigation with the entire discovery period still before us, the Department will not be prejudiced by allowing the case to

move forward with Consol as the named appellant. In fact, discovery has been stayed as of December 8, 2017, at the Department's request, while this matter was under review.

Given the ambiguity of the Notice of Appeal, lack of prejudice to the Department, a preference for deciding cases on the merits, and a requirement to view the facts in the light most favorable to the nonmoving party, we deny the Motion to Dismiss and amend the caption in this case moving forward to reflect Consol as the Appellant in this matter.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TODD HOMET	:	
	:	
v.	:	**EHB Docket No. 2017-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 2nd day of February, 2018, it is hereby ordered that the Department's Motion to Dismiss the Appeal of Todd Homet and/or Consol is **denied.** The caption for this matter shall henceforth read as follows:

CONSOL PA COAL COMPANY, LLC	:	
	:	
v.	:	**EHB Docket No. 2017-097-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 2, 2018

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

For the Commonwealth of PA, DEP:
Mary Martha Truschel, Esquire
Matthew Kessler, Esquire
(via electronic filing system)

For Appellant:
R. Henry Moore, Esquire
Patrick W. Dennison, Esquire
(*via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	**Issued: February 5, 2018**

OPINION AND ORDER ON
MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellants' Motion for Sanctions against the Permittee for alleged spoliation of evidence is denied where the Appellants have not demonstrated how they have been prejudiced by the removal and elimination of a water filter by a representative of the Permittee when they themselves removed and disposed of an earlier filter. Additionally, a subsequent filter has been sent to a laboratory for testing, and the Appellants have not demonstrated why the testing of this filter is insufficient.

O P I N I O N

This matter involves an appeal filed by Barry and Brenda Miller, challenging a decision by the Department of Environmental Protection (Department) to relieve RoxCoal, Inc. of its responsibility to provide a temporary source of water to the Millers pursuant to 25 Pa. Code § 89.145a(e) of the mining regulations.[1] By letter dated April 19, 2017, the Department notified

[1] 25 Pa. Code § 89.145a(e) requires a mining operator to provide a temporary water supply whenever contamination, diminution or interruption occurs to a water supply located within the area of rebuttable presumption of underground mining activities.

the Millers that it conducted an investigation into their claim of water loss and agreed with RoxCoal's rebuttal that its mining activities at the Geronimo Mine did not affect the Millers' water supply. The Millers appealed the Department's decision on May 17, 2017.

The matter currently before the Board is a Motion for Sanctions for Spoliation of Evidence filed by the Millers on December 18, 2017. The Department and RoxCoal filed responses to the motion on December 27, 2017 and January 2, 2018, respectively. According to the documents filed by the parties, including the deposition testimony of Mr. Miller, we find the facts surrounding this matter to be as follows: In or about March 2017, prior to the filing of this appeal, John Weir, an agent of RoxCoal, visited the Miller property as part of the initial investigation into the Millers' claim that their water supply had been affected by mining. (Miller Deposition, Ex. A to RoxCoal Response, p. 47) According to Mr. Miller's deposition testimony, Mr. Miller removed the water filter[2] and handed it to Mr. Weir. (*Id*. at 46) Mr. Weir left the property with the filter and did not return it. According to Mr. Miller, Mr. Weir took the filter without Mr. Miller's permission, but Mr. Miller did not ask Mr. Weir to return it. (*Id*. at 46, 47, 48). RoxCoal states that it no longer has the filter and that no tests were conducted on it. (RoxCoal Response, para. 14)

According to Mr. Miller's deposition testimony, the filter in question was the *second* filter that the Millers had installed since they began noticing issues with their water. The first filter was removed and thrown away by Mr. Miller. (Miller Deposition, Ex. A to RoxCoal Response, p. 93-94) When Mr. Weir took the filter in question, Mr. Miller replaced it with a third filter, which he subsequently sent to Skyview Laboratories, Inc. for testing. (*Id*. at 56-58) According to RoxCoal, the results of that testing have not been provided to it or the Department,

[2] The Department's response describes the "water filter" as a "cellulosic water filter cartridge." (Department's Response, para. 6)

although a narrative statement from Skyview Laboratories was produced by the Millers. (RoxCoal Response, para. 10-11; Ex. D to Motion)

It is the contention of the Millers that the second filter – the filter that is the subject of the Motion for Sanctions – "is the key evidence needed by the Appellants to prove the source of the diminution and damage to the Appellants' water well" and that RoxCoal's removal and destruction of the filter constitutes spoliation of evidence. (Motion, para. 12, 15) The Millers ask the Board to grant their motion and issue a sanction preventing RoxCoal from disputing liability as to the cause of the diminution[3] of the Appellants' water well and allow the case to proceed solely on the issue of damages. In response, RoxCoal argues that no spoliation has occurred because Mr. Miller did not object to Mr. Weir taking the filter, nor did he request that the filter be returned. RoxCoal also asserts that Mr. Weir did not take the filter with any intent to deprive the Millers of the ability to prove their claim. RoxCoal contends that it disposed of the filter after retaining it for several weeks because it did not understand it to be relevant. In addition to disputing that the Millers have demonstrated grounds for sanctions, the Department argues that even if the Board were to impose sanctions against RoxCoal, the Department must be permitted to present evidence in support of its letter which is the subject of the appeal.

The Board addressed the issue of spoliation in *Perano v. DEP*, 2011 EHB 17, 19-20:

> Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Phillips v. Potter*, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa., May 14, 2009) (quoting *Mosaid Technologies, Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 335 (D. N.J. 2004)); *Centimark Corp. v. Pegnato &*

[3] There is a dispute between the Millers and RoxCoal as to whether this case involves a claim of both water contamination and water loss. RoxCoal points to deposition testimony by Mr. Miller that it claims eliminates any contention of water loss. When asked "was it simply a quality issue or did you also notice a change in the quantity?" Mr. Miller responded, "No, it's quality. The quantity, it seemed like we had plenty of water." (Miller Deposition, Ex. A to RoxCoal Response, p. 30) We need not address this issue at this time. We simply point it out to clarify statements made by the parties in their filings.

> *Pegnato Roof Management, Inc*., 2008 U.S. Dist. LEXIS 37057 (W.D. Pa., May 6, 2008) (same) [footnote omitted]. Sanctions may be imposed against a party who is guilty of spoliation. Sanctions are within the Board's discretion and may range from an order to submit to further discovery, to cost-shifting, fines, adverse inferences, preclusion, and even summary judgment in severe cases. *Eichman v. McKeon*, 824 A.2d 305, 313 (Pa. Super. 2003). *See also Pension Committee v. Banc of American* [sic] *Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. USB Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

The Board noted that although the Environmental Hearing Board is not bound by federal case law, "we may refer to it for its persuasive value particularly where, as here, the Pennsylvania Supreme Court has adopted a federal court's holding as the applicable standard." *Perano, supra* at 20, n. 1.

Of course, a party cannot be sanctioned for destroying evidence it had no duty to preserve. As we explained in *Perano*, "The obligation to preserve evidence arises when a party knows or should have known that litigation is pending or likely and the party knows or should have known that the evidence could be relevant in that litigation. . ." *Id.* at 21 (citations omitted). Stated plainly, "[s]poliation occurs if potentially relevant evidence generated after the operative date is lost or destroyed." *Id.*

Here, the Millers have not demonstrated how they have been prejudiced by the removal and elimination of the filter in question (i.e., the second filter). Mr. Miller testified in his deposition that he himself disposed of the first filter, i.e., the filter that preceded the one in question. That filter was in place at the time the Millers began experiencing the alleged water problems. We agree with RoxCoal that it would be unwarranted to sanction RoxCoal for the unavailability of the second filter when the Millers themselves failed to preserve the first filter. Additionally, the filter that was installed to replace the one taken by RoxCoal has been sent to a laboratory for testing. The Millers have not explained how the second filter is more relevant

than the first filter that was destroyed by the Millers or why testing of the third filter is not sufficient. Unless and until these questions are answered, we see no grounds for finding that RoxCoal should be sanctioned for committing spoliation of evidence.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	

O R D E R

AND NOW, this 5th day of February, 2018, it is hereby ordered that the Appellants' Motion for Sanctions for Spoliation of Evidence is **denied** without prejudice.

ENVIRONMENTAL HEARING BOARD

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

DATED: February 5, 2018

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

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

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

For Permittee:
Christopher Buell, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 6, 2018**
	:	

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants the Department's unopposed motion for partial summary judgment on the issue of liability for a violation giving rise to an assessment of civil penalty against the Appellants. The only violation alleged in the penalty assessment is the Appellants' failure to comply with a prior Department order to clean up waste tires on the Appellants' property, the appeal from which the Board previously dismissed in an Opinion and Order granting summary judgment. The undisputed facts show that the Appellants did not comply with the Department's order, and the Department eventually employed a contractor to clean up the tires.

O P I N I O N

Max and Carol Rozum have appealed an assessment of civil penalty issued by the Department of Environmental Protection (the "Department") on March 20, 2017, seeking a penalty of $18,000 for violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003. The civil penalty assessment avers that the Rozums failed to comply with an earlier order requiring the Rozums to clean up more than 600 tons of waste tires being stored on property they own or formerly owned in Allegheny Township, Venango County. The Rozums

filed their notice of appeal *pro se* on April 17, 2017. Thereafter, on August 2, 2017, counsel entered an appearance on behalf of the Rozums.

The Rozums' notice of appeal contains four objections to the civil penalty assessment: (1) the waste tires on the property were disposed of by the prior owner; (2) the tires were placed out of public view, and therefore, were not a public nuisance; (3) the tires were placed in a wooded area and did not present a fire hazard; and (4) the Department's contractor who removed the waste tires damaged the Rozums' property, including damage to a driveway gate, damage to wildlife food plots, and the loss of some timber on the property.

The civil penalty assessment stems from an order the Department issued on March 3, 2008. Among other things, the order required the Rozums to remove the waste tires from the property and properly dispose of them at an authorized facility. The Rozums appealed that order to this Board and we granted summary judgment against them because there was no dispute that the waste tires were on the Rozums' property, that the Rozums did not have a permit for the storage of the tires, and that the Rozums were in violation of the Solid Waste Management Act. *Rozum v. DEP*, 2008 EHB 731.[1] The Rozums did not appeal our decision to Commonwealth

[1] We note that two of the objections raised by the Rozums in this appeal were also raised in their 2008 appeal of the underlying order. We addressed those objections in our Opinion granting summary judgment against them:

> It is not necessary to show that the tires are creating a nuisance as a prerequisite to the Department's order. Nor is financial inability to comply a defense to the validity of a Department order in a Board proceeding. *Ramey Borough v. DEP*, 351 A.2d 614, 615 (Pa. Cmwlth. 1976); *Starr v. DEP*, 2003 EHB 365, 372. The Rozums do not cite any authority to support their innocent-landowner defense, but even if we assume that such a defense is available in this setting, it would not be available to the Rozums because they admit that they were fully aware of the unlawful tire pile before purchasing the Property [from Jerry Richards]. Notably, the Rozums have not argued that any of the specific terms or requirements of the Order are unreasonable in response to the Department's motion.

Rozum v. DEP, 2008 EHB 731, 735-36. *See also id.* at 735 (quoting *Bertothy v. DEP*, 2007 EHB 254, 256-57 (Department has authority to order owner of property to clean up waste tires even if owner did not dump the tires)).

Court. Therefore, the order became final as to the Rozums, meaning they could no longer contest that they were in violation of the law and had to remove the waste tires. *See New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, 684-85.

The Department has now moved for partial summary judgment on the issue of the Rozums' liability for the violation in the assessment of civil penalty. The Department asserts that the single violation giving rise to the penalty assessment is the Rozums' indisputable failure to comply with the March 2008 order to remove the tires. The Department filed its motion for partial summary judgment on December 13, 2017. The Rozums did not file a response.

Our rule governing motions for summary judgment requires that a response to such a motion shall be filed within 30 days of service. 25 Pa. Code § 1021.94a(g). It pointedly contains mandatory language for responding. The rule further provides that in the absence of a response, the Board may grant summary judgment against the nonresponsive party. 25 Pa. Code § 1021.94a(*l*). This portion of our rule mirrors the summary judgment provisions of the Pennsylvania Rules of Civil Procedure. *See* Pa.R.C.P. No. 1035.3(d) ("Summary judgment may be entered against a party who does not respond."). We have dealt with this same circumstance numerous times and we have frequently granted summary judgment against a party who has failed to respond to a summary judgment motion. *See, e.g., Stedge v. DEP*, 2015 EHB 19; *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). Although our rules permit the granting of summary judgment

without further discussion based on the Rozums' failure to respond alone, we will briefly address the substance of the Department's motion.

The Department outlines a series of events that transpired subsequent to our Opinion and Order dismissing the Rozums' prior appeal in 2008. In short, the Department filed a petition to enforce the March 2008 order in the Venango County Court of Common Pleas in May 2009 after the Rozums did not comply with the deadline in the order to remove the tires. (DEP Ex. B.) The Court of Common Pleas granted the petition to enforce in July 2009 and required the Rozums to remove the tires in 90 days. (DEP Ex. C, N.) The Rozums still did not clean up the waste tires after being ordered by the Court of Common Pleas and twice being found in contempt of the Court's order in October 2009 and January 2012. (DEP Ex. D, E, F, H, I.) The Department eventually hired a contractor to remove the tires in September and October 2012. (DEP Ex. J, K.) In October 2017, the Department obtained a judgment in the Court of Common Pleas to recoup the money it spent to hire the contractor and prosecute the case in front of the Court.[2] (DEP Ex. M, O, P.) Based on this course of events, the Department contends that it is undisputed that the Rozums failed to comply with the 2008 order. Having reviewed the documents accompanying the Department's motion, and having no response in opposition from the Rozums, we agree.

The Rozums' failure to comply with the March 2008 order is apparent. The Rozums even acknowledge in their notice of appeal that the Department had a contractor remove the tires from their property. (Notice of Appeal ¶ 4.) The Solid Waste Management Act makes it unlawful for a person to violate an order of the Department, 35 P.S. § 6018.610, and permits the Department to assess civil penalties for such a violation subject to that person's right to appeal the assessment before the Board to contest the amount of the penalty or the fact of the violation,

[2] The Department's civil penalty assessment asserts that the $18,000 in penalties it seeks in this proceeding are separate from the reimbursement of its costs awarded by the Court of Common Pleas. (*See* ¶¶ AF, AG, AI.)

35 P.S. § 6018.605. The fact of the violation has been established. Therefore, the only issue left to address in this appeal is the reasonableness of the Department's penalty assessment. We will move forward with scheduling a hearing for this purpose.

For these reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of February, 2018, it is hereby ordered that the Department's unopposed motion for partial summary judgment is **granted**. The Appellants may no longer contest their liability for the violation giving rise to the assessment of civil penalty under appeal.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 6, 2018

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

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

For Appellants:
Lawrence E. Bolind, Jr., 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: February 9, 2018**

OPINION AND ORDER ON
PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment which alleged that the appellant had not followed its bylaws or statutory requirements regarding nonprofit corporations in authorizing the filing of the appeal. There is no evidence that the appellant has not in fact authorized the prosecution of the appeal and the Board need not delve into the intricacies of the appellant's internal corporate management in the absence of such evidence.

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, and the Department 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.

Sunoco has now filed a motion for summary judgment. It argues that the Council did not properly authorize the filing of this appeal in accordance with its own bylaws and the Pennsylvania Nonprofit Corporation Law of 1988, 15 Pa.C.S. § 5101 *et. seq.* Strangely, and perhaps tellingly, Sunoco has not included a single citation to an Environmental Hearing Board decision in its papers. Instead, in the course of being presented with an esoteric discussion of the intricacies of nonprofit corporate governance and agency law, we are referred to cases from jurisdictions as distant as Hawaii and as old as 1833. The Council opposes the motion, largely by engaging in Sunoco's debate regarding corporate law, again without citation to any helpful Board precedent. The Department has remained silent, which essentially signals to us that it does not support Sunoco's motion.

Sunoco's theory is that, because only 14 of the 18 members on the Council's Board of Directors responded by email with affirmative votes in favor of filing the appeal rather than by a vote at a meeting of the Board of Directors prior to filing the appeal, it follows that we should dismiss this appeal. (Sunoco adds that the Council failed to file with the Secretary of its Board those written consents that it did receive.) Admittedly, no Director then or at any subsequent time voted against the request for authorization. The Directors again approved the litigation at their next scheduled meeting by a unanimous vote of those in attendance, but that occurred after the Environmental Hearing Board's 30-day appeal period, which Sunoco says is after it acquired a "vested right" to assert an *ultra vires* claim, citing a 41-year-old case from Wisconsin. *Town of Nasewaupee v. City of Sturgeon Bay*, 251 N.W. 2d 845 (Wis. 1977).

The Council responds that the appeal was authorized in accordance with its bylaws, which allow a special vote by its Board of Directors or its Executive Committee, which is what occurred here, all within the time for filing an appeal. The Council says the provisions of the Nonprofit Corporation Law relied upon by Sunoco set default statutory requirements for actions by boards of directors, but only if the bylaws do not address the issue, as the Council's bylaws do here.

To be clear, there is no evidence whatsoever that the Council has not in fact authorized the prosecution of this appeal. *Compare City of Erie v. DEP*, 2003 EHB 382 (granting motion to withdraw appeal where evidence showed city's mayor did not authorize the appeal), *recon. den.*, 2003 EHB 488, *aff'd*, 844 A.2d 586 (Pa. Cmwlth. 2004). There is no evidence in this case of any dissention in the ranks, any disagreement, or any weakening in the Council's resolve to commence and then pursue this appeal. To the contrary, in his affidavit, supported by exhibits, Russ Allen, the President of the Board of Directors of Clean Air Council, declares that he sent an email to the entire Board of Directors calling for a special vote on whether to approve the litigation after receiving a staff request to initiate this appeal on April 18, 2016. After some discussion by email regarding the details and implications of the proposed litigation, 14 of the 18 Board members, including all of the members of the Executive Committee, voted yea on the motion to approve. The remaining 4 did not respond one way or the other. Accordingly, the motion was approved, and Clean Air Council staff were then authorized to file the appropriate legal papers commencing litigation. Mr. Allen tells us that the procedure the Council followed in this case is allowed per Section 10.1, "Special Provisions on Litigation," of Clean Air Council's Bylaws in effect at the time, and the procedure is in keeping with the longstanding practice of its Board of Directors for many years, as the Directors from time to time need to

consider authorization of litigation within tight legal timeframes. In this case, the Directors did not have time to wait until their next regular meeting to authorize litigation, since that was scheduled for June 2016. Before the next regular meeting of the Board of Directors was held and per its usual practice, Council staff sent the Directors updates on the status of new and ongoing litigation.

The Directors held their next regular meeting on June 22, 2016. During that meeting, the Directors took a formal vote to approve the new litigation, including the appeal that was authorized in April 2016. The motion to approve passed ten to zero. The minutes of the meeting were attached to Allen's affidavit and are consistent with his averment. Since the June 2016 meeting, the Directors have continued to be regularly updated by Council staff on the status of the appeal. Allen states that he has never heard any Board of Directors member, staff member, or anyone else associated with the Council question or cast doubt on the validity of the authorization procedure or its propriety.

In the absence of *any* evidence that the appellant has not in fact authorized prosecution of the appeal, we will decline Sunoco's invitation to delve any further into the intricacies of the organization's internal governance. Sunoco's hypertechnical arguments about whether the Council strictly complied with its own bylaws in authorizing this appeal diverts needless attention and resources away from where our focus should be: whether the Department erred in issuing the subject plan approvals. This approach is consistent with our Supreme Court's recent admonishment that courts should limit their interference with the business decisions of corporate managers in the absence of fraud, self-dealing, misconduct, or malfeasance, none of which have been alleged here. *Zampogna v. Law Enforcement Health Benefits, Inc.*, 151 A.3d 1003, 1012

(Pa. 2016).[1] Although the Court in *Zampogna* was primarily focused on a claim that a corporation had acted contrary to the purposes for which it was created, we believe the same sentiment applies to us analyzing whether the Council complied with its own bylaws in the course of authorizing this appeal. We also have serious doubts that it is appropriate for a third party such as Sunoco to employ the doctrine of *ultra vires* in the corporate setting as a sword, as opposed to its use in disputes between persons (e.g. officers, shareholders, members) directly associated with the organization who have a disagreement about how the organization has been run. *Compare City of Erie, supra*.

If we assume for purposes of argument that the Environmental Hearing Board can or should analyze whether the Council acted in accordance with its bylaws, Sunoco has at the very most raised an issue about which there is a genuine dispute of material fact. Summary judgment would not be appropriate even if its argument had merit.

Accordingly, we issue the Order that follows.

[1] The Court noted that, if the doctrine of *ultra vires* is not dead in the corporate setting in Pennsylvania, it is seriously ill. *Id.*

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 9th day of February, 2018, it is hereby ordered that Sunoco's motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: February 9, 2018

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 Landy Khuri, Esquire
Anthony Holtzman, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY ROHANNA	:	
	:	
v.	:	**EHB Docket No. 2016-148-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC	:	**Issued: February 15, 2018**

OPINION AND ORDER ON
APPELLANT'S PETITION TO VACATE ORDERS

By Steven C. Beckman, Judge

Synopsis

The Opinion and Order on Dismissal of Appeal dated January 5, 2018, is vacated. The Appellant has demonstrated that his counsel did not receive electronic service of the Board's Pre-Hearing Order No. 2 and Rule to Show Cause.

O P I N I O N

On November 18, 2016, Mr. Rohanna filed a timely appeal of the Department of Environmental Protection's ("Department") denial of a mine subsidence claim for damages to his home allegedly due to mine subsidence from mining conducted by Emerald Contura, LLC ("Emerald"). On October 16, 2017, the Board issued Pre-Hearing Order No. 2 ("Pre-Hearing Order"), setting forth hearing dates in February 2018 and deadlines for the filing of pre-hearing memoranda. The Pre-Hearing Order required that Mr. Rohanna submit his pre-hearing memorandum by December 15, 2017. Mr. Rohanna failed to submit a pre-hearing memorandum by December 15, 2017, as required. On December 19, 2017, the Board issued a Rule to Show Cause ordering Mr. Rohanna to explain why his appeal should not be dismissed as a sanction for

failing to follow a Board order, or alternatively, to file his pre-hearing memorandum on or before December 27, 2017. Mr. Rohanna filed no response to the Rule to Show Cause. On January 5, 2018, pursuant to 25 Pa. Code § 1021.161, the Board dismissed Mr. Rohanna's appeal by Opinion and Order ("Opinion and Order") for failure to comply with Board orders and an apparent loss of interest in pursuing his appeal. On January 18, 2018, Mr. Rohanna filed a Nunc Pro Tunc Petition to Vacate Orders ("Petition") asserting that his counsel never received service of the Board's Pre-Hearing Order or Rule to Show Cause. The Department and Emerald filed responses opposing Mr. Rohanna's Petition.

According to Mr. Rohanna's Petition, the Board's Pre-Hearing Order and Rule to Show Cause were never served on his attorney, David Hook. The Petition further alleges that the Board's January 5, 2018 Opinion and Order dismissing the appeal was also not served on Mr. Hook, and that Mr. Hook did not become aware of it until a week later on January 12, 2018. Based on a phone call to the Board's administrative staff by Mr. Hook's office, it appears that Mr. Hook was not registered to receive electronic service of filings or orders. On February 7, 2018, Mr. Rohanna filed a Reply that included an affidavit from his attorney, Mr. Hook, affirming that he had not received the Board's orders regarding the filing of a pre-hearing memorandum.

In their responses, both the Department and Emerald allege that Mr. Hook had reason to know, or should have known, of the pre-hearing deadlines established in this matter. The Department and Emerald point out that Mr. Hook was responsive to emails between the parties and participated in the scheduling of the hearing. They argue that he does not have a valid excuse for missing the deadlines established in the Pre-Hearing Order, and thus the Opinion and Order should not be vacated. Neither the Department nor Emerald set forth any concrete evidence to

demonstrate that Mr. Hook received service of the Board's orders or knew of the pre-hearing deadlines set forth in this case.

When the Board's electronic filing system was first established, participation was elective, and attorneys who registered for electronic filing had the option of receiving service electronically or continuing to receive service traditionally (i.e. by mail or fax). When electronic filing became mandatory, receipt of service electronically also became mandatory. The choice to opt out was removed from the registration page on the Board's website and all registered users were to receive electronic service of all documents filed with or issued by the Board. The Board's rules governing filing and service of parties, found at 25 Pa. Code § 1021.32, now require all parties to use electronic filing and service unless they are excused from the mandatory requirements by the Board.

The Board's rules provide that "if electronic filing or service does not occur or is made untimely because of a technical issue, the party affected may seek appropriate relief from the Board." 25 Pa. Code § 1021.32(c)(15). Following an investigation into the matter, the Board determined that Mr. Hook registered to use the electronic filing system at some point prior to the Board instituting mandatory electronic filing. When he registered, Mr. Hook opted out of receiving electronic service. Due to a technical error, it appears that Mr. Hook never received electronic service of any documents in this case, in spite of being a registered user and successfully filing documents electronically.[1]

Based on our investigation of the circumstances in this case, we conclude that Mr. Hook

[1] The Board has since reviewed its databases and found other similarly situated attorneys who were registered for electronic filing but who had opted out of receiving electronic service. The issue has been corrected in the database, and we believe that we have eliminated the possibility of a similar scenario occurring in the future.

did not receive service of the Board's Pre-Hearing Order setting forth the deadline for filing his client's pre-hearing memorandum. Nor was he served the Board's Rule to Show Cause why the appeal should not be dismissed for failure to file a pre-hearing memorandum. Emerald and the Department did not provide any evidence contrary to these conclusions. However, their responses do highlight that Mr. Hook and Mr. Rohanna demonstrated a continued involvement in this case and a desire to continue to pursue the appeal. The Board's Opinion and Order dismissing Mr. Rohanna's appeal was premised on the failure to follow Board Orders and an apparent lack of interest in proceeding with his case. The lack of service and other evidence presented undermine these findings and lead us to conclude that the Opinion and Order are no longer proper. For these reasons, the Opinion and Order will be vacated and a conference call with the parties will be held to schedule a new hearing and deadlines for the submission of pre-hearing documents.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY ROHANNA	:	
	:	
v.	:	**EHB Docket No. 2016-148-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMERALD CONTURA, LLC	:	

O R D E R

AND NOW, this 15th day of February, 2018, it is hereby ordered that the Opinion and Order on Dismissal of Appeal dated January 5, 2018 is vacated.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: February 15, 2018

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

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

For Appellant:
David C. Hook, Esquire
(*via electronic filing system)*

For Permittee:
Nicole V. Schmitt, Esquire
Kevin K. Douglass, 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: February 20, 2018**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss an appeal as moot where the plan approval under appeal was subsequently modified by the Department with provisions that have no demonstrated effect on the terms and conditions that are the subject of the appeal.

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, and the Department improperly allowed Sunoco to circumvent certain permitting 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. The plan approval under appeal, No. 23-0119E, was issued on April 1, 2016.

The Department has now filed a motion to dismiss the Council's appeal. The Department contends that it issued another plan approval in March 2017 (also numbered 23-0119E) that superseded and replaced the plan approval the Council has appealed. The March 2017 plan approval apparently contains new provisions related to emission reduction credits, which are required for a new or modified facility to commence operations or increase its emissions. 25 Pa. Code § 127.206(d)(2). It appears that the 2016 plan approval requires Sunoco to secure certain amounts of emission reduction credits, and the 2017 plan approval memorializes the credits Sunoco ended up securing from various other facilities. The Department says that the Council did not appeal the March 2017 plan approval and the appeal of the April 2016 plan approval is now moot. The Council opposes the motion, arguing that the 2017 plan approval is only a minor modification of the 2016 plan approval that did not change any of the terms and conditions that make up the substance of the Council's appeal. The Council adds that it is not challenging any aspect of the emission reduction credits in this appeal. Sunoco has not weighed in on the motion.

We evaluate motions to dismiss in the light most favorable to the nonmoving party and will grant the motion where the moving party is entitled to judgment as a matter of law. *Consol Pa. Coal Co., LLC v. DEP*, 2015 EHB 48, 54; *Dobbin v. DEP*, 2010 EHB 852, 857. Mootness is a prudential limitation related to justiciability. A matter becomes moot when events occur during the pendency of the appeal that deprive the Board of the ability to provide effective relief. *South v. DEP*, 2015 EHB 203, 206. Mootness does not deprive the Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of

prudence to proceed. *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900.

Much of the Department's argument simply boils down to a repeated, unsupported assertion that the 2017 plan approval superseded and replaced the 2016 plan approval, and therefore, there is nothing left for the Board to act on in this appeal. The Department's papers contain generic statements such as, "[a] revised, amended, or modified plan approval always supersedes and replaces the previous one covering the same project[,]" "[i]t is simply a matter of common sense that anytime the Department issues a revised, amended, or modified plan approval or permit it must replace the old one[,]" and "[t]here is absolutely no question that when the Department issues a revised, modified, or amended permit that the old one is nullified and ceases to have any legal effect." (Reply Brief at 2, 8.) But these purportedly self-evident axioms are not backed by any real analysis of the facts of this matter as applied to legal authority. For instance, in lieu of an examination of the actual provisions of the two plan approvals, the Department primarily relies on an affidavit from its Regional Air Quality Program manager, James Rebarchak, to make its claim that the 2017 plan approval was "a different permitting action" that "superseded" the 2016 plan approval. (DEP Ex. A, ¶11.) The Department never points to any language to that effect in the 2017 plan approval itself.

The Council, on the other hand, cites actual language from the 2017 plan approval containing a far less categorical statement on what has been superseded:

> The permittee shall comply with all of the existing requirements of its current plan approvals and operating permit, unless specifically revised in this plan approval. The provisions in this plan approval shall be construed to supersede any contrary provisions in any previous plan approval or operating permit.

(DEP Ex. C at 10.) The 2017 plan approval also on its face identifies it as a "revision" and that the type of revision is a "modification." (DEP Ex. C at 1.) It is further described as a "minor

plan approval modification…granted solely for the transfer and use of ERCs [emission reduction credits]." (DEP Ex. C at 10.) The Council also attaches to its response an internal Department memo dated March 23, 2017 from George Eckert to James Rebarchak discussing the emission reduction credits required by the 2016 plan approval. (CAC Ex. G.) Mr. Eckert recommends the issuance of another plan approval to memorialize the transference, retirement, and allocation of the emission reduction credits for nitrogen oxide (NOx) and volatile organic compounds (VOC). Mr. Eckert also states in the memo: "There are no public notices for this minor modification of the plan approval as no new determinations are being made pertaining to the reassessment of any control technology or any technical issues pertaining [to] the project." (CAC Ex. G at 2.) Nevertheless, the Department did publish notice of the minor modification in the *Pennsylvania Bulletin*, under the heading "Plan Approval Revisions Issued including Extensions, Minor Modifications and Transfers of Ownership":

> **23-0119E: Sunoco Partners Marketing & Terminals, L.P. (SPMT)** (2nd and Green Streets, Marcus Hook, PA 19061-0426) On March 28, 2017 *for the modification of an existing plan approval* to incorporate conditions addressing the retirement of 56.1 tons of VOC and 32.8 tons of NOx Emission Reduction Credits (ERCs) as were required by this plan approval.

47 Pa.B. 2241 (Apr. 15, 2017) (emphasis in italics added). By every indication, the 2017 plan approval appears to be nothing more than a modification of the 2016 plan approval to reflect the emission reduction credits secured by Sunoco, not a wholesale replacement of the 2016 plan approval as the Department claims.

When a permit or plan approval is merely modified by a subsequent Department action, we must take a close look at what exactly is being modified. In order for a subsequent Department action to render an appeal from an earlier Department action moot, it must be clear that the first action is "gone and is no longer here for the Appellants to appeal or for the Board to

issue any relief with respect thereto." *Cooley v. DEP*, 2005 EHB 761, 774. Unless it is very clear that the earlier, now defunct action is nullified and ceases to have any legal effect, the appeal therefrom is not moot. *West Buffalo Twp. Concerned Citizens v. DEP*, 2015 EHB 780, 781; *Perano v. DEP*, 2010 EHB 449, 451-52; *Stewart & Conti Dev. Co. v. DEP*, 2004 EHB 18, 19-20; *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160, 1163.

The Department attempts to liken this case to *Cooley, supra*, 2005 EHB 761, where we granted summary judgment against an appellant on the basis of mootness, finding that an appeal of a plan approval was mooted by the issuance of a second plan approval for the same waste-to-energy facility. However, there are significant differences between *Cooley* and the situation before us now. In *Cooley*, the Department informed the permittee that it was treating the permittee's application for a modification of its existing plan approval as an application for a new plan approval. There was evidence of significant work that went into the second plan approval, including new technical information and data, a revised siting analysis, and an updated modeling analysis. The Department provided notice of and held a public meeting on the new plan approval. The second plan approval, when issued, authorized the construction of a differently configured facility than the first plan approval, with the second plan approval authorizing three combustion units as opposed to two in the first plan approval.

We have no indication of any of that here. Instead, the Department acted on what it says was an application from Sunoco for a "new" plan approval, which it has not included with its motion, only 15 days after receiving the application. (DEP Ex. A, ¶¶ 7, 8.) The Department then issued a modification to a plan approval that, from what we can tell, remains in large part identical to what the Council appealed. Where we held in *Cooley* that, because of the substantial substantive changes in the plan approvals, "the Second Plan Approval cannot be viewed as a

continuation, amendment or modification of the First Plan Approval[,]" that is exactly what the 2017 plan approval appears to be here—a continuation, amendment, or modification of the 2016 plan approval. This does not appear to be a case where the Department's modification of a permit changed the very conditions that were the subject of the appeal. *See PQ Corp. v. DEP*, 2017 EHB 680, 682 (denying motion to dismiss and finding that the permit requirements at issue in the appeal had not been revised). *See also Valley Forge*, 1997 EHB 1160; *Cmwlth. Envtl. Sys., L.P. v. DEP*, 1996 EHB 340. Indeed, the Council points out that its notice of appeal does not contain any objections regarding emission reduction credits for the facility.

The Department in its reply attempts to distinguish the 2016 and 2017 plan approvals beyond simply the emission reduction credits, cursorily mentioning baseline emissions, piping, and cooling water flow. (Reply Brief at 4-5.) However, once again, the Department does not take the time to actually identify any provisions in the plan approvals to support the alleged differences. To the extent the Department argues that individual objections in the Council's appeal have at least been mooted instead of the entire appeal, the Department has fallen far short of establishing that argument in its motion. The Department makes some vague references to differences in the calculation of baseline emissions in the 2016 and 2017 plan approvals, but it never makes an effort to explain in detail what those differences are. More importantly, the Department does not explain how any of these purported differences affect in any way the objections in the Council's appeal. At one point the Department says that only the 2017 plan approval allows the sources to operate, and we should ignore "boilerplate" language in the 2016 plan approval that says it authorizes operation. But even if the 2017 plan approval does allow the sources to operate and the 2016 plan approval does not, we think it is more important to know whether the sources are being operated pursuant to conditions from the 2016 plan approval

that are being challenged in the Council's appeal, and whether or not those conditions have been modified. The Department offers no argument on that question. With that being said, the Council's appeal of the 2016 plan approval obviously does not cover the things that have in fact been modified by the 2017 plan approval; however, the Council says it is not challenging any of the modifications, which is why it did not appeal the 2017 plan approval.

Finally, the Department also argues, apparently in the alternative, that the 2016 plan approval expired on October 1, 2017, and therefore, the 2016 plan approval no longer exists. The Department tells us that Sunoco applied for an extension of the 2017 plan approval, but again, no documents from this application are attached to the Department's motion. The Department says that it then extended the 2017, not 2016, plan approval on October 6, 2017, retroactive to October 2, 2017. The Department includes with its motion a cover letter where the Department memorialized the extension. The letter contains one paragraph of substance, which reads as follows:

> Per 25 Pa. Code Section 127.12b, the expiration date of the above-referenced Plan Approval [No. 23-0119E] has been extended by 180 days. Enclosed is your revised Plan Approval Extension with the new expiration date. Please replace your Plan Approval cover page with the enclosed one.

(DEP Ex. D.) The plan approval extension reflects an issue date of March 10, 2017, a revision date of October 6, 2017, an effective date of October 2, 2017, and an expiration date of April 1, 2018. The parties have some dispute over the issue date. The Council says that the date should be April 1, 2016, which is the date of issuance of the 2016 plan approval. The Department says that the March 10, 2017 date is a typographical error, but assures us that the date should be March 28, 2017, when the 2017 plan approval was issued. The appropriate date is mostly beside the point. The 2016 plan approval was set to expire on October 1, 2017, and the extension went into effect on October 2, which is a fairly clear indication that what is being extended are the

provisions of the 2016 plan approval. Further, to our knowledge, the extension did not change any substantive conditions of the plan approval. For largely the same reasons why we find that the 2017 plan approval modification did not moot the Council's appeal of the 2016 plan approval, we find that this extension, and the alleged expiration, have not mooted the appeal either. The conditions that the Council is appealing have survived through the modification, through the subsequent extension, and are still in effect. The Council's appeal retains vitality and is not moot.

Accordingly, we issue the Order that follows.

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 20th day of February, 2018, it is hereby ordered that the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: February 20, 2018

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 Landy Khuri, Esquire
Anthony Holtzman, Esquire
(*via electronic filing system*)

SCOTT AND GWENDOLYN CORSNITZ	:	
	:	
v.	:	**EHB Docket No. 2016-030-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 23, 2018**
	:	

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the Appellants' appeal of the Department's administrative order. The Department met its burden of proof demonstrating that the order that it issued to the Corsnitz Appellants was lawful, reasonable and supported by the facts. The order directed the Appellants to cease all unauthorized fill activity, to submit an Erosion and Sedimentation Control Plan and to develop a Restoration Plan. The Appellants were not able to successfully challenge the Department's determination that the old mill race that the Appellant's filled-in was a wetland. In addition, the Department was not estopped from issuing the challenged order under the facts of this appeal.

FINDINGS OF FACT

Parties

1. The Department is the agency with the duty and authority to administer and enforce The Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* ("Dam Safety and Encroachments Act"); The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* ("Clean Streams

Law" or "CSL"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (DEP Ex. 4).

2. Mr. Scott A. Corsnitz and Mrs. Gwendolyn L. Corsnitz ("Appellants" or "the Corsnitzes"), are a husband and wife who reside at 37 Matamoras Road, Halifax, Dauphin County, Pennsylvania. (DEP Ex. 4; Notes of Transcript ("N.T.") at 168).

3. The Appellants own an approximately 72-acre parcel of land that is located to the north and south sides of Camp Hebron Road, east of its intersection with Peters Mountain Road, in Halifax Township, Dauphin County, Pennsylvania ("Site"). (DEP Ex. 4; N.T. at 17, 20-21, 168).

4. The Site has the Property ID of 29-028-009-000-0000 as referenced in Dauphin County tax parcel mapping. (DEP Ex. 4; N.T. 20-21).

5. Powell Creek and associated wetlands are the receiving waters for the Site. Both Powell Creek and associated wetlands are waters of the Commonwealth. The Powell Creek basin's fishery is classified as Trout Stocking (TSF) in 25 Pa. Code § 93.9m. (DEP Ex. 4).

6. On May 9, 2014, the Department received a confidential complaint stating that earth disturbance activities were occurring on the Site. (DEP Ex. 4; N.T. at 21).

7. In response to this complaint, the Department requested that the Dauphin County Conservation District ("DCCD") inspect the Site to see if any earth disturbance activities were occurring on the Site. (N.T. at 22).

8. The DCCD has a delegation agreement with the Department to inspect for earth disturbance or Chapter 102 violations, which were part of the complaint. (N.T. at 133).

9. DCCD did not follow-up with the Department regarding the Site, and after some

time had passed, the Department's Water Pollution Biologist, Felicia Lamphere, realized she had not heard back about the site inspection. (N.T. at 22).

10. After it realized that DCCD did not promptly follow-up with the Department, the Department conducted an initial Site inspection on June 3, 2015 to determine whether any potential violations had occurred. (N.T. at 23).

11. During the June 3rd inspection, the Department's intern noted evidence of fill and excavation activities in an area of potential wetlands located on the south side of Camp Hebron Road. (DEP Ex. 1; DEP Ex. 4; N.T. at 23-24, 40).

12. On this same date, June 3, 2015, Felicia Lamphere left a voicemail for Mr. Corsnitz, in which she asked that he halt all additional fill and excavation activities on the Site until the Department could conduct a more thorough site assessment. (N.T. at 24, 41, 185).

13. Mr. Corsnitz acknowledged that he received the message containing the Department's request that he cease fill and excavation activities on the Site until the Department conducted a more thorough assessment of the Site. (N.T. at 177, 185).

Expertise in Wetland Determination

14. Felicia Lamphere is an expert in the implementation and enforcement of the waterways and wetlands program and 25 Pa. Code Chapter 105, including the identification and determination of the presence of wetlands. (N.T. at 13-14).[1]

15. Mr. Corsnitz has no experience or training in making the determination as to whether a wetland is present in a particular location. (N.T. at 184).

16. At no point did the Corsnitzes hire someone to make a wetland determination at the Site. (N.T. at 184).

July 28, 2015 Site Inspection

[1] The Parties stipulated to this fact during the hearing. (N.T. at 25).

17. Felicia Lamphere inspected the Site on July 28, 2015. (DEP Ex. 1; DEP Ex. 8; N.T. at 25).

18. Felicia Lamphere noted fill activity and the absence of the required erosion and sediment control plan. (DEP Ex. 1; DEP Ex. 8).

19. During this inspection, Felicia Lamphere took numerous photographs. (DEP Ex. 8; N.T. at 26).

20. The photographs of the Site show hydrophytic vegetation, a depressed area with standing water, algal film, iron deposits, and disturbed conditions in the old mill race wetland complex area south of Camp Hebron Road. (DEP Ex. 8; N.T. at 26-28).

21. Felicia Lamphere observed cattails and jewel weed, both types of hydrophytic vegetation mostly found in wetlands. (DEP Ex. 8; N.T. at 26-28).

22. Felicia Lamphere observed soy beans with stunted growth near data point 4 on Department Exhibit 3. (DEP Ex. 3; DEP Ex. 8; N.T. at 28-29).

23. Stunted growth of plants that are not water tolerant, like soybeans, is a secondary hydrology indicator. (DEP Ex. 15; N.T. at 28).

24. Standing water, algal film, and iron deposits are primary hydrology indicators. (DEP Ex. 15; N.T. at 28).

25. Felicia Lamphere observed algal film near data point 4 on Department Exhibit 3. (DEP Ex.3; DEP Ex. 8; N.T. at 28-29).

26. Algal film is a primary hydrology indicator that reflects prolonged wet conditions that are of a sufficient frequency and duration for such growth to develop. (DEP Ex. 15; N.T. at 29-30).

27. Iron deposits are a primary hydrology indicator. (DEP Ex. 15; N.T. at 31-32).

28. Felicia Lamphere observed iron deposits in the old mill race wetland complex on the south side of Camp Hebron Road. (DEP Ex. 8; N.T. at 31).

29. Aquatic fauna, like frog eggs and frogs, are a primary hydrology indicator that demonstrates that water was present for a sufficient duration and frequency during the growing season to establish aquatic fauna habitat. (DEP Ex. 15; N.T. at 31).

30. Felicia Lamphere observed frogs and frog egg masses in the old mill race wetland complex on the south side of Camp Hebron Road. (DEP Ex. 8; N.T. at 31).

31. A high water table is a primary hydrology indicator when it is observed within 12 inches of the soil surface. (DEP Ex. 15; N.T. at 32-33).

32. Felicia Lamphere took a soil sample at data point 2, where she observed a high water table at 3 inches from the soil surface. (DEP Ex. 1; DEP Ex. 8; N.T. at 32).

33. Felicia Lamphere took a soil sample at data point 3, where she observed a high water table at 4 inches from the soil surface. (DEP Ex. 1; DEP Ex. 8).

34. Felicia Lamphere took a soil sample at data point 4, where she observed a high water table at 4 inches from the soil surface. (DEP Ex. 1; DEP Ex. 8).

35. Hydric soils are one of the three wetland parameters. (DEP Ex. 6; DEP Ex. 15; N.T. at 24, 72).

36. Felicia Lamphere used alpha, alpha-dipyridyl soil testing strips and an up-to-date Munsell soil color chart to make the determination that hydric soils were present at data points 2-4. (DEP Ex. 1; DEP Ex. 8; N.T. at 33-36, 105).

37. Hydric soils develop under prolonged conditions of saturation, flooding, or ponding during the growing season that result in anaerobic conditions in the upper part of the soil. (N.T. at 109).

38. Felicia Lamphere observed earth disturbances at data points 1-4 during her inspection. (DEP Ex. 1; DEP Ex. 8).

39. Data point 1 was outside of the mill race. (N.T. at 80).

40. Felicia Lamphere determined that a wetland was not present at data point 1. (DEP Ex. 8; N.T. at 80).

41. Felicia Lamphere determined that a disturbed wetland was present at data points 2-4. (DEP Ex. 1; DEP Ex. 8).

42. Following her inspection, Felicia Lamphere reviewed aerial photographs of the Site to see whether wetlands or other water resources existed, had previously impacted the Site, or would be impacted at the Site. (DEP Ex. 1; DEP Ex. 13; N.T. at 41-43, 48, 102).

43. This review of the aerial photographs enabled Felicia Lamphere to determine that wetlands were impacted on the Site prior to and after her initial inspection of the Site. (DEP Ex. 1; DEP Ex. 13; N.T. at 41-43, 48, 102).

July 29, 2015 Site Inspection

44. Felicia Lamphere inspected the Site again on July 29, 2015. (DEP Ex. 15; N.T. 42-43).

45. Felicia Lamphere inspected the mill race wetland complex (1) to determine whether additional fill activity had occurred on the south side of Camp Hebron Road, (2) to investigate previous fill activities on the north side of Camp Hebron Road, and (3) to record the coordinates of the fill the Corsnitzes has already placed in the wetland complex at the Site. (DEP Ex. 1; N.T. at 52-53).

46. Felicia Lamphere took pictures of the Site during this inspection. (DEP Ex. 9).

47. Sparsely vegetated concave surfaces are secondary hydrology indicators. (DEP

Ex. 15; N.T. at 51-52).

48. Felicia Lamphere observed standing water, sparsely vegetated concave surfaces, and a swale. (DEP Ex. 9; N.T. at 51).

49. Felicia Lamphere also observed stunted plant growth, a depression area containing standing water, and algae near data point 7. (DEP Ex. 9; N.T. at 50).

50. Felicia Lamphere noted blocked culverts during this inspection. (DEP Ex. 9; N.T. at 46-47).

51. The blocked culverts on the Site cut off a hydrology source for the wetlands located in the old mill race. (N.T. at 47).

52. The Corsnitzes never refused the Department access for any of the Department's inspections. (N.T. at 115).

July 31, 2015 Site Inspection

53. At her July 31, 2015 inspection, the Corsnitzes granted Felicia Lamphere permission to inspect the Site as long as the Department notified Mr. Corsnitz in advance and he could be present. (N.T. at 115, 122).

54. Mr. Corsnitz was present for the July 31, 2015 inspection of the Site. (DEP Ex. 1; N.T. at 53-55).

55. Felicia Lamphere asked Mr. Corsnitz to refrain from engaging in any additional earth disturbance or fill activities in or near the old mill race wetland complex. (N.T. at 54-55).

56. During this inspection, Felicia Lamphere observed and was told by Mr. Corsnitz that additional fill had been placed in the old mill race wetland complex on both the north and south side of Camp Hebron Road in order to place the land into agricultural production. (DEP Ex. 1; DEP Ex. 9; N.T. at 54).

August 6, 2015 Site Inspection

57. After receiving permission from Mr. Corsnitz, Felicia Lamphere inspected the Site again on August 6, 2015. (DEP Ex. 1; N.T. at 55).

58. Mr. Corsnitz was present for the inspection. (DEP Ex. 1; N.T. at 55).

59. Felicia Lamphere took photographs during the August 6, 2015 inspection. (DEP Ex. 10; N.T. at 55).

60. At the time of the inspection, an approximately 650-foot long corridor of unfilled wetlands existed on the south side of Camp Hebron Road. (DEP Ex. 1; N.T. at 58, 69).

61. Mr. Corsnitz informed Felicia Lamphere that he intended to place fill into this corridor on the Site, which he referred to as an abandoned mill race. (DEP Ex. 1; DEP Ex. 4; N.T. at 69).

62. Felicia Lamphere investigated the areas immediately above and below the impacted, filled areas of the old mill race wetland complex. (DEP Ex. 10; DEP Ex. 15; N.T. at 57-65).

63. Felicia Lamphere observed wetland indicators in the areas immediately above and below the impacted, filled areas of the old mill race wetland complex. (DEP Ex. 10; DEP Ex. 15; N.T. at 57-65).

64. During this inspection, Felicia Lamphere determined that wetlands were present at the Site at data points 6, 7, and 8. (DEP Ex. 1).

65. At this time, Felicia Lamphere also determined that data point 5 was not a wetland and is not one of the areas either filled by the Corsnitzes or addressed by the Order.

66. Felicia Lamphere again asked Mr. Corsnitz to refrain from further fill or excavation activities in the abandoned mill race wetland complex at the Site, including in the

approximately 650-foot long corridor of unfilled wetlands. (DEP Ex. 4; N.T. 69, 71).

67. Felicia Lamphere had warned Mr. Corsnitz not to fill in the wetlands on the Site on three separate occasions prior to the wetlands being filled. (N.T. at 74).

September 17, 2015 Site Inspection

68. Felicia Lamphere inspected the Site again on September 17, 2015 from the public road. (DEP Ex. 2; DEP Ex. 11; N.T. at 73).

69. Felicia Lamphere took photographs of the Site during this inspection. (DEP. Ex. 11; N.T. at 73).

70. During this inspection, the Department determined that the Corsnitzes had filled in the remaining mill race wetland located on the south side of Camp Hebron Road in the area around and including data points 1 through 4, even though Mr. Corsnitz had been warned not to do so on August 6, 2015. (DEP Ex. 1; DEP Ex. 2; DEP Ex. 3; DEP Ex. 4; DEP Ex. 11; N.T. at 41, 48, 73-75).

October 8, 2015 Site Inspection

71. Felicia Lamphere inspected the Site on October 8, 2015. (DEP EX. 2; DEP Ex. 12; N.T. at 76).

72. As with her other Site inspections, Felicia Lamphere took photographs during this one. (DEP Ex. 12).

73. The Department determined that the Cornitzes had filled in and discharged sediment into the remaining mill race wetland and the area around it including data points 1 through 4. (DEP Ex. 1; DEP Ex. 2; DEP Ex. 3; DEP Ex. 4; N.T. at 41, 48, 77-78).

74. Mr. Corsnitz was present during the October 8, 2015 inspection. (DEP Ex. 2; N.T. 79).

The Department's Wetlands Determination

75. As a result of the Site inspections conducted on July 28, 2015, July 29, 2015, July 31, 2015, August 6, 2015, September 15, 2015, and October 8, 2015, the Department determined that the Corsnitzes had placed materials constituting "fill" as it is defined in 25 Pa. Code § 105.1 into wetlands on both the north and south sides of Camp Hebron Road at the Site without obtaining a permit from the Department. (DEP Ex. 1; DEP Ex. 2; DEP Ex. 4; DEP Ex.6; N.T. at 77-78).

76. The Corsnitzes conducted earth disturbance activities in the wetlands without first obtaining a permit from the Department. (DEP Ex. 1; DEP Ex. 2; DEP Ex. 4; DEP Ex. 6; N.T. at 77-78, 81, 87).

77. The Corsnitzes placed fill into wetlands at the Site without first obtaining a permit from the Department. (DEP Ex. 1; DEP Ex. 2; DEP Ex. 4; N.T. 77-78).

78. At the time of the Department's inspections, the Corsnitzes' excavation and fill activities in the abandoned mill race wetlands at the Site were observable from the public road. (N.T. at 73, 90-91, 113, 140).

79. Additionally, the Corsnitzes' excavation and fill activities in the abandoned mill race wetlands at the Site were observable in aerial photographs. (DEP Ex. 13; N.T. at 41-43, 48, 102, 113).

80. The Corsnitzes' placement of fill in the wetlands on the Site is both a "water obstruction" and an "encroachment," as those terms are defined at 25 Pa. Code § 105.1. (DEP Ex. 6).

81. Felicia Lamphere made the determination that wetlands were present on the Site by following the methodology laid out by the *1987 Corps of Engineers Wetland Delineation*

Manual, Technical Report ("Manual") and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region, Version 2.0* ("Supplement"). (DEP Ex. 6; N.T. at 16, 25.)

82. Felicia Lamphere evaluated the Site in accordance with the Manual and Supplement for the presence of the three separate wetland parameters – hydrophytic vegetation, hydric soils, and wetland hydrology. (DEP Ex. 6; N.T. at 24).

83. Over the course of her evaluation, Felicia Lamphere observed all three wetland parameters at the Site. (DEP Ex. 6).

84. In areas of the Site where the Corsnitzes placed fill due to recent clearing and grubbing activities at the time of the investigation, only hydric soils and wetland hydrology were observed. (DEP Ex. 6; N.T. at 25).

85. Mr. Corsnitz admitted that he had disturbed and cleared vegetation from the mill race area from 2013-2014 and into the spring of 2015. (N.T. at 181-82)

86. Due to areas of the Site being devoid of vegetation from earlier clearing and grubbing, Felicia Lamphere applied Chapter 5 of the Supplement, *"Difficult Wetland Situations in the Eastern Mountains and Piedmont Region,"* to the data points collected in those areas. (DEP Ex. 6; N.T. at 25).

87. Felicia Lamphere documented details of the wetland determination completed at the Site, which are found in the inspections reports, Report 1 Amended (dated November 13, 2015) and Report 3 (dated October 8, 2015). (DEP Ex. 1).

88. On August 4, 2015, prior to the Department's August 6, 2015 inspection, the Site received approximately .30 inches of rain. (C-4).[2]

[2] Appellants' Exhibits were referenced as "C" exhibits followed by the appropriate exhibit number in the Appellants' Post-Hearing Brief and the Board will follow the same practice.

89. On July 27, 2015, prior to the Department's July 29, 2015 inspection, the Site received approximately .54 inches of rain. (C-4).

90. The rainfall data that the Appellants identified at the Hearing does not alter the old mill race's status as a wetland. (N.T. at 117-18).

91. Rainfall occurring one or two days before an inspection would not provide the requisite prolonged saturation to create the wetland indicators found at the Site. (N.T. at 117-18).

92. If it had rained the week prior to the inspection, Felicia Lamphere would have been aware of this and would have considered that factor during her inspection. (N.T. at 118-19).

DISCUSSION

Background

The Department issued an Administrative Order ("Order") to the Appellants on February 3, 2016. The Department issued the Order to the Appellants and alleged that they had violated various regulatory requirements when they filled-in and graded portions of an old mill race that was present on their property north and south of Camp Hebron Road. In the Order the Department asserted that the Appellants had violated various provisions of Chapter 105 of the Department's regulations including the following:

1. Placed soil and other fill materials in wetlands on both the north and south sides of Camp Hebron Road without first obtaining a permit. Paragraph H of February 3, 2016 Order.
2. Placed fill and discharged sediment in an approximately 650 foot long corridor of unfilled wetlands that remained on the south side of Camp Hebron Road after the Department advised the Appellants not to conduct any additional fill activities on the Site. Paragraph I and J of the February 3, 2016 Order.

3. Failed to obtain a permit prior to the installation of a water obstruction or encroachment in violation of Section 6(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.18. Appellants conduct of filling-in the wetlands without a permit constitutes unlawful conduct under Sections 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611 and a nuisance under Section 402 of the Clean Streams Law, 35 P.S. § 691.402; Paragraph K of February 3, 2016 Order.

To correct the listed violations the Department directed the Appellants to:

1. Except as directed under the Order, cease all fill and excavation activities on the Site.
2. On or before April 15, 2016, submit an Agricultural Erosion and Sedimentation Plan meeting the requirements of 25 Pa. Code § 102.4(a).
3. On or before April 15, 2016, develop and submit a restoration plan, prepared by a qualified environmental professional for review and approval to the Department that details how the impacted wetlands identified on the map attached to the Order will be restored pre-disturbance conditions.[3]
4. Implement restoration plan within sixty days of receipt of Department approval.
5. Respond to Department requests for additional information about restoration plan prior to its approval within seven days.

Paragraphs a-e of February 3, 20016 Order. On March 2, 2016, the Appellants appealed the Order to the Pennsylvania Environmental Hearing Board ("Board"). On March 21, 2017, the

[3] The Order listed six items that the Appellants were to include in their restoration plan: 1) a wetland erosion delineation; 2) a sequence of work; 3) erosion and sedimentation controls that will be used during restoration activities; 4) plan views and cross-sections of grading needed to restore wetlands; 5) the location of disposal site for all fill materials removed to restore affected areas; and 6) measures to protect the wetlands from future activities.

Board held a hearing in this appeal in Harrisburg. The parties have filed their Post-Hearing Briefs and the Board is now in the position to resolve this appeal.

Burden of Proof and Standard of Review

In matters before the Board, the party with the burden of proof is required to have presented a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). The Department has the burden of proof in this matter. Under the Board's rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3. Here the Department issued an order and must show that its actions were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32. The Board can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

The Corsnitzes raise two major objections to the Department's issuance of its February 3, 2016 Order. First, they assert that the Department failed to satisfy its burden to establish that the old mill race was a wetland subject to regulation by the Department under the Department's regulations in 25 Pa. Code Chapter 105. Second, the Corsnitzes argue that the Department is estopped from pursuing enforcement against the Corsnitzes based upon the delay in investigating

the anonymous complaint on May 9, 2014. The Corsnitzes believe that the year long delay in the Department's investigation of the alleged violations on the Site caused severe prejudice to the Appellants in this matter. The Board will address each of these major objections in order below.

Department's Determination that Old Mill Race was Wetland Subject to Regulation

The Corsnitzes offered no expert witnesses to challenge the Department's expert witness who testified that the old mill race complex north and south of the Camp Hebron Road was a wetland. Instead, the Corsnitzes asserted that the Department's expert witness, Felicia Lamphere, incorrectly conducted her wetlands evaluation and reached an incorrect conclusion that the old mill race complex north and south of Camp Hebron Road was a wetland subject to the Department's jurisdiction under Chapter 105 of the Department's regulations. The Corsnitzes asserted that Ms. Lamphere made at least two critical errors in her evaluation of the old mill race complex. The alleged that she failed to follow the scientific methods adopted by the Department and set forth in the 1987 Corps of Engineers Wetland Delineation Manual, Technical Report Y-78-1 ("Manual") and the Regional Supplement to the Corp of Engineers Wetland Delineation Manual; Eastern Mountain and Predmont Regions, Version 2.0 ("Supplement"). Specifically, the Corsnitzes assert that Ms. Lamphere failed to adhere to the proper procedures to prevent cross-contamination of the soil samples by her digging tools when conducting the alpha, alpha-dipyridyl test. In addition, the Corsnitzes argue that Ms. Lamphere failed to consider recent precipitation events in determining that the old mill race was a wetland. According to the Appellants, both of these failures could cause false positives to incorrectly support a conclusion that the old mill race was a wetland. The Corsnitzes assert that these failures to follow the proper procedures discredit Ms. Lamphere's expert testimony and prevent the Department from meeting its burden to establish that the old mill race was a wetland.

To place the Corsnitzes' arguments in context the Board will first examine the testimony of Ms. Lamphere to determine how she conducted her wetlands evaluation. After reviewing how she conducted her wetlands evaluation, the Board will consider the Corsnitzes' claims that Ms. Lamphere's evaluation failed to adhere to the proper procedures. Prior to the Department's issuance of its Order, Ms. Lamphere inspected the Site on July 28, 2015, July 29, 2015, July 31, 2015, August 6, 2015, September 17, 2015 and October 8, 2015. She observed earth disturbance at data points 1 through 4 during her July 28, 2015 inspection of the Site and determined that wetlands were present at data points 2 through 4, but not at data point 1 which is outside the old mill race. During the July 31, 2015 inspection, Ms. Lamphere observed and Mr. Corsnitz confirmed that fill had already been placed in portions of the old mill race complex on both the north and south sides of the Camp Hebron Road. During the August 6, 2015, inspection Ms. Lamphere identified a 650-foot corridor of unfilled wetlands in the old mill race on the south side of Camp Hebron Road on the Site. She also investigated areas immediately above and below areas already impacted by prior fill activities in the old mill race. In these areas, she observed wetlands and determined that they were present at data points 6, 7, and 8, but not at data point 5. She also warned Mr. Corsnitz not to fill in the 650-foot long corridor of unfilled wetlands. During the September 17, 2015 inspection, Ms. Lamphere determined that the Appellants had filled in the wetlands on the south side of Hebron Road in the area around and including data points 6 through 8 despite her prior warnings to Mr. Corsnitz.

At the hearing, the Board qualified Ms. Lamphere as an expert in the implementation and enforcement of the Department's waterways and wetlands program in 25 Pa. Code Chapter 105, including the identification and determination of the presence of wetlands. Relying upon her expertise to identify wetlands, she determined that portions of the old mill race were a wetland

complex. She evaluated the Site using the appropriate methodology for determining the presence of wetlands.[4] The methodology involves the use and presence of three distinct wetlands parameters – hydophytic vegetation, hydric soils and wetlands hydrology. In certain areas Ms. Lamphere only observed hydric soils and wetland hydrology because Mr. Corsnitz removed the vegetation when he conducted his clearing and grubbing activities in these areas. She was able to make her wetlands determination for these areas, notwithstanding the lack of vegetation, applying Chapter 5 of the Supplement.[5] In other areas, Ms. Lamphere observed the presence of all three wetland indicators. Based upon her field observations, her analysis of multiple soil samples and her review of aerial photographs of the Site over many years, Ms. Lamphere determined that wetlands were present at the Site in portions of the old mill race at data points 2, 3, 4, 6, 7 and 8.

The Appellants assert that Ms. Lamphere did not follow the proper scientific methods described in the Manual or Supplement in making her wetlands determinations. Because she did not follow the accepted methods, the Appellants argue that Ms. Lamphere's expert testimony fails to meet the standard for expert testimony and lacks a "reasonable degree of scientific certainty." Without Ms. Lamphere's testimony, the Appellants assert that the Department can not meet its burden of proof. The Board disagrees that Ms. Lamphere failed to follow the proper methods in the Manual and Supplement and finds that neither of the Appellants' specific objections have merit and neither alleged error persuades the Board to discredit Ms. Lamphere's expert testimony.

[4] She followed the mythology described in the 1987 Corps of Engineers Wetland Manual, Technical Report Y-87-1 ("Manual") and the Regional Supplement to the Corps of Engineers Wetlands Delineation Manual Eastern Mountain and Piedmont Region, Version 2.0 ("Supplement").

[5] Chapter 5 of the Supplement is entitled "Difficult Wetland Situations in the Eastern Mountain and Predmont Region."

The Appellants assert that Ms. Lamphere was unaware that precautions must be in place to prevent the cross-contamination of iron from her tools to the soil sample, which could create false positives. She testified that "there's no need for any precaution to do something like this." (N.T. 95). The Board agrees that she appeared to be unfamiliar with the caution in the Supplement identified at the hearing. This possible lack of familiarity with the statement in the Supplement does not, however, detract from Ms. Lamphere's testimony, in which she described how she dug the soil samples to perform the alpha, alpha-dipyridyl test in a manner to avoid cross-contamination. (N.T. 118). She testified that she places the test strips on soil that has not touched her shovel during its excavation. The Supplement includes a caution to avoid cross-contamination and Ms. Lamphere's description of her digging method, when conducting the alpha, alpha-dipyridyl test, shows she uses proper methods even if she was unfamiliar with the caution in the Supplement to avoid cross-contamination. The Board finds that Ms. Lamphere followed the proper method to avoid cross-contamination between her shovel and the soil samples that she tested.

The Appellants also assert that Ms. Lamphere failed to follow the proper scientific method in the Manual and Supplement by failing to consider recent precipitation in evaluating a number of factors. The Department disagrees and asserts that Ms. Lamphere considered recent rain events when she inspected the Site, but she did not believe that these precipitation events had any impact on her opinion. She testified that the numerous wetlands indicators she observed at the Site could not have resulted from recent rainfall events. The numerous wetland indicators she observed at the old mill race complex resulted from frequent and long duration of wet conditions at the Site. Ms. Lamphere stated that a recent rain event is insufficient to create the wetland indicators she observed, such as hydric soils, iron deposits, algae hydric vegetation and

aquatic fauna. The Board agrees with the Department and finds Ms. Lamphere's testimony credible on this point.

Overall, the Board finds that Ms. Lamphere's expert testimony, regarding her determination that wetlands were present in portions of the old mill race complex, to be credible and supported by the record. Neither of the specific objections raised by the Appellants detract from her wetlands determinations or prevent the Department from meeting its burden of proof to support its Order under appeal. The record before the Board establishes that there were wetlands in the old mill race complex north and south of Camp Hebron Road and that the Appellants filled in these wetlands in violation of Chapter 105 requirements without a permit.

Department's Delay in Pursuing Anonymous Complaint

The Corsnitzes argue that the Department should be estopped from pursuing an enforcement order, even if the facts support the Department's wetlands determination, because of its "utter failure to provide even a cursory review of the initial complaint until over one year. …" Appellants Post-Hearing Brief at 12. According to the Corsnitzes, the delay "caused severe prejudice in this matter." *Id.*

The Corsnitzes assert that the facts support their estoppel argument. The Department received an anonymous complaint on May 9, 2014 alleging that grubbing and earth disturbance work was being conducted in and around a stream or wetlands near the intersections of Peters Mountain Road and Camp Hebron Road. The Department contacted the DCCD to take an initial look at the activities and report back to the Department. (N.T. at 21-22). The DCCD did not report back to the Department. In 2015, the Department reviewed its caseload report and noticed that the DCCD had not reported back, and in June 2015, the Department sent a summer intern to the site to see if there were any potential violations on the site. The summer intern visited the

site and reported that he observed some concerns that the Department should investigate. After the summer intern visited the Site, Ms. Lamphere contacted Mr. Corsnitz by phone and left him a message that he should stop any additional earth disturbances until the Department could inspect the site to determine whether any violations were occurring. (N.T. 23). The Department investigated the Site on July 28, 2015, which was the first time Ms. Lamphere visited the site. (N.T. 24). The first inspection of the site occurred more than a year after the Department received the initial complaint.

In 2014, the Corsnitzes had a conversation with the DCCD and there was no mention of the complaint or potential wetland violations. (N.T. 174-176). The Appellants assert that the Department's delay in visiting the site to take pictures or to direct them to cease grubbing allowed potential evidence to be lost and destroyed that would have showed that the old mill race complex was not a wetland. Appellants' Post-Hearing Brief at 13. The Appellants believe that they were severely prejudiced by the Department's inaction and silence that allowed this evidence to be destroyed when they filled-in the old mill race and graded these areas. In addition, the Appellants asserts that the Department should be estopped based upon their failure to take some sort of action within the first year of receiving the anonymous complaint in 2014.

The Department disagrees that its delayed response to the initial complaint estopped it from taking enforcement action and issuing the Order against the Appellants. The Department asserts that the Corsnitzes bear the burden of proof to establish their estopped affirmative defenses. *Robinson Coal v. DEP*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3. In addition, the Department asserts that the Appellants contention that the undue delay in investigating the illegal conduct of the Appellants who conducted unpermitted wetland fill activities, "is without legal merit." *Baehler v. DEP*, 2004 EHB 413, 416 *aff'd* 863 A.2d 57 (Pa.

Cmwlth. 2004) (*citing Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 339. (Argument that violation should have been excused because Department should have been more vigilant in discovering the violations and reporting them to the party "borders on the absurd"). The Department does not agree that the facts support the finding that there was undue delay. Specifically, the Department asserts that the Corsnitzes willfully filled in large portions of the mill race wetlands complex after the Department repeatedly told them not to do so.

The doctrine of equitable estoppel applies when an agency of the Commonwealth (1) intentionally or negligently misrepresented a material fact; (2) knows or has reason to know that another person would justifiably rely on that misrepresentation; (3) or where the other person has been induced to act to her detriment because she justifiably relied on the misrepresentation. *Natiello v. DEP*, 990 A.2d 1196, 1203 (Pa. Cmwlth. 2010). In order to establish estoppel, the party asserting the claim must show (1) misleading words, conduct, or silence by the agency; (2) unambiguous proof that the asserting party reasonably relied upon the agency's misrepresentation; and (3) the lack of a duty to inquire on the part of asserting party. *Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004); *Baldwin Health Ctr. v. DPW*, 755 A.2d 86 (Pa. Cmwlth. 2000).

The Board rejects the Appellants' argument that the Department is estopped from issuing the Order as a result of the delay from May 2014 until July 2015 when the Department inspected the site for the first time. The facts of the appeal do not support the Appellants' argument. In addition, there are significant legal obstacles that prevent the Board from agreeing with the Appellants.

The Appellants claim that the "Department was aware of an alleged violation [in 2014] and chose to remain silent on the issue." Appellants' Post-Hearing Brief at 13. In 2014, the

Department contacted the DCCD and requested that the DCCD investigate the complaint, which alleged earth disturbance activities. The DCCD visited the site and had a conversation with the Appellants and, according to the Appellants, the DCCD never mentioned any potential wetland issues. The Appellants attribute the DCCD's failure to mention any potential wetland issues to the Appellants in 2014 to the Department, and they assert that they relied upon the Department's attributed "silence" in 2014 to begin grubbing and earthwork on their property. The attributed "silence" of the Department in 2014 allegedly evinced by its failure to mention any potential wetland issues is the lynch pin of both the Appellants' estoppel argument and their claim that potential evidence showing that the old mill race was not a wetland was lost and destroyed by the Department's inaction.[6] *Id.* After the Department received the complaint in 2014, it promptly referred the matter to the DCCD to investigate the alleged earth disturbance or Chapter 102 violations.[7] The DCCD has a delegation agreement with the Department to inspect for Chapter 102 violations. The DCCD never reported back to the Department after its inspection in 2014, and after some time passed, the Department reviewed its caseload and realized that it had not yet heard back from the DCCD about the DCCD's inspection of the Appellants' property.

The Department conducted an initial inspection of the site on June 3, 2015, and during this inspection, a Department intern observed evidence of fill and excavation activities in potential wetlands on the south side of Hebron Road. Also on June 3, 2015, Ms. Lamphere called the Appellants and left a message for Mr. Corsnitz requesting that he refrain from conducting additional fill and excavation activities on the Site until the Department was able to

[6] The Department was able to establish the presence of wetlands in the old mill race notwithstanding the Appellants' earth disturbance and fill activities for the reasons set forth in this Adjudication.

[7] Chapter 102 contains the regulatory requirements for Erosion and Sedimentation Control. 25 Pa. Code Chapter 102. Chapter 105 contains the regulatory requirements for Dam Safety and Waterway Management. 25 Pa. Code Chapter 105. The requirements governing the protection of wetlands are in Chapter 105 at 25 Pa. Code §§ 105.17-105.20. A proposed earthmoving activity often involved both Chapter 102 and Chapter 105 requirements that are related but separate.

conduct a more thorough assessment of the Site. On July 28, 2015, Ms. Lamphere inspected the Site and she determined that disturbed wetlands were present at data points 2 through 4.[8] As previously discussed earlier in this Adjudication, the Board finds Ms. Lamphere's testimony regarding the presence of wetlands at data point 2 through 4 credible to support the Board's finding that wetlands were present at these data points.

As previously referenced, the Appellants' main estoppel argument is that the delay from 2014 to 2015 allowed evidence to be destroyed that would have demonstrated that the old mill race complex was not a wetland and this delay severely prejudiced the Appellants. The Board rejects this argument for several reasons. First, no witness testified about the loss of "potential evidence showing that the old mill run [race] was not a wetland… "Appellants' Post-Hearing Brief at 13." The Appellants did not have an expert witness to support their claim that their fill and excavation activities destroyed the evidence that there were no wetlands at data points 2 through 4. Consequently, there is no evidentiary basis in the record to make such a claim that evidence was destroyed.

Second, the only evidence in the record is the testimony from Ms. Lamphere, which is directly to the contrary of Appellants' claim: that notwithstanding the Appellants' fill and excavation activities, she could conclusively establish the presence of wetlands at data points 2 through 4. If she could establish the presence of wetlands after the Appellants conducted their fill and excavation activities, then there was no evidence to establish the contrary finding that there were no wetlands. Ms. Lamphere's testimony, which the Board finds credible, eliminates the possibility of the destruction of "potential evidence showing" that there were no wetlands.

[8] She also determined that wetlands were not present at data point 1, which was outside the old mill race complex area.

The Appellants make a second estoppel argument that "the Department should take some action within the first years" of receiving the initial complaint of grubbing near an alleged wetlands. The Board rejects this argument because it is not supported by the facts. The Department received a complaint in 2014 regarding "earth disturbance activities" and the Department promptly asked the DCCD to inspect the Site. The DCCD has a delegation from the Department to inspect for Chapter 102 violation. The DCCD never reported back to the Department and when the Department realized that it had not received a response from the DCCD, it inspected the site and found both earth disturbance activities and fill activities. Prior to the Department's June 3, 2015 inspection it was not aware of potential wetland fill problems. On the same day as this inspection, the Department promptly contacted the Appellants and ask them to stop this activity until after the Department could finish its wetlands evaluation. The Department made its wetlands determination during its July 28, 2015 inspection. Under these facts, the Department did promptly notify the Appellants after it learned of potential wetland fill problems.[9] Upon receiving multiple notifications from the Department, the Appellants ignored the Department's notifications regarding the presence of wetlands and the need to cease evacuation and fill activities. There is undisputed testimony that the Appellants conducted fill and excavation activities after the Department asked the Appellants to stop these activities. While some of these activities occurred before the Department's initial inspection on June 3, 2015, a substantial amount of the Appellants' fill and excavation activities occurred after the Department asked the Appellants to stop their fill and excavation activities. There is no basis in

[9] The one year delay between the DCCD initial inspection and the Department's realization that the DCCD had not reported back to the Department is a minor point. The DCCD was focused on earth disturbance activities and not specifically on fill of wetland activities. The Department's delay in following up after the DCCD's 2014 inspection did not prejudice the Appellants for the reasons set forth in this Adjudication.

the record before the Board to support the Appellants' claim that the Department failed to take some action within the first year of receiving notice of alleged wetland violations.

Even if there was a factual basis for Appellants' claim that the Department waited for more than a year to notify Appellants of the alleged wetlands violations, the Board would nevertheless still reject their claim because even under these facts the claim "is without legal merit." *Baehler v. DEP*, 2004 EHB at 416. Under these hypothetical facts, the Appellants would not be able to establish estoppel and would not be able to make any of the required showings.[10] This alleged silence attributed to the Department is not sufficient to make the required showings. The DCCD had a delegation agreement to investigate Chapter 102 violations involving excavation or earth moving activities. The DCCD was not there in 2014 to investigate Chapter 105 wetland fill activities. The DCCD's failure to mention potential 105 wetland fill violations was not misleading. The DCCD was only there in 2014 to investigate possible Chapter 102 excavation or earthmoving violations, which it did.

The Appellants also allege that they reasonably relied upon the Department's attributed silence in 2014 to their detriment. According to the Appellants, evidence that would prove that there were no wetlands in the old mill race was destroyed when they filled in the old mill race, thereby depriving the Appellants of a defense to the Department's order. Notwithstanding the Appellants' fill activities, the Department's expert witness was able to conclusively establish the presence of wetlands in 2015. The Appellants made no effort to disapprove the Department's finding of wetlands, and they had the same opportunity as the Department to evaluate conditions at the site. There is no evidence in the record to support the Appellants' bare assertion that

[10] In order to establish estoppel, as we outlined on page 21 of this Adjudication, the party asserting the alarm must show (1) misleading words, conduct or silence by the agency; (2) unambiguous proof that the asserting party reasonably relied upon the agency's misrepresentation; and (3) the lack of a duty to inquire on the party of the asserting party. *Baehler v. DEP*, 863 A.2d at 60.

evidence was destroyed that would establish that there were no wetlands. The Appellants suffered no apparent detriment as a result of the Department's alleged attributed silence.

Moreover, the Board agrees with the Department that the Appellants' contention that the Department's undue delay in investigating the Appellants' illegal conduct is without legal merit and does not support their estoppel argument. *Baehler v. DEP*, 2004 EHB at 416. Even if there were undue delay in investigating the Appellants' illegal conduct in filling in the wetlands, such delay does not support Appellants' claim that the Department is estopped from enforcing the law. *Id*. The Board continues to believe that the argument that violations of law should be excused because the Department should have been more vigilant in discovering the violations and reporting them to the party "borders on the absurd." *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB at 339, cited in *Baehler v. DEP*, 2004 EHB at 416.

Finally, it is important to note that the Appellants planned to conduct excavation and fill activities on their property, and they, as landowners, had a duty to inquire whether they needed permits or other approvals to conduct these planned activities. Landowners are responsible for knowing and complying with the law. *Peters Township v. Russell*, 121 A.3d 1147, 1152 (Pa. Cmwlth. 2015) *citing In re Kearney*, 7 A.2d 159 (Pa. Super. 1939) (Ignorance of the law does not excuse a violation.) A person's duty to obtain all necessary permits or approvals is not dependent upon the Department's notification that permits or approvals are necessary to conduct a certain activity. Ignorance of the law is no defense where a person is required to secure permits or approvals to conduct an activity. *See, e.g., DEP v. George and Shirley Stambach*, 2009 EHB 481, 490; *Most Health Services, Inc., v. DEP*, 2008 EHB 174, 182 *citing Enterprise Tire Recycling v. DEP*, 1999 EHB 900, 902 (Appellant's assertion that it did not know it needed a permit for a solid waste activity is not a defense to the Department's compliance order). If the

Appellants planned to conduct excavation and fill activities on their property to level their land for farming, it was their duty to inquire whether permits or approvals were required to conduct such activities. The Appellants are therefore unable to show or establish any of the elements necessary to establish estoppel. The Board therefore rejects the Appellants' estoppel argument for the numerous reasons set forth above.

Department's Authority Over Artificial Wetlands

The Appellants also assert as a matter of law that the Department's jurisdiction does not extend to artificial wetlands, which are not included within the definition of "body of water" at 25 Pa. Code § 105.1. According to the Appellants, the old mill race complex was a man-made feature created in the 1700s, and the Department lacks the authority to regulate any activity to fill-in the old mill race complex even if it was a wetland. The Board rejects this argument for legal and factual reasons. First, the regulatory definition of the term "body of water" does in fact include artificial wetlands within the definition as set forth below:

> Body of water – A natural or artificial lake, pond, reservoir, swamp, marsh or wetland.

25 Pa. Code § 105.1. (emphasis added). This definition, which clearly includes, artificial or man-made bodies of water, is consistent with the statutory definitions in the Dam Safety and Encroachments Act, 32 P.S. § 693.3 (definition of "Body of Water" and "Watercourse" or "Stream") and the Clean Streams Law, 35 P.S. § 691.1 (definition of "Waters of the Commonwealth"). The regulations in Chapter 105 were promulgated under the authority of both statutes and they specifically include authority to regulate artificial or man-made bodies of water, watercourse or waters of the Commonwealth. *Id.* The Department has the authority to regulate the wetlands in the old mill race complex even if these wetlands are artificial.

Second, the Appellants assert that the old mill race was constructed in the 1700s and served a mill that is no longer in existence. If the artificial water channel in the mill race has been around for more than two hundred years, it may become part of the natural environment and cease to be an artificial water channel.[11] Regardless of their status as natural or artificial, the wetlands in the old mill race complex are a body of water subject to Department regulations under the Dam Safety and Encroachments Act and the Clean Streams Law and the regulations at 25 Pa. Code Chapter 105 promulgated thereunder. The Department has clear authority over all bodies of water including artificial wetlands, and the Department has jurisdiction over the wetlands associated with the old mill race complex even if they are artificial wetlands.

Additional Considerations

At the hearing, the Appellants asserted that the Department inspections were illegal, warrantless searches. In its Post-Hearing Brief, the Department argued that its inspections of the Site were lawful and the evidence obtained during the inspections was admissible. The Appellants did not address this issue in their Post-Hearing Brief, and therefore, the Board concludes that the Appellants have waived this issue. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 366-371. In addition, the Appellants did not mention this issue in either their Notice of Appeal or their Pre-Hearing Memorandum. Appellants' failure to raise the issue in its Notice of Appeal or Pre-Hearing Memorandum is another reason to consider this issue waived. *Giorgio Foods, Inc. v. DEP*, 1989 EHB 331, 334-35; *Maddock v. DEP*, 2002 EHB 1. The Board does not

[11] More than the mere passage of time is needed, but here the artificial water channel that was constructed to feed the old water-driven mill continues to exist in a different form long after the use of the mill was discontinued. Until it was filled in, the old water channel existed as a depression on the surface of the land north and south of Camp Hebron Road that contained wetlands identified by Ms. Lamphere. The wetlands were created over an extended period of time, and they reflected current natural conditions in the old mill race complex prior to the Appellants' fill and excavation activities.

have to address the merits of this issue because the Board finds that the Appellants have waived it.

In its order under appeal, the Department directed the Appellants to take four actions: cease additional fill and excavating activities; submit an agricultural Erosion and Sedimentation Plan; submit a restoration plan for review and approval that details how impacted wetlands will be restored; and implement the approved restoration plan. According to the Department the only item that the Appellants satisfied was the second item. The Appellants submitted an E&S Plan. The specific restoration plan requirements are not before the Board, and the Board's Adjudication does not address whether any specific restoration plan requirements are lawful or reasonable. The Board notes that the Department may have some discretion in reviewing and approving any restoration plan since it has already indicated a willingness to allow the fill of wetlands north of Camp Hebron Road to continue.[12]

Conclusion

For the reasons set for above, the Board finds that the Department has sustained its burden to establish that its order under appeal was lawful, reasonable and supported the facts and issues the following order.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. 35 P.S. § 7514.

[12] When issuing permits that allow persons to fill wetlands under Chapter 105 regulations, the Department often allows persons to make payments into an approved wetlands mitigation bank. *See, e.g.*, 47 Pa. B. 3223 (June 10, 2017) (*Newtown Development Associates, L.P.*); 47 Pa. B. 3119 (June 3, 2017) (*Sunoco Pipeline, LP*); 47 Pa. B. 2781 (May 13, 2017) (*Berncher Company, Penn Liberty Plaza I*); 47 Pa. B. 1776 (March 25, 2017) (*Columbia Gas Transmission, LLC*); 46 Pa. B. 4209 (July 30, 2016) (*Consol Pennsylvania Coal Company, LLC*) and 45 Pa. B. 5962 (October 3, 2015) (*South Buffalo Township*). Although the Appellants never applied for or received a permit to fill in the wetlands in the old mill race complex, the Department has allowed use of wetland mitigation banks to satisfy Chapter 105 requirements in appropriate situations.

2. The Department has the burden of proof in an appeal from the issuance of an Administrative Order. 25 Pa. Code § 1021.122(b)(4).

3. The Department has authority to issue the Order pursuant to Sections 5, 402, and 610 of The Clean Streams Law, 35 P.S. §§ 691.5 and 691.610, Section 20 of the Dam Safety and Encroachments Act, 32 P.S. § 693.20 and Section 1917-A of the Administrative Order, *supra,* and the rules and regulations adopted thereunder.

4. The Department reasonably exercised its authority when it issued the Order to the Corsnitzes.

5. Issues not raised by the Corsnitzes in their Notice of Appeal are deemed waived unless they show good cause for raising them later. *Thomas v. DEP*, 1998 EHB 93, 100.

6. Issues not raised by the Corsnitzes in their Pre-Hearing Memorandum are waived. *Maddock v. DEP*, 2002 EHB 1.

7. Issue not raised by the Corsnitzes in their Post-Hearing Brief are waived. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 366-371.

8. The areas under the Corsnitzes placed the fill material constitute wetlands as defined in 25 Pa. Code § 105.1.

9. 25 Pa. Code § 105.1 defines a "body of water" as "a natural or artificial lake, pond, reservoir, swamp, marsh or wetland."

10. The Department regulates both natural and artificial wetlands pursuant to the definition of "body of water" in 25 Pa. Code § 105.1.

11. The fill placement in wetlands is a "discharge of fill material" that constitutes both a water obstruction and an encroachment and requires prior permit authorization from the Department under 25 Pa. Code § 105.11.

12. No such permit was obtained by the Corsnitzes for the Site; therefore, the Corsnitzes' activities are in violation of Department regulations at 25 Pa. Code § 105.11(a) and Section 6(a) of the Dam Safety and Encroachment Act, 32 P.S. § 693.6(a).

13. The Corsnitzes' conduct of causing or allowing the addition of fill and the discharge of sediment to waters of the Commonwealth, such as the wetlands described above, constitutes unlawful conduct under Sections 401, 402 and 611 of The Clean Streams Law, 35 P.S. §§ 691.401, 691.402, 691.611.

14. The Corsnitzes' failure to obtain a permit prior to the installation of a water obstruction or encroachment is a violation of Section 6(a) of the Dam Safety and Encroachment Act, 32 P.S. § 693.6(a), 25 Pa. Code 105.11(a), and is unlawful conduct under Section 18 of the Dam Safety and Encroachment Act, 32 P.S. § 693.18.

15. The Corsnitzes' construction, operation, or maintenance of a water obstruction or encroachment without a permit is a violation of the Dam Safety and Encroachments Act, 32 P.S. § 693.6, and constitutes unlawful conduct under Sections 401 and 611 of The Clean Streams Law, 35 P.S. §§ 691.401 and 691.611, and a nuisance under Section 402 of The Clean Streams Law, 35 P.S. § 691.402.

16. The Order was a reasonable, necessary and lawful exercise of the Department's discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCOTT AND GWENDOLYN CORSNITZ	:	
	:	
v.	:	**EHB Docket No. 2016-030-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 23rd day of February, 2018, 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: February 23, 2018

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

For the Commonwealth of PA, DEP:
Curtis C. Sullivan, Esquire
Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellants:
Andrew S. Withers, 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: February 26, 2018**
	:	

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the Appellant's appeal of the Department's Chapter 105 Order. The Department demonstrated that wetlands existed at the Site and showed by a preponderance of the evidence that it acted reasonably and in accordance with the law and the facts when it issued the Chapter 105 Order to the Appellant. Taken together, the Board finds that the Appellant filled wetlands on the Site and that the Department's Chapter 105 Order was a reasonable and lawful exercise of the Department's authority granted to it under The Clean Streams Law, and the Dam Safety and Encroachments Act.

FINDINGS OF FACT

Parties

1. The Department is the agency with the duty and authority to administer and enforce The Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* ("Dam Safety and Encroachments Act"); The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* ("Clean Streams Law" or "CSL"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L.

177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (DEP-12; DEP-13).

2. Mr. Anthony Liddick ("Appellant" or "Mr. Liddick") maintains a mailing address of 1764 Old Trail Road, Liverpool, Buffalo Township, Perry County, PA 17045. (DEP-1; DEP-12; DEP-13).

Site

3. Mr. Liddick owns property that is located on both the eastern and western sides of State Route 11/15 ("S.R. 11/15") in Buffalo Township, Perry County ("Site"). (DEP-2, p. 1; N.T. 15).

4. The Site is referenced in Perry County tax parcel mapping as Tax Parcel PIN 030.24.00—040.000. (DEP-12; DEP-13, p. 1; N.T. 18, 71).

Background

5. The Site's receiving waters are an unnamed tributary ("UNT") to the Susquehanna River, the Susquehanna River, and associated wetlands. (DEP-1).

6. The UNT to the Susquehanna River, the Susquehanna River, and the associated wetlands are waters of the Commonwealth. Both the Susquehanna River and the UNT to the Susquehanna River are classified as Warm Water Fishes ("WWF") and Migratory Fishes ("MF") in 25 Pa. Code § 93.9m. (DEP-1).

7. On April 9, 2015, the Department received a complaint alleging that logging activities were taking place at the Site on the east side of S.R. 11/15 that could potentially be impacting the Susquehanna River's floodplain. (N.T. 19, 64).

8. On May 22, 2015, the Department received a second complaint regarding the Site that alleged earth disturbance through clear cutting in a potential wetland on the east side of S.R.

11/15. (N.T. 19).

Inspections

9. The Department conducted inspections of the Site on July 2, 2015; March 24, 2016; March 29, 2016; June 3, 2016; and June 21, 2016. (N.T. 19, 23, 27, 38-39; DEP-2, p. 1; DEP-5; DEP-7, p.2).

10. All five inspections were conducted by Department Water Pollution Biologist, Felicia Lamphere. (N.T. 19, 23, 27; DEP-2, p. 1; DEP-3).

11. Ms. Lamphere is an expert in the implementation and enforcement of the waterways and wetlands program and 25 Pa. Code Chapter 105; her expertise includes the identification and determination of the presence of wetlands. (N.T. 13-14).

12. Mr. Liddick did not testify as to having experience or training in wetlands identification. (N.T. 81-86).

13. Ms. Lamphere determined that wetlands were present on the Site by following the methodology described in the *1987 Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1* ("Manual") and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region, Version 2.0* ("Supplement"). (DEP-10; DEP-11; DEP-14; N.T. 11, 20).

14. In accordance with both the Manual and the Supplement, Ms. Lamphere evaluated the Site for the presence of three separate wetland parameters: hydrophytic vegetation, hydric soils, and wetland hydrology. (DEP-3; DEP-4; DEP-7; DEP-10; DEP-11; DEP-14; N.T. 19-20).

15. Over the course of her inspections, Ms. Lamphere observed all three wetland parameters at the Site. (DEP-3; DEP-4; DEP-7; DEP-10; DEP-11; DEP-14; N.T. 27-37, 42, 44-

45, 50).

16. As a result of the five Site inspections, Ms. Lamphere determined to a reasonable degree of scientific certainty that Mr. Liddick placed "fill" as that term is defined at 25 Pa. Code § 105.1, in wetlands at the Site on the west side of S. R. 11/15 without permit authorization from the Department. (N.T. 53-54; DEP-14).

17. The fill placement in the wetlands constitutes both a "water obstruction" and an "encroachment," as those terms are defined at 25 Pa. Code § 105.1. (DEP-14).

18. The amount of fill placed at portions of the Site during her investigations required Ms. Lamphere to apply Chapter 5 of the Supplement, *"Difficult Wetland Situations in the Eastern Mountain and Piedmont Region,"* to the data points she collected in the areas disturbed by fill material. (N.T. 20; DEP-11; DEP-14).

19. As a result of additional inspections completed on November 8, 2016 and February 3, 2017, the Department determined that Mr. Liddick conducted additional activities on the Site that violated Chapter 102 and Chapter 105. (DEP-8; DEP-9).

20. Ms. Lamphere identified all three wetland parameters on the portion of the Site west of S. R. 11/15. (DEP-3; DEP-4; DEP-7; DEP-10; DEP-11; DEP-14; N.T. 27-37, 42, 44-45, 50).

21. Ms. Lamphere determined that wetlands are present at the Site in those areas where Mr. Liddick placed fill. (N.T. 53-54; DEP-14).

Department Order

22. On March 29, 2016, the Department issued a Chapter 105 Order ("Order") to Mr. Liddick, addressing Mr. Liddick's various violations of the Dam Safety and Encroachments Act and the regulations promulgated thereunder. (N.T. 16; DEP-3; DEP-12).

23. The Order directs Mr. Liddick to complete the following remedial actions:

a. Remove all fill material located in the floodway (50 feet from the top of the streambank) on the north and south sides of the unnamed tributary to the Susquehanna River on the east side of S. R. 11/15.

b. Remove all fill material from the wetlands on the portion of Tax Parcel 30.24.40 located on the west side of S. R. 11/15 between Old Trail Road and S. R. 11/15.

c. Reinstall the culvert in the unnamed tributary to the Susquehanna River, as identified within GP-07-50-15-104, so that the culvert is depressed into the stream bed by six (6) inches as required by Condition (r) of the permit.

d. Stabilize all earth disturbance with seed and straw mulch.

e. Implement additional Best Management Practices or actions that the Department may request in writing.

f. Items 1-5 above must be completed by April 22, 2016 unless a different time frame is approved by the Department in writing.

(DEP-12, p.3)

24. At the time of the Hearing, Mr. Liddick had only satisfactorily complied with Remedial Action a. and c. described above in paragraph 23. (N.T. 71-76).

25. At the time of the Hearing, Mr. Liddick had not complied with Remedial Actions b. and d. described above in paragraph 23. (N.T. 69, 71-76).

Appeal to the Environmental Hearing Board

26. On April 21, 2016, Mr. Liddick filed an appeal of the Order with the Board. (*See* EHB Docket No. 2016-051-M).

27. A Hearing was held on September 7, 2017. (EHB Docket No. 2016-051-M, Bd. Ex. 12).

28. Mr. Liddick did not file a Post-Hearing Brief meeting the requirements of 25 Pa. Code § 1021.131. He only filed a statement that said, "my survey clearly showed no wetlands In [sic] the area that Ms [sic] Lamphere said she found wetlands." (EHB Docket No. 2016-051-M, Bd. Ex. 21).

Exhibit A-1

29. Exhibit A-1 is an untitled and undated sheet of paper that identifies "required right-of-way" and "wetlands" on the east side of S. R. 11/15. (Exhibit A-1).

30. Exhibit A-1 contains no information on its face to support Mr. Liddick's assertion that it is a wetlands study of or map depicting both sides (east and west) of S. R. 11/15. (Exhibit A-1).

31. Mr. Liddick admitted at the hearing that he did not know if wetlands sampling was conducted, or where it might have been conducted in connection with the preparation of Exhibit A-1. (N.T. at 88).

32. Mr. Liddick did not know who prepared Exhibit A-1 or when it was prepared. (N.T. at 88).

33. No one testified at the hearing to describe what Exhibit A-1 depicts, who prepared it, when it was prepared, or how it was prepared. (N.T. at 88).

DISCUSSION

Background

On April 9, 2015, the Department received a complaint that Anthony Liddick ("Appellant") was allegedly conducting logging activities on his property located on the east and

west sides of State Route 11/15 ("S. R. 11/15") in Buffalo Township, Perry County, Pennsylvania ("Site"). The alleged logging activity potentially impacted the floodplain of the Susquehanna River. On May 22, 2015, the Department received a second complaint, alleging that the Appellant had clear-cut and conducted earth disturbance activities on the east side of S. R. 11/15.

Following its receipt of these complaints, the Department sent Felicia Lamphere ("Ms. Lamphere"), a Department Water Pollution Biologist, to inspect the Site on July 2, 2015. During the inspection, Ms. Lamphere noted several violations, which included the placement of fill in wetlands to establish and improve a road – an action that created deep ruts in the wetland caused by heavy equipment; placement of fill – soil and stone – in the FEMA detailed floodway of the Susquehanna River; placement of fill within the floodway of the unnamed tributary ("UNT") to the Susquehanna River to improve a road and to create fill pads on the east side of S. R. 11/15; and placement of a 32-inch diameter culvert pipe and associated fill in the UNT to the Susquehanna River. These actions were taken without authorization from the Department. Ms. Lamphere also did not note any erosion and sediment controls present on the Site. She requested that the Appellant refrain from taking any further earth disturbance activities.

On March 26, 2016, the Department conducted another Site inspection and discovered more fill in potential wetlands on the west side of S. R. 11/15. The Department has averred that it made several attempts to bring Mr. Liddick into voluntary compliance following both inspections. When these attempts proved unsuccessful, the Department returned to the Site on March 29, 2016 and issued the Order to Mr. Liddick to address multiple violations of the Dam Safety and Encroachment Act, the Clean Streams Law, and the regulations promulgated thereunder.

On April 21, 2016, Mr. Liddick filed this appeal with the Board. In his Notice of Appeal, Mr. Liddick listed objections to the Department's Order: (1) the UNT does not run into the Susquehanna; it runs to and stops at Mr. Liddick's canal; (2) a state survey Mr. Liddick possesses does not show that there are wetlands on the west side of the highway; and (3) the culvert pipe will no longer be needed in the summer when the stream dries up.

On October 17, 2016, the Department filed a Motion to Compel Discovery Responses and Request to Extend Deadlines, following which the Board issued an Order directing the Appellant to file a response to the Motion on or before October 25, 2016. The Appellant did not comply with this Order and on November 3, 2016, the Board issued an Opinion and Order granting the Department's Motion to Compel and providing it with an extension of deadlines.

On January 5, 2017, the Department filed a Motion for Sanctions for Appellant's failure to comply with the Board's November 3, 2016 Order. The Department requested that the Board dismiss the appeal or, in the alternative, issue sanctions that would (1) preclude the Appellant from introducing any witness or evidence at the hearing in this matter that is within the scope of what the Department requested in discovery; (2) preclude the Appellant from introducing expert testimony; and (3) shift the burden of the proceeding in this matter from the Department to the Appellant. The Appellant did not respond to the Department's Motion and on January 23, 2017, the Board issued an Opinion and Order granting in part and denying in part the Department's Motion. Specifically, as a sanction for failure to comply with the Department's discovery requests and the Board's order granting the Department's Motion to Compel, the Board precluded the Appellant from introducing as evidence at the hearing any documents other than those that had already been identified by the Appellant. Additionally, the Board precluded the

Appellant from calling any witnesses other than himself at the hearing on the merits. The Board, however, declined to shift the burden in the appeal from the Department to the Appellant.

A hearing on the merits was held in Harrisburg on September 7, 2017 and the matter is now ripe for adjudication.[1]

Burden of Proof and Standard of Review

In hearings before the Board, the party with the burden of proof is required to present a *prima facie* case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b). Here, that is the Department. The Department bears the burden of proof in appeals of Department orders. 25 Pa. Code § 1021.122(b)(4). The Practice and Procedure Rules of the Environmental Hearing Board provide that "the Department has the burden of proof in the following cases . . . when it issues an order." 25 Pa. Code § 1021.122(b)(4). The Department must show by a preponderance of the evidence that it acted lawfully and in a reasonable exercise of its discretion when it issued the order and that the order is supported by the facts. *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75. However, an appellant bears the burden of proof for any affirmative defenses raised to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

The Board reviews Department actions *de novo. Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Smedley v. DEP*, 2001 EHB 131, 156. The Board is also able to

[1] We note that during this appeal, the Department asserted that under *Thomas v. DEP*, 1998 EHB 93, 100 and *Maddock v. DEP*, 2002 EHB 1, issues not raised by an appellant in his Notice of Appeal or in his Prehearing Memorandum are deemed waived. *See* Department's Post-Hearing Brief at 27, ¶¶ 7-8. While this is true, the issue we primarily address is whether wetlands existed on the Appellant's property, an issue raised both in the Appellant's Notice of Appeal and Prehearing Memorandum. Therefore, we will not address the Department's arguments regarding waiver of issues, other than finding that the Appellant's sole issue on appeal was not waived.

consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). In this case, the Board finds that the Department acted reasonably, lawfully, and in accordance with the facts when it issued the Chapter 105 Order to the Appellant.

The Department Established that the Portion of the Site on the West Side of State Route 11/15 is a Wetland.

We find that the Department met its burden and demonstrated both that wetlands exist on the portion of the Site on the west side of S. R. 11/15 and that the Appellant filled in those wetlands without a permit. Because the Appellant has admitted that he filled in the portion of the Site on the west side of S. R. 11/15, the primary factual question we must address is whether the area on the west side of S. R. 11/15 contains wetlands. For the reasons set for below, we find that it does.

Where the issues in an appeal require scientific or specialized knowledge or experience to understand, expert testimony is required. *Diehl v. DEP*, Docket no. 2016-099-M, slip op. at 8 (Opinion issued January 3, 2018); *United Refining Company v. DEP*, 2016 EHB 442, 449. Evidence pertaining to wetlands and associated testimony is one such issue. *See, e.g., DEP v. Seligman*, 2014 EHB 755; *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133; *Oley Township v. DEP*, 1996 EHB 1098. Further, if an appellant challenging a Department action raises a technical issue, he "must come forward with technical evidence." See *Prizm Asset Mgmt. Co. v. DEP*, 2005 EHB 819, 844; *Shuey v. DEP*, 2005 EHB 657. Here, the Appellant challenged the Department's Order on the grounds that the Site located on the west side of S. R. 11/15 did not

contain wetlands. However, he did not present technical evidence or expert testimony on that point.[2]

The standard for expert testimony in Pennsylvania is that the expert must possess knowledge beyond that of a layperson, the knowledge must assist the trier of fact in understanding the evidence or an issue of fact, and the expert's methodology must be generally accepted in the field. Pa.R.E. 702; *Fisher v. DEP*, 2010 EHB 46, 47-48; *Rhodes v. DEP*, 2009 EHB 237, 238-39. Further, an expert must testify with a "reasonable degree of scientific certainty" that what she has stated is more probable than not based on scientific knowledge and methods. See *City of Harrisburg v. DER*, 1996 EHB 709; *Al Hamilton Contracting Co. v. DER*, 659 A.2d 31 (Pa. Cmwlth. 1995).

The Department presented extensive testimony by its expert, Ms. Lamphere, regarding her inspections of the Site and her process for making a wetlands determination. Due to the sanctions issued against him, the Appellant provided the Board with no expert witnesses or reports regarding the Site. In fact, the Appellant had only one exhibit – an untitled and undated Pennsylvania Department of Transportation map that shows part of his property located along a portion of S. R. 11/15 and which Mr. Liddick asserts does not show wetlands at the Site. (Exhibit A-1).[3] The Appellant admitted to filling in the Site, though he contests that the Site contains wetlands. (N.T. 53-54; DEP-14).

We think that Ms. Lamphere's testimony was both credible and fully supported by the data collected during her multiple Site investigations. She followed the established methodology

[2] Mr. Liddick testified that he hired an expert witness, Steve Bason, in 2015 after the Department issued the Order under appeal. (N.T. at 84). Mr. Bason did about 12.5 hours of work on Mr. Liddick's property and was hired to determine whether wetlands were present on the west side of S. R. 11/15. *Id*. Mr. Bason did not testify at the hearing and he was not identified in discovery or listed as a witness in the Appellant's Prehearing Memorandum. Rather than rely upon Mr. Bason's testimony, Mr. Liddick decided to rely upon the one-page exhibit that he believes is a Department of Transportation wetlands study. *Id*

[3] The Board will address Exhibit A-1 in greater detail below.

that is described in the *1987 Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1* ("Manual") and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region, Version 2.0* ("Supplement"). During her investigations, Ms. Lamphere evaluated the Site in accordance with the Manual and Supplement. She noted whether the three separate wetland parameters – hydrophytic vegetation, hydric soils, and wetland hydrology – were present on the Site and found that they were. (FOF 15, 20).

While inspecting the western portion of S. R. 11/15 during her March 24, 2016 investigation, Ms. Lamphere observed hydrophytic vegetation, ponding water, and fill material. (N.T. 23-24). Additionally, she noted the presence of hydrophytic vegetation in the form of several obligate plants – plants mostly found in wetlands – and facultative wet plants – plants usually found in wetlands. (N.T. 24). While Ms. Lamphere could not obtain a soil profile because the Appellant asked her to leave his property, she considered the Site to be a potential wetland. (N.T. 24).

On March 29, 2016, with permission to inspect the western portion of S. R. 11/15, Ms. Lamphere took soil samples and made observations at five data points. (DEP Ex. 3; DEP Ex. 4). Because the fill pad in this area contained approximately 10-12 feet of fill, Ms. Lamphere established data points around this area. (N.T. 27-37). She documented several hydrology indicators in addition to various types of hydrophytic vegetation at data point 1. (N.T. 27-28). A soil sample taken in accordance with the Manual, demonstrated that the soil was in an anaerobic state, which satisfied the definition of hydric soils and fulfilled the third and final wetland indicator. N.T. 29-30). Ms. Lamphere determined that data points 1 and 2 were wetlands. (N.T. 27-37). Data points 3 and 4 were uplands. (N.T. 27-37). Ms. Lamphere was unable to reach a conclusive assessment at data point 5 due to the extent of fill in this location, but classified it as

"potential wetlands" due to the presence of two out of the three wetlands indicators. (N.T. 27-37).

After flagging fill to be removed on June 3, 2016, on June 21, 2016, Ms. Lamphere returned to the Site to inspect a 17-foot deep trench in the fill pad that the Appellant dug so that soil samples might be taken. (N.T. 41-43). The area had previously been filled in, so Ms. Lamphere applied Chapter 5 of the Supplement: "Difficult Wetland Situations in the Eastern Mountains and Piedmont Region" to the data points collected in the trench. (FOF 18). She determined that hydrology and hydric soil wetland indicators were present and that the area was a wetland. (FOF 14, 15). Following her inspection, Ms. Lamphere asked the Appellant to remove the fill material that she had flagged on June 3, 2016. (N.T. 38-39). At the time of the hearing, no fill had been removed.

We find that Ms. Lamphere's testimony establishes that the Appellant filled wetlands without a permit on the western portion of the Site. Ms. Lamphere visited the site 5 times and spoke with the Appellant on several occasions. (FOF 10). She followed established procedure in conducting her investigations and identified all three wetland criteria on this portion of the Site. (FOF 20). Ms. Lamphere testified that she determined to a reasonable degree of scientific certainty that, in her expert opinion, the area that the Appellant filled in was a wetland. (N.T. 53-54, 60). We agree and find that the Appellant filled in wetlands on his property on the west side of S. R. 11/15.

Appellant's Challenges to the Wetlands Determinations

Before we move on, it bears noting that at the hearing and subsequently when he made his Post-Hearing filing,[4] Mr. Liddick focused his challenge to the Department's Order on a

[4] Mr. Liddick was directed to file his Post-Hearing Brief on or before November 27, 2017. On November 27, 2017, he filed a single, unsigned, and undated piece of paper with the following statement: "my

particular exhibit that the Board allowed into evidence over the objection of the Department. During his case-in-chief, Mr. Liddick identified Exhibit A-1 as a "Department of Transportation Survey for Wetlands" or "the Department of Transportation's Wetland Study Map." (N.T. 80). These descriptions of the document belong to Mr. Liddick, as the document does not have a title or description anywhere on the single page. It shows a portion of S. R. 11/15 and is identified as sheet 47 of 104 in Perry, Juniata, and Snyder Counties. Of particular interest to Mr. Liddick is its legend, which identifies both required right-of-way areas and wetland areas with both areas either cross-hatched or shaded. Both identified areas are on the east side of S. R. 11/15 towards the Susquehanna River. The cross-hatched required right-of-way areas run along the entire length of S. R. 11/15 on the east side. The shaded wetland areas are on the north and south ends of S. R. 11/15 on the east side with an area in the middle that has no wetland areas depicted. Neither of these areas are depicted on the west side of S. R. 11/15. Mr. Liddick asserts that Exhibit A-1 is a study of wetlands east and west of S. R. 11/15, and that it "clearly showed no wetlands in the area that Ms. Lamphere said she found wetlands." Appellant's Post-Hearing Statement at 1. He relies on Exhibit A-1 to challenge that wetlands exist on the west side of S. R. 11/15. The Board disagrees with this challenge.

Mr. Liddick asserts that Exhibit A-1 includes his property east and west of S. R. 11/15. However, a close examination of Exhibit A-1 reveals that Mr. Liddick is not identified as a property owner on the map. In his Notice of Appeal, Mr. Liddick included a copy of the document that was later marked Exhibit A-1. The copy of the document filed with his Notice of Appeal included a handwritten notation and circle around the property owned by Roger L. Buriak west of S. R. 11/15. The notation for this circled area stated "no wetlands." The Board

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survey clearly showed no wetlands in the area that Ms. Lamphere said she found wetlands." This statement does not meet the Board's Post-Hearing Brief requirements found at 25 Pa. Code § 1021.131.

assumes that this is the property on the west side of S. R. 11/15 that Mr. Liddick currently owns, but Mr. Liddick did not address this uncertainty in his testimony at the hearing. The fact that Exhibit A-1 does not list the current owner of the circled portion of the property raises additional concerns regarding the date on which Exhibit A-1 was prepared.

Although the Board allowed Mr. Liddick to introduce his Exhibit A-1 into evidence, the Board gives no weight to this exhibit or to Mr. Liddick's testimony describing what it depicts for several reasons. First, Exhibit A-1 on its face contains no support for Mr. Liddick's assertion that it is a wetlands study on both the east and west sides of S. R. 11/15. He asserts that the exhibit establishes that there were wetlands on portions of the east side of S. R. 11/15, but no wetlands on the west side of S. R. 11/15. While the untitled and undated sheet identifies required right-of-way areas on the east side of S. R. 11/15 and corresponding wetland areas on or near these required right-of-way areas on the east side of S. R. 11/15, there is no indication on the face of the document that it represents anything about the west side of S. R. 11/15. If the required right-of-way is the focus of the sheet and there are no required right-of-way areas on the west side of S. R. 11/15, Exhibit A-1 does not address whether there are wetlands on the west side of S. R. 11/15.

Second, and relatedly, there was no credible evidence presented to support Mr. Liddick's bald assertion that Exhibit A-1 represents a study of wetland areas east and west of S. R. 11/15. Mr. Liddick testified that the Department of Transportation had the "study done" upon which he relies. (N.T. at 84). As previously mentioned, there was no testimony regarding who performed the alleged study, when it was conducted, or how it was performed. Mr. Liddick did not know if sampling for wetlands was done or where it might have been done. (N.T. 88). On cross-examination, Mr. Liddick agreed that he did not know what study was done and where sampling,

if any, had been done. *Id*. No witness testified to support Mr. Liddick's assertion, and without evidentiary support, the assertion is nothing more than hopeful but unsupported conjecture.

Finally, even if Exhibit A-1 were viewed as mapping of known wetland areas, such mapping of already known wetland areas would not preclude the Department from identifying additional wetland areas that were not previously mapped. In general, some wetland areas are already known and mapped, but other wetland areas are neither known nor fully mapped or delineated. All wetland areas are protected and subject to regulation, which is why the Manual and Supplement exist to aid in identifying unknown wetland areas and delineating the boundaries of these newly identified areas. Ms. Lamphere conducted a wetlands evaluation on the west side of S. R. 11/15, and this recent wetlands assessment is not precluded by any lack of prior wetlands mapping in previously known wetland areas. New wetland areas are often identified in the normal course of business following the procedures set forth in the Manual and Supplement that the Department applied here. Exhibit A-1 does not preclude the identification of additional wetlands on Mr. Liddick's property on the west side of S. R. 11/15.

The Department's Chapter 105 Order is a Reasonable, Lawful, and Necessary Exercise of the Department's Discretion

Due to both the evidence laid out above and that which follows, the Board finds that the Department's Chapter 105 Order, issued to the Appellant, constituted a reasonable and lawful exercise of its discretion and that the Order is supported by the facts. *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153.

The Department has the authority to issue Chapter 105 Orders pursuant to Section 20 of the Dam Safety and Encroachments Act, 32 P.S. § 693.20, and Section 1917-A of the Administrative Code and the rules and regulations adopted thereunder. The Department has the

discretion to determine when an order should be issued. The Dam Safety and Encroachments Act provides in relevant part:

> The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to . . . orders requiring persons to cease any activity which is in violation of the provisions of this act. Such an order may be issued if the department finds that a person is in violation of any provision of this act, or any rule or regulation issued hereunder. The department may, in its order, require compliance with such terms and conditions as are necessary to effect the purposes of this act.

32 P.S. § 693.20. The Department has similar authority under The Clean Streams Law. 35 P.S. § 691.610.

Additionally, the Department has authority under the Administrative Code to direct individuals who have created a statutory public nuisance to abate that nuisance. *Becker v. DEP*, EHB Docket No. 2013-038-C, slip op. at 36 (Opinion issued April 10, 2017) (citing 71 P.S. § 510-17; *Ryan v. Dep't of Envtl. Res.*, 373 A.2d 475 (Pa. Cmwlth. 1977); *Tenth Street Building Corp. v. DER*, 1985 EHB 829, 842; *Ryan v. DER*, 1976 EHB 228). Section 19(a) of the Dam Safety and Encroachments Act states that "any activity that constitutes unlawful conduct under the act shall be restrained or prevented in the manner provided by law for the abatement of public nuisances." 32 P.S. § 693.19(a). Both Section 19(a) of the Dam Safety and Encroachments Act and 17(1) of the Administrative Code give the Department the authority to abate nuisances. 32 P.S. § 693.19(a); 71 P.S. § 510-17(1). Here, we find that the Department exercised its discretion reasonably and lawfully in accordance with the relevant statute and regulations.

While the Department has the authority to issue orders, it typically will not issue them before pursuing and exhausting other means of achieving compliance. (N.T. 63-65). The Department has demonstrated that it gave the Appellant ample time in which to come into

voluntary compliance prior to the issuance of the Order. The Department's second expert witness, Andrea Blosser, testified that most Chapter 105 complaints are resolved through voluntary compliance. (N.T. 63-65). However, the Appellant made no attempt to achieve voluntary compliance during the time prior to his receipt of the Order that is under appeal. (N.T. 69, 71-76).

Before issuing the Order on March 29, 2016, the Department had already inspected the Site and made efforts to work with the Appellant in order to achieve voluntary compliance for the violations noted in the inspection reports. (DEP-1; DEP-2). During its first inspection, the Department recorded that the Appellant had (1) placed fill in the wetlands to establish and improve a road, (2) used heavy equipment that caused deep rutting in the wetlands, (3) deposited fill as defined by 25 Pa. Code § 105.1 in the FEMA detailed floodway of the Susquehanna River[5], (4) deposited fill into the floodway of the UNT to the Susquehanna River on the east side of S. R. 11/15 to improve a road and to create fill pads, and (5) installed a 32-inch diameter culvert pipe and associated fill in the UNT to the Susquehanna River. The Appellant did not possess a permit for any of the actions taken. (FOF 16). While inspections were still ongoing, he continued to violate the Department's regulations and ignored Ms. Lamphere's repeated requests to cease fill activity into areas of the wetland on the west side of the Site. It is clear to the Board that the Department issued the Order only after it became apparent that the Appellant would not follow the Department's requests.

The Chapter 105 Order required the Appellant to take five remedial actions: (1) Remove all fill material located in the floodway on the north and south sides of the UNT to the

[5] "Fill" is defined as "Sand, gravel, earth or other material placed or deposited to form an embankment or raise the elevation of the land surface. The term includes material used to replace an area with aquatic life with dry land or to change the bottom elevation of a regulated water of this Commonwealth." 25 Pa. Code § 105.1.

Susquehanna River on the East side of S. R. 11/15; (2) Remove all fill material from the wetlands on the portion of tax parcel 30.24.40 located on the west side of S. R. 11/15 between Old Trail Road and Route 11/15; (3) Reinstall the culvert in the UNT to the Susquehanna River, as identified within GP-07-50-15-104, so that the culvert is depressed into the stream bed by six (6) inches as required by condition r of the permit; (4) Stabilize all earth disturbance with seed and straw mulch; (5) Implement additional Best Management Practices or actions that the Department may request in writing. (FOF 23). All five requirements were to be completed by April 22, 2016 unless a different timeframe was approved by the Department in writing. (DEP-12). The Appellant complied with the Department's request to remove the fill material that was in the floodway on the north and south sides of the UNT to the Susquehanna River on the east side of S. R. 11/15. (FOF 24). Additionally, he reinstalled the culvert in the UNT to the Susquehanna River. (FOF 24). However, the Appellant did not complete remedial actions two and four as directed by the Chapter 105 Order.

The Appellant's unpermitted actions were in violation of The Clean Streams Law and the Dam Safety and Encroachment Act. His placement of fill in wetlands is a "discharge of fill material" that is a water obstruction and encroachment requiring prior permit authorization under 25 Pa. Code § 105.11. As stated previously, the Appellant had no such permit for the Site. This is a violation of 25 Pa. Code § 105.11(a) and Section 6a of the Dam Safety and Encroachment Act, 32 P.S. § 693.6(a). Additionally, the Appellant caused or allowed the addition of fill and discharge of sediment to waters of the Commonwealth in violation of Sections 401, 402, and 611 of The Clean Streams Law, 35 P.S. §§ 691.401, 691.402, 691.611. His failure to obtain a permit before installing a water obstruction or encroachment violates Section 6(a) of the Dam Safety

and Encroachment Act, 32 P.S. § 693.6(a), 25 Pa. Code § 105.11(a), and constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachment Act, 32 P.S. § 693.18.

Further, at the time of the hearing, the Appellant had made no effort to stabilize all earth disturbance activity on the Site with seed and straw mulch as directed by the Order. Under 25 Pa. Code § 102.22, stabilization of earth disturbance is required. (N.T. 75). Additionally, the Appellant's earth disturbance activities had the potential to pollute the Waters of the Commonwealth, including wetlands, through sedimentation if the disturbances were not properly stabilized. (N.T. 75). As the evidence demonstrates, no stabilization has been done on the Site.

Additionally, we think it bears noting that at no point did the Appellant inform the Department of any impediments to his being able to complete the final remedial actions. (N.T. 76-77). Nor did he ask the Department for an extension of time in which to complete the actions. (N.T. 76-77). The Department made multiple efforts to bring the Appellant into voluntary compliance. When that failed, the Department issued the Chapter 105 Order. The Appellant completed two of the remedial actions, but has not complied with the rest of the Order – which was issued to restore the Site to pre-violation conditions and prevent future violations from occurring. In fact, by continuing his earth disturbance activities, the Appellant has compounded already existent violations. Taken together, we think the evidence demonstrates that the Department behaved reasonably and in accordance with the law when it issued the Chapter 105 Order to the Appellant.

Conclusion

The Board finds that the Department has demonstrated by a preponderance of the evidence that wetlands are present on the Site and that the Appellant has filled them in without a permit. Further, we find that the Department acted reasonably and in accordance with the law

when it issued the Appellant the Order. We find that the Order was supported by the facts as presented to us in evidence at the hearing. Therefore, we dismiss this appeal.

CONCLUSIONS OF LAW

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

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

3. Pursuant to 25 Pa. Code § 1021.122(b)(4), the Department has the burden of proof in the appeal of a Department order.

4. The Department must show by a preponderance of the evidence that it acted lawfully and in a reasonable exercise of its discretion when it issued the order and that the order is supported by the facts. *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

5. The appellant bears the burden of proof for any affirmative defenses raised to the Department's order. *Robinson Coal*, 2015 EHB 130, 154; *Carroll Twp. v. DEP*, 2009 EHB 401, 409 n.3.

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

7. The Department has the authority to issue the Chapter 105 Order under appeal pursuant to Section 20 of the Dam Safety and Encroachments Act, 32 P.S. § 693.20; Section 5, 402, and 610 of The Clean Streams Law, 35 P.S. §§ 691.5, 691.402, and 691.610; and Section 1917-A of the Administrative Code, *supra*, and the rules and regulations adopted thereunder.

8. The Department's issuance of the Chapter 105 Order was a reasonable exercise of its authority.

9. The Department's issuance of the Chapter 105 Order was reasonable and authorized by the Dam Safety and Encroachments Act, The Clean Streams Law, and the Administrative Code.

10. The remedial actions contained within the Chapter 105 Order are reasonable because the Appellant continued to violate the regulations despite being directed by the Department to cease all fill and earth disturbance activities on the Site.

11. Issues not raised by the Appellant in his Notice of Appeal are deemed waived unless he shows good cause for raising them later. *Thomas v. DEP*, 1998 EHB 93, 100.

12. Issues not raised by the Appellant in his Pre-Hearing Memorandum are deemed waived. *Maddock v. DEP*, 2002 EHB 1.

13. The Appellant's placement of fill in wetlands is a "discharge of fill material" that constitutes a "water obstruction" and an "encroachment," as defined at 25 Pa. Code § 105.1.

14. 25 Pa. Code § 105.1 defines "body of water" as "a natural or artificial lake, pond, reservoir, swamp, marsh, or wetland."

15. The area on the west side of the Site where the Appellant placed the fill constitutes "wetlands" as that term is defined in 25 Pa. Code § 105.1.

16. In accordance with the regulations at 25 Pa. Code § 105.451(c), the Department adopts and incorporates by reference the *1987 Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1* ("Manual") and any subsequent changes to the Manual, as the methodology to be used for identifying and delineating wetlands in this Commonwealth.

17. 25 Pa. Code § 105.11(a) states that "a person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department."

18. The Appellant's placement of fill in wetlands is a "discharge of fill material" that is a water obstruction and an encroachment that requires prior permit authorization from the Department under 25 Pa. Code § 105.11.

19. The Appellant's activities are in violation of the Department regulations at 25 Pa. Code § 105.11(a) and Section 6(a) of the Dam Safety and Encroachment Act, 32 P.S. § 693.6(a).

20. The Appellant's causation or allowance of fill and the discharge of sediment to the waters of the Commonwealth constitutes unlawful conduct under Sections 401, 402, and 611 of The Clean Streams Law, 35 P.S. §§ 691.401, 691.402, 691.611.

21. The Appellant's failure to obtain a permit prior to the installation of a water obstruction or encroachment is a violation of Section 6(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), 25 Pa. Code § 105.11(a), and is unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18.

22. The Appellant's construction, operation, or maintenance of a water obstruction or encroachment without a permit is a violation of the Dam Safety and Encroachments Act, 32 P.S. § 693.6, and constitutes unlawful conduct under Section 401 and 611 of The Clean Streams Law,

35 P.S. §§ 691.401 and 691.611, and a nuisance under Section 402 of the Clean Streams Law, 35 P.S. § 691.402.

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 26th of February, 2018, 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: February 26, 2018

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

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

For Appellant (*Pro Se*):
Anthony Liddick
1764 Old Trail Road
Liverpool, PA 17045

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	**Issued: March 8, 2018**

OPINION AND ORDER ON APPELLANTS' MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellants' Motion for Summary Judgment is denied where genuine issues of material fact exist and Appellants have not demonstrated their claim of prejudice.

O P I N I O N

This matter involves an appeal filed by Barry and Brenda Miller, challenging a decision by the Department of Environmental Protection (Department) to relieve RoxCoal, Inc. of its responsibility to provide a temporary source of water to the Millers pursuant to 25 Pa. Code § 89.145a(e) of the mining regulations.[1] By letter dated April 19, 2017, the Department notified the Millers that it conducted an investigation into their claim of water loss and agreed with RoxCoal's rebuttal that its mining activities at the Geronimo Mine did not affect the Millers' water supply. The Millers appealed the Department's decision on May 17, 2017.

[1] 25 Pa. Code § 89.145a(e) requires a mining operator to provide a temporary water supply whenever contamination, diminution or interruption occurs to a water supply located within the area of rebuttable presumption of underground mining activities.

The matter currently before the Board is the Millers' Motion for Summary Judgment filed on December 18, 2017. The Millers ask the Board to grant summary judgment on the question of RoxCoal's liability for their water problems and to allow the case to proceed solely on the question of damages. The basis for the Millers' motion is their claim that RoxCoal should be sanctioned for committing spoliation of evidence by disposing of a water filter removed from the Millers' home. The Department and RoxCoal filed responses opposing the motion.[2]

The Board previously addressed the question of spoliation in this matter in an Opinion and Order issued on February 5, 2018. There, we denied the Millers' Motion for Sanctions against RoxCoal. Based on the documents filed by the parties in support of and in opposition to the Motion for Sanctions, we concluded that the Millers had failed to demonstrate that they were prejudiced by the removal and elimination of the water filter in question. As we discussed in our earlier Opinion, the Millers disposed of an earlier water filter that was in place during the time when the alleged issues with their water began. They also submitted a third water filter to a laboratory for testing. We concluded that the Millers had failed to demonstrate how the second filter – the filter that is the subject of their Motion for Spoliation and their Motion for Summary Judgment – is somehow more relevant than the first filter, which they themselves disposed of, or the third filter, which they submitted for testing. We further found no basis for concluding that RoxCoal had intentionally acted to destroy evidence. The filter in question had been removed by Mr. Miller and provided to John Weir, a representative of RoxCoal, for inspection. Mr. Weir took the filter to RoxCoal for further examination. According to the deposition testimony of Mr. Miller, provided with RoxCoal's response to the Motion for Sanctions, the Millers did not ask

[2] An extension for filing responses and replies was granted to the parties on January 4, 2018.

Mr. Weir to return the filter. Based on the record before us, there is no basis for concluding that spoliation has occurred.

Even if we were to find that spoliation had occurred, the Millers have not demonstrated that sanctions are warranted, much less the relief requested by their Motion for Summary Judgment. The Board applies three factors to determine an appropriate sanction for spoliation of evidence: (1) the degree of fault of the party who destroyed evidence; (2) the degree of prejudice suffered by the party seeking the evidence; and (3) whether a lesser sanction will suffice to correct the unfairness suffered by the innocent party and deter further spoliation by the offending party. *Perano v. DEP*, 2011 EHB 17, 23 (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994) and *Schroeder v. Commonwealth*, 710 A.2d 23 (Pa. 1998)); *DEP v. Neville Chemical Co.*, 2005 EHB 212, 213-14 (citing *Schroeder, supra*). As with their Motion for Sanctions, the Millers' Motion for Summary Judgment and supporting documentation fails to demonstrate why RoxCoal's failure to produce the second filter causes them irreparable harm and prejudice. The Millers contend that data that could have been recovered from the second water filter would provide the "[e]vidence needed to determine the source of the mining disturbance that created the damages to the Appellants' well." However, they fail to explain why data from the third filter cannot provide the same information or why the second filter holds more significance than the first filter which the Millers themselves failed to preserve. There is also no evidence that RoxCoal acted in bad faith since the Millers provided them with the filter and did not ask for it in return. See *Miller v. DEP*, EHB Docket No. 2017-040-R (Opinion and Order on Motion for Sanctions issued February 5, 2018).

In addition, RoxCoal argues that the Millers provide no evidence or explanation as to why testing the water itself, or other plumbing components, cannot provide the evidence they claim would have been garnered from the second filter. We agree.

The standard for a grant of summary judgment is high. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt, where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 343. Here we have many questions as to why the loss of the second filter prejudices the Millers' case at all, much less to such an extent that they are entitled to sanctions or summary judgment. As such, summary judgment is not warranted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	

O R D E R

AND NOW, this 8th day of March, 2018, it is hereby ordered that the Appellants' Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 8, 2018

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

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For Permittee:
Christopher Buell, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	**Issued: March 8, 2018**

OPINION AND ORDER ON
PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board denies a permittee's motion for summary judgment where the discovery period has been extended and is ongoing and where the development of a full record at hearing would assist the Board in resolving issues of material fact.

O P I N I O N

This matter involves an appeal filed by Barry and Brenda Miller, challenging a decision by the Department of Environmental Protection (Department) to relieve RoxCoal, Inc. of its responsibility to provide a temporary source of water to the Millers pursuant to 25 Pa. Code § 89.145a(e).[1] The matter currently before the Board is RoxCoal's Motion for Summary Judgment filed on December 18, 2017. The Department filed a memorandum in support of the motion, and

[1] 25 Pa. Code § 89.145a(e) requires a mining operator to provide a temporary water supply whenever contamination, diminution or interruption occurs to a water supply located within the area of rebuttable presumption of underground mining activities.

the Millers filed a response in opposition to the motion. RoxCoal submitted a reply on February 27, 2018. [2] A Motion for Summary Judgment was also filed by the Millers.

Background

Based on the parties' Statements of Undisputed Material Facts and responses, the background of this matter appears to be as follows: The Millers reside in Stoystown, Pennsylvania and obtain their water from a water well located on their property. RoxCoal is the owner and operator of the Geronimo Mine, an underground coal mine. In May 2008, the Millers reported a diminution in water quantity from their water well. At the time of the Millers' complaint, mining in the Geronimo Mine was approximately 250 feet from the Millers' well, and in the summer of 2008, mining in the Geronimo Mine came within 83 feet of the Millers' well. In June 2008 RoxCoal drilled a new well for the Millers.

According to RoxCoal, mining was completed in the Geronimo Mine in September 2010, after which the mine was sealed. A mine owned and operated by AK Coal is also located in the area of the Millers' property, and mining in that mine was ongoing at the time of the parties' filings.

In January 2017 the Millers alleged that they began to experience issues with their water, including discoloration, odor, an oily sheen and a burning sensation upon contact with the water. On March 9, 2017, the Millers reported their water complaint to the Department. According to the parties' filings, the Millers made their complaint with respect to AK Coal. However, on March 16, 2017 the Department notified RoxCoal by letter that the Millers' water well fell within the zone of rebuttable presumption for the Geronimo Mine and ordered RoxCoal to provide the Millers with a temporary water supply. There is no indication whether the

[2] An extension for filing responses and replies was granted to the parties on January 4, 2018.

Department contacted AK Coal or investigated whether AK Coal could be the source of the alleged problem with the Miller water supply. On March 21, 2017 the parent company of RoxCoal submitted a rebuttal report to the Department stating that RoxCoal's mining activities had not impacted the Millers' water well. By letter dated April 19, 2017, the Department notified the Millers that it agreed with RoxCoal's rebuttal and concluded that RoxCoal's mining did not affect the Millers' water supply. The Millers appealed the Department's decision to the Environmental Hearing Board on May 17, 2017.

Standard for Summary Judgment

Motions for summary judgment are governed by Pa. R.C.P. 1035.1 – 1035.5, which are incorporated into the Environmental Hearing Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.94a(a). As the Board explained in *Longenecker v. DEP*, 2016 EHB 552, 553, summary judgment may be obtained in one of two ways: (1) The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Property One, LLC v. DEP*, 2017 EHB 1209, 1212 (citing *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742.) (2) Summary judgment may also be available under the following circumstances:

> 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.

Longenecker, supra at 553-54 (citing Pa.R.C.P. 1035.2(2)).

The record on which the Board decides a summary judgment motion consists of the parties' filings, as well as discovery responses, depositions, affidavits, and other documents accompanying the motion or response labeled as exhibits. *Property One, supra*, at 1212 (citing

25 Pa. Code § 1021.94a(a) and (h); Pa.R.C.P. 1035.1.) In considering whether summary judgment is warranted, we must view the record in the light most favorable to the non-moving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. *Diehl v. DEP*, 2017 EHB 1248, 1252-53.

Discussion

In its motion, RoxCoal argues that it is entitled to summary judgment under the second scenario described above. It asserts that upon the completion of discovery the Millers have produced no evidence that would allow them to carry their burden of proof at trial. As a third-party appellant challenging the Department's decision that mining did not affect their water supply, the Millers have the burden of proving by a preponderance of the evidence that the Department's decision was in error. 25 Pa. Code § 1021.122(a). RoxCoal argues that in order for the Millers to meet this burden they must present evidence that a hydrogeologic connection exists between RoxCoal's mining and the Millers' water well. RoxCoal asserts that because the Millers have produced no expert reports nor identified expert witnesses who can testify to a hydrogeologic connection between their well and RoxCoal's mining, they cannot meet their burden of proof. In response, the Millers argue that they have produced a report from Skyview Lab stating that the alleged impact to their water was caused by a mining disturbance and that they have obtained an expert witness. In rebuttal, RoxCoal argues that the Skyview report states only that "a disturbance" occurred but does not state that it had any connection to mining in general or to the Geronimo Mine in particular.

It is true that at the time RoxCoal filed its motion, the discovery period had concluded. However, in an Opinion and Order issued on January 12, 2018, the Board granted the Millers' motion to extend the discovery period to March 14, 2018. Because the discovery period is

ongoing, it is premature to rule on whether the Millers have produced sufficient evidence in discovery to meet their burden of proof.

RoxCoal also argues that it is entitled to summary judgment because the evidence offered in its rebuttal report to the Department conclusively establishes that its mining did not impact the Millers' water supply. It directs us to Section 5.2(e)(2) of the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §1406.1 *et seq.*, 52 P.S. § 1406.5b(e)(2), which states that a mine operator shall be relieved of liability when it affirmatively proves that the alleged contamination occurred more than three years after mining activity took place. RoxCoal asserts that its mine had been closed for nearly seven years when the Millers claimed they experienced the current issues with their well and the Millers have failed to come forward with any evidence to prove that RoxCoal is responsible for their water issues.

As we noted earlier, because the discovery period is ongoing we find that it is premature to rule on the question of whether the Millers have produced sufficient evidence to meet their burden of proof. Moreover, and more importantly, it seems to us that this case involves questions of fact that may be better resolved through testimony and evidence produced at a hearing. The Department initially ordered RoxCoal to provide a temporary source of water to the Millers and then relieved RoxCoal of its responsibility when RoxCoal submitted its rebuttal report. However, the record contains little information as to the basis for the Department's decision to relieve RoxCoal of responsibility. The issues appear to us to be more complex than that framed by RoxCoal in its motion. *SCA Services v. DER*, 1994 EHB 1. As we held in *Sludge Free UMBT v. DEP*, 2015 EHB 469, 470-71:

> Summary judgment is only granted in "the clearest of cases," *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576, and usually

> only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented, *Citizen Advocates United to Safeguard the Env't v. DEP*, 2007 EHB 101, 106. We review the Department's actions *de novo* to determine whether they constitute reasonable exercises of the Department's discretion that are lawful, supported by the facts, and consistent with the Department's obligation under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, [2015 EHB 221]; *Solebury School v. DEP*, 2014 EHB 482, 519.

This appears to be a case where testimony will be helpful in aiding the Board in understanding the Department's decision and whether that decision is supported by the facts, and is lawful and a reasonable exercise of the Department's discretion. Although this is a close call, we are not disposed to grant summary judgment "unless the matter is free from doubt." (Quoting former Chief Judge Krancer in *Ainjar Trust v. DEP*, 2001 EHB 59, 68.) We feel that the issues will be more appropriately resolved by considering a record fully developed at a hearing on the merits. *Sludge Free, supra*. As recently stated by Judge Mather in *Diehl v. DEP*, EHB Docket No. 2016-099-M (Opinion and Order on Motion for Summary Judgment issued January 3, 2018), *slip op.* at 11, "A motion for summary judgment is not the appropriate place for us to make decisions regarding the quality of evidence when we have not yet heard testimony."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY MILLER AND BRENDA MILLER	:	
	:	
v.	:	**EHB Docket No. 2017-040-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROXCOAL, INC., Permittee	:	

O R D E R

AND NOW, this 8th day of March, 2018, it is hereby ordered that RoxCoal's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 8, 2018

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

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For Permittee:
Christopher Buell, Esquire
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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: March 9, 2018**

OPINION AND ORDER ON
CLEAN AIR COUNCIL'S MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment regarding a circumvention claim and other claims under the air pollution control regulations because the case does not present a limited set of material facts that are truly undisputed or a clear question of law.

O P I N I O N

Sunoco Partners Marketing & Terminals, L.P. ("Sunoco") operates the Marcus Hook Industrial Complex in Delaware County. There are several air contamination sources at the facility, which are permitted under several plan approvals and Title V Operating Permit No. 23-0119. The complex, which also includes air contaminant sources located in Sunoco's facility in the state of Delaware (permitted under Title V Operating Permit No. AQM-003/00021), is considered by the Department of Environmental Protection (the "Department") to be a single facility for purposes of the regulations regarding Nonattainment New Source Review (NNSR), Prevention of Significant Deterioration (PSD), and Title V.

The Marcus Hook Industrial Complex was formerly a refinery. As refinery operations gradually wound down, Sunoco decided to buy the facility and convert it into a facility for the storage and processing of natural gas liquids (NGLs). The facility continues to operate pursuant to a Title V permit. Rather than convert the facility into an NGL storage and processing facility in one comprehensive plan approval, Sunoco has been repurposing the facility pursuant to several plan approvals and requests for determinations (RFDs), a mechanism for determining whether a plan approval for certain work is required.

In February 2013, the Department issued Sunoco a plan approval to construct one storage tank for ethane and one for propane. (Plan Approval 23-0119). In September 2013, the Department issued Sunoco a plan approval to construct a deethanizer to separate the ethane-propane mix delivered to the facility into its constituent parts for storage in the tanks. (Plan Approval 23-0119A.) In January 2014, the Department issued Sunoco a plan approval authorizing the installation of a truck loading and offloading facility and the repurposing of equipment, including an existing fractionation tower, to fractionate (or separate a mixture into its component parts) natural gasoline (another type of NGL) into pentane and light naphtha and store and distribute those products. (Plan Approval 23-0119B.)

In November 2014, the Department issued a separate plan approval to Sunoco to install a cooling tower to facilitate the water cooling process that is part of the deethanization process. (Plan Approval 23-0119C.) In February 2015, the Department issued a plan approval to Sunoco to construct one storage tank for ethane, two for propane, and one for butane. (Plan Approval 23-0119D.) In April 2016, the Department issued Sunoco a plan approval for the development of the two fractionation systems, made up of two depropanizers and one debutanizer and associated piping and "fugitive components." The project also involves installing a new sub-header for

Marcus Hook's ethylene complex flare (located in Delaware), using cooling water from what is identified as the 15-2B cooling tower, and using steam from auxiliary boilers at the facility. (Plan Approval 23-0119E.) It is from this plan approval that the Clean Air Council (the "Council") filed this appeal. This is the only plan approval that the Council appealed.

In August 2015, the Department issued an RFD to Sunoco authorizing two new 50,000-barrel sphere tanks at the facility to store propane and butane materials. (RFD 5236.) Thus, Sunoco was not required to obtain a plan approval for that work. In April 2016, the Department issued another RFD to Sunoco determining that no plan approval was needed for it to transfer the cooling load for Instrument Air Compressors from the 15-6 cooling tower to the 15-2B cooling tower, a process that would require the installation of two new pumps and increase the overall 15-2B cooling tower capacity to 28,500 gpm. (RFD 5597.) Finally, in August 2016, the Department issued a separate plan approval to Sunoco which increased VOC and other emissions limits for certain storage tanks so that they could be used to store high vapor pressure materials including gasoline. (Plan Approval 23-0119F.)

It is not difficult to see why the Council would be concerned by Sunoco's pattern of development. The Council variously complains in this appeal that Sunoco (with the Department's consent) has circumvented permitting requirements and that proper PSD and NNSR applicability determinations were not performed due to the oversegmentation of the work. Its fundamental concern is that it does not understand why Sunoco is being allowed to convert the Marcus Hook facility from a refinery into an NGL processing and storage facility in such a piecemeal fashion for permitting purposes. Since all of the work that Sunoco is doing is taking place at the same facility, the Council is asking why all of that work is not being evaluated holistically. The Council suggests that the facility is being permitted in a fragmentary fashion in

order to avoid certain regulatory thresholds that, if exceeded, it says would require "more environmental protections." The Council's objection is not so much that there have been separate plan approvals; it is that, in reviewing the separate plan approval for Project E, the Department should have aggregated the emissions from all of the parts of what is in reality one project to assess whether certain regulatory thresholds have been exceeded, thereby triggering certain additional regulatory requirements and more accurate public notices.

In light of its concerns, and in furtherance of its appeal from Plan Approval 23-0119E ("Plan Approval E," which approved "Project E"), the Council has filed a motion for summary judgment.[1] The majority of its motion and brief are directed at its claim that Sunoco has unlawfully circumvented NNSR and PSD requirements. However, it also contends the Department authorized use of an unlawful baseline period for the purpose of calculating the emissions increases resulting from the project and that the Department failed to apply the Lowest Achievable Emissions Rate (LAER) requirement to modified equipment involved in Project E.

The Department in response does not provide much of an answer on the segmentation issue. It says it aggregated emissions from some of the work covered by separate plan approvals and not others depending upon whether it considered the projects to be "sufficiently linked." It says that, although it has decided to combine some of Sunoco's applications over the years into a single project, the Plan Approval E project was not sufficiently connected in time and space and

[1] Summary Judgment will only be entered in favor of the moving party if the motion record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(m). As the Board has explained:

> We review the motion in the light most favorable to the non-moving parties. Summary judgment may only be granted in the clearest of cases where the right is clear and free from doubt. All doubts as to the presence of a genuine issue of material fact must be resolved against the moving party. Summary judgment is appropriate only in a case where a limited set of material facts are truly undisputed and the appeal presents a clear question of law.

Consol Pa. Coal Co., LLC v. DEP, 2012 EHB 229, 231 (internal citations and quotations omitted).

functional, economic, and financial interdependence to Sunoco's other work to be linked. No further explanation is provided. It argues more generally that the Council is seeking summary judgment based on a voluminous, incomplete, and inaccurate set of facts. The Council in the Department's view incorrectly asserts that the Board can decide the issues it has raised as a matter of law. It says the issues are fact-dependent and require the Board to evaluate the credibility of fact witnesses, consider all the evidence, and develop a full record upon which it can render a thorough and well-supported decision. The myriad of decisions the Department made based on years of factual information and legal analysis present a complex set of mixed questions of law and fact in its view. Therefore, the issues raised in the Council's motion cannot be decided by summary judgment, the Department says.

Sunoco, of course, also opposes the Council's motion. It echoes the Department's position that this complex appeal is chock full of disputed issues of fact and law and does not lend itself to resolution on summary judgment. It does not make much of an effort to dispute that the various projects covered by the plan approvals cover projects that are interdependent, which would be hard to dispute given that all of the work relates to various steps in the fractionation process, but it says that the conversion of the facility has not been done pursuant to any master plan or any intent to avoid regulatory requirements. Indeed, it says that, absent such a showing of intent, the projects should not be aggregated regardless of their interdependence. Sunoco says that it has proceeded in the way it has due to "evolving business opportunities, engineering factors, and market conditions," with no master plan in hand and with no intent to disguise a major project as something less.

Improper Segmentation

Before we delve further into the merits of the Council's objections, we need to address two preliminary points raised by Sunoco in its response to the motion for summary judgment. Sunoco argues that the Council's notice of appeal did not cover the argument being made in its summary judgment motion that the plan approval circumvented the PSD program as distinct from the NNSR program. Therefore, Sunoco contends, the Council has waived the right to assert that claim and should be precluded from arguing it for the first time here. Sunoco points to Paragraph 9 of the Council's notice of appeal, which provides: "The Department wrongly accepted Sunoco's division of its Marcus Hook Mariner East project into multiple sub-projects, allowing unlawful circumvention of New Source Review in violation of 25 Pa. Code § 127.216." Sunoco asserts that this objection cannot be read to encompass an argument regarding the PSD program.

It is true that allegations not raised in a notice of appeal are generally waived. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367-68; *Berks Cnty. v. DEP*, 2012 EHB 23, 32-34; *Rhodes v. DEP*, 2009 EHB 325, 327-28. However, we have also held that notices of appeal are to be read broadly, and we will be reluctant to find waiver so long as an objection falls within the "genre of the issue" contained in the notice of appeal. *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 206-08; *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002); *Jefferson Cnty. Bd. of Comm'rs v. DEP*, 1996 EHB 997, 1004-05. *See also Croner, Inc. v. DER*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

As the Council points out, the PSD program and the NNSR program are really just two subsets of the overall New Source Review program under the Clean Air Act—one applies to permitting major emitting facilities in attainment areas for certain pollutants, and one applies to

permitting facilities in nonattainment areas. *See United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 279 (3d Cir. 2013). Unfortunately, the term "New Source Review" is sometimes used to cover both programs, although it is usually used as a shorthand for only the NNSR program. *See, e.g.*, EPA New Source Review Manual (1990) at Preface p.1 (the focus of the manual is the PSD portion of the NSR program). The Board itself, perhaps with less than perfect precision, has commingled the names of the programs with respect to circumvention claims. *See United Refining Co. v. DEP*, 2008 EHB 434, 445 ("An operator may not phase, stage, or delay a project or engage in incremental construction to avoid the applicability triggers of the NSR/PSD programs."). We are reluctant to readily treat the perplexing plethora of acronyms and terms used in the air program as a minefield to bar the Council from pursuing its objection with respect to PSD regulations.

"[T]he 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." *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 523, 526. Sunoco never says it was surprised by this argument in the Council's motion. The pertinent facts in determining whether something should have been treated as a significant project for PSD purposes are not likely to be much different than those that are implicated in determining whether NNSR applies. Furthermore, the parties have had ample time to conduct discovery in this matter, with the Board granting several extensions of the discovery and other prehearing deadlines at the parties' joint request from its original six-month deadline of October 31, 2016 to October 13, 2017, and permitting further discovery at the Council's request until December 1, 2017. We find it difficult to believe that Sunoco is only now finding out that the Council's circumvention argument touches on the PSD program.

Sunoco also in its response seeks to fault the Council for not appealing every plan approval that was issued for the Marcus Hook facility back to the first 23-0119 plan approval issued in February 2013. Sunoco argues that the Council is barred from challenging the alleged segmentation of the plan approvals by reason of administrative finality, which is generally applied to prevent a party from later challenging a Department action where the party did not timely appeal the action in the first instance. *Property One, LLC v. DEP*, 2017 EHB 1209, 1219; *New Hope Crushed Stone & Lime Co. v. DEP*, 2017 EHB 1005, 1019-20. To some extent, that is true. The Council only appealed Plan Approval E and our jurisdiction is limited to granting relief with respect to Plan Approval E. The Council cannot use its appeal of Plan Approval E to collaterally attack the substance of any other plan approvals. *Love v. DEP*, 2010 EHB 523, 525; *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406.

However, as we expressed in an earlier Opinion granting the Council's motion to compel, merely because the Council did not appeal the earlier plan approvals does not mean that all of the contents of those plan approvals and the information that went into the development of the terms and conditions of those plan approvals are not relevant in the current appeal. *Clean Air Council v. DEP*, 2016 EHB 567, 573-75. Looking back at earlier plan approvals is precisely the point of a circumvention claim—it examines the pattern of development and construction of a facility to see if the various segments should have been aggregated for purposes of permitting and applicable regulatory requirements. The Council would have needed to be clairvoyant at the time the first plan approval was issued to know that Sunoco would then seek several other plan approvals for the same facility. A party's purported circumvention of the regulatory requirements would not be apparent from the issuance of the very first in an as yet undetermined string of approvals. Instead, circumvention may only be revealed by a course of conduct that

emerges over time through subsequent iterations of approvals for a facility. To the extent that the circumvention analysis needs to look at what has been done in other plan approvals, the Council is not barred from referring to those approvals to make its circumvention argument as it pertains to the plan approval under appeal.

Turning now to the substance of the Council's improper segmentation argument, the Council relies in part on 25 Pa. Code § 127.216, which reads as follows:

> 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.

There is a provision in Sunoco's plan approval to the same effect. (*See* Page 8, Section B. #010(a).) Section 127.216 and the permit condition reflect the regulatory agencies' responsibility to guard against efforts to disguise major projects as something less to avoid regulatory requirements by breaking up what is in reality a major project into a potentially infinite series of smaller parts. *United Refining*, 2008 EHB 434, 445.

In the somewhat related area of single-source determinations, the question is whether multiple sources are located at one facility for permitting purposes. That determination turns on whether the pollutant-emitting activities belong to the same industrial grouping, are located on contiguous properties, and are under the control of the same person. *National Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 922-24, *rev'd on other grounds*, No. 116 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 400 (Pa. Cmwlth. Jun. 2, 2017). *See also, Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). Here, there is no dispute that the Marcus Hook complex is a single facility for NNSR, PSD, and Title V applicability purposes. Indeed, the plan

approval specifically says so. (Page 10, Section C. VII #002.) It operates pursuant to one Title V permit.

The question presented here is, even if only one facility is involved, when is it appropriate to group multiple air contamination sources located "over a geographic area of a facility" together and aggregate their emissions for permitting purposes? There appears to be no disagreement that sometimes it is and sometimes it is not. As previously mentioned, the Department does not elaborate on why it decided it was not appropriate to aggregate with respect to Plan Approval E, but it was appropriate to aggregate with respect to other parts of the transformation work at the site.

"There is obviously considerable room for judgment and discretion in the grouping of possibly related tasks to determine whether they together constitute a major project." *United Refining*, 2008 EHB at 445. There is no bright-line rule to follow:

> Instead, the Department must independently consider such factors as the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations.

Id. This Board's role in the administrative process is to assess whether the Department has acted consistently with the Pennsylvania Constitution, statutes, and regulations, and otherwise reasonably in deciding whether to group together or not group together combinations of air contamination sources for permitting purposes.

Sunoco's argument in its response to the Council's motion for summary judgment that there must be a showing of a deliberate intent to design a project in such a way as to avoid regulatory requirements is inconsistent with this multifactorial approach. As the Council correctly points out, making such a showing would almost always be impossible. There is

nothing inherently improper in developing and revising a facility in stages over time. Indeed, we suspect it is the rare facility of any size that does not undergo changes over time. A perfectly innocent and legitimate expansion may nevertheless trigger regulatory thresholds without there having been any nefarious design to avoid regulations through subterfuge or artifice. The language of Section 127.216 prohibiting an operator's "allowing" of circumvention further suggests that any deliberate intent is unnecessary. The multifactorial approach described in *United Refining*, which is based upon objective criteria, remains the better approach. Even if we assume *arguendo* that there is no circumvention *per se*, the regulatory agency must still decide which parts of work at a facility should be aggregated because they are, in the Department's words, "sufficiently linked."

Similarly, Sunoco argues that there can be no circumvention claim if a party obtains some kind of permit, plan approval, or RFD—any kind of permit, approval, or RFD—even if it is obtained improperly or it is clearly the wrong permit. We do not believe this interpretation does justice to Section 127.216, and it has not been endorsed by the Department, and it is not consistent with our holding in *United Refining*. Again, however, even if there is no circumvention *per se*, the Department must still decide which sources to aggregate and that discretionary decision can be challenged.

As we have now explained on many occasions, once we enter the realm of reviewing the Department's exercise of its discretion, we typically exit the realm where summary judgment is appropriate. *Clean Air Council v. DEP*, EHB Docket No. 2017-009-L, slip op. at 7 (Opinion and Order, Jan. 8, 2018); *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 341, 355. In this case, for reasons that are a mystery at this point, the Department decided not to group together the activities covered by Plan Approval E with any or all of the other activities being undertaken at

Marcus Hook to convert it into an NGL storage and processing facility. We need to understand why the Department did what it did before we can even begin to assess whether its decision was lawful and reasonable.[2] The record at this point has not been adequately developed to make that determination. Therefore, summary judgment is inappropriate.

The Council previously put forward a claim of circumvention somewhat similar to the claim that it is advocating in this appeal at a gas processing plant in *Clean Air Council v. DEP and Markwest Liberty Midstream & Resources, LLC*, 2013 EHB 404. There, as here, the Council asked us to rule in its favor on its circumvention claim. Our words there apply with equal force here:

> Whether there was a pattern of development [that circumvented appropriate permitting requirements] in this case involves mixed questions of law and fact on which the parties clearly disagree. Moreover, what is also at issue here are inferences and presumptions that arise from those facts. We have stated that summary judgment is not appropriate in complex matters involving mixed questions of law and fact. Indeed, this is a complex matter involving mixed questions of law and fact.
>
> The size and complexity of the filing in this case, and on the circumvention issue alone, indicates that summary judgment, even partial summary judgment, is not appropriate….A reading of the motion, responses, replies, sur-replies, and replies to sur-replies raises more questions in our mind than provides answers. To quote the Board in *Citizen Advocates*:
>
> > It is difficult to imagine issues less suited to resolution on summary judgment than these. All of these issues are at least as much factual as they are legal. Summary judgment makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law…This consolidated appeal presents quite the opposite scenario.
>
> 2007 EHB at 106 (citation omitted).
>
> Therefore, partial summary judgment on the issue of circumvention is denied.

Id., 2013 EHB at 410-411 (internal citations omitted). The parties in the instant appeal seem to assume in their summary judgment papers that we know a lot about the NGL fractionation

[2] The Council has not argued in this case that the Department acted inconsistently with its duties under the Pennsylvania Constitution.

process. Although we appreciate the compliment, the daedal intricacies of the air pollution control regulations combined with the complex nature of the project itself make it impossible to fully understand and appreciate the parties' respective positions in the sterile context of a summary judgment motion.

If the Department erred and the activities covered by Plan Approval E should have been grouped together with other activities, the next question becomes, what are the consequences of the new grouping? On this question the Council's motion is unclear. The Council says that "fewer environmental protections" were imposed than should have been imposed. Undefined "air pollution protections" are said to have been skirted. The Council at one point says a proper plan approval would have had "different requirements." The Council never explains what the "different requirements" should have been or might have been. It never tells us exactly how a proper plan approval could have been more protective of the environment. We note that Plan Approval E contains about twenty single-spaced pages of detailed performance standards. The Department treated the main components of Project E as if they were new sources. It is easy to get caught up in the minutia of the air pollution regulations to the point that one loses sight of the forest for the trees. The Board is reluctant to decide purely academic disputes, *Sayreville Seaport Assocs. v. DEP*, 2011 EHB 815, 822 (Board does not issue advisory opinions), and divorcing the aggregation analysis from practical realities can be problematic, *see National Fuel Gas Midstream Corp. v. Dep't of Envtl. Prot.*, No. 116 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 400 (Pa. Cmwlth. Jun. 2, 2017). The Council may wish to consider explaining the practical significance of the arguments it is making as this case moves forward, including how that practical significance translates into specific relief respecting the plan approval under review, which after all is the only plan approval subject to our jurisdiction. The Council should

not take it for granted that a plan rescission—the only remedy it has asked for—is the only appropriate remedy even if we find that the Department erred.

Baseline Emissions and LAER

The Council next argues that it is entitled to summary judgment because the Department miscalculated the emission increases that would result from the components of Project E that are allegedly being modified. There are three preexisting emissions units involved in Project E that relate to this issue: the ethylene complex flare, the 15-2B cooling tower, and auxiliary boilers. As noted above, we have only the roughest sense of what these things are or what they do, which makes it difficult to fully appreciate the Council's concern. Apparently, as part of Project E Sunoco will make some additions of piping to the 15-2B cooling tower and the tower will experience increased demand. Sunoco will add connections to the flare and install a new sub-header, and the auxiliary boilers will be required to accommodate incremental steam demand. The Department eventually determined that these changes do not constitute "modifications."

The NNSR requirements can come into play if an existing emissions unit is "modified." 25 Pa. Code § 127.203a(a). Determining whether a source has been "modified" is one of the most contentious parts of air pollution law and it is complicated and highly fact-specific. A modification is defined as follows:

> Modification – A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted, except that routine maintenance, repair and replacement are not considered physical changes. An increase in the hours of operation is not considered a modification if the increase in the hours of operation has been authorized in a way that is Federally enforceable or legally and practicably enforceable by an operating permit condition.

25 Pa. Code § 121.1. Not all modifications trigger NNSR. It depends in part upon whether there has been an increase in an NNSR pollutant from the project. 25 Pa. Code § 127.203a. In

determining whether there has been an increase, there obviously needs to be a baseline from which to compare the new emissions.

In its initial brief, the Council jumped right into a critique of how the Department calculated the baseline emissions related to the flare, tower, and boilers. Among other things, it said the Department selected an unrepresentative two-year baseline period, which also happened to be based on inadequate data, and without making a proper written determination. (In a separate context, the Council did discuss the modification issue.) In response, both the Department and Sunoco say we do not need to get into any details regarding how the Department calculated emission increases because the sources are not being modified.

The Department admits that it originally decided some of the changes qualified as modifications but it changed its mind after this appeal was filed because its original determination was based on "certain incorrect facts." The correct facts and revised determinations according to the Department are that the additional flare header piping from the fractionation towers is a *new* source, not a modified source. No additional piping or modifications were necessary to the flare itself, only the sub-header. Sunoco applied to install new piping to the flare sub-header and an increase in flare sweep gas. The new flare connections in the fractionation system were to be routed to the new sub-header and ultimately flow to the existing flare located in Delaware. After reviewing Sunoco's application, the Department determined that the flare itself would not be modified. The flare header is a separate source, it says.

The Department says the 15-2B cooling tower is an existing source that was reactivated in 2014 with Department approval. Since 2014, the 15-2B cooling tower was operating at a reduced capacity. Sunoco sought to increase the cooling demand without seeking to increase its

current emission limit and without the addition of any new lines. The Department says the Council cannot point to anywhere in the record that shows that the boilers underwent a physical change. In fact, there were no new steam or condensing lines installed to the boilers and the existing emission limits were not changed. The boilers burned gas to produce steam before Plan Approval E and burned gas to produce steam afterwards. The boilers were established prior to Sunoco's purchase of the facility and were used when the facility was a refinery. During that time, the boilers established that they could produce 267,000 pounds of steam per hour from each boiler, totaling 801,000 pounds per hour from all three boilers. The additional steam demand part of Plan Approval E, totaling 580,700 pounds per hour for all projects, is well within the amount that the boilers can produce. Based on this version of the facts, the Department concluded on reconsideration that none of the changes to the secondary components at issue constituted modifications.

Sunoco argues that adding lines or other such connections to an existing emissions unit does not constitute a physical change to the unit itself such that there has been a "modification." Similarly, increasing the demand on an existing unit does not constitute a triggering change in the method of operation of the unit, such that there has been a "modification." The Council directly disputes these points on the facts and the law. Among other things, it directly disputes the Department's finding that no lines were added to the cooling tower.

Although there does not appear to be much dispute about the changes themselves that Sunoco is making, even where there is no dispute, it is readily apparent that we do not have enough to go on to address the significance of those changes in the context of summary judgment. We agree with Sunoco and the Department that it would be premature to get into a

discussion of the details of the Department's calculations before deciding whether those calculations were even necessary.

The Council's final and related argument is that the Department erred by not requiring Sunoco to comply with Lowest Achievable Emission Rate (LAER) as set forth at 25 Pa. Code § 127.205 with respect to the flare, tower, and boilers. This issue implicates the modification issue as well. The Department adds that, even if the units were "modified," the resulting emission increases were below LAER thresholds. It says there are situations, such as the one presented here, where the "project as a whole" triggers NNSR but the emissions increase from an individual source within the project is not large enough to trigger LAER as to that source. The Council for the first time in its reply develops an argument that we are unable to follow completely, but which we think is that we need to look at *all* of Project E and even other projects (e.g. Project B) to determine if there has been a modification. The Council may be arguing that, since Project E taken together with others involves a modification, the amount of the increase from everything must be calculated and LAER applies to everything. The Council will have an opportunity to better explain its position on this issue as we move forward, but it is clearly not explained well enough here to support summary judgment in its favor. Once again, these issues regarding LAER go beyond what we can be expected to handle on a cold record in the context of a summary judgment motion.

Echoing our earlier point, we would like to be shown going forward that time is not being spent on a purely academic issue. The flare sub-header and meter prover were treated as new sources and LAER *was* imposed. As previously mentioned, the plan approval contains extensive performance standards and LAER was applied to the major units. We would welcome a description of what LAER might entail even if it did apply to the flare, tower, and boilers.

For all of the foregoing reasons, we issue the Order that follows.

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 9th day of March, 2018, it is hereby ordered that the Appellant'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: March 9, 2018

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

For the Commonwealth of PA, DEP:
Jessica Hunt, Esquire
Douglas White, Esquire
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For Appellant:
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Joseph Minott, Esquire
Christopher D. Ahlers, Esquire
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For Permittee:
David J. Raphael, Esquire
Brigid Landy Khuri, Esquire
Anthony Holtzman, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor, and PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, Intervenor	:	**Issued: March 15, 2018**

OPINION AND ORDER ON
DAMASCUS CITIZENS FOR SUSTAINABILITY INC.'S PETITION TO INTERVENE

By Steven C. Beckman, Judge

Synopsis

The Board denies a petition to intervene by the Damascus Citizens for Sustainability, Inc. in a third party appeal of a brine spreading plan where it has not demonstrated that it has organizational standing as a representative of the appellant in this case, Ms. Lawson, or that it has standing in its own right.

O P I N I O N

Introduction

Siri Lawson ("Ms. Lawson") has appealed the Department of Environmental Protection's ("Department") Approval No. NW9517 authorizing brine spreading for dust control in Sugar Grove and Farmington Townships in Warren County ("Department Approval"). The Department Approval authorizes the spreading of brine on unpaved roads and lots in Sugar Grove Township and Farmington Township by Hydro Transport LLC ("Hydro Transport"). Hydro Transport is a Pennsylvania Limited Liability Corporation engaged in providing services

for the oil and gas industry, including but not limited to hauling and spreading of brine. In her Notice of Appeal, Ms. Lawson contends as follows: 1) the Department Approval constitutes an approved discharge of an industrial waste that contributes to or creates a danger of pollution to waters of the Commonwealth; 2) the Department Approval fails to impose adequate operating requirements to protect waters of the Commonwealth or prevent the deterioration of air quality in violation of Article 1, Section 27 of the Pennsylvania Constitution; 3) the Department Approval is a violation of the Clean Streams Law and the Solid Waste Management Act; and 4) the Department lacks authority to grant approval for roadspreading plans.

Four petitions to intervene have been filed in this appeal. A petition was filed on August 24, 2017, on behalf of Farmington Township that was granted by the Board by opinion and order dated September 6, 2017. A petition was filed by the Pennsylvania Grade Crude Oil Coalition on August 10, 2017, and denied by the Board in an opinion and order dated September 11, 2017. A third petition was filed by the Pennsylvania State Association of Township Supervisors ("PSATS") on October 13, 2017, and granted in an opinion and order dated November 3, 2017. A fourth petition, which is the subject of this opinion and order, was filed by the Damascus Citizens for Sustainability, Inc. ("DCS") on February 15, 2018 ("Petition"). The Department filed a letter with the Board on March 1, 2018, stating that the Department did not oppose the Petition. On March 2, 2018, Hydro Transport, Farmington Township and PSATS filed a Joint Answer and Brief opposing DCS's Petition. Also on March 2, 2018, Ms. Lawson filed a letter with the Board that simply states that she supports DCS's Petition. The Petition is now ready for decision by the Board.

Standard of Review

Section 4 of the Environmental Hearing Board Act states that "[a]ny interested party may intervene in any matter pending before the Board." *See also* 25 Pa. Code § 1021.81 (a person may petition to intervene in any matter prior to the initial presentation of evidence). The Board will deny the petition (to intervene) if it fails to include sufficient legal grounds or verified factual averments to establish the right to intervene. 25 Pa. Code § 1021.81(e). The Board has held that the right to intervene in a pending appeal should be comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Logan v. DEP*, 2016 EHB 531, 533; *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433,434. A person or entity will have standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Logan*, 2016 EHB at 533 (citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). This interest must be more than a general interest such that the entity seeking intervention "will either gain or lose by direct operation of the Board's ultimate determination." *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth, 1997); *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Hostetter v. DEP*, 2012 EHB 386, 388; *Pagnotti Enterprises, Inc. v. DER*, 1992 EHB 433, 436. An organization can have standing either in its own right or as a representative of its members. *Citizens for Pennsylvania's Future v. DEP and Anadarko E&P Onshore, LLC*, 2015 EHB 750, 751 *citing Pennsylvania Trout v. DEP*, 2004 EHB 310, 355, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004). An organization has standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643 (citing *Funk v. Wolf*, 144 A.3d 228, (Pa. Cmwlth. Jul. 26, 2016)).

Analysis

Our rule on intervention makes clear that the party seeking to intervene must come forward with sufficient legal grounds or verified factual averments to establish the right to intervene. 25 Pa. Code § 1021.81(e). In order to intervene in this matter, DCS must demonstrate that it has standing. DCS asserts that Ms. Lawson is a member of DCS and therefore claims that it has organizational standing based on Ms. Lawson. (Petition, p. 2). In the alternative, DCS asserts that it has direct standing because the group's environmental and public health protection goals will be affected in a substantial, direct and immediate way by the Board's decision in this case. (Petition, p. 2).

In their Joint Answer to Damascus Citizens for Sustainability, Inc.'s Petition To Intervene and Brief ("Joint Answer"), Permittee Hydro Transport and Intervenors Farmington Township and PSATS oppose intervention asserting that DCS does not have standing derived from Ms. Lawson and further that DCS does not have standing in its own right. (Joint Answer, para 17, 18). The Joint Answer does not set forth a detailed argument in support of its statement that DCS does not have standing through Ms. Lawson, but it maintains that DCS does not have standing in its own right because DCS is primarily concerned with the broader impacts related to the oil and gas industry generally and the outcome will have no impact on DCS's ability to continue its educational efforts. They argue that DCS has no interest that is direct, substantial or immediate. Further, the parties in the Joint Answer believe that granting intervention will "gravely prejudice the defendants" and be disruptive to the proceedings. (Joint Answer, para. 19).

We first evaluate DCS's claim that it has organizational standing as a representative of one of its members, Ms. Lawson. The Petition and Brief state that Ms. Lawson is a member of

DCS. In support of its Petition, DCS attached two signed affidavits. The first is an affidavit from Ms. Lawson entitled Affidavit of Siri Lawson As Member Of Damascus Citizens or Sustainability, Inc. Despite its title, Ms. Lawson does not claim membership in DCS and she makes no mention of any relationship, affiliation or association of any kind with DCS in the text of her affidavit following her affirmation. In fact, her affidavit does not reference DCS at any point in the text of the document. Instead it appears to be designed to support her individual claim for standing by focusing on the impact that she alleges the brine spreading has had on her health and wellbeing. While we find that Ms. Lawson has standing in her own right to challenge the Department Approval, there is nothing in her signed affidavit filed with the Petition that supports DCS's claim to organizational standing through her alleged membership in DCS.

The second signed affidavit attached to the Petition is from Ms. Barbara Arrindell, who is identified as the Director of DCS and the Chair of DCS's Board of Directors. In describing the organization, Ms. Arrindell states in Paragraph 3 of her affidavit that there are "Currently, 4,334 people signed up as members of Damascus Citizens" but does not identify Ms. Lawson as one of those members. Ms. Lawson's relationship to DCS is discussed in just one place in Ms. Arrindell's affidavit, Paragraph 16. In that paragraph, Ms. Arrindell states that DCS first met Ms. Lawson in 2008 when Ms. Lawson mailed a letter to the group describing her experience with oil and gas drilling in western New York and northwestern Pennsylvania. Ms. Arrindell states that "we have written, faxed and talked on the phone many times over the 10 years" and that Ms. Lawson has been "a colleague, source of key information and contributor" over that time. (Arrindell Affidavit, para. 16). Ms. Arrindell further states that she introduced Ms. Lawson to Michelle Bamberger who authored an article and book on drilling impacts that featured Ms. Lawson along with other households. At no point in Paragraph 16 of her affidavit

does Ms. Arrindell identify Ms. Lawson as a member of DCS. In fact, the language of Ms. Arrindell's affidavit seems to quite consciously avoid using the term member to describe and discuss Ms. Lawson. Therefore, on its face, DCS's claim in its Petition that Ms. Lawson is a member of DCS is not directly supported by the affidavits presented by DCS.

We think this case is distinguishable from prior Board decisions that have discussed the issue of organizational standing and the concept of membership. The Board, in the prior decisions, properly concluded that it would not delve deeply into what constitutes formal membership in an organization, instead looking at the nature of the relationship of the individuals to the organization. In the *Borough of Roaring Spring v. DEP*, 2004 EHB 889, the Board expressed concern that focusing on formal membership requirements and the timing of membership would result in needless distraction and that arguments would ensue over the nature of practices an organization must follow to be considered a legitimate association with actual members and acceptable membership rituals. *Id*. at 906. The Board picked up on that theme in its recent summary judgment decision in *Friends of Lackawanna v. DEP*, 2016 EHB 641 ("*FOL*"). The permittee in that case argued that the individuals did not have a close enough association with the organization to confer standing on the organization. The Board rejected the permittee's position noting that the affidavits presented by the individuals demonstrated a sufficient connection to the organization stating "They have all actively advanced and directed the mission and work of FOL. They have publicly held themselves out as members of the organization." *FOL* at 647. A quick review of the affidavits submitted by the individuals in the *FOL* case reveals that those affidavits contain an affirmative statement that the individual is a member of the Friends of Lackawanna.

The factual evidence presented by the organizations in these cases is in contrast with the evidence presented by DCS in the affidavits attached to the Petition. Ms. Lawson is the person in the best position to offer testimony on the nature of her relationship to DCS, and her affidavit, other than the title, is completely silent on that subject. Unlike the individuals in *FOL*, the text of her affidavit does not state that she considers herself a member of the organization seeking organizational standing through her. There is no mention in her affidavit of her participating in DCS sponsored meetings, events or other activities. We do not think the title of the affidavit alone is sufficient to support a determination by the Board that she is a member of or affiliated with DCS given the lack of information in the body of the affidavit.

Ms. Arrindell's affidavit also does not identify Ms. Lawson as a member despite the fact that DCS apparently has a membership structure that allows Ms. Arrindell to state with great specificity that 4,334 people are signed up as members of DCS. In *FOL*, the Board noted that besides self-identifying as members of the organization, the individuals "actively advanced and directed the mission and work of FOL." There is no evidence in the affidavits presented by DCS that Ms. Lawson had a similar level of association or affiliation with DCS. In her affidavit, Ms. Arrindell provides what she describes as an abridged summary of DCS's involvement with "gas oil production waste issues and contents," (Arrindell Affidavit, para. 18) but there is no discussion of Ms. Lawson directing or participating in any of the listed DCS activities. Instead, we have Ms. Arrindell's statement regarding communications between the organization and Ms. Lawson via letter, fax and phone along with an introduction from DCS to a researcher. Ms. Arrindell describes Ms. Lawson as colleague, source of key information and contributor but does not provide any context for this description. For instance, we are unsure what Ms. Arrindell intends to convey by describing Ms. Lawson as a "contributor." Is that simply the sharing of

information previously described or does she mean that Ms. Lawson is a financial contributor to the organization? If she means the latter, why doesn't Ms. Arrindell say so or mention Ms. Lawson as a financial contributor when Ms. Arrindell states earlier in her affidavit that individual supporters contribute close to half of the DCS operating budget? The Board is left to guess as to what is intended by the use of such vague terms in the Arrindell affidavit. The shortcomings in the Arrindell affidavit require us to make assumptions and to parse out the nature of Ms. Lawson's relationship to DCS. We find that the relationship between Ms. Lawson and DCS described by Ms. Arrindell in her affidavit is not sufficient to find an affiliation or association between Ms. Lawson and DCS that supports organizational standing for DCS as a representative of Ms. Lawson.

It would have been simple for Ms. Lawson or Ms. Arrindell to state that Ms. Lawson is a member of DCS in their individual affidavits if that, in fact, is a true statement. In light of the other information in Ms. Arrindell's affidavit about the membership and structure of DCS, the fact that neither of them did so gives us pause. Perhaps it was simply an oversight of counsel in putting together the affidavits or perhaps counsel believed that we would simply rely on the verified statement in the Petition. However, when we view the totality of the information provided with the Petition, including the affidavits, we are left with more questions than answers about Ms. Lawson and her relationship to DCS. In its not our intention in this case to set the bar too high in looking at organizational standing as a representative of an organization's members but, in order for that requirement to have some meaning, we can't simply throw the door open to any measure of contact or association between the person and the organization. The party seeking to intervene on that basis must convince the Board that it has the necessary connection with the person to properly represent them. DCS simply did not come forward with sufficient

factual information to convince the Board that it was entitled to organizational standing as Ms. Lawson's representative in this case.

We now turn our attention to DCS' alternative argument that it has standing in its own right. DCS must show that it has a substantial, direct and immediate interest in the outcome of this appeal such that DCS will either gain or lose by the direct outcome of the Board's decision. We stated in *Friends of Lackawanna* that "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**." *Id.* at 648, (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 943; *Barshinger v. DEP*, 1996, EHB 849, 858; *RESCUE Wyoming v. DER*, 1993 EHB 839.) (emphasis added). The Department action challenged in this case involves the approval of roadspreading of brine in two townships (Farmington and Sugar Grove) located in Warren County, Pennsylvania. DCS's Petition and the affidavit of Ms. Arrindell make it clear that DCS's mission centers on protecting the public and environment from impacts of oil and gas development. It is also clear that DCS has been involved in general in addressing the use of brine on roads. What is not clear is whether DCS has devoted time and resources to protecting citizens and the environment in the area affected by the Department's action.

Ms. Arrindell states in her affidavit that 500 subscribers list a primary address in Pennsylvania and many other subscribers have interests in or visit Pennsylvania. However, we are not clear what she means by "subscribers" and there is no detail provided regarding where in Pennsylvania these subscribers are located or where their interests or travels bring them. There is no indication in the affidavit that these subscribers have any association with Farmington Township, Sugar Grove Township or the Warren County area. Ms. Arrindell goes into detail in her affidavit regarding DCS's involvement with gas drilling and brine spreading issues. The

majority of the described activities involve New York and/or Ohio issues and locations. Where the discussed activities are Pennsylvania based, they reflect general statewide actions like commenting on state permitting issues or involve locations in the upper Delaware region in eastern Pennsylvania. Ms. Arrindell discusses a health effects survey effort that DCS is involved in and states that participating respondents are from 13 Pennsylvania counties but makes no mention of which counties are represented or whether Warren County is among those in which surveys have been completed. None of the activities discussed in the affidavit demonstrate DCS's involvement in specific environmental concerns in Farmington or Sugar Grove Townships, the areas that are affected by the Department's action. Because DCS's interest in the spreading of brine is generalized in nature and it presented no evidence that its interests directly extend to the area where the Department undertook its action, we conclude that it has failed to demonstrate a substantial, direct and immediate interest in the outcome of this appeal. We do not believe that DCS will gain or lose by the direct outcome of our decision in this case.

We view DCS's Petition as similar to the petition to intervene in this matter by the Pennsylvania Grade Crude Oil Coalition ("Coalition"), which we denied. In opposing the Coalition's petition, Ms. Lawson argued that the Coalition failed to demonstrate that it had a substantial, direct and immediate interest in the matter. She further argued that the information provided to support standing was vague and unsubstantiated, noting that the claims in the Coalition's petition, including the status of members could not be verified given the lack of an affidavit and proof of membership. We agreed with Ms. Lawson and held that the Coalition did not demonstrate that any member independently had standing and the concerns expressed by the Coalition were generalized and "focused on the permitting and practice of roadspreading of brine in general and the impact the Board's decision in this case may have on that activity." *Siri*

Lawson v. DEP, 2017 EHB 1040, 1044. We think the same can be said for DCS and its Petition. We have no doubt that DCS is opposed to the roadspreading of brine in general and has an interest in the legal precedent that may be established by a Board decision in this case, but that is not a sufficient basis on which to grant intervention. See *JS Mining, Inc. v. DEP*, 2003 EHB 507.

Ultimately, DCS failed to provide sufficient factual averments supported by its affidavits for the Board to conclude that it was entitled to organizational standing as a representative of Ms. Lawson. DCS also failed to put forth sufficient evidence that it had substantial, direct and immediate interests that would be effected by the outcome of this litigation. Therefore, allowing intervention by DCS is not appropriate and its Petition should be denied.[1]

Accordingly, we issue the following Order.

[1] Because we have concluded that DCS may not intervene in this matter we consider the Motion for Admission Pro Hac Vice filed by John J. Zimmerman on February 22, 2018, to be moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor, and PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, Intervenor	:	

O R D E R

AND NOW, this 15th day of March, 2018, it is hereby ordered that Damascus Citizens for Sustainability Inc.'s Petition to Intervene in this matter is DENIED.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 15, 2018

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

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

For Appellants:
Rose K. Monahan, Esquire
Emily A. Collins, Esquire
(via electronic filing system)

For Permittee:
Jean M. Mosites, Esquire
Shannon DeHarde, Esquire
(via electronic filing system)

For Farmington Township:
Timothy M. Zieziula, Esquire
(via electronic filing system)

For Pennsylvania State Association of Township Supervisors:
Scott E. Coburn, Esquire
(via electronic filing system)

For Damascus Citizens for Sustainability
John J. Zimmerman, Esquire
Zimmerman & Associates
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zimmermanjj@verizon.net
(via U.S. mail and e-mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES K. AND GAYLYNN G. KUNCIO	:	
	:	
v.	:	**EHB Docket No. 2018-011-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 16, 2018**
	:	

OPINION AND ORDER ON
DISMISSING APPEAL

By Steven C. Beckman, Judge

Synopsis

The Board dismisses the Appeal of James K. and Gaylynn G. Kuncio where Appellants have demonstrated an intent not to proceed and have failed to follow Board rules and Orders.

O P I N I O N

This matter involves a letter sent by James K. and Gaylynn G. Kuncio to the Environmental Hearing Board that was received by the Board on January 29, 2018. The letter is addressed to "Department of Environmental Protection, Environmental Hearing Board" and references an "Approval Letter – Revision, DEP Code No. N6-17-075, Application No. 957271, Authorization No. 1210421." The body of the Kuncios' letter refers to a "letter addressed to Ms. Cindy Black, Wilmington Township Secretary, pertaining to the replacement of the malfunctioning septic system and proposed small flow treatment facility (SFTF) on the property belonging to Thomas and Denise Pesci at 4409 New Castle Rd," and sets forth objections related to the proposed SFTF. It concludes with the statement, "[s]hould you want to discuss our position on this matter further, please feel free to contact us in writing."

The Board treated the Kuncios' letter as an appeal and issued an Order for Perfection on January 30, 2018, requiring them to file additional information with the Board by February 15, 2018. The Board's rule at 25 Pa. Code § 1021.51 requires a notice of appeal to contain the following information: a complete address, a copy of the written notice of the Department action being appealed (if a written notification has been received), the date of notice of the Department action, objections to the Department action, and proof of service to various required parties. The Kuncios did not submit anything in response to the Board's Order for Perfection. On January 30, 2018, the Board also issued an Order to the Kuncios regarding the Board's mandatory electronic filing rules. The Kuncios have not registered for electronic filing at the Board's website. On February 23, 2018, we issued a Rule to Show Cause ordering the Kuncios to explain why their appeal should not be dismissed as a sanction for failing to comply with the Board's Order for Perfection, or alternatively, requiring them to perfect their appeal in compliance with the Order of Perfection on or before March 9, 2018. The Kuncios have not filed anything with the Board in response to the Rule to Show Cause and have not contacted the Board at any point in this process.

From the outset, based on the form and content of their letter, it was unclear to us if the Kuncios intended to file an appeal. Based on the lack of response and communication from the Kuncios it appears that the Kuncios were unclear about the requirements and formalities of proceedings before the Board, may not have intended to file an appeal in the first place, and/or have become disinterested in further pursuing an appeal at this point. Whatever the reason, this appeal cannot go forward without action on their part. The Board's rules authorize sanctions upon parties for failing to abide by Board Orders and/or the Board's rules of practice and procedure. *Slater v. DEP*, 2016 EHB 380, 381, citing 25 Pa. Code § 1021.161. Included within

these sanctions is the dismissal of an appeal. Further, the Board has consistently held that where a party has shown a demonstrable disinterest in proceeding with an appeal, dismissal is appropriate. *Id.*, citing *Mann Realty Associates, Inc. v. DEP*, 2015 EHB 110, 113; *Casey v. DEP*, 2014 EHB 908, 910-911; *Nitzschke v. DEP*, 2013 EHB 861, 862. When a party evinces an intent to no longer continue an appeal, we have found it is appropriate to consider the dismissal of the appeal. *Id.* The Kuncios' apparent lack of interest in proceeding with their appeal, along with the failure to follow the Board's rules and Orders, makes it appropriate for us to dismiss this case. Based on the foregoing, the Board dismisses this appeal and issues the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES K. AND GAYLYNN G. KUNCIO	:	
	:	
v.	:	**EHB Docket No. 2018-011-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of March, 2018, it is hereby ordered the appeal in this matter is dismissed. The docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 16, 2018

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

For the Commonwealth of PA, DEP:
Kayla A. Despenes, Esquire
Angele N. Erde, Esquire
(via electronic filing system)

For Appellants:
James K. and Gaylynn G. Kuncio
4408 New Castle Road
New Wilmington, PA 16142
(via U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 19, 2018**

OPINION AND ORDER ON REMAND

By Michelle A. Coleman, Judge

Synopsis

The Board, in accordance with direction from the Commonwealth Court on remand, revises an order issued to the appellant by the Department.

O P I N I O N

This matter is before us on remand from the Commonwealth Court. *See Becker v. Dep't of Envtl. Prot.*, No. 560 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 944 (Pa. Cmwlth. Dec. 1, 2017). We briefly recap the case history relevant to the remand, although a more detailed history can be found in our Adjudication at *Becker v. DEP*, 2017 EHB 227, 237-40. Mr. Becker appealed an order issued by the Department of Environmental Protection (the "Department") to Center Bridge Trust and Mr. Becker as sole trustee, requiring, among other things, that certain measures be taken to restore the course of a stream channel that Mr. Becker had rerouted and to stabilize the disturbance that resulted from the stream rerouting, at a site located at 7072 Upper York Road in Solebury Township, Bucks County. At some point Mr. Becker lost title to the site in an upset tax sale. As a result of the tax sale, the site fell into the possession of Peter

Edwardson. The Department also issued an order to Mr. Edwardson to compel him to undertake the necessary repairs at the site, an order which Mr. Edwardson appealed to the Board. Efforts by the Department, Mr. Becker, and Mr. Edwardson to settle both appeals concurrently were unsuccessful. We later dismissed Mr. Edwardson's appeal in response to a motion from the Department because it was untimely filed. *See Edwardson v. DEP*, 2015 EHB 833.

We then issued our Adjudication in this case dismissing Mr. Becker's appeal. We found that, contrary to Mr. Becker's argument, the channel on the site was in fact a stream with a defined bed and banks and intermittent flow subject to regulation by the Department. We also found that Mr. Becker conducted the unlawful activity outlined by the Department's order. Namely, we determined that Mr. Becker's rerouting of the stream channel constituted an encroachment under the Dam Safety and Encroachments Act; that the rerouting of the existing stream channel without a permit was unlawful; that Mr. Becker did not develop, implement, or maintain appropriate erosion and sediment control best management practices while conducting earth disturbance activities; and that his earth disturbance activities caused sediment pollution to waters of the Commonwealth in violation of the law. Overall, we determined that the Department's order was a lawful and reasonable exercise of its discretion that was supported by the facts and evidence adduced at the hearing on the merits.

Mr. Becker appealed our Adjudication to the Commonwealth Court, but none of these findings and conclusions were disturbed or called into question by the Court's Opinion. The Court affirmed the Board's Adjudication, but remanded the matter back to the Board for limited further proceedings pertaining to remedy. Specifically, the Commonwealth Court instructed as follows:

> Accordingly, because the record demonstrates that separate compliance orders have been issued against Becker, as sole trustee of the Trust, and Edwardson, and

> it is unclear what corrections have already been made by Edwardson, the Board's order is affirmed but we remand the matter to the Board for the limited purpose of either imposing on Becker an alternative remedy – *e.g.*, imposing on him the cost of remediation – or obtaining permission from Edwardson to permit the work to be done, as well as coordinating enforcement of the two separate, final orders.

Becker v. Dep't of Envtl. Prot., slip op. at 21, 2017 Pa. Commw. Unpub. LEXIS 944 at *24-25. This Opinion follows from the Court's remand to effectuate a remedy in accordance with its directive.

The Department order that is the subject of this appeal provides the following:

> **Center Bridge Trust and Heywood Becker, as Trustee of the Center Bridge Trust,** shall do the following:
>
> | **Milestone Event(s)** | **Milestone Date** |
> |---|---|
> | a. Stabilize all disturbed areas throughout the Site. Stabilization shall include the application of seed and mulch at 3 tons per acre. | Within 10 days of this Order |
> | b. Implement effective Best Management Practices. | Within 10 days of this Order |
> | c. Submit a Joint Permit Application (Department's 105 Permit and the U.S. Army Corps of Engineers Section 404 Permit) that includes a stream restoration plan to place stream into its original location and restore the impacted aquatic habitat. | Within 10 days of this Order |
> | d. Submit an erosion and sedimentation control plan for all work associated with the restoration plan. | Within 10 days of this Order |
> | e. Implement the stream restoration plan. | Within 14 days of receipt of the Department's written approval of the stream restoration plan and issuance of the Department's 105 Permit and the U.S. Army Corps of Engineers Section 404 Permit. |

f. Permanently stabilize the Site.	Within 120 days of commencement of implementation of the stream restoration plan

As noted above, we found this order to be reasonable, lawful, and supported by the facts. The Commonwealth Court did not find differently. Instead, the Court's Opinion provides narrow instruction to account for the fact that Mr. Becker no longer owns the subject site. The Court did not otherwise alter the outstanding obligations that flow from the order. Accordingly, in order to fulfill our responsibilities pursuant to the Court's directive on this limited remand, we will revise the Department's order to require that Mr. Becker negotiate an agreement for access to the site to perform the work required by the order, and we will adjust the timeframes for the order's other requirements accordingly.[1] We believe this satisfies the Commonwealth Court's instruction.

We issue the Order that follows.

[1] The Department has represented in a status report that Mr. Edwardson no longer owns the site, but that the current owner "indicated a willingness to negotiate an access agreement with Mr. Becker."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 19th day of March, 2018, it is hereby ordered as follows:

1. The Department's order of February 27, 2013 issued to Center Bridge Trust and Heywood Becker, as Trustee of the Center Bridge Trust, is revised as follows:
    a. On or before **May 21, 2018**, Heywood Becker shall negotiate an access agreement with the current owner of 7072 Upper York Road in Solebury Township, Bucks County (the "Site") to perform the work at the Site required by the Department's order.
    b. All "Milestone Dates" in the Department's order shall follow from the date of execution of the access agreement specified here in Paragraph a.
2. The Department's order in all other respects is affirmed.
3. 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: March 19, 2018

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

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

For Appellant, *Pro Se*:
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P.O. Box 180
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5382 Wismer Road
Pipersville, PA 18947

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 20, 2018**
	:	

OPINION AND ORDER ON
MOTION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an untimely motion for reconsideration filed by the appellants seeking reconsideration of an Opinion and Order granting partial summary judgment against them. Even if the motion for reconsideration had been timely, the inattention of counsel in failing to respond to the Department's motion for partial summary judgment does not constitute an extraordinary circumstance justifying reconsideration of an interlocutory order. Further, the appellants have presented no crucial facts that are inconsistent with those facts that were relied on in deciding the motion for partial summary judgment.

O P I N I O N

Max and Carol Rozum have appealed an assessment of civil penalty issued by the Department of Environmental Protection (the "Department") on March 20, 2017, seeking a penalty of $18,000 for violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003. The civil penalty assessment asserts that the Rozums failed to comply with an earlier order from March 2008 requiring the Rozums to clean up more than 600 tons of waste tires stored on property they own in Allegheny Township, Venango County. The Rozums filed their

notice of appeal *pro se* on April 17, 2017. On August 2, 2017, counsel entered an appearance on behalf of the Rozums, and they have been represented by counsel since that time.

On February 6, 2018, we issued an Opinion and Order granting a motion for partial summary judgment that had been filed by the Department on December 13, 2017. The Department sought summary judgment on the issue of the Rozums' liability for the violation giving rise to the assessment of civil penalty—the failure to comply with the 2008 order to remove the waste tires from their property and properly dispose of them at an authorized facility. The Rozums never filed a response to that motion. Although we could have simply granted the Department's motion on the basis of the Rozums' failure to respond, we nevertheless briefly delved into the substance of the motion. We found that the Rozums' failure to comply with the 2008 order was apparent from the documents provided by the Department in its motion, many of which concerned a petition to enforce the 2008 order before the Venango County Court of Common Pleas. We noted that the Rozums even acknowledged in their notice of appeal that the Department engaged a contractor to remove the tires from their property after the Rozums did not remove the tires themselves. Therefore, we granted summary judgment in favor of the Department on the fact of the violation underlying the penalty assessment.

The Rozums have now filed a motion for reconsideration of our Opinion and Order. The Rozums' motion was filed on March 6, 2018. The motion avers that "Counsel for Appellant[s] did not realize that his computer system had received the e-filing just prior to the Christmas season holidays, and was unaware that the Motion was filed until the Court's filing of it['s] Opinion and Order dated February 6, 2018." The Rozums also aver that counsel "was out of the state on that date and did not return to his office until February 12, 2018 and only read the Opinion and Order on February 15, 2018." The Rozums then direct us to a case from 1884,

Lance v. Bonnell, 105 Pa. 46 (Pa. 1884), in support of a statement that "[a]ny delay was no fault of the Appellants, but because of the Appellants' counsel's unintentionally not being aware of the pleading had been filed and not being able to file the a [sic] responsive pleading." Attached to the motion is an affidavit from appellant Max Rozum, Jr. The Department has filed a response in opposition with an accompanying memorandum of law. For the reasons set forth below, we deny the motion for reconsideration.

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 under 25 Pa. Code § 1021.151. *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). Our rule on reconsideration of interlocutory orders provides that the motion or petition "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."

Importantly for our current purposes, a request to reconsider an interlocutory order must be filed within ten days of the order. 25 Pa. Code § 1021.151(a). The Rozums' motion for reconsideration was filed on March 6, which is 28 days after the issuance of our Opinion on February 6. The motion could be denied on this reason alone due to its untimeliness. *See Koch v. DEP*, 2010 EHB 146. However, even if the motion were timely, there is nothing in the motion that would prompt us to reconsider our Opinion and Order.

The Rozums' motion boils down to an admission that its counsel was not paying attention. Counsel apparently did not see the automatically generated email notification informing him of the filing of the Department's motion for partial summary judgment, so he did not file a response. The motion seems to suggest that we should excuse the failure to file a response to the motion because it was filed almost two weeks before Christmas and no one reminded counsel that it was filed.[1] Counsel for the Rozums references being "out of the state" for an undefined period of time, but does not explain why that should excuse his conduct. Counsel even admits to returning to his office on February 12, but not reading our Opinion until February 15. He then waited another two and a half weeks to file the motion for reconsideration.

There are no extraordinary circumstances presented in the Rozums' motion. As we have held before, a failure to respond to a motion due to an oversight on the part of counsel is not an extraordinary circumstance that justifies reconsideration of an interlocutory order. *DEP v.*

[1] Counsel for the Rozums avers in the motion that in "email communications in January with opposing counsel, no mention was ever made of the December filing of the Motion for Partial Summary Judgment." The Department denies this and says its counsel mentioned the motion in an email dated January 24, 2018. Whether or not counsel for the Department mentioned the pending motion is immaterial because we are unaware of any obligation a party has to remind opposing counsel of outstanding deadlines.

Pecora, 2007 EHB 156, 159; *Borough of Berwick v. DEP*, 1998 EHB 199, 202; *Reitz Coal Company v. DER*, 1988 EHB 796, 797. In *Borough of Berwick v. DEP*, 1998 EHB 199, we did not grant a petition for reconsideration when the petitioner explained how an opposing party's motion was left out of the petitioner's internal tickler file, which caused the petitioner to fail to respond to the underlying motion. Ignoring or overlooking email notice of a filing is the modern analog, and we are not presented with any more convincing an argument as to why such neglect warrants reconsideration.[2] There is no allegation of any sort of error or defect in the electronic service of the Department's motion, only that counsel "did not realize that his computer system had received the e-filing."

Finally, even if the Rozums had filed a timely request for reconsideration, and even if the Rozums' request did present extraordinary circumstances, they do not bring forth any inconsistent crucial facts that justify reconsideration of our Opinion and Order. The affidavit from Max Rozum, Jr. contains several factual averments, mostly concerning background information on the Rozums' purchase of the subject property, but none of them run counter to the properly supported facts in the Department's motion for partial summary judgment. None of the averments undermine the crucial fact of the Department's motion that the Rozums failed to comply with the Department's order from 2008. The closest the affidavit comes is averring that Mr. Rozum had removed "a substantial amount" of waste tires by September 2012, four and a half years after the Department issued its original order. (Affidavit ¶ 17.) The affidavit, like the notice of appeal, again admits that the Department had to engage a contractor to remove the

[2] Counsel for the Rozums registered for electronic filing, which is now mandatory (subject to exception for a showing of unreasonable burden), 25 Pa. Code § 1021.32(c), and electronic service, which constitutes valid and effective service, 25 Pa. Code §§ 1021.33(b) and 1021.34(c). By registering for the Board's electronic filing system, a user certifies that he or she will accept electronic service of documents filed electronically. 25 Pa. Code § 1021.34(h).

remaining waste tires. (Affidavit ¶ 16, 21.) Most of the statements in the affidavit more appropriately go to considerations such as the amount of the penalty that is assessed under the Solid Waste Management Act, not liability. *See* 35 P.S. § 6018.605 (amount of penalty to be based on willfulness of violation, damage to natural resources, cost of restoration and abatement, cost savings to violator, and other relevant factors). (See, e.g., Affidavit ¶ 19 ("I never intentionally violated any statute of the Commonwealth of Pennsylvania pertaining to unlawful disposal of waste tires on the subject property.").) The Rozums remain free to get into these matters at the hearing on the reasonableness of the amount of the Department's penalty. They do not warrant reconsideration.

For these reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. AND CAROL K. ROZUM	:	
	:	
v.	:	**EHB Docket No. 2017-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 20th day of March, 2018, it is hereby ordered that the Appellants' motion for reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: March 20, 2018

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

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

For Appellants:
Lawrence E. Bolind, Jr., Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2016-047-L**
	:	**(Consolidated with 2016-104-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA ENERGY CENTER, LLC, Permittee	:	**Issued: March 28, 2018**

OPINION AND ORDER ON
APPLICATION FOR COSTS AND FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's application for costs and fees where the evidence does not support a finding that the appellant's consolidated appeals were a substantial or significant cause of the permittee's decision to change the design of its power plant to eliminate an industrial wastewater discharge that was the subject of the appeals.

O P I N I O N

Before us is an application for costs and fees filed by the Sierra Club in a consolidated appeal of an NPDES permit and a water quality management permit (WQM) issued by the Department of Environmental Protection ("the Department") to Lackawanna Energy Center ("LEC") for an industrial wastewater discharge associated with a new natural gas-fired power plant located in the Borough of Jessup in Lackawanna County.[1] Sierra Club is seeking a total of $77,018.56 in attorney's fees and costs in connection with its litigation of the appeals of the two permits.

[1] We consolidated the two appeals on September 1, 2016 in response to a joint request from the parties.

LEC's NPDES permit was issued on March 2, 2016, authorizing a discharge of no more than 290,000 gallons per day (gpd) of industrial wastewater from the facility to Grassy Island Creek. (Notes of Transcript page ("T.") 59-60; Sierra Club Exhibit No. ("SC Ex.") 1.) Grassy Island Creek is designated as Cold Water Fishes and Migratory Fishes. (T. 59; Department Exhibit No. ("DEP Ex.") 2 (at 1).) LEC's discharge is approximately 1.1 miles upstream from Grassy Island Creek's confluence with the Lackawanna River, at a point where the Lackawanna River is designated as High Quality Cold Water Fishes and Migratory Fishes. (*Id.*)

During the NPDES permit application process, the Department requested that LEC prepare an antidegradation analysis out of what the Department says was "an abundance of caution" due to the proximity of the discharge to the High Quality portion of the Lackawanna River.[2] (T. 64-65, 104.) The antidegradation regulations generally require the maintenance and protection of existing instream uses and water quality. 25 Pa. Code § 93.4a. A nondischarge alternatives analysis is required as part of the antidegradation analysis for High Quality and Exceptional Value waters to look at ways in which a discharge can be reduced or eliminated. 25 Pa. Code § 93.4c(b)(1)(i). (T. 66-67.) As requested, LEC prepared and submitted the antidegradation analysis and nondischarge alternatives analysis. (SC Ex. 3.) The nondischarge alternatives analysis was the crux of Sierra Club's challenge, arguing, among other things, that LEC did not conduct a sufficient analysis, that the Department did not perform an adequate evaluation of the analysis, and that the Department erred when it did not require a nondischarge alternative that reduced or eliminated the industrial wastewater discharge.

After receiving its NPDES permit, LEC submitted an application for a WQM permit. (T. 60.) NPDES permits and WQM permits work in tandem; a WQM permit must be obtained as a

[2] The antidegradation module in the Department's NPDES permit application asks if the proposed discharge is either directly to or upstream of receiving waters with an existing use of High Quality or Exceptional Value. (SC Ex. 3 (at 004652).)

prerequisite to commencing a discharge authorized by an NPDES permit. (T. 60.) The purpose of the WQM permit is to acknowledge and certify that the applicant has submitted a proposal for the construction of a treatment facility that is consistent with the Department's design standards and will meet the effluent limits provided in the corresponding NPDES permit. (T. 61-62.) The WQM permit was issued on May 24, 2016. (T. 93; SC Ex. 2; DEP Ex. 5.)

In April 2017, LEC sought to amend its NPDES permit to eliminate the industrial wastewater discharge due to changes in the design of the facility that greatly reduced the quantity of industrial wastewater generated—from 290,000 gpd to an estimated 56,600 gpd. (T. 89-90, 113, 190; DEP Ex. 6.) The Department approved LEC's amendment of its NPDES permit.[3] (T. 190.) LEC no longer needs to discharge wastewater to Grassy Island Creek because the wastewater has been reduced to a volume that will allow LEC to either truck the wastewater offsite to a licensed treatment facility, or connect to a sewer system and convey the wastewater to the Lackawanna River Basin Sewer Authority's Throop plant. (T. 106.) Upon receiving the amended NPDES permit, LEC requested termination of its WQM permit, a request which the Department granted on April 27, 2017, with the termination effective 30 days from that date. (T. 191-92; DEP Ex. 9, 10.)

On June 15, 2017, the parties filed a joint motion requesting that the Board enter a final order dismissing the consolidated appeals as moot but retaining jurisdiction over any application for costs and fees to be filed by Sierra Club. We entered such an order and required Sierra Club to submit any fees application by July 17, 2017, pursuant to 25 Pa. Code § 1021.182(c) (application for costs and fees shall be filed within 30 days of the entry of a final order by the Board). Up until that point, the only activities on the docket for this consolidated proceeding

[3] The amended NPDES permit still authorizes LEC to discharge industrial stormwater (not wastewater) to Grassy Island Creek. (T. 190-91.)

were a handful of joint requests to extend the prehearing deadlines. We were presented with no occasion to reach a decision on any aspect of the merits of the consolidated appeal.

Sierra Club, believing that its appeals were the impetus for LEC to change its facility to eliminate the wastewater discharge to Grassy Island Creek, filed its application to recover the costs and fees it expended in this matter pursuant to the Clean Streams Law. The Department and LEC filed responses opposing the application, arguing, among other things, that the permitting changes were the result of a business decision made by LEC to bring down costs.[4] We then held a conference call with the parties to discuss how to proceed. Consistent with previous direction from the appellate courts in other matters involving applications for costs and fees where no final decision was reached on the merits, we held an evidentiary hearing on November 15, 2017 to create a record to support our findings on Sierra Club's application.[5] *See, e.g., Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 1005 (Pa. 2007) (remanding matter to the Board to develop a record with findings of fact and conclusions of law to support Board's decision to deny application); *Upper Gwynedd Towamencin Mun. Auth. v. Dep't of Envtl. Prot.*, 9 A.3d 255, 268 (Pa. Cmwlth. 2010) (remanding matter to the Board to consider whether existing record sufficient to support factual findings and instructing Board to conduct hearing if record insufficient). The parties filed post-hearing briefs and the application is ripe for decision.

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). Section 307(b) provides the Board with broad discretion to award fees in

[4] It is not clear why LEC has actively opposed Sierra Club's application. Sierra Club did not seek fees from LEC.

[5] At the hearing we heard testimony from Joanne Kilgour on behalf of Sierra Club, Amy Bellanca on behalf of the Department, Daniel Ewan on behalf of LEC, and Ryan Hamilton, counsel for Sierra Club.

appropriate proceedings. *Solebury Twp., supra*, 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-prong 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; and (3) if those two prongs 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. The threshold criteria for an award varies depending on whether the applicant obtained a final ruling on the merits. If there is a final ruling on the merits, we look to the criteria established in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990).[6] Where, as here, there was no final ruling on the merits, we look to the criteria established by the catalyst test. *Hatfield Twp. Mun. Auth.*, 2013 EHB 764, 776-77. *See also Solebury Twp.*, 928 A.2d 990 (Pa. 2007); *Upper Gwynedd Towamencin Mun. Auth., supra*, 9 A.3d 255, 263-65 (Pa. Cmwlth. 2010). Under the catalyst test, in the absence of bad faith or vexatious conduct, a party must satisfy three criteria to be eligible for an award of fees and costs under Section 307(b):

1. The applicant must show that the Department provided some of the benefit sought in the appeal;
2. The applicant must show that the appeal stated a genuine claim, i.e., one that was at least colorable, not frivolous, unreasonable, or groundless; and

[6] To be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:

(1) The Board issued a final order;
(2) The applicant for fees and expenses must be the prevailing party;
(3) The applicant must have achieved some degree of success on the merits; and
(4) The applicant must have made a substantial contribution.

Kwalwasser, 1988 EHB 1308, 1310. *See also Crum Creek*, 2013 EHB 835, 838.

3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

Citizens for Pennsylvania's Future v. DEP, 2013 EHB 739, 748; *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 72; *Lower Salford Twp. Auth. v. DEP*, 2009 EHB 633, *rev'd on other grounds*, 9 A.3d 255 (Pa. Cmwlth. 2010). *See also Solebury Twp. v. DEP*, 2008 EHB 658.

Here, we will turn directly to the causation requirement of the catalyst test. We conclude that Sierra Club has not established that its appeal was a substantial or significant cause of the elimination of the discharge to Grassy Island Creek. In essence, Sierra Club's argument is that, because it filed an appeal and because LEC later made changes to its facility that eliminated the discharge Sierra Club challenged, the appeal must have been a cause, if not the only cause, of LEC's decision. Sierra Club has not provided any evidence other than the relative timing of the events to show that LEC made changes to its facility *as a result of* Sierra Club's appeal, either in whole or in part.

Although the relative timing of events can support a finding of causation, it is rarely enough by itself. A well executed rain dance is unlikely to be the cause of subsequent rainfall. In the absence of any other reasonable explanation, a showing of temporal alignment might have been entitled to more weight, but here, in contrast to Sierra Club's limited showing, LEC presented the uncontradicted testimony of Daniel Ewan, Vice President of Thermal Development at Invenergy LLC, a company of which LEC is an affiliate. (LEC Exhibit No. ("LEC Ex.") 1.) Mr. Ewan led the team of engineers and developers responsible for the development of the LEC facility in Jessup, and he reviewed and approved the NPDES and WQM permit applications. (T. 100-01.) Mr. Ewan credibly testified that the reason that LEC redesigned its facility to eliminate

the discharge was for purely economic and business reasons, and it was not prompted by Sierra Club's appeals. (T. 117, 120.)

He testified that LEC's team of consultants were engaged in a continual process of trying to reduce the amount of wastewater generated from the facility. Early on in that process, LEC had changed the design of its facility from being water-cooled to air-cooled, which reduced the volume of wastewater from more than a million gallons per day to 290,000 gpd. (T. 88-89, 91-92, 105-06.) That volume of wastewater was still too much to be trucked off site or conveyed to a sewer system. (T. 77, 107-08.) Once in possession of the preliminary effluent limitations in the draft NPDES permit, LEC could perform a detailed engineering analysis and determine what equipment was needed to meet the limits. (T. 117-18, 128.) Mr. Ewan testified that, when the final effluent limitations were issued, they were more stringent than LEC anticipated and more equipment needed to be added at a significantly higher cost in order to meet the final limits. (T. 118-19, 128-30.) Therefore, LEC asked its engineers to look for ways to bring down the cost of the operation by reevaluating processes, looking at new technology, and assessing ways to handle the wastewater differently. (T. 119-20, 129.) LEC identified additional opportunities for wastewater reduction that made other disposal options, such as trucking and using an existing sewer system, more economically and technically feasible. (T. 108-09.)

We have no reason to doubt Mr. Ewan's testimony that LEC was engaged in an ongoing process to try to bring down its costs, and that it was this ongoing process that led to the elimination of the discharge to Grassy Island Creek. He said that capital costs were evaluated throughout the permit application process, including costs associated with wastewater. (T. 104-05.) The reduction in wastewater that LEC was ultimately able to achieve will save approximately $3 million in capital costs. (T. 126-27.)

The situation before us now is similar to *Citizens for Pennsylvania's Future, supra*, where PennFuture sought fees in its appeal of a water obstruction and encroachment permit authorizing the construction of two temporary waterlines that would supply water to two gas well sites. The permittee eventually surrendered its permit, and the Department then cancelled the permit. Believing its appeal had been mooted, PennFuture withdrew the appeal but reserved its right to file an application for fees and costs. After conducting a hearing to receive evidence on disputed facts pertaining to the catalyst test, the Board determined that PennFuture's appeal played no role in the permittee's decision to surrender its permit and the Department's resultant decision to cancel the permit. The evidence showed that the permittee's decision to surrender its permit was the result of operational changes that were not connected to the appeal. A witness associated with the permittee testified that the permittee concluded that it was not cost effective to continue to use aboveground waterlines to transport water over long distances. The permittee also more broadly reoriented its gas development strategy to focus on only a specific number of well pads, and decided that, when it reactivated the well site involved in the appeal, it would instead employ tanker trucks to supply water. Thus, we held that PennFuture's appeal was not a substantial or significant cause of the surrender and cancellation of the permit, and PennFuture was not entitled to recover fees and costs. The permittee made certain operational decisions that were not prompted by, in response to, or influenced by the appeal.

The same can be said here. Ultimately, in the face of credible testimony to the contrary, Sierra Club never shows that LEC was motivated in any part by Sierra Club's appeal, or the

objections pursued by Sierra Club over the course of the litigation, to make the design changes that eliminated the need for a discharge. [7]

Accordingly, we issue the Order that follows.

[7] Our finding that Sierra Club's appeal was not a substantial or significant cause of the elimination of the discharge makes it unnecessary to address the Department and LEC's claim that Sierra Club also failed to satisfy other criteria for a fees award.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2016-047-L**
	:	**(Consolidated with 2016-104-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and LACKAWANNA ENERGY	:	
CENTER, LLC, Permittee	:	

O R D E R

AND NOW, this 28th day of March, 2018, it is hereby ordered that Sierra Club's application for costs and fees is **denied.**

ENVIRONMENTAL HEARING BOARD

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

*** Chief Judge and Chairman Thomas W. Renwand files a dissenting opinion.**

DATED: March 28, 2018

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

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

For Appellant:
Emily A. Collins, Esquire
Ryan Hamilton, Esquire
(*via electronic filing system*)

For Permittee:
Lorene Boudreau, Esquire
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Ronald M. Varnum, Esquire
Michael S. Blazer, Esquire
Allison Hyeyeon Park In, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB	:	
	:	
v.	:	**EHB Docket No. 2016-047-L**
	:	**(Consolidated with 2016-104-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and LACKAWANNA ENERGY	:	
CENTER, LLC, Permittee	:	

DISSENTING OPINION OF
CHIEF JUDGE AND CHAIRMAN THOMAS W. RENWAND

I respectfully dissent. I do not believe that the facts of this case lead to a dismissal of the Appellant's Application for Costs and Fees. Instead, I believe the Appellant has shown that it is entitled to an award of costs and fees. The Pennsylvania Supreme Court and Commonwealth Court have given the Board clear and specific direction on how we should evaluate an application for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. Specifically, the Courts have overturned the Board when we have taken an overly narrow approach in our application of the *Kwalwasser* and catalyst tests. *See*, *Solebury Township v. Department of Environmental Protection (Solebury I),* 928 A.2d 990 (Pa. 2007) (Board's application of the *Kwalwasser* criteria was too narrow in view of the broad language of Section 307(b); remanded to the Board to create a record to support its findings); *Upper Gwynedd Towamencin Municipal Authority v. Department of Environmental Protection,* 9 A.3d 255 (Pa. Cmwlth. 2010) (Board's application of the catalyst test was too narrow; vacated and remanded); *Chalfont-New Britain Joint Sewage Authority v. Department of Environmental Protection,* 24 A.3d 470, *rev'g, Hatfield Township v. Department,* 2010 EHB 571 (Board's application of the catalyst test was too narrow; Board incorrectly denied attorneys' fees based on its conclusion that

the petitioners had achieved only temporary success). I fear that my colleagues have once again applied an overly restrictive approach to the catalyst test by finding that Sierra Club's appeal played no role in LEC's decision to adopt nondischarge alternatives.

The facts of this case fall squarely within the realm of *Solebury Township v. DEP (Solebury II)* 2008 EHB 658, in which the Board, on remand from the Pennsylvania Supreme Court, found that attorneys' fees were warranted. That case involved an appeal of a Section 401 water quality certification[1] issued to the Pennsylvania Department of Transportation (PennDOT) by the Pennsylvania Department of Environmental Protection (Department) in connection with a proposed bypass project in Montgomery and Bucks Counties. Two Townships (as well as environmental groups) filed an appeal with the Environmental Hearing Board, challenging the grant of the water quality certification. Among the Townships' objections was the contention that the issuance of the Section 401 certification was the product of an illegally truncated review process in contravention of Department regulations. Seven days prior to *en banc* oral argument on summary judgment motions, PennDOT requested that the Section 401 certification be rescinded, which the Department did, and on the motion of PennDOT, the appeals were dismissed as moot.

The Board initially denied the Townships' application for attorneys' fees. Applying the *Kwalwasser* test, the Board determined that the Townships did not meet three prongs of the four-prong test, namely that the Townships were not prevailing parties, had achieved no success on the merits, and had made no substantial contribution to the outcome of the case. On appeal, the Commonwealth Court reversed, finding that the Board had applied an overly narrow interpretation of the aforesaid three prongs of the *Kwalwasser* test. The matter was appealed to the Pennsylvania Supreme Court, which agreed that the Board's application of *Kwalwasser* was

[1] Section 401 of the Federal Water Pollution Control Act.

too narrow and remanded the matter to the Board to establish a record on which to support its findings. On remand, after holding an evidentiary hearing, the Board awarded the Townships a portion of the attorneys' fees requested. Although the Board found that the Townships had achieved limited and temporary success (since PennDOT was likely to apply for a new Section 401 certification) "they, at least for now, accomplished exactly what they sought out to do by filing their appeals." *Solebury II*, 2008 EHB at 682. Likewise, the appellant in this matter has accomplished exactly what it sought to do, which is the elimination of the industrial wastewater discharge to Grassy Island Creek.

The majority, however, finds that the appeal by Sierra Club had no causative effect on LEC's decision to forego its plans to discharge to Grassy Island Creek and to utilize a nondischarge alternative instead. The majority accepts LEC's conclusory statement that its decision to truck wastewater offsite and/or discharge it through the local sewer plant rather than discharge it to Grassy Island Creek was purely a business decision, having no connection to the pending challenge by Sierra Club. Yet, these are precisely the main arguments raised by Sierra Club in its appeal, i.e. that the Department and LEC did not adequately consider nondischarge alternatives prior to the issuance of the permits. According to the antidegradation analysis conducted by LEC prior to the issuance of the permits, nondischarge alternatives were rejected as being infeasible. (Ex. 7 to Sierra Club's Application.) What has changed, other than the filing of Sierra Club's appeal?

In *Solebury II*, the Board awarded fees even though it found that a causative relationship between the Townships' appeals and the change in PennDOT's project was lacking. Writing for the Board, Judge Labuskes stated:

> We do not believe that the Townships' litigation substantially contributed to PennDOT's decision to put the highway project on

> hold and eventually redesign it. Although local opposition in its many forms was certainly a factor in propelling the expressway project to the top of the list of dozens of projects that could have been put on hold, what primarily drove the reconsideration was the fact that PennDOT realized that it had far more projects in the works than money to pay for them.

Solebury II, 2008 EHB at 676-78. Indeed, on remand the Board made the following findings of fact:

> 6. PennDOT decided to put the expressway project on hold primarily but not exclusively because the new Administration was concerned that the project was too expensive given the Commonwealth's multiple needs and the limited resources available to meet those needs. (T. 84-91.)
>
> 7. PennDOT decided to put the project on hold to give it an opportunity to determine whether less expensive alternatives were available that would serve local mobility needs while addressing ongoing concerns about the project's impact on the landscape, thereby reaching an accommodation with local groups and municipalities opposed to the project. . . .
>
> 9. PennDOT after years of study now intends to move forward with a "parkway" concept, which is roughly in line with one of the transportation choices that had been advocated by the Townships from the beginning. . . .
>
> 11. The EHB appeals in and of themselves were not a substantial cause of the highway project moratorium or its ultimate redesign.

Id. at 664-65 (case citations and citations to transcript omitted). However, while the Board concluded that the Townships' appeals did not cause the change in the PennDOT project, we nevertheless found that, based on the timing, the appeals caused the rescission of the Section 401 certification. As the Board stated, "Nothing else can explain why PennDOT and DEP did what they did *when* they did it." *Id*. at 679 (emphasis in original).

Likewise, the timing of LEC's decision to pursue two nondischarge alternatives must be an important factor in determining whether Sierra Club's appeal had any cause on the outcome

of this matter. As in *Solebury*, LEC has now decided to move forward with a course of action that had been advocated by Sierra Club from the beginning. I see no difference between the set of facts presented to us in *Solebury II* and those in the matter now before us. In fact, in my opinion, the facts here are more compelling for an award of fees under the very instructive language given to us by the Supreme Court: "[T]the practical relief sought by [the appellants] should be considered when characterizing them as prevailing parties." *Solebury II*, 928 A.2d at 1004. The practical relief obtained by Sierra Club in this matter is exactly what was sought in its appeal – that LEC propose and the Department approve nondischarge alternatives for the industrial wastewater disposal. Objectively, even the Department and LEC agree that Sierra Club has obtained the relief it sought since they moved to dismiss Sierra Club's appeal as being moot after LEC embraced the nondischarge alternatives. Yet, while we elected to award fees in *Solebury II*, the majority chooses not to do so here. I believe my esteemed colleagues are failing to heed the very explicit guidance provided to us by the Supreme Court in *Solebury I* that Pennsylvania has a "strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions." 928 A.2d at 1004. As noted previously, when the Board has failed to heed that directive, our rulings have not withstood appellate review. *Solebury I, supra*; *Upper Gwynedd, supra; Chalfont-New Britain, supra*. If our holding here is subjected to scrutiny by the Commonwealth Court and Supreme Court, I believe that the Board may once again be reminded by the Courts that our focus should not be so narrow in light of "the Board's broad discretion to award attorneys' fees." *Solebury I*, 928 A.2d at 1003.

Moreover, the majority is establishing a dangerous precedent that would allow permittees and the Department to avoid paying attorneys' fees by simply making the claim that a decision to withdraw or vacate an action that has been appealed was a "business decision." Here, the

majority relies heavily on the testimony of Daniel Ewan, Vice President of Thermal Development at Invenergy LLC, an affiliate of LEC. In my view, Mr. Ewan struggled unsuccessfully to advance a non-convincing argument that the main reason for the company to shift its position was entirely for business reasons. Sierra Club made a strong factual argument that a robust antidegradation analysis at the permit application stage would have led LEC to reach the same conclusion it eventually came to after litigation ensued. In fact, Amy Bellanca, the Department's permit chief for the Clean Waste Program for the Northeast Regional Office, testified that the preliminary effluent limits provided to LEC on July 8, 2015 were "about the same" as the final limits. (T. 97) Even after the Board took the unprecedented step of allowing Mr. Ewan to testify confidentially, he was unable to set forth any new specific process or development that transpired after the permit was issued that was not available during the permitting application stage. In fact, he testified generally that the savings resulted from a change order by their engineer that the new system would result in a "deduction in price of a little over $3 million." (T. 126)

No explanation is provided as to why this analysis could not have been conducted prior to the issuance of the permits. Indeed, the very nondischarge alternatives that LEC is now pursuing were rejected by LEC as being "infeasible," and the Department accepted that conclusion without question. The majority states that "Mr. Ewan credibly testified that the reason that LEC redesigned its facility to eliminate the discharge was for purely economic and business reasons" and "Sierra Club never shows that LEC was motivated in any part by Sierra Club's appeal, or the objections pursued by Sierra Club over the course of the litigation, to make the design changes that eliminated the need for a discharge." Opinion at 6, 8-9. I believe that the majority applies an overly restrictive reading of the catalyst test (i.e., the appeal was a "substantial or significant

cause of the Department's action providing relief") by requiring the applicant to prove that a permittee's decision to abandon the action under appeal was not a purely business decision. Not only is this subjective test a nearly impossible standard to meet, it is also likely to lead to attorneys' fees applications turning into mini-trials involving extensive discovery into the motivations behind a permittee's actions. Moreover, a company may be motivated by cost-savings or an eye to efficiency *and* a desire to avoid further litigation. Such motivations are not mutually exclusive.

The majority makes note of the fact that there was little activity on the docket prior to the termination of the appeal, seemingly as support for its conclusion that the appeal had no effect on LEC's change of plans. However, the Board's docket does not accurately reflect what could very well be substantial and important prehearing activity among the parties themselves such as the exchange of discovery. According to Sierra Club, LEC's submission of its application to eliminate the outfall to Grassy Island Creek occurred after a period of extensive discovery, including depositions of Department staff. (Sierra Club Application, para. 29) It appears that Sierra Club was very active in discovery and had prepared expert reports.

The majority, however, places little significance on the timing of LEC's decision to change its plans after the filing of Sierra Club's appeal, stating, "Although the relative timing of events can support a finding of causation, it is rarely enough by itself." Opinion at 6. Yet, in awarding fees in *Solebury II*, the Board placed great importance on the timing of PennDOT's decision to change its plans. There, the Board iterated the many financial and administrative reasons that PennDOT had for revamping its project, but ultimately found that the timing of PennDOT's action was likely due to the Townships' appeals. In reaching this decision, the Board held, "The timing of events confirms our conclusion." *Solebury II*, 2008 EHB at 679.

Mr. Ewan testified that after receiving the final effluent limitations issued by the Department, LEC asked its engineers to look for ways to bring down costs and, at that point, to assess ways to handle the wastewater differently. Nevertheless, those final effluent limitations were not radically different from preliminary effluent limitations. The question that remains unanswered is why this evaluation wasn't undertaken before the issuance of the permits and why the Department did not require more evaluation. This is precisely one of the arguments made by Sierra Club in its appeal. If LEC's process of reviewing nondischarge alternatives was still ongoing, it raises a question as to why the permits were issued before that review was complete. I am reminded of Judge Myers' ruling in *New Hanover Township v. Department of Environmental Protection*, 1996 EHB 668, 685, *aff'd*, 2081 CD 1996 (Pa. Cmwlth. August 19, 1997) (overturning the Department's decision to issue a permit without having a final, approvable design in place) in which he stated, "DEP officials were well aware that they were trying to ride two horses at once – a stunt rarely successful in public affairs – and were likely to be dismounted if challenged."

The Sierra Club was successful in obtaining the relief it requested in its consolidated appeal. Therefore, based on the very explicit instructions and guidance that the Board has been provided by the appellate courts, I would find that Sierra Club has met its burden of demonstrating that it is entitled to an award of costs and fees under Section 307(b) of the Clean Streams Law.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 28, 2018

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEYWOOD BECKER	:	
	:	
v.	:	**EHB Docket No. 2013-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 11, 2018**

OPINION AND ORDER ON RECONSIDERATION

By Michelle A. Coleman, Judge

Synopsis

The Board denies an appellant's motion for reconsideration of an Opinion and Order on Remand because the appellant has not presented compelling and persuasive reasons justifying reconsideration.

O P I N I O N

Heywood Becker has filed a motion for reconsideration of an Opinion and Order we issued following a remand from the Commonwealth Court. *See Becker v. DEP*, EHB Docket No. 2013-038-C (Opinion and Order, Mar. 19, 2018). The Court affirmed the Board's Adjudication, *Becker v. DEP*, 2017 EHB 227, but remanded it for the limited purpose of imposing a remedy that recognized the fact that Mr. Becker no longer owned the property where he had previously unlawfully rerouted a stream channel and conducted earth disturbance activities without a permit. *See Becker v. Dep't of Envtl. Prot.*, No. 560 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 944 (Pa. Cmwlth. Dec. 1, 2017). Our directive on remand from the Court was to impose

on Mr. Becker the cost of remediation of the site or obtain permission from the current property owner to conduct the work. *Id.*, slip op. at 21, 2017 Pa. Commw. Unpub. LEXIS 944 at *24-25.

Pursuant to the Court's instruction, we modified the Department order under appeal to provide that Mr. Becker must negotiate an access agreement with the current property owner of the site at 7072 Upper York Road in Solebury Township, Bucks County to perform the work required by the Department's order. We gave Mr. Becker approximately 60 days to negotiate access. We tolled the timeframes for completing the obligations imposed by the Department's order so that they would begin from the execution of the access agreement. We otherwise affirmed the Department's order, as we also did in our Adjudication, and dismissed Mr. Becker's appeal.

In his motion for reconsideration, Mr. Becker contends that he is unable to comply with our Order in that he cannot negotiate an access agreement with the current property owner. Mr. Becker attaches what purports to be a letter from the current property owner in which the owner states that he will not grant permission for the remediation work to be done on his property. The letter appears to be in response to some communication the property owner had with Mr. Becker. Mr. Becker invokes the doctrine of impossibility of performance as justification for his motion.

The Department, in its response, says that it spoke to the current property owner and confirmed that the owner wrote the letter attached to Mr. Becker's motion, but represents that the owner is willing to perform the remediation work on his own in order to resolve this matter. The Department supports these averments with an affidavit from one of its Environmental Protection Specialists. The Department then asks us to issue an order requiring Mr. Becker to pay for the remediation work to be done by a contractor selected by the current owner, in accordance with plans to be approved by the Department. Attached to the Department's response is an outline for

remediation work that was apparently submitted to the Department in 2014 by the owner of the site at the time, Peter Edwardson. The scope of work contains a broad cost estimate that is dependent on "numerous variables." The Department asserts that reconsideration should be denied because the doctrine of impossibility does not apply.

Rule 1021.152(a) of the Board's rules sets forth our standard for granting reconsideration of final orders. 25 Pa. Code § 1021.152(a). "Reconsideration is within the discretion of the Board and will be granted only for **compelling and persuasive reasons**." *Id*. (emphasis added). Reasons that may justify reconsideration of a final order, include, but are not limited to, the following:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition:
>
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with exercise of due diligence.

Id. See generally PQ Corp. v. DEP, 2017 EHB 1081; *Consol Pa. Coal Co., LLC v. DEP*, 2015 EHB 117, 118.

Although neither party bothers to even cite our rule on reconsideration, let alone offer a discussion of the standard, it would appear that Mr. Becker is presenting what he believes is a fact that is inconsistent with our findings justifying reconsideration of our decision.

We do not find a compelling and persuasive reason to grant reconsideration. We believe that our Opinion on remand complied with the directive from the Commonwealth Court. The issue that Mr. Becker raises is a matter concerning the Department's *enforcement* of its order, as revised by the Board on remand, before the courts of competent jurisdiction. *See, e.g., Tire Jockey Serv. v. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1185 (Pa. 2007) (the Department is the

agency charged with implementing and enforcing the Commonwealth's environmental statutes and regulations); *Dep't of Envtl. Prot. v. N. Am. Refractories Co.*, 791 A.2d 461, 462 (Pa. Cmwlth. 2002) (same); *Pa. Indep. Oil & Gas Ass'n v. Dep't of Envtl. Prot.*, 146 A.3d 820, 830 n.15 (Pa. Cmwlth. 2016) (same). *See also* 32 P.S. § 693.20(c); 35 P.S. § 691.601(a); *Commonwealth v. Coward*, 414 A.2d 91 (Pa. 1980) (Department has the right, if not the pressing duty, under the Clean Streams Law to seek enforcement of its orders for the abatement of pollution before the courts). If Mr. Becker is unable to negotiate an access agreement with the current owner of the site, or comply with the Department's order in any other respect, then it is up to the Department to decide how to proceed with achieving remediation of the site. *See Ramey Borough v. Dep't of Envtl. Res.*, 351 A.2d 613, 615 (Pa. 1976) (a person's ability to comply with a Department order, for financial or other reasons, may be relevant in a proceeding to enforce a Department order, but not in determining the validity of the order). *See also Carl L. Kresge & Sons, Inc. v. DEP*, 2000 EHB 30, 65-67 (impossibility in the form of physical inability to perform reclamation not a defense to bond forfeiture); *Wasson v. DEP*, 1998 EHB 1148, 1158-59. This issue does not constitute a reason for reconsideration.[1]

In addition, we will not entertain the Department's request to impose on Mr. Becker the cost to remediate the site. The Department essentially asks for reconsideration in its own right without conforming its request to the proper procedures for seeking reconsideration (i.e. filing the request within ten days of the date of our order and allowing the other party an opportunity to respond), and without providing any compelling and persuasive reasons. Furthermore, imposing the costs of remediation on Mr. Becker is a remedy that, absent a complaint for penalties initiated

[1] Mr. Becker also requests in his motion that we order the Department to conduct an inspection of the site to determine what remediation measures, if any in his view, need to be completed. Nothing we have done prevents the Department from conducting an inspection of the site at any time. However, as with the enforcement of the Department's order as modified, this is a matter for the Department to determine, and not a reason for the Board to grant reconsideration.

by the Department in a separate proceeding before this Board pursuant to the Dam Safety and Encroachments Act, 32 P.S. § 693.21(a), or the Clean Streams Law, 35 P.S. § 691.605(a), we respectfully believe is unavailable to the Board in the context of this appeal of a Department order. *See, e.g., Pines at W. Penn, LLC v. Dep't of Envtl. Prot.*, 24 A.3d 1065, 1070 (Pa. Cmwlth. 2011); *Leeward Constr. v. Dep't of Envtl. Prot.*, 821 A.2d 145 (Pa. Cmwlth. 2003); *Westinghouse Elec. Corp. v. Dep't of Envtl. Prot. (Westinghouse II)*, 745 A.2d 1277 (Pa. Cmwlth. 2000); *Westinghouse Elec. Corp. v. Dep't of Envtl. Prot. (Westinghouse I)*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 11th day of April, 2018, it is ordered that the Appellant's motion for reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 11, 2018

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

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

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5382 Wismer Road
Pipersville, PA 18947

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC Permittee	:	**Issued: April 24, 2018**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Chief Judge

Synopsis

The Board denies the Appellants' Petition for Supersedeas in their appeal of Permit Revision 210 authorizing longwall mining under Polen Run in the 5L Panel of the Bailey Mine East Expansion Area. The Board finds that the updated hydrogeologic data, monitoring data and other evidence presented at the supersedeas hearing supports the Department's issuance of the permit revision. The Appellants have raised important concerns regarding the health of Polen Run, but Consol and the Department have presented strong evidence that Polen Run is not likely to be impaired and, should any flow loss occur, it can be successfully restored.

O P I N I O N

Background

The history of this matter is fully set forth in the Pennsylvania Environmental Hearing Board (Board) Opinion issued on February 1, 2017 in *Center for Coalfield Justice v. DEP and*

Consol Pennsylvania Coal Co., 2017 EHB 38 (*Coalfield Justice I*), and Adjudication issued on August 15, 2017 in *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co.*, 2017 EHB 799 (*Coalfield Justice II*). We borrow from those decisions in presenting the history here: The Bailey Mine complex is a large underground coal mine complex located in Greene and Washington Counties, Pennsylvania. Consol Pennsylvania Coal Company, LLC (Consol), has conducted development and longwall mining activities at the Bailey Mine since 1985 under CMAP No. 30841316. In 2007, Consol sought a permit revision to CMAP No. 30841316 to conduct development and longwall mining in the area known as the Bailey Mine Eastern Expansion Area ("BMEEA"). BMEEA is located adjacent to and partially underlies Ryerson Station State Park, the only state park in Greene County. BMEEA consists of several longwall panels running largely in an east-west direction, referred to as Panels 1L, 2L, etc. The panel at issue in this appeal is the 5L.

On March 29, 2012, the Pennsylvania Department of Environmental Protection (Department or DEP), issued Permit Revision No. 158 allowing development mining for BMEEA. On May 1, 2014, the Department issued Permit Revision No. 180 which authorized longwall mining in panels 1L through 5L of BMEEA, but did not authorize longwall mining beneath two streams, Polen Run and Kent Run. Those streams are generally located in the western half of BMEEA and flow north–south perpendicular to the panels. On February 26, 2015, the Department issued Permit Revision No. 189 authorizing longwall mining under Polen Run in the 1L and 2L panels. Consol's application that led to Permit Revision No. 189 did not seek permission to mine under Kent Run.

On February 22, 2016, Consol submitted an application seeking authorization to conduct longwall mining beneath Polen Run and Kent Run in the 3L panel. On December 13, 2016, the

Department issued Permit Revision No. 204 authorizing longwall mining beneath both Polen Run and Kent Run in the 3L panel. Permit Revision No. 204 required Consol to implement an approved stream restoration plan to address any impacts to the streams from Consol's longwall mining. It also included Special Condition 97 stating that Consol could not conduct longwall mining beneath or adjacent to Kent Run until the Pennsylvania Department of Conservation and Natural Resources granted written access to Consol to allow it to perform stream mitigation work authorized by the Department.

The Center for Coalfield Justice and Sierra Club (Appellants) appealed the issuance of Permit Revisions 180, 189 and 204, and petitioned for supersedeas in the case of Permit Revision 204. On February 1, 2017, the Board granted, in part, the Appellants' Petition for Supersedeas as to Permit Revision 204, finding that the Appellants had met their burden of demonstrating that they were likely to succeed on the merits of their appeal (*Coalfield Justice I*). With regard to Polen Run, the Board found that the matter was moot because Polen Run had already been undermined in the 3L panel by the time the supersedeas was filed.

On August 15, 2017, the Board issued an Adjudication on the appeals of Permit Revisions 180 and 189, finding that the Department's issuance of Permit Revision 180 was reasonable and in compliance with the applicable statutes and regulations and that the anticipated and actual impacts to the streams from longwall mining did not rise to the level of impairing the streams. As to Permit Revision 189, the Board found that the evidence presented at hearing demonstrated that the permit revision was issued in violation of the applicable statutes and regulations and Article I, Section 27 of the Pennsylvania Constitution because the anticipated and actual impacts to Polen Run had impaired and were likely to further impair Polen Run and cause pollution as that term is defined under 25 Pa. Code § 86.37(a)(3) of the Department's

regulations (*Coalfield Justice II*). In *Coalfield Justice II*, we recognized that neither the Clean Streams Law nor the Mine Subsidence Act require that there be no impact to waters of the Commonwealth from activities permitted by the Department, including longwall mining. 2017 EHB at 834, 835. By the same token, the law prohibits longwall mining from permanently eliminating natural flow in a stream. *Id.* at 842-43.

The matter currently before the Board is the Department's issuance of Permit Revision 210 on March 7, 2018, authorizing Consol to conduct full extraction longwall mining beneath Polen Run in the 5L panel. The Appellants appealed the issuance of the permit revision on March 21, 2018 and on the same date filed Petitions for Supersedeas and Temporary Supersedeas. On April 3, 2018, the Board held a conference call with the parties to address the Petitions for Supersedeas and Temporary Supersedeas and requested a status update from counsel for Consol as to the advancement of mining as of that date. By Order dated March 28, 2018, the Board restricted mining within 500 feet of Polen Run until such time as the Board could hold a supersedeas hearing on the Appellants' petition. The Board directed Consol to keep the Board apprised as to the progression of mining and the anticipated date on which mining was expected to reach the 500-foot buffer. On April 3, 2018, the parties conferred and consented to an amendment of the Board's Order and agreed to a 100-foot buffer. The Board adopted the parties' amendment and revised its Order on April 4, 2018.

A supersedeas hearing was held on April 5-6, 2018 and April 16-17, 2018 and the parties submitted briefs on April 20, 2018.

Standing

There is no question that the Appellants have standing in this matter. Both Center for Coalfield Justice and Sierra Club have standing through at least one of their members, Veronica

Fike. *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (An organization has standing if at least one individual associated with the group has standing). Ms. Fike grew up in the area of Ryerson Station State Park and used the park frequently during her childhood. She continues to live in the area and hike in the park, including in the area of Polen Run. Ms. Fike testified that she used to spend much of her time on Duke Lake until it had to be drained due to mine damage caused by Consol's mining and now her use of the park involves other aquatic resources, including Polen Run.

Supersedeas Standard

As we stated in *Coalfield Justice I*, "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." 2017 EHB at 41-42 (citing *Delaware Riverkeeper Network v. DEP*, 2016 EHB 41, 43). The burden is on the petitioner to prove that a supersedeas should be granted. *Id.* at 42 (citing *Tinicum Twp. v. DEP*, 2008 EHB 123, 126). The Environmental Hearing Board Act sets forth factors to be considered in ruling on a request for supersedeas:

1) Irreparable harm to the petitioner;
2) Likelihood of the petitioner's success on the merits;
3) Likelihood of injury to the public or other parties, such as the permittee in third party appeals.[1]

[1] Even though the Environmental Hearing Board Act requires the Board to consider "likelihood of injury to. . . other parties such as the permittee in third party appeals" in determining whether to grant or deny a supersedeas, we can think of few, if any, circumstances in which harm to a permittee in a third-party appeal would prevent the granting of a supersedeas where the petitioner has demonstrated both a likelihood of success on the merits and irreparable harm.

Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, at § 7514(d). These factors are also codified in the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.63(a). 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. *Id.* at § 1021.63(b). In order for a supersedeas to be granted, a successful petitioner must make a credible showing on each of the three factors enumerated above, with a strong showing of a likelihood of success on the merits. *Coalfield Justice I, supra* at 42 (citing *Hudson v. DEP*, 2015 EHB 719, 726). In order to be successful, the petitioner's likelihood of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Id.* (citing *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829). A ruling on a supersedeas is merely a prediction, based on the limited record before us and the shortened timeframe for consideration, of who is likely to prevail following a final disposition of the appeal. *Weaver v. DEP*, 2013 EHB 486, 489.

Likelihood of Success on the Merits and Irreparable Harm

The Appellants must make a strong showing that they are likely to be successful on the merits of their claim. They must show by a preponderance of the evidence that the Department's decision to issue Permit Revision 210 was unreasonable or did not comply with the applicable statutes or regulations or Article I, Section 27 of the Pennsylvania Constitution. 25 Pa. Code § 1021.122(a). To meet this burden they must demonstrate that the Department's issuance of Permit Revision 210 is likely to cause impairment to Polen Run.

The Appellants assert that the evidence presented at the supersedeas hearing shows that severe impacts to Polen Run in the 5L panel are likely and that streambed grouting is unlikely to be successful in restoring Polen Run. The Appellants contend that this conclusion is well-

documented in prior permit revisions approved for the BMEEA and that the conditions that previously caused the Department to deny longwall mining beneath Polen Run have not changed. The Board has recognized that the Department has previously expressed concerns with the potential for flow loss in Polen Run. In *Coalfield Justice II*, we noted that the Department did not permit longwall mining under Polen Run in a prior permit revision - Permit Revision 180 - because the Department had concluded that the proposed mitigation/restoration technique – grouting – would not be successful in restoring Polen Run. 2017 EHB at 813, Finding of Fact 87.[2] When the Department permitted mining under Polen Run in Permit Revision 189 and authorized streambed lining as a method of mitigation, we found that actual impairment had occurred to Polen Run due to the permanent destruction of the existing stream channel. *Id*. at 852. When the Department permitted mining under both Polen Run and Kent Run in the 3L panel under Permit Revision 210, the Board granted the Appellants' petition for supersedeas after finding that the Department had made its decision without considering the issues that had led it to deny prior requests to mine under Kent Run. *Coalfield Justice I, supra*.[3] The Appellants assert that the same problems that led either the Department or the Board to reject the undermining of Polen Run and/or Kent Run under previous permit revisions continue to exist under Permit Revision 210, the subject of this supersedeas action.

The Appellants argue that flow loss is already occurring in Polen Run and that it will be exacerbated by further mining in the 5L panel. They point to testimony by both Department hydrogeologist, Paul Cestoni, and Consol's Manager of Hydrogeology, Joshua Silvis, confirming that flow loss had occurred in the 1L and 3L panels of the stream and that the 2L panel was lined

[2] The reference to Permit Revision No. "187" in Finding of Fact 87 in the Board's Adjudication in *Coalfield Justice II* is a typographical error. The correct permit number is "180."

[3] The Board's supersedeas decision in *Coalfield Justice I* covered only mining under Kent Run since mining had already taken place under Polen Run.

due to concern about flow loss. They argue that Consol and the Department wear blinders as to those impacts when making their prediction of "no impact" from the undermining of Polen Run in the 5L panel. It is the Appellants' contention that none of the factors that troubled either the Department or the Board in previous permit revisions have changed with regard to Permit Revision 210; they assert that the only thing that has changed is Consol's characterization of the impact on Polen Run.

In support of their supersedeas petition, the Appellants presented the testimony of Dr. Keith Eshleman, who was recognized as an expert in hydrology, and Dr. Benjamin Stout, recognized as an expert in stream ecology. Dr. Eshleman is a professor at the University of Maryland Center for Environmental Science. He has spent the last 15 years conducting monitoring on the effects of longwall mining on small streams in West Virginia. It is his opinion that dewatering is occurring in Polen Run as a result of longwall mining. In reaching his conclusion, Dr. Eshleman relied on a number of materials, including Act 54 Reports prepared by the University of Pittsburgh; hydrogeologic factors and flow data; and comment letters from the Pennsylvania Department of Conservation and Natural Resources (DCNR). It is Dr. Eshleman's contention that the flow data submitted by Consol does not accurately reflect the condition of Polen Run because the frequency of data collection was inadequate. He advocated for continuous monitoring in which data is collected every 15 minutes, as opposed to the less frequent data collection conducted by Consol and submitted to the Department. He testified that complete stream dewatering episodes can occur for very short durations and such episodes are missed without continuous monitoring. Department hydrogeologist Paul Cestoni admitted that he did not do any analysis to assess the frequency or duration of low-flow or no-flow periods. As further support for his conclusion that Polen Run is susceptible to dewatering, Dr. Eshleman

referred to the University of Pittsburgh's 2008-2013 Act 54 Report regarding the effect of longwall mining on streams. The Act 54 Report presents information on streams that have not recovered following longwall mining. Dr. Eshleman also referred to the Department's own analysis in previous permit applications in which it had expressed concerns about Polen Run. In previous permit reviews, the Department had concluded that the hydrogeologic setting of Polen Run was similar to that of other streams overlying the Bailey Mine that had experienced substantial flow loss and had not been restored.

Dr. Eshleman presented a very compelling case, but for one fact: The updated data submitted with the application for Permit Revision 210 presents a very different picture than data submitted with previous permit applications. The data submitted with the application for Permit Revision 210 reflects more recent conditions in the BMEEA. In his affidavit in support of the Petition for Supersedeas, Dr. Eshleman states, "I am confident that the geology of Polen Run in the 5L panel has not changed since the initial determination [when the Department did not authorize the undermining of Polen Run]." However, what appears to have changed is that more recent data indicates that undermined streams over the BMEEA are being restored. Table 8.5 (admitted at the supersedeas hearing as Appellants' Exhibit 2) reflects hydrogeologic data as of April 2011. Three of the streams listed in the table – Polly Hollow, Crows Nest, and Unnamed Tributary 32596 (also known as the Kim Jones Stream) – are located west of Polen Run. All three streams experienced flow loss due to undermining and have not recovered.[4] According to testimony by the Department's Michael Bodnar and Consol's Joshua Silvis, those streams were not subject to the Department's 2005 Technical Guidance Document on Surface Water

[4] Consol's Manager of Hydrogeology, Joshua Silvis, testified that it is Consol's belief that Polly Hollow, Crows Nest and Unnamed Tributary 32596 have, in fact, recovered and they are simply waiting on the Department's determination.

Protection for Underground Bituminous Coal Mining Operations, which, according to Mr. Silvis, "establishes more robust hydrologic and biological monitoring protocols" (T. 311) and contains additional requirements that were not in effect during the undermining of the aforesaid three affected streams. Consol submitted a revised table of hydrogeologic variables with its application for Permit Revision 210. This document – Table 8.9a (admitted as Appellants' Exhibit 1) – contains hydrogeologic information for an updated set of reference streams as of November 2017 and February 2018. Table 8.9a lists a number of streams overlying the Bailey Mine that have recovered following mining-induced flow loss. All of the streams listed in Table 8.9a were subject to the Department's 2005 Technical Guidance Document, unlike the three aforementioned streams that are alleged to have not recovered (Polly Hollow, Crows Nest and Unnamed Tributary 32596). Polen Run has comparable or, in some cases, more favorable hydrogeologic variable conditions than many of the streams listed in Table 8.9a. Three variables, in particular, are note-worthy: 1) Polen Run's drainage area is larger than 13 of the 16 streams listed in Table 8.9a. The larger the drainage area, the less likely it is that a stream will experience subsidence-induced flow loss. 2) The percentage of exposed bedrock in Polen Run over the 5L panel is the same or less than the streams listed in Table 8.9a.[5] The lower the percentage of exposed bedrock, the less likely it is that a stream will experience subsidence-induced flow loss. 3) Polen Run over the 5L panel has comparable depth of cover, and in some cases more depth of cover, than a number of the streams listed in Table 8.9a. The greater the depth of cover, the less likely it is that a stream will experience subsidence-induced flow loss.

[5] Table 8.5 from 2011 lists the percentage of exposed bedrock in Polen Run as 37%, whereas the more recent Table 8.9a lists it as less than 5% in the streambed above the 5L panel. Witnesses for Consol and the Department testified that the figure of "less than 5%" was supported by field observations conducted by both Consol and the Department, and the Appellants presented no evidence that leads us to conclude that this figure is not correct.

Thus, Table 8.9a supports the prediction that Polen Run is likely to recover should it experience flow loss from mining.

Dr. Eshleman expressed concern with relying on the streams listed in Table 8.9a due to their location in a different section of the BMEEA (over the I panels) but acknowledged that proximity is not necessarily one of the hydrogeologic variables that is required for stream comparison. We find that a better indicator of predicted impact from mining on streams in the BMEEA is whether the mining and restoration were done under the same set of requirements. Although the parties' experts disputed whether Polen Run aligned more closely with the hydrogeologic variables of the streams in Table 8.5 versus the streams in Table 8.9a, there was enough similarity between Polen Run and the streams in Table 8.9a that we find it to be a sufficient indicator of mining impact for the purpose of deciding the Petition for Supersedeas.

It is notable that at least 13 of the 16 streams in Table 8.9a experienced flow loss. However, all of the 13 streams have evidently recovered, and both Consol and the Department rely on the recovery of those streams as support for their prediction that Polen Run will recover in the event flow loss is experienced. When asked what alleviated his prior concerns regarding the undermining of Polen Run, the Department's Michael Bodnar stated that the updated hydrogeologic analysis leads him to believe that should any flow loss occur, the restoration techniques will successfully restore the stream. He stated that he has seen grouting successfully restore streams, including Polen Run over the 3L Panel.

In addition to the updated hydrogeologic data, Consol also submitted 12 months of flow data for Polen Run above the 3L panel which was completed in February 2018. The data shows that the post-mitigation streamflow met or exceeded the performance requirements. In 2017

Consol submitted flow data for the entire length of Polen Run which showed that post-mining streamflow is within the range of pre-mining flow.

We agree with Dr. Eshleman that continuous monitoring would have provided a more complete picture as to flow data. However, there is no indication that continuous monitoring would have provided a *different* picture. Dr. Eshleman did not conduct any of his own monitoring for Polen Run, and it is only speculative that more frequent monitoring would have provided different results. Alleging that the Department's investigation or review was deficient is generally not enough to meet an appellant's burden of proof; the appellant must demonstrate that following a different course of action would have resulted in a different outcome. *See, O'Reilly v. DEP*, 2001 EHB 19, 51 (A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance).

Finally, we find that reliance on the Act 54 Report is limited. The Act 54 Report is a broad study of the general effects of longwall mining on structures and water resources, but is not necessarily a comprehensive or current study. Consol's expert on stream ecology, Mark Haibach, testified that the data contained in the report, covering the period from 2008-2013, is now dated and reflects pre-restoration conditions. It is his opinion that more recent data leads to different conclusions. For these reasons, we assign limited weight to the Act 54 Report.

We note that in at least one prior permit revision, the Department did not believe that grouting would successfully restore Polen Run should it suffer flow loss. This raises the question: what has changed? One thing that has changed, according to the testimony of Consol's Supervisor of Stream Mitigation, Brian Benson, is the method of grouting. In Mr. Benson's words, "We have gotten better at what we do now" as compared to grouting performed seven to nine years ago. (T. 482)

The Appellants also presented the testimony of stream ecologist Dr. Benjamin Stout, a professor of biology at Wheeling Jesuit University. Dr. Stout reviewed the macroinvertebrate data and total biological scores at various sampling points along Polen Run. He testified that at sampling location BSW06 there has been a decline in the diversity of the macroinvertebrate community. Consol's expert Mr. Haibach disagreed and testified that it is his opinion that the biological data shows a healthy community at Polen Run. The cumulative evidence shows that, while there seems to be a shift in the type of taxa present post-mining as compared to pre-mining, the overall number and diversity of taxa meet the standards set forth in the Department's Technical Guidance Document. Based on the overall evidence, we find that the biological data does not support the granting of a supersedeas for Polen Run in the 5L panel.

Dr. Stout also testified as to the problems associated with grouting, should it be necessary. Experts for both Consol and the Department testified that they believe flow loss in Polen Run is unlikely, but in the event of flow loss, flow can be successfully restored through grouting and other so-called minor forms of stream restoration activities including augmentation, heave removal and surface fracture sealing. Grouting consists of drilling small diameter boreholes and injecting a grouting material into the holes with a pump machine. (T. 465-66) Although it is considered by the Department to be a "minor" form of stream restoration, the evidence suggests that grouting causes a significant disruption to the stream both while the grouting is being conducted and after it is completed. According to Consol's Supervisor of Stream Mitigation, Brian Benson, grouting is either unlikely to be needed in Polen Run over the 5 L panel or, if needed, will take place only in certain sections where the work is likely to be completed in two weeks. In the unlikely event that the entire length of Polen Run above the 5L panel needs to be grouted, the process can take six to eight weeks. Mr. Bodnar predicted a

potentially longer period of time of two to four months. According to Dr. Stout, once a stream has been grouted, the grouting creates a barrier between underground water flow and the surface stream and isolates the stream's surface flow from the hyporheic zone which is the moistened zone beneath the surface. This zone provides a refuge for certain macroinvertebrates during times of low flow.

The question, then, is whether grouting causes impairment to a stream such that its approval by the Department constitutes a violation of Article I, § 27. We examined this issue in *Coalfield Justice II*:

> Consolidation grouting is more involved [than other minor forms of stream restoration] and involves de-watering a section of the stream and drilling into the streambed. In general these grouting activities take place in limited sections of the streams and take a limited amount of time to complete according to the testimony. In the end, with consolidation grouting, the pre-mining streambed and channel are largely intact following restoration.

2017 EHB at 850.

Overall, it is necessary to strike a balance, as we did in *Coalfield Justice II*, recognizing that some impact from mining is likely to occur, while ensuring that the requirements of Article I, § 27 are met. Depending on the extent of grouting, it is possible that it could result in the impairment of a stream. Here, however, the evidence shows that grouting will only be necessary in small sections of the stream, if at all, and will not interfere with the overall function of the stream or the public's enjoyment of it. Grouting was necessary along only a 300-foot stretch of the 1,700 foot length of Polen Run above the 3L panel. We feel confident, based on the evidence, that the extent of grouting that may be necessary in Polen Run above the 5L panel will be comparable.

We agree with the sentiment expressed in the Department's brief that "one of the most important tasks performed by the Board is to evaluate and decide the credibility of expert witnesses." (Department Brief, p. 19). Not only is this one of the Board's most important tasks, it is also one of the most difficult, especially where, as here, the quality of expert testimony was outstanding on all sides. Each party's expert witnesses were well-prepared, knowledgeable about the facts of the case, and articulate in their explanations; they provided helpful and persuasive testimony. However, although the testimony presented by the Appellants' expert witnesses was compelling, we find that the testimony and evidence presented by Consol and the Department were equally persuasive and successfully rebutted the contentions raised by the Appellants. Given the high burden that must be met in order to grant a supersedeas, where the evidence comes down to a close call we cannot find that the burden has been met.

The Appellants argue that, in granting Permit Revision 210, the Department ignored the concerns of its sister agency, the Department of Conservation and Natural Resources (DCNR). DCNR submitted comments to the Department in the form of letters dated September 1, 2017 and January 4, 2018. DCNR's comments were admitted at the supersedeas hearing as Stipulated Exhibits 9 and 10. Since the 5L Panel (as well as other panels at the BMEEA) undermines Ryerson Station State Park, DCNR has an interest in the matter as trustee of the state park. In its letter dated January 4, 2018, DCNR expresses concern with the hydrogeologic data submitted by Consol in Table 8.9a, and states as follows:

> The DCNR does not believe CPCC [Consol] has provided definitive data supporting their conclusion that hydrogeologic impacts are not predicted in Polen Run 5L and, if flow loss were to occur, it would be temporary and constrained to the transition phase of subsidence (See Addendum to Module 8; Polen Run, 5L). Rather, existing streambed lithology, percentage of the Polen Run watershed undermined, and observed and documented post-mining impacts within Polen Run corroborate CPCC's [Consol's] original

> conclusion from April 2011 that hydrologic impacts to Polen Run 5L are likely.

(Stipulated Ex. 10, p. 1) The letter concludes with the following:

> The July 2017 Environmental Hearing Board Decision (2014-072-B) confirms [that] data which does not accurately represent what it is purported to support cannot be relied on as an indication of successful restoration. Polen 3L is the only panel in Polen Run where grouting is the sole restoration technique employed and is the only restoration commensurate to what is proposed for Polen Run 5L. The DCNR believes the DEP should require the CPCC [Consol] to provide appropriate monitoring data for flow and biological scores within Polen Run 3L, over a minimum of a 12 months duration, prior to considering a permit revision to mine under Polen Run in the 5L Panel. The DCNR is [sic] also does not see any scientific or other support for relying on the restoration of a stream in one panel when the stream crosses multiple panels. In the DCNR's view, the entirety of the stream that was undermined needs to be used to determine if continued longwall mining in additional panels will cause subsidence in the additional panels. Using one small portion does not meet any scientifically accepted standard for concluding that there will be no impacts from mining. The DCNR believes the CPCC [Consol] must, at minimum, show successful restoration in Polen Run 3L to demonstrate their possible ability to restore flow and biological conditions in 5L.
>
> Both the DCNR and the DEP are trustees of public natural resources. Polen Run is an important natural resource in Ryerson Station State Park and Greene County. The DCNR recommends that the DEP work with the DCNR to develop requirements and recommendations prior to allowing the CPCC [Consol] to undermine Polen Run. In this way both agencies can effectively manage these natural resources for the benefit of the citizens of Pennsylvania.

(Stipulated Ex. 10, 4-5) No one from DCNR testified at the hearing, so we have no way of knowing whether DCNR's concerns were alleviated. According to Mr. Bodnar, the Department had several discussions with representatives of DCNR and took them into the field to show them a stream restoration. Additionally, the Department required a full 12 months of flow data for Polen Run above the 3L Panel, as requested by DCNR in its letter. However, testimony from a

representative of DCNR would have been helpful and would have provided a more complete picture as to its position on the approval of Permit Revision 210. In a case involving the threat of mine subsidence, it is rare that the owner or trustee of the property to be undermined does not testify. Nonetheless, we do have the testimony of Mr. Bodnar that DCNR's comments and concerns were taken into consideration and that the Department worked with DCNR to ensure that its requirements were met, and there was no evidence presented rebutting that testimony.

Article I, Section 27

Our recent decisions in *Coalfield Justice II*, *supra,* and *Friends of Lackawanna v. DEP*, 2017 EHB 1123, discussed the Department's duties under Article I, § 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment, following the Pennsylvania Supreme Court's holding in *Pa. Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*):

> We held in [*Coalfield Justice II*] that the proper approach in evaluating the Department's decision under the first part of Article I, Section 27 is, first, for the Board to ensure that the Department considered the environmental effects of its actions. The Department cannot make an informed decision regarding the environmental effects of its action if it does not have an adequate understanding of what those effects are or will be. *Id*. *Cf. Blue Mtn. Preservation Ass'n. v. DEP*, 2006 EHB 589 (failure to conduct proper analysis alone justifies a remand); *Hudson v. DEP*, 2015 EHB 719 (same). We must then decide whether the Department correctly determined that any degradation, diminution, depletion, or deterioration of the environment that is likely to result from the approved activity is reasonable or unreasonable. [*Coalfield Justice II*, 2017 EHB 855-63].

Friends of Lackawanna, 2017 EHB at 1160-61.

We acknowledge the actions undertaken by Consol and the Department in response to the Board's earlier rulings in *Coalfield Justice I* and *II*. It is apparent that both Consol and the Department have made a substantial effort to comply with those rulings. Two factors that led to

the granting of a supersedeas in the appeal of Permit Revision 204 have been corrected here: First, in the case of Permit Revision 204 the Board expressed concern over Consol's proposal to install a channel liner in Kent Run, particularly given the lack of sufficient data showing the success of a liner in Polen Run, as well as the different physical nature and setting of the two streams. Second, the Board was unable to assign a high degree of credibility to the Department's lead hydrogeology reviewer since he failed to discuss the data with prior permit reviewers. Additionally, he had worked as a consultant for Consol and during his review of the permit revision application was tasked with reviewing some of the very data that he himself had collected while working for Consol. These errors have been corrected with the submission of the application for Permit Revision 210: Paul Cestoni, the lead hydrogeologist for the Department in the review of Permit Revision 210, provided credible testimony; Consol submitted updated and more comprehensive hydrogeologic data to the Department; and less invasive restoration techniques have been approved for Polen Run. Additionally, there was extensive testimony in this case about the Department's denial of a permit to undermine Polen Run in the 4L panel because Consol had not submitted the requisite 12 months of data required by the Technical Guidance Document. Instead of accepting data collected over a shorter time period, as occurred with the approval of Permit Revision 204, the Department denied the approval to mine. The Department credibly demonstrated to us that in cases where insufficient data was provided by Consol, the Department did not allow mining to go forward. When it came time to seek authorization to undermine Polen Run in the 5L Panel, the evidence indicates that Consol submitted the requisite amount of data and that the data supports the Department's decision to allow mining. Consol has demonstrated that it has clearly committed substantial resources to

develop effective preventive and mitigation techniques to ensure that the environment is protected.

We do agree with the Appellants, however, that Consol's prediction of "no impact" is unlikely. In our opinion, the totality of evidence suggests that there is at least some likelihood that Polen Run will experience some degree of temporary flow loss. As the Appellants point out, every section of Polen Run that has been undermined has required some degree of mitigation for flow loss. However, the evidence also convinces us that any such flow loss will be minimal and short-lived and restored with the restoration techniques authorized by the permit revision. Indeed, we believe based on evidence presented before us, that the actual effects on the stream and Ryerson Station State Park will not be noticeable and will not interfere with the use of the park by the public. Although the Department had previously concluded that grouting in Polen Run would not work to restore the stream, the updated and comprehensive data submitted with Consol's permit application and presented at the supersedeas hearing leads us to conclude that grouting will be successful to restore Polen Run over the 5L panel should flow loss occur. This conclusion is based on post-restoration performance in other streams and in Polen Run over the 3L panel. As noted earlier, although there may be circumstances in which grouting could constitute a violation of Article I, § 27, we find that the extent of grouting that is likely to be required here does not rise to that level. The evidence indicates that if grouting is needed, it will only be required in some sections of Polen Run and not the entire length of the stream in the 5L panel.

As we explained in *Coalfield Justice II*, we must view the impacts of mine subsidence and the resulting restoration along a spectrum. Judge Beckman, writing for the Board, stated:

> There is no question that the longwall mining authorized by the Department degrades and causes deterioration of the streams in

> BMEEA on at least a limited and temporary basis. Ultimately then it becomes an issue of whether the degradation and deterioration is unreasonable. We hold that they are not in this case. In order to be unreasonable, we conclude that the destruction and degradation of the streams would need be more significant than the limited and temporary impacts that result from Consol's longwall mining under Permit Revision No. 180 issued by the Department. Longwall mining has social utility and is a type of development leading to an increase in the general welfare, convenience, and prosperity of the people. If it lacked that characteristic, it would be more likely to be judged unreasonable. The impacts to streams are generally limited in time and scope in a large part because of the requirements for mitigation and restoration that the Department placed in Permit Revision No. 180.

2017 EHB at 860. We find the same to be true here in our review of the evidence presented at the supersedeas hearing challenging Permit Revision 210.

In sum, the evidence presented by the Appellants at the supersedeas hearing is not sufficient to demonstrate a likelihood of success on the merits. However, as we stated in *Weaver*, "it is important to remember that the Board is not called upon to decide the case on the merits in the context of a petition for supersedeas." 2013 EHB 489. Our decision is based solely on the evidence presented to us at the supersedeas hearing which by its very nature is not fully developed. We are aware of the practical burdens imposed on the Appellants in a supersedeas hearing where they have not had the benefit of discovery and where they are required to prepare their case under significant time constraints. We note, of course, that if this case proceeds to a hearing on the merits additional evidence may be available regarding the impact of mining on Polen Run. At this time, however, based on the evidence before us, we see no basis for concluding that the Department acted unreasonably or in violation of the relevant statutes and regulations or Article I, § 27 of the Pennsylvania Constitution when it issued Permit Revision 210.

We acknowledge the important public service undertaken by the Appellants in appealing the issuance of Permit Revision 210 and the previous permit revisions that involve mining under Ryerson Station State Park. Ryerson Station State Park is the only state park in Greene County, and, pursuant to Article I, § 27, the public has a right to the preservation of its natural, scenic, historic and esthetic values. As has been clearly stated many times, Article I, § 27 creates a trust with natural resources as the corpus of the trust, the Commonwealth as trustee, and the people as the named beneficiaries. Appellants' appeal raises important public issues and ensures that the Department fulfills its duties and obligations under Article I, § 27. Those duties and obligations also extend to this Board and to the appellate courts.

Conclusion

Because we find that the Appellants have not prevailed in demonstrating a likelihood of success on the merits or irreparable harm, we need not address the remaining factor of harm to others.[6]

[6] The Appellants presented testimony by Mr. Art Sullivan and Consol presented the testimony of Mr. Eric Schubel regarding the effect of a supersedeas on Consol's mining operations. We found both witnesses very knowledgeable and articulate. However, because we find that the Appellants have not demonstrated a likelihood of success on the merits, we need not address the specific testimony of Mr. Sullivan and Mr. Schubel.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTER FOR COALFIELD JUSTICE AND SIERRA CLUB	:	
v.	:	**EHB Docket No. 2018-028-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, LLC, Permittee	:	

O R D E R

AND NOW, this 24th day of April, 2018, the Appellants' Petition for Supersedeas and Application for Temporary Supersedeas are denied for the reasons set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 24, 2018

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

For the Commonwealth of PA, DEP:
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For Permittee:
Megan S. Haines, Esquire
Timothy M. Sullivan, Esquire
Daniel M. Krainin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER KARNICK	:	
	:	
v.	:	**EHB Docket No. 2016-135-M**
	:	**(Consolidated with 2016-116-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WAYCO SAND AND GRAVEL, Permittee	:	**Issued: April 24, 2018**

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board sustains the Appellant's appeal of the Department's approval of Stage I and II bond release for the permitted area of his property. Because the Department either failed to apply the correct reclamation standard to Appellant's property or misapplied the appropriate reclamation standard, we find that it acted unreasonably, abused its discretion, and did not act in accordance with the facts or the law.

FINDINGS OF FACT

Parties

1. The Department is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301 *et seq.* ("Noncoal Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq.*; the regulations promulgated pursuant to the Noncoal Act found at 25 Pa. Code Chapter 77; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17

("Administrative Code"), and the rules and regulations promulgated thereunder.

2. Wayco, Inc. is a Pennsylvania corporation with a business mailing address at 198 O'Connell Road, Waymart, PA 18472. Wayco is in the business of asphalt paving and also conducts surface mining of sand and gravel.

3. Appellant, Peter Karnick, has a mailing address of 398 Tikhons Road, Waymart, PA 18472. He is a 50% owner of the property for which the bond release under appeal was approved ("Site").

Site and Permit

4. Mr. Karnick's family has owned the Site for almost 100 years. Mr. Karnick has lived there all his life.

5. Wayco's permit covered property owned by both Susan Andrews ("Andrews property") and the Appellant. (DEP Ex. 1)

6. The permit was for a total of 80 acres. (DEP Ex. 1).

7. The Site is 7.6 acres. (Notes of Transcript ("N.T."). at 30).

8. The Site is labeled as parcel 13 on Module 15. (DEP Ex. 8; N.T. at 31).

9. The hatched area seen on Module 15 is the Site, which is up for bond release. (DEP Ex. 8; N.T. at 32-33).

10. Mining support activities occurred on the Site and the plant – where sand and gravel were processed, stockpiles, and ponds were all located on the Site. Wayco did not conduct any mining or extract any minerals from the Site. (DEP Ex. 6; N.T. at 33-34).

11. Wayco constructed several ponds or impoundments on the Appellant's property as part of its processing operations, including two large silt or sedimentation ponds or basins ("silt ponds"). (N.T. at 166)

12. In addition to there being no excavation of any minerals on the Site, there were no pits or highwalls on the Appellant's property. (N.T. at 33).

13. The Site was previously mined for sand and gravel and was reclaimed before Wayco used it for processing minerals excavated on other sites. (N.T. at 35).

14. Wayco and Appellant entered into a 10-year lease agreement that allowed Wayco to use the Site for processing noncoal minerals extracted from other sites in its sand and gravel operations. (DEP Ex. 2).

15. There are drainage problems associated with the continued presence of the two silt ponds on the Appellant's property. (N.T. at 143-44; 165-67; 242-43).

16. The continued presence of spoil or waste materials on Appellant's property that are part of the two silt ponds adversely affect drainage patterns and prevent adequate drainage. (N.T. at 165-67).

17. Wayco's attempt to improve the drainage problems associated with its decision to leave the silt ponds on the property has not eliminated those drainage problems, which continue to exist. (N.T. at 174; Appellant Ex. 4).

18. The two facultative plant species that grew on the reclaimed silt ponds often grow in wetland areas, but they may also grow in non-wetland areas. (N.T. at 93).

19. The Appellant never had an expert conduct a wetlands investigation to determine whether the reclaimed silt ponds were wetlands. (N.T. at 186-87).

20. Module 15 Land Use and Reclamation Act states "reclamation contours of 20' of [sic] less are provided," "the area is forestland and pastureland and will be reclaimed as such," and "the site will be reclaimed to AOC." (DEP Ex. 8).

21. Module 17 Postmining Land Use and Reclamation states "AOC will be restored

during reclamation;" more specifically, "The site will be restored to AOC by regrading. Positive drainage will be produced and forestland restored. Reclamation will increase the amount of forestland on the permit area." (DEP Ex. 10; N.T. at 38).

22. Module 17 Postmining Land Use and Reclamation also contains section 17.3, "Alternate Reclamation to AOC," which is marked "N/A." (DEP Ex. 10).

23. The mine permit area on the Site "was used for the processing of sand and gravel and the location of sedimentation ponds." (Permittee Prehearing Memorandum at 3 ¶ 19; N.T. at 33).

24. The Board conducted a Site visit following an in-person status conference at the Pottsville District Mining Office on May 5, 2017. (Board Ex. 12).

25. In its Prehearing Memorandum, the Permittee stated that the permitted mine area "was reclaimed in grade in accordance with the permit to a 35° Terrace reclamation." (Permittee Prehearing Memorandum at 3 ¶ 20).

26. In its Prehearing Memorandum, the Permittee stated that "the final slope conformed to 25 PA Code Section 77.5942 [sic] requiring a 35° slope or less." (Permittee Prehearing Memorandum at 10 ¶ 27).

27. In its Prehearing Memorandum, the Permittee stated that "an expert is required to testify is [sic] whether or not the property was returned to a 35% [sic] slope or less." (Permittee Prehearing Memorandum at 12 ¶ 40).

Inspections

28. The Department conducted inspections of the Site on April 3, 2012; April 17, 2012; July 31, 2012; October 18, 2012; May 3, 2013; May 23, 2014; October 22, 2014; October 14, 2015; June 15, 2016; and September 22, 2016. (Appellant Ex. 13, 14, 15, 16, 17, and 19;

DEP Ex. 20, 23).

29. In its inspection report from April 3 and 17, 2012, the Department stated that "Although the rest of the permit was approved for an AOC reclamation (mining area), [Appellant's] property was a support area where no mining was proposed to be done. The permit calls for the processing plant to remain post-mining in order to process sand brought in from other sites, hence the 35-degree terracing post-mining slopes." (Appellant Ex. 13).

30. In its inspection report from July 31, 2012, the Department noted that the property was not yet graded and seeded to the satisfaction of the Department and that "more stringent reclamation requirements than [were] currently being applied to this site [might] be considered as warranted. (Appellant Ex. 14).

31. In its inspection report from October 18, 2012, the Department expressed concern over the stability of the surface of the basins, e.g. "The fact that the machine track sank into the surface on the first pass in a section of the basin suggests to the Department that, in the least, that particular section of the basin is unstable, and is thereby inherently unsafe. As a site inspector, I do not want to see any vehicles driving over that section of the basin at all in its current condition." (Appellant Ex. 15).

32. In its inspection report from May 3, 2013, the Department stated that it would require Wayco to "grade the berm up and over the filled in sedimentation basins, in order to increase the drainage gradient over them." The Department also indicated that Wayco should "add additional fill material to the filled in pond that is located below the basins." (Appellant Ex. 16)

33. Also in the May 3, 2013 inspection report, the Department indicated that the final slopes on the Site "should look similar to those already seen between the two sedimentation

ponds." (Appellant Ex. 16).

34. In its inspection report from October 14, 2015, the Department noted that all measured slopes in reclaimed areas measured between 10 and 15 degrees. (DEP Ex. 23).

35. In its inspection report from June 15 and 16, 2016, the Department noted "no slopes in excess of 35 degrees from the horizontal, unless approved by the Department as satisfactorily revegetated and stable" was one of the minimum standards for "any reclaimed and revegetated area on a large surface mining permit." (Appellant Ex. 9).

36. In its inspection report from September 22, 2016, the Department indicated that "excluding the approximately 100 by 100-foot terraced area east of the scalehouse and the barn/shed, the operator reclaimed the former plant area, former staging areas, and former sedimentation basins to an Approximate Original Contour configuration, by blending this excess material into the existing landscape." (Appellant Ex. 19).

Expert Witnesses

37. Gary Harper is a surface mine conservation inspector for the Department. (N.T. at 15).

38. Mr. Harper received 86 college credits in forestry from the Pennsylvania State University; in 1995 he graduated summa cum laude with a Bachelor of Science in Chemistry from East Stroudsburg University; in 1997, he graduated magna cum laude with a Bachelor of Science in Biology with a secondary education certification from East Stroudsburg University. (N.T. at 15).

39. Mr. Harper began his employment with the Department in 1999 as a surface mine conservation inspector. (N.T. at 15).

40. During his employment, Mr. Harper has taken 18 course through the Federal

Office of Surface Mining, which include Wetlands Awareness, Excess Spoil Handling and Disposal, Steep Slope Topography, Erosion and Sediment Control, Principles of Inspection, Soils and Revegetation. (N.T. at 16-17).

41. As a surface mine conservation inspector, Mr. Harper's duties include pre-permit reviews, coal and non-coal mine inspections, and bond release application reviews and inspections. (N.T. at 16-17).

42. Mr. Harper is familiar with the regulations in Chapter 77 of the Pennsylvania Code, which apply to noncoal. (N.T. 16-17).

43. Mr. Harper has had as many as 550 sites assigned to him at one time. (N.T. 17-18).

44. Mr. Harper has inspected about 170 sites for reclamation. (N.T. 18).

45. Mr. Harper testified that Section 77.243 of Chapter 77 contains criteria and scheduling for bond release. (N.T. at 19).

46. Section 77.243(b)(1) covers Stage I bond release and the requirements to meet it. (N.T. at 19).

47. Mr. Harper testified that in order to meet Stage I criteria for bond release, an applicant must complete backfilling and grading of the fill; have drainage set-up in accordance with the permit and regulations, and in accordance with the reclamation plan; must put soil back and revegetate successfully; the land must be stable to avoid accelerated erosion under Chapter 102; the land must be capable of supporting the post-mining use; the conditions of the permit must be satisfied, and the Act and regulations must be met. (N.T. at 19-20).

48. Mr. Harper testified that Stage II is governed by Section 77.243(b)(2), which requires the Department to wait five years before releasing the remaining bond unless the

Department is satisfied that all requirements have been met and the site is stable. (N.T. at 20).

49. Mr. Harper testified that Sections 77.591-595 are all the standards for backfilling and grading. (N.T. at 20).

50. Mr. Harper testified that Section 77.592 covers approximate original contour. (N.T. at 20).

51. Mr. Harper testified that to determine the approximate original contour (AOC) it is necessary to approximate the original contours of the land by determining whether the reclaimed area blends with the landscape, has its edges feathered into the landscape, and looks like the original landscape. (N.T. 20-21).

52. Mr. Harper testified that Section 77.594 pertains to final slopes, with two possibilities, AOC or terracing. (N.T. at 21).

53. Mr. Harper testified that Sections 77.611-618 address revegetation. (N.T. at 21).

54. According to Mr. Harper, Section 77.618(b)(1) states that when an area is not cropland, revegetation is determined by the percentage of ground cover, the minimum being 70% with no more than 1% of the total area containing less than 30% ground cover. Additionally, no single or contiguous area of 3,000 square feet or greater may have less than 30% ground cover. (N.T. at 22).

55. Mr. Harper testified that the ground cover requirement for pastureland and forestland is the same with the exception that tree planting is required for forestland. (N.T. at 22-23).

56. Mr. Harper testified that when doing a bond release application inspection, the inspector checks to determine whether the standards for Section 77.618 have been met, that there is 70% ground cover, that there are no large bare patches with less than 30% vegetation, and that

there is no more than one percent of the permit area with less than 30 percent vegetation. (N.T. at 23).

57. The Board qualified Mr. Harper as an expert in noncoal surface mining reclamation. (N.T. at 25).

58. Gary Latsha began his employment with the Department in October 2003 as a surface mine conservation inspector. (N.T. at 111-12).

59. Mr. Latsha remained in this position until November 2005, at which time he became a compliance specialist. (N.T. at 112).

60. In his role as compliance specialist, Mr. Latsha calculated civil penalties and relied on information provided to him by inspectors, guidance documents,, and the regulations, to do so. (N.T. at 115).

61. In May 2011, Mr. Latsha became a surface mine conservation inspector supervisor. (N.T. at 113).

62. Mr. Latsha has inspected both coal and noncoal mines. (N.T. at 114).

63. In his role as a mine inspector, Mr. Latsha was responsible for inspecting approximately 35 mines per month. (N.T. at 114).

64. Mr. Latsha is familiar with 25 Pa. Code Chapter 77, which are the noncoal mining regulations. (N.T. at 114-15).

65. As an inspector supervisor, Mr. Latsha is responsible for supervising five mine inspectors and one blasting inspector. (N.T. at 113).

66. Mr. Latsha supervises Mr. Harper. (N.T. at 116)

67. Mr. Latsha has been involved with about 40-50 noncoal reclamation sites. (N.T. at 117).

68. Mr. Latsha is responsible for assigning Completion Reports to the inspectors under his supervision, and assigned the Wayco Completion Report to Mr. Harper. (DEP Ex. 4; N.T. at 118).

69. Mr. Latsha testified that in order to comply with the requirements for Stage I bond release, the permittee must complete necessary backfilling; regrade the site; revegetate the site; and take care of any outstanding drainage issues on the site such that the reclamation plan would be met. (N.T. at 119).

70. Mr. Latsha testified that in order to comply with the requirements for Stage II bond release, the permittee must demonstrate that the vegetation on the site meets the Department's standards as defined under the regulations, and complete necessary paperwork. (N.T. at 119).

71. As an inspector supervisor, Mr. Latsha has made 40-50 bond release recommendations. (N.T. at 119).

72. The Board qualified Mr. Latsha as an expert in noncoal surface mining reclamation. (N.T. at 118).

73. Jeff Weinberger works for Wayco, doing work related to engineering, estimating, and permit managing. (N.T. at 231).

74. Prior to Wayco, Mr. Weinberger worked for CECO Associates, where his duties included mine permit managing, grading, topography, and AutoCAD drafting in relation to topography. (N.T. at 231).

75. Mr. Weinberger's professional experience has been concentrated in mining. (N.T. at 231).

76. Mr. Weinberger has Bachelor of Science degrees from Drexel University in

Architectural Engineering and Civil Engineering, with minors in Construction Management and Environmental Engineering. (N.T. at 232).

77. Since the fall of 2016, Mr. Weinberger has been a licensed professional engineer. (N.T. at 232).

78. As an engineer, Mr. Weinberger has been involved in 16 mining projects, including reclamation projects. (N.T. at 232).

79. Mr. Weinberger has certified drawings as an engineer, designed drainage systems, conducted land surveying, created over a hundred topographic maps, and designed water-holding basins and sedimentation basins. (N.T. at 233).

80. The Board qualified Mr. Weinberger as an expert as a professional engineer in noncoal mining reclamation. (N.T. at 234).

Reclamation

81. Department witness Gary Harper stated "Essentially AOC means you are approximating what was there to begin with. And, if you can look at it and it seems to blend in the landscape . . . it looks a lot like [the original landscape] . . . it's reclaimed to AOC." (N.T. at 20-21).

82. Department witness Gary Harper stated that the reclaimed Site met AOC because the area blends with the Site, but admitted that the Department did not take measurements of the Site before Wayco used the Site. (N.T. at 38-39).

83. In April 2012, after the first regrading of the Site, the steepest slope on the Site was 30 degrees. (DEP Ex. 27; N.T. at 57).

84. In October 2012, after the second regrading of the Site, the average slope on the site measured around 12-16 degrees. (DEP Ex. 28; N.T. at 60-61).

85. Mr. Harper measured the slope of one of Mr. Karnick's fields and determined that it was approximately 18.75 degrees. (DEP Ex. 35, 36; N.T. at 64-65).

86. Mr. Harper testified that the permit states that the Site should be returned to AOC but that the permit also allows 35-degree terracing due to applicable regulations. (N.T. at 83).

87. Mr. Harper testified that the Site was reclaimed to AOC except where "the landlord requested [a terrace] by his barn." (N.T. at 87).

88. Wayco's completion report has a box checked for 35-degree terrace. (DEP Ex. 4; N.T. at 88).

89. Mr. Harper testified that if Wayco wanted to do a 35-degree terrace, they could do one. (N.T. at 88).

90. Mr. Harper testified that "the part [of the Site] by the barn is terraced. The part to the north, the most of it is approximate original contour. It's both." (N.T. at 90-91)

91. Mr. Harper testified that terracing could include approximate original contour and the cross-sections show terracing for the Karnick property. (N.T. at 91).

92. Mr. Harper testified that "terracing is allowed when you apply for terracing. It's implied in this permit that the area on your property can be reclaimed to 35-degree terrace. If [Wayco] had made it on a 35-degree terrace in the first place and pulled all the equipment and graded the ponds, it could have all stayed like that." (N.T. at 91).

93. A soil test was required but was never submitted to the Department. (N.T. at 95-96).

94. Module 15 designated that the Site be "reclaimed as AOC." (DEP Ex. 8; N.T. at 98).

95. The permit states that the 80-acre permit area had slopes ranging from 12 percent

at the highest elevations to one percent at the lowest elevations. (DEP Ex. 8; N.T. at 99).

96. The Department did not measure the final slopes on the property after reclamation. (N.T. at 101).

97. Mr. Harper estimated that the final average slope on the property was eight or nine degrees. (N.T. at 101).

98. Mr. Harper stated that if there is excess material on the property during reclamation, the AOC slopes will be steeper, if there is less material, the slopes will be hollower. (N.T. at 102).

99. Mr. Harper testified that "a considerable amount of material" from the Andrews property is present on the Site. (N.T. at 103).

100. Mr. Harper testified that he did not know whether the Department applied a 35-degree terracing or an AOC standard when it approved the bond release. (N.T. at 109-10).

101. Mr. Harper stated that there was ambiguity in the permit and discrepancies between the permit and application, (N.T. 109-10).

102. Mr. Harper stated that prior to Wayco's reclamation efforts, the greatest slope on the Site was 30 degrees and any further action taken by Wayco with respect to reducing slope was not done because the slopes were out of compliance. (N.T. at 207).

103. Mr. Harper stated that 35-degrees applies to AOC but that he did not know where in the regulations this could be found. (N.T. at 225).

104. Department witness Gary Latsha testified that the Site was reclaimed to AOC despite the fact that the first page of the Completion Report indicates that there was a 35 degree terrace reclamation. (N.T. at 120-21).

105. Mr. Latsha testified that Module 15 indicates that the entire Site would be

reclaimed to AOC. (N.T. at 121-22).

106. Mr. Latsha testified that Module 17 indicates that AOC will be restored to the Site during reclamation through regrading, reduction of positive drainage, and restoration of forestland. (N.T. at 123-24).

107. Mr. Latsha stated that although the Site was reclaimed to AOC, if any terracing had been done, it would be at the south end of the property. (N.T. at 129).

108. Mr. Latsha confirmed that soil reports were supposed to be submitted but were not. (N.T. at 135).

109. Mr. Latsha stated he had no knowledge of the specifics in the Department's inspection report from October 18, 2012, which recommended that the dams at the Site be torn down to eight to 10 feet and that the land be regraded over the silt ponds. (Appellant's Ex. 15; N.T. at 137-39).

110. The October 18, 2012 inspection report was sent to Mr. Latsha's attention. (Appellant's Ex. 15; N.T. at 138).

111. Mr. Latsha stated that he was generally in agreement that slopes on the Site should be cut down, but didn't recall a number. (N.T. at 138).

112. Mr. Latsha testified that the Department never made Wayco cut down the slopes, but they did cut down the slopes. (N.T. at 140).

113. Mr. Latsha testified that the Department wouldn't allow slopes in excess of 35-degrees. (N.T. at 152).

114. Mr. Latsha testified that 35-degree slopes "also applied to approximate original contour." (N.T. at 152).

115. Mr. Latsha also testified, regarding 35-degree slope, "I don't necessarily know

that it applies to approximate original contour because we're trying to . . . blend the area into the surrounding area. There may be parts that are a little steeper. There may be parts that are shallower." (N.T. at 152).

116. The problem with reclamation on the Site was not insufficient material to achieve AOC. There was sufficient material on the Site to allow contouring and achieve AOC. (N.T. at 103).

117. The problem with reclamation on the Site in achieving AOC was excess material in the form of the silt ponds. (N.T. at 92, 166-67)

118. The silt ponds on the Site grew over time as Wayco processed more materials from more sites where minerals were extracted. As more materials were processed in the silt ponds, more processing waste was left on the Site. (N.T. at 166-68).

119. The silt ponds were constructed on a portion of the Site that was sloping towards the lake at the bottom of the hill. (DEP Ex. 6; DEP Ex. 8; N.T. at 34).

120. The silt ponds are near grade at their uphill side, but along the lateral side and downhill side, the silt ponds are above grade. (DEP Ex. 6; DEP Ex. 8).

121. When Wayco mined the adjoining Andrews property, Wayco placed excess material on the Site, and the final reclamation of the Site had to account for that excess material. A terrace was done on a part of the Site and AOC was done on the rest of it. (N.T. at 91).

122. When Wayco initially completed reclamation on the Site, the silt pond was eight to 10 feet high on the down slope side and the final slope measured at 30 degrees, which was the steepest slope on the Site in 2012. (DEP Ex. 27, 28; N.T. at 57-58).

123. After Wayco performed its second grading of the silt ponds, the final slope was around 12 to 16 degrees. (N.T. at 60-61).

124. Despite Wayco's efforts to regrade the silt ponds and to reduce the final slopes of the edges of the silt ponds, the silt ponds remain in place on the Site. Further, they still contain substantial amounts of silt and other waste materials from Wayco's long term processing operations on the Site. (N.T. at 167).

125. When Wayco performed its initial reclamation of the silt ponds, it filled them with silt and other materials and eliminated the berms on the basins. (Permittee Ex. 18-D; N.T. at 264-65).

DISCUSSION

Background

Peter Karnick ("Appellant" or "Mr. Karnick") filed appeals with the Board on August 10, 2016 and on October 11, 2016. Both appeals are of the Department's approval of Wayco, Inc.'s ("Permittee" or "Wayco") Completion Report for Large Noncoal Mine ("Completion Report"). On August 10, 2016, the Appellant filed an appeal of a Department letter dated July 1, 2016, which determined that Wayco had met requirements for both Stage I and Stage II bond release on Appellant's property and that the Department intended to release the bond. On October 11, 2016, the Appellant filed with the Board an appeal from a Department letter dated September 13, 2016 written to the Appellant to communicate that Wayco had been notified on July 21, 2016 that the bond for the permitted site was eligible for release. On October 11, 2016, the Board consolidated the two appeals *sua sponte*.

Appellant owns a farm in Waymart, Pennsylvania, just under eight acres of which he leased to Wayco in a 10-year lease agreement. This area was part of a larger area of 80 acres for which Wayco had a noncoal surface mining permit: Surface Mining Permit No. 64940301, issued in 1994. This permitted area encompassed both the Appellant's property and the

neighboring Andrews property, with mining activities taking place only on the neighboring property. Wayco used Appellant's 7.6 acres for mining support activities, like the processing of sand and gravel and the location of sedimentation ponds. The Appellant never appealed the issuance of Wayco's permit.

Appellant contends that after using his property, the Permittee failed to properly reclaim it. According to the Appellant, Wayco built two large silt ponds that covered 2-3 acres of land and were approximately 12-15 feet deep. While on the property over the course of 15 years, Wayco processed somewhere around 2.4 million tons of sand and gravel from the neighboring Andrews property and from four other nearby properties.[1] Waste from the processing operations was deposited into the silt ponds, which were dammed with clay, preventing any water from leaking out. The Appellant avers that despite Wayco's digging of drainage ditches in the reclaimed silt ponds, no water ever drained out of the ponds, and that he is concerned that the water and silt will remain behind the dams. This would prevent him from using his farmland as he did prior to Wayco's involvement. It is the Appellant's argument that Wayco never returned his property to its approximate original contour and instead employed terracing in its reclamation efforts, in addition to leaving behind sedimentation ponds lacking in proper drainage.

The Department and Permittee counter that Mr. Karnick's property was fully reclaimed in accordance with applicable regulations and the permit. The Permittee makes six arguments for the dismissal of Mr. Karnick's appeal: (1) The Appellant failed to prove that the property was not returned to Approximate Original Contour ("AOC") as per the permit requirements, standards, and regulations; (2) the Appellant failed to prove that the property was not returned to Forest/Pastureland as per the Permit; (3) the Appellant failed to prove that the property was not

[1] The additional properties that Wayco mined include the Chauncey Frazze property, the Bob Recht property, the Eddie Greene property, and the Nancy French property. (N.T. at 160-61). Materials from these four additional sites were processed on Appellant's property.

revegetated to the Permit requirements, standards, and regulations; (4) the Appellant failed to prove that the property did not meet the Soil Condition Standards as per the permit; (5) the Appellant failed to prove that positive drainage had not occurred and that the wetlands on the property were due to the reclamation; and (6) the Appeal should be dismissed because Appellant's issues relate to the permit, which is no longer an appealable action due to its 1994 issuance.[2]

Similarly, the Department also submitted six arguments in support of its conclusion that the Appeal should be dismissed: (1) the Appellant failed to make a *prima facie* case; (2) the Appellant failed to provide any evidence to support his claim that Wayco did not reclaim to AOC; (3) the Department did not approve terracing as the method of reclamation; (4) the Permittee reclaimed in accordance with the Department-approved reclamation plan; (5) the Department did not allow the Permittee to leave impoundments behind on the property; and (6) the Appellant's arguments regarding the absence of the soil test from the Completion Report are not relevant to reclamation Stage I or II bond release.[3]

At the Appellant's request, the Board conducted a site view on May 5, 2017, following an in-person status conference at the Pottsville District Mining Office. (Board Ex. 12). A hearing on the merits was then held at the Department's Northeast Regional Office in Wilkes-Barre on September 22, 2017 and the matter is now ripe for adjudication.

[2] Permittee also argues that any mention by the Appellant of the oral contract between Appellant and Permittee should be struck, as the Board does not have jurisdiction over private contracts. *Brockway Borough Municipal Authority v. DEP*, 2014 EHB 351.

[3] Like the Permittee, the Department also reminds the Board that the Board determined that it would not consider the oral contract between the Appellant and Permittee.

Burden of Proof and Standard of Review

In hearings before the Board, the party with the burden of proof is required to present a *prima facie* case by the close of its case-in-chief. 25 Pa. Code § 1021.117(a). Here, that is the Appellant, who filed this third-party appeal challenging the Department's decision to approve Wayco's application for bond release. An appellant bears the burden of proof when he is not the recipient of a Department action. 25 Pa. Code § 1021.122(c)(2). Specifically, the Practice and Procedure Rules of the Environmental Hearing Board provide that "a Party appealing an action of the Department shall have the burden of proof in the following cases . . . [w]hen a party who is not the recipient of an action by the Department protests the action." 25 Pa. Code § 1021.122(c)(2). The Appellant must show by a preponderance of the evidence that the Department has abused its discretion or committed an error of law in approving the action, or that its decision is not supported by the facts. *Wetzel v. DEP*, 2017 EHB 548; *Hummel v. DEP*, 2017 EHB 938; *Mirkovich v. DEP*, 2016 EHB 8; *Solebury School District v. DEP*, 2014 EHB 482; *Gadinski v. DEP*, 2013 EHB 246.

The Board reviews Department actions *de novo. Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Smedley v. DEP*, 2001 EHB 131, 156. Further, the Board may also consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). In this case, the Board finds that the Department did not act reasonably, lawfully, and in accordance with the facts when it approved the Stage I and II bond release to Wayco. Our analysis begins and ends with the standard the Department applied to the reclamation.

Regulatory Requirements for Bond Release

The standard for Stage I and II bond release are set forth in 25 Pa. Code § 77.243, which states as follows:

> (b)(1) Reclamation Stage I shall be deemed to have been completed when:
>
> i. The permittee completes backfilling, regrading and drainage control in accordance with the approved reclamation plan.
>
> ii. Topsoil has been replaced and revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met.
>
> iii. The lands have been stabilized to prevent accelerated erosion and sedimentation under Chapter 102 (relating to erosion control).
>
> iv. The permittee has successfully completed mining and reclamation operations in accordance with the approved reclamation plan, so that the land is capable of supporting postmining land use approved under § 77.653 (relating to postmining land use).
>
> (b)(2) Reclamation Stage II shall be deemed to have been complete when the applicable liability period under § 77.204 (relating to period of liability) has expired.

25 Pa. Code § 77.243(b)(1)-(2). Backfilling and grading are addressed in 25 Pa. Code §§ 77.591-77.596 and we discuss them in more detail below. In general, Sections 77.592 and 77.593 provide for reclamation to return a site to approximate original contour ("AOC") unless the Department approves alternative reclamation to contouring.[4] 25 Pa. Code §§ 77.592-593. If an alternate to AOC is approved under Section 77.593, Section 77.594(2) allows for terracing as long as the final overall slope shall be 35 degrees or less unless otherwise approved under subparagraph (v). If there is sufficient material to achieve AOC, and no alternative is approved

[4] AOC – approximate original contour – "contouring as defined in this section." 52 P.S. § 3303; 25 Pa. Code § 71.1. Contouring – "Reclamation of the land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwalls, spoil piles, or depressions to accumulate water and with adequate provision for drainage." *Id*.

under Section 77.593, Section 77.594(1) requires that final slopes approximate the general nature of premining topography. 52 P.S. § 3303; 25 Pa. Code § 77.594(1).

Inconsistencies in the Department's and the Permittee's Arguments

Before addressing the legal arguments before us, we think it necessary to address the "telling of two stories" by the Department and the Permittee. In their Prehearing Memorandums, arguments centered on the alternative to AOC reclamation: terracing, which includes a 35-degree final slope requirement, as the standard applied to Mr. Karnick's property. In the Department's case, there appeared to be a conflation of the AOC reclamation with an alternative to AOC that includes a 35-degree terracing with a 35-degree final slope requirement. Wayco also advanced similar positions during the early portions of this appeal that identified terracing as the proper reclamation standard to consider in the appeal.

After the parties filed their respective Prehearing Memoranda, Wayco filed a series of Motions in Limine. One of Wayco's Motions in Limine illustrates the confusion between the Department and Wayco regarding the availability of the terracing alternative to AOC and the related 35-degree final slope requirement. Specifically, Wayco filed a Motion seeking to exclude all testimony concerning the Appellant's disagreement with the 35-degree slope requirement and to limit the testimony to whether the 35-degree slope requirement was met. Permittee's Motion in Limine to Exclude Any Testimony of the Permittee Concerning the [Appellant's] Dislike of the 35 Degree Slope Terracing Standard Under 25 Pa. Code Section 77.594 at 2. In Wayco's supporting memorandum, Wayco stated that the "Appellant has not offered any survey to show that the property has not been returned to a 35% [sic] slope as required by the Noncoal Mining Permit." Memorandum in Support of Permittee's Motions in Limine at 19. On the eve of the hearing, Wayco and the Department believed both that Wayco's permit allowed terracing and the

related 35-degree final slope requirement, and that the terracing around the silt ponds at the time of the bond release was acceptable and in compliance with the applicable terracing and 35-degree slope requirements.

The Board scheduled a call to address Wayco's numerous Motions in Limine. During the call, the Board granted some of the Motions and denied others. The Board specifically denied Wayco's Motion to limit Appellant's testimony concerning the terracing alternative to AOC and the related 35-degree final slope that Wayco argued was required by its permit. In denying this Motion, the Board expressed some surprise and confusion regarding Wayco's position that its reclamation plan for the Appellant's property required terracing under Section 77.593(2) as an alternative to AOC.

The Board explained that the general requirement for reclamation of disturbed areas is AOC or contouring except terracing may be approved if the operator demonstrates that mining operations have extracted quantities of minerals so that contouring cannot be achieved with the remaining overburden. 25 Pa. Code § 77.591. There is also authority for other alternatives to contouring or terracing. *Id*. The terracing alternative to contouring, which includes the 35-degree final slope requirement, provides a safe alternative reclamation where there is insufficient overburden or waste material to reclaim the site to AOC. 25 Pa. Code § 77.593(1).[5]

The Board further clarified that Wayco's belief regarding its permit was puzzling because no mineral extraction occurred on Appellant's property under Wayco's mining permit. Wayco used the Site for processing minerals that had been extracted from other properties. There was no concern about a lack of overburden or materials on Appellant's property to achieve AOC. To the contrary, as stated, there was no mineral extraction on the Appellant's property, only processing

[5] A former Pottsville District Mining Manager once described the meaning of the safety requirement to the presiding Judge: "Kids exploring reclaimed quarries won't fall off the cliff above an exposed quarry highwall, but they will safely roll down the hill with a final slope of 35-degrees or less."

materials excavated on other properties. Therefore, the problem was an excess of materials with which to achieve AOC, not a shortage of overburden or spoil materials, which might authorize terracing. The Site contained no large empty pits or highwalls, excavated "over a substantial period of time." The Board expressed an interest in learning from Wayco and the Department at the hearing how the terracing alternative to AOC with its 35-degree final slope requirements applied to the reclamation of Appellant's property under the applicable regulatory requirements.

It is apparent to the Board that Wayco and the Department had something of an epiphany following the Board's explanation of the regulatory requirements governing the terracing alternative to AOC and the related 35-degree final slope requirement, At the hearing, the Department and Wayco more or less abandoned their joint position that the mining permit allowed the terracing alternative for the reclamation of the Site and the availability of the 35-degree final slope requirement. The Department and Wayco shifted their positions at the hearing and only asserted that the final reclamation of the Appellant's property met the applicable AOC requirement. The complete record before the Board establishes that this belated argument was not the reason that the Department and Wayco gave the Appellant when the Department granted Wayco's application for bond release in 2014.[6]

The Department's apparent rejection at the time of the hearing of its earlier justification for its approval of the bond release (permit authorized terracing of Appellant's property as long as the final slope was not greater than 35 degrees) is a position mandated by the Department's regulations. The Board agrees with the Department's last minute rejection of this justification.

[6] The Appellant was clearly under the impression that the Department and Wayco relied on the terracing alternative with the related 35-degree final slope requirement to justify the approval of Wayco's bond release application. The Appellant's understanding was based upon the Department's representation over a period of time of applicable regulatory requirements for reclamation and specific reclamation standards in Wayco's permit.

As previously laid out above, AOC or contouring is the preferred standard for reclamation, with alternatives (including 35-degree terracing) only approved in special cases where certain criteria are met.[7] At the hearing, the Department and Permittee appeared to switch gears and present testimony and arguments that AOC was, in fact, the only appropriate standard to apply to the reclamation of Mr. Karnick's property. However, this appeal's record contradicts this assertion.

In its Prehearing Memorandum, the Department averred that the Department's inspections on June 15 and 28, 2016 "determined the minimum requirements of 70 percent vegetative coverage had been exceeded, with no large bare patches present and the grading of the slopes were below the minimum requirement of 35 degrees." Department's Prehearing Memorandum at 6, ¶ 39. The Department also stated that it directed the Permittee to regrade slopes "even though the slopes and vegetation at the time met the minimum requirements for approximate original contour, final slopes and successful vegetation." *Id*. at 5, ¶ 28. Taken together, these two points suggest that the standard the Department applied to the reclamation was one that combined AOC with 35-degree terracing, something that is not found in the applicable regulations.

The Permittee was also convoluted in its presentation of what standards were applied to the Appellant's property. In its Prehearing Memorandum, the Permittee stated, "The permitted mine area was reclaimed in grade in accordance with the permit to a 35° Terrace reclamation." Permittee's Prehearing Memorandum at 3, ¶ 20. However, the Permittee also asserted that "The approximate original contour as stated in Module 17 . . . is a standard which the Court must

[7] Section 77.593 lists two alternatives to AOC or contouring. 25 Pa. Code § 77.593. The first alternative to contouring is where the mineral extraction occurred over a substantial period of time and that the volume of minerals to be removed is large compared to the overburden to restore the area to AOC. The second alternative may be allowed if an applicant can't meet the requirements for the first alternative, but the applicant can meet other requirements including landowner approval. *Id*. The landowner's appeal in this matter clearly precludes the second alternative.

apply" and cited Section 77.592 for the definition of AOC. *Id*. at 7, ¶ 1; 10, ¶ 26. But immediately after citing the definition for AOC, the Permittee asserted "The final slope conformed to 25 Pa. Code Section 77.594 requiring a 35° slope or less." *Id*. at 10, ¶ 27. Again, as did the Department, the Permittee appeared to have conflated an AOC standard with a 35-degree terracing standard.

This unclear line of argument continued into the hearing. Department witness, Gary Harper, testified regarding both the AOC standard and the terracing standard. (N.T. at 20-21). He stated, "[If you restore an area] to approximate original contour, you have to demonstrate that you'll restore it to condition [sic] capable of supporting uses it could have supported or the use it did support prior to mining or to a higher or better use post-mining." (N.T. at 20). Additionally, Mr. Harper testified, "If terracing is approved for post-mining reclamation, slopes – the final steepest part of the slope – well, actually they do the average slope. It has to be 35 degrees or less unless otherwise approved by the Department." (N.T. at 21).

On cross, the Appellant pressed Mr. Harper regarding the regulations and whether terracing was allowed on his property within the permitted area.

> Mr. Karnick: What did you feel when they completed the reclamation? Was [the reclamation] to contour or was it terracing?
>
> Mr. Harper: The part to the south by the barn is terraced. The part to the north, the [sic] most of it is approximate original contour. It's both. But terracing could include approximate original contour.

(N.T. at 90-91). The Appellant, aided by his son (also in attendance at the hearing), then made the proposition that terracing is not allowed under Section 77.593 of the regulations. (N.T. at 91). The Department witness disagreed.

> Mr. Harper: Terracing is allowed when you apply for terracing. It's implied in this permit that the area on your property can be reclaimed to 35-degree terrace. If they had made it on a 35-degree terrace in the first place and then pulled all the equipment and graded the

> ponds, it could have all stayed like that. It could have just stayed that way because that's what's on the cross-sections.

(N.T. at 91). Mr. Harper further testified that when "a mining permit crosses property lines, material can go back and forth across the property line." Therefore, because excess material ended-up on the Appellant's property, "the configuration and final reclamation [had] to count [sic] for the excess material, and a terrace was done on part of it. AOC was done on the rest of it." (N.T. at 92).

The standard to which the Appellant's property had been reclaimed became still more muddled following a question from Judge Mather, put to Mr. Harper.

> Judge Mather: [I]n terms of the areas where the ponds are, the Department approved that as meeting AOC, not an alternative involving terracing; is that correct?
>
> Mr. Harper: In general the permit says AOC in several modules, but Module 15 includes the cross-sections. . . . It shows 35-degree terraces all the way back to the end of the bonded area on Karnick's. It's like there's an ambiguity in here in this permit in the various modules.
>
> Judge Mather: [. . .] Was it an AOC standard or a terracing standard for the area around the ponds?
>
> Mr. Harper: I can't answer that because I don't have the final say in the decision. . . . I'm sorry but I don't know which one. It says 35-degree in the application. It's AOC there. . . My feeling was that it was AOC overall.
>
> Judge Mather: So you don't know what standard the Department applied in approving the bond release for the area around or near or involving the ponds?
>
> Mr. Harper: No. [. . .]

(N.T. at 109-10). As alluded to by Mr. Harper, it is clear that some of the confusion derives from documents in the record, chiefly Modules 15, 17, and Wayco's Completion Report from October 24, 2014.

Module 15, "Land Use and Reclamation Act," states that the "site will be reclaimed to AOC." (DEP Ex. 8). Similarly, Module 17, "Postmining Land Use and Reclamation," states that

"AOC will be restored during reclamation" and how AOC will be achieved (by regrading). (DEP Ex. 10). Similarly, section 17.3 of Module 17 is titled "Alternate Reclamation to AOC" and marked "N/A," presumably because reclamation was intended to be to AOC. (DEP Ex. 10). However, Wayco's Completion Report shows that Wayco checked "other: 35-degree terracing" for Stage I reclamation. (DEP Ex. 4). This Completion Report was submitted to and accepted by the Department without comment regarding the 35-degree terracing standard identified by Wayco.[8] (N.T. at 88, 120). Further, inspection reports completed by the Department suggest a strong interest in the slope measurements on site rather than whether the reclamation met AOC. (*See, e.g.* DEP Ex. 13; 23).

Take, for example, the Department's inspection report from April 3, 2012 and April 17, 2012 reveals the special attention paid to slope on the Site and an erroneous reading of the regulations. (Appellant's Ex. 13). The relevant portion of the report reads as follows:

> The approved reclamation slopes shown on the mapping for [Mr. Karnick's] property were 35 degree terraces. Although the rest of the permit was approved for an Approximate Original Contour reclamation (mining area), his property was a support area where no mining was proposed to be done. The permit calls for the processing plant to remain post-mining in order to process sand brought in from other sites, hence the 35 degree terrace post-mining slopes.

(Appellant's Ex. 13). Another inspection report from June 16, 2016 and June 28, 2016 also highlights this issue. (Appellant's Ex. 9). This inspection report addresses the requirements that must be met in order for a bond release to be approved. The relevant portion of the report reads as follows:

> The minimum Departmental standard for any reclaimed and revegetated area on a large surface mining permit include:

[8] Counsel for the Department asked Department witness Gary Latsha, about Wayco's Completion Report and whether the "other" box that had been checked indicated that there was a 35-degree terrace reclamation. Mr. Latsha replied that it did. However, Mr. Latsha then testified that the reclamation that was supposed to be done for the Site was AOC. (N.T. at 120-21).

1) Positive drainage;

2) No unapproved areas of permanent, nor more that [sic] a very short-term nor extensive, standing water;

3) A minimum of a 70 percent vegetative covering of at least three self-regenerating and/or perennial species overall;

4) No slopes in excess of 35 degrees from the horizontal, unless approved by the Department as satisfactorily revegetated, and stable;

5) No large, bare patches of soil being present and evident; and

6) A non-eroding surface and sub-surface which is stable enough to accommodate the approved post-mining land use for the permit, which in this case, is forest land.

(Appellant Ex. 9 (emphasis added)). It is exceedingly difficult to glean from the record a clear sense of what standard was applied to the Site reclamation, and it appears that both the Permittee and the Department were equally confused on this point at the time of the hearing.

The Department Did Not Correctly Apply the Requisite Standard to the Reclamation for Stage I and II Bond Release

After careful review of the record and all filings, the Board finds that the Department's approval of Stage I and II bond release was unreasonable, an abuse of discretion, and not in accordance with the facts or the law. Under the applicable regulations, as previously discussed, terracing is not permitted for reclamation of areas where noncoal surface mining did not occur. More specifically, terracing is not permitted where minerals were not extracted from the land. Only in specific situations may alternatives to AOC be approved, and none of those situations apply here. Here, if the Department approved terracing for reclamation of the Appellant's property, the Department acted against the law. If the Permittee sought to reclaim the Site to AOC, an examination of the record before us shows that it failed to do so successfully.

I. <u>The 35-Degree Terracing Standard Does Not Apply to the Site</u>

Section 77.591 of the regulations promulgated to the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301 *et seq*. ("Noncoal Act") states in part,

> Areas disturbed . . . shall be reclaimed by contouring, except terracing may be utilized if the operator demonstrates that operation has extracted quantities of minerals so that contouring cannot be achieved with the remaining overburden and waste material.

25 Pa. Code § 77.591. A plain reading of this regulation makes clear that terracing should only occur in areas where minerals have been removed in such great amounts that neither the overburden or waste material on the site will allow for contouring. Though perhaps redundant, we nonetheless think it important to highlight the word "extracted" as it appears in the regulation. It is apparent from the language of the regulation that the use of terracing as an alternative to AOC is available only when reclaiming land from which minerals have been removed.[9] It does not apply to, or address, land onto which excess material has been dumped – presumably because material may be removed as necessary in order to achieve AOC.

Section 77.593 further clarifies that terracing is an alternative to contouring that may only be employed in limited scenarios (which we do not believe apply to this Appeal). Section 77.593 sets forth two situations where an alternate form of reclamation to AOC may be used. First, where the applicant demonstrates "that the proposed operation will be carried out over a substantial period of time and that the volume of mineral to be removed is large compared to the overburden to restore the area to approximate original contour." 25 Pa. Code § 77.593(1). Second, where the requirements of subsection (1) are not met and the applicant "demonstrates that the operation will either restore the land affected to a condition capable of supporting the

[9] Appellant's Ex. 13, supra, and the Department's misrepresentation of the regulation as allowing terracing on land used as a support site, where no mining was done.

uses it was capable of supporting prior to mining or to a higher or better use." 25 Pa. Code § 77.593(2).[10] Both subsections contain a list of requirements which must be met by the applicant. Neither subsection is applicable here, as no volume of mineral was removed from the Site in question to qualify under Paragraph (1) (rather, waste products were accumulated at the Site), and we do not see evidence of a clear effort by the Permittee to request approval under Paragraph (2), which mandates landowner approval.[11] 25 Pa. Code § 77.593(1), (2). Wayco's reclamation plans may have been allowed under Paragraph (2), but neither the Department nor Wayco suggested this justification.

Section 77.594 provides direction for final slopes for reclamation of noncoal surface mines. The regulation is clear with respect to AOC:

> (1) If there is sufficient overburden material to achieve approximate original contour and no alternative reclamation is approved under § 77.593 (relating to alternatives to contouring):
>
> (i) The postmining slopes shall approximate the premining slopes or slopes approved by the Department based on consideration of soil, rock formation, climate or other characteristics of the area.
>
> (ii) Final postmining slopes are not required to be uniform but shall approximate the general nature of the premining topography.

25 Pa. Code § 77.594(1)(i)-(ii). Of particular note here is that there is no mention of slope degrees, nor any requirement that reclaimed slopes be of no more than 35 degrees. Indeed, for

[10] In writing this Adjudication, the Board noted a typo in 25 Pa. Code § 77.593(2), which reads "If the applicant does not meet the requirements of subsection (a) [. . .]." A close reading of subsection (2) in the context of both Section 77.593 and the relevant section of the Noncoal Act, 52 P.S. § 3307(c), the Board believes that (a) should be (1). After consulting both the Pennsylvania Bulletin containing the final regulation (20 Pa. B. 1643) as well as the Pennsylvania Bulletin containing the proposed regulation (18 Pa. B. 2667) it appears that the error has existed from the regulation's inception.

[11] Though there is confusion regarding to what standard the Site was reclaimed, for argument's sake the Permittee did not meet the criteria for alternative reclamation under Section 77.593(1), therefore leaving only the possibility for approval of terracing under Section 77.593(2). This provision mandates landowner approval of the alternative to AOC. However, the very premise of this appeal is that the landowner found the Site reclamation unacceptable, and the stability, drainage and configuration necessary for the Site to be returned to its intended use is dubious at best. *See* 25 Pa. Code § 77.593(2)(i) and (iv).

AOC reclamation, slopes must approximate premining slopes, not adhere to an objective measurement. However, despite its apparent switch to an AOC standard during the hearing, the Department nevertheless continued to reference "35-degree slopes" as though that were a relevant part of AOC reclamation. (*See, e.g.*, N.T. at 152, 224-25).[12]

For example, the Department determined that the steepest slope on the Site following Wayco's activities, but before its reclamation work, was 30-degrees and was "in compliance" with applicable regulations. (N.T. at 207). It is the Department's position that the consecutive steps taken to further decrease the slope were not done to bring it below a 35 percent grade, because "nowhere were [the slopes] excessive." N.T. at 207.

To reiterate, the AOC standard does not include a 35-degree final slope standard. The Department's reliance on 35-degrees as the standard by which adherence to the regulations may be judged is erroneous and misplaced. Additionally, the Department also divulged that it failed to take any exact slope measurements prior to the Permittee beginning its work on the Site, instead having only the general slope description found in the permit.[13] (DEP Ex. 7; N.T. at 99). Further, the Department was unable to give more than a rough estimate of the current average slope of the Site, something critical to determining whether AOC had been met by the reclamation. (N.T. at 101-03).[14]

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[12] *E.g.*, Mr. Karnick: Did you apply the 35-degree slope to the entire property, the requirement?
Mr. Latsha: Well, we would not allow a slope that's in excess of 35 degrees.
Mr. Karnick: That 35 degrees is only for terracing?
Mr. Latsha: Well, it also applied to approximate original contour. If there was an area that was steeper, we would try to get that graded out a little bit. We would still like the slopes to remain around less than 35 degrees. (N.T. at 152).

[13] "The approximate 80-acre permit area slopes generally to the northwest. Slopes range from 12 percent at the highest elevations to one percent at the lowest elevations. These natural slopes are interrupted by an area which was previously surface mined for sand and gravel." (N.T. at 99).

[14] Discussion regarding the new slopes of the Site revealed that the new slope average fell somewhere around 8-9 degrees. (N.T. at 99). Converting this to slope percentage reveals that the average slope, formerly between 1-12 percent on the Site is – according to a rough estimate at the hearing – now

The Permittee also presented an unclear picture of what standard was applied to the bond release. Wayco's engineer, Jeff Weinberger, testified that in conducting his assessment of the Site, he followed the Department's inspection reports, which established that the slopes were 10-15 degrees. However, Mr. Weinberger acknowledged that the original slope on the Site (estimated to be between 1 and 12 percent) was around 7 degrees. (N.T. at 243-44). This suggests that slope measurements increased by 100 percent following Wayco's activity on the Site and after Wayco completed reclamation. Although the witness equivocated as to whether a 100 percent increase in slope might qualify as "approximate" within the context of AOC, the Board is of the opinion that it does not.

Reading the Department's and Permittee's Post-Hearing Briefs did not give us a clearer sense of the reclamation standard applied to Mr. Karnick's property. The Department makes much of what it views as the Appellant's failure to meet his burden of proof, but the Department itself fails to address what the Board sees as the Appellant's main arguments: chiefly that his property was not reclaimed to the proper standard and that the regulations do not permit the Department to approve terracing on his property to allow Wayco to leave the two large silt ponds on the Site.

Instead, the Department persists in its mischaracterization of its regulations. For example, in its discussion of the post-mining slope on the Appellant's land, the Department wrote "[t]he 30-degree slope met AOC and slope requirements." Department's Post-Hearing Brief at 51. Based on what we know, this is untrue – both because AOC does not have specific "slope requirements" and because we know that – at least according to the permit – the slopes were between one and 12 percent before the Permittee began using the Site. Slopes of between one

somewhere around 16 percent a not insignificant departure from AOC. For further reference, given the Department's apparent attachment to 35-degrees as a reference point for the reclamation, the Board thinks it is worth noting that a 35-degree slope is roughly a 70 percent slope.

and 12 percent are slopes between 0.57 and 6.84 degrees. These numbers are a far cry from the 30 degrees present on the Site at the conclusion of Wayco's work and certainly are not in conformance with AOC. While the Department reiterated that after Wayco's final regrading, the steepest slopes on the Site measured between 12 and 16 degrees, as we discussed earlier, we do not find this convincing evidence of AOC having been met. *Id*. Further, the Department's assertion that the slopes on the neighboring Andrews property were between 16 and 18 degrees has no bearing on the Site that is the subject of this appeal. *Id*. The Department quibbled with Mr. Karnick's description of the Site as having formerly been "an evenly sloped pasture," and again we remind the Department that the permit described slopes as having been between one and 12 percent. *Id*. at 52; N.T. at 99.

The Permittee also persisted in mischaracterizing the relevant regulations in this matter in its Post-Hearing Brief: "Under 25 Pa. Code § 77.559 [sic] the final slopes were required to be 35 degrees or less." Permittee Post-Hearing Brief at 13.[15] We reiterate that this is an incorrect reading and application of the regulation. While the Permittee cites to the correct definition of AOC, it nonetheless references its expert's testimony that the post-reclamation slopes "[met] the 35-degree or less standard as required by law." *Id.* at 14. As we laid out earlier, there is no 35-degree requirement in the AOC reclamation standard.

II. If AOC Was the Reclamation Standard Applied to the Site, It Was Not Met

Having already addressed that the terracing alternative to AOC with its 35-degree final slope requirements is not a valid legal argument to support the Department's decision, the Board next needs to consider whether Wayco's plans to leave the silt ponds in place qualifies as AOC. This is the argument that the Department and Wayco advanced at the hearing and in their Post-

[15] Permittee's Post-Hearing Brief did not have page numbers – we have counted them ourselves, using the title page as one.

Hearing Briefs. The simple question for the Board to resolve is whether the Department has the authority to allow Wayco to reclaim the Appellant's property in a manner that allows for the two large silt ponds to remain on the property in their current size and form and permits Wayco to avoid having to remove the large amount of waste material generated by its processing operations. The Department believes that that it has this authority. The Board finds that it does not. For the reasons set forth below, the Board finds that Wayco's decision to leave the silt ponds on the Site does not meet either the statutory or regulatory definitions of AOC or contouring.

As previously discussed in depth, there has been a great deal of confusion in this appeal regarding the appropriate reclamation standard to apply to this Site. Wayco and the Department initially identified the terracing alternative with its associated 35-degree final slopes as the appropriate standard. Upon the realization during the pendency of this appeal that this standard was not allowed under the applicable regulations for Appellant's property, the Department and Wayco instead focused on the AOC or contouring standard as the appropriate reclamation standard. However, neither of these attempts describe the real issue in this appeal, which Wayco and the Department have ignored. Both overlook the simple fact that Wayco used the Appellant's property for processing minerals, a major part of which involved the use of several silt ponds constructed on the Site. Wayco used these ponds for an extended period of time, over the course of which the silt ponds grew in size as more materials were processed and more waste materials were generated as a result of Wayco's processing operations. When Wayco decided to abandon the processing operations on the Site, Wayco wanted to leave the silt ponds in place with little to no additional reclamation beyond some minor grading or earthmoving.

The continued presence of the silt ponds on the Site is the Appellant's major objection to the reclamation of his property.[16] The steep slope of the silt basins and the lack of proper drainage in and around them prevents the Appellant from using his property as he would like. The Appellant's focus has always been the retention of the silt ponds in their current form on his property. Because of the Appellant's concerns, Wayco returned to the property three times after 2012 to attempt to placate the Appellant and spent more than $35,000 on the property. Wayco took berm material from the silt ponds and spread it across the ponds' slopes to lessen the degree of slope. Further, Wayco constructed ditches to drain the silt ponds. Despite these efforts, the ponds remain on the property and are clearly visible on its surface. The slopes on the downhill side of the silt ponds are steep, becoming less steep along the sides until they reach the uphill side of the ponds, which is more or less at grade.

At the hearing, the Department and Wayco argued that the justification for the Department's approval of Wayco's application for bond release was based on the approved reclamation constituting AOC. To this end, both the Department and Wayco provided expert testimony that the reclamation of the Site met the AOC standard.

The Appellant vociferously objected to this characterization. Further, he was strongly opposed to the Department's decision to allow Wayco to leave the silt ponds in place on his property. He asserted that rather than regrade his land to AOC, Wayco had simply filled-in the ponds with materials that caused drainage problems on the Site. These drainage problems were

[16] It should also be noted that the Appellant also claimed that Wayco created wetlands on the silt ponds because of the presence of facultative wetland plants (e.g., willows and phragmites). The Department disagreed with the Appellant that the growth of these plants established the presence of wetlands. The Board agrees with the Department. Based upon the Appellant's lack of expert testimony and the Department's observation that these plants can grow in both wetland and non-wetland areas, the Board does not think there is sufficient evidence to support a finding of newly created wetlands on the Site. N.T. at 93.

so significant that Wayco attempted to improve the drainage in one of the ponds by digging up a portion of it and installing a drainage channel. Additionally, the steep slopes on the sides of the ponds prevented him from using the reclaimed property in the manner he wished. Nonetheless, the Department's and Wayco's expert witnesses testified that Wayco's reclamation met AOC despite of the fact that these two large silt ponds remained on the Site, containing a substantial amount of waste material from processing activities, and creating drainage issues.

In evaluating the Appellant's challenge to the Department's and Wayco's assertion that Wayco achieved the AOC reclamation standard on the Site, it is useful to consider the definition of AOC. Section 3303 of the Noncoal Surface Mining Conservation and Reclamation Act defines the term "approximate original contour" as "Contouring as defined in this Act." 52 P.S. § 3303; 25 Pa. Code § 77.1. Section 3303 defines the term "contouring" as "Reclamation of the land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage patterns of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water and with adequate provisions for drainage."[17] *Id.* To achieve AOC, Wayco had to conduct its reclamation activities to meet the definition of "contouring." The Board finds that Wayco's reclamation efforts fall short of the statutory definition, even when one considers that Wayco returned to the Site at least three times to try to address the Appellant's concerns.[18]

[17] The definitions of these terms in the Department's Noncoal Mining regulations are the same as the statutory definitions. *See* 25 Pa. Code § 77.1.

[18] The Department asserts that Wayco met the AOC reclamation standard even before it returned to Appellant's property to reduce the height and slope of the silt ponds that remained on the Site. According to the Department, these efforts were not needed to meet the AOC reclamation standard. The Board disagrees. Even with these half measures, Wayco's reclamation still does not meet the AOC reclamation standard. The silt basins remain on the surface of the Appellant's property, contain spoil materials, and are creating drainage problems.

Both the Department and Permittee are correct that the Appellant has the burden of proof in this appeal and that the Appellant did not present expert witnesses during the hearing to address the reclamation standards. However, given the Appellant's *pro se* status and what we view as a surprisingly mistaken application of the Noncoal Surface Mining Act regulations, we do not feel that the Appellant's lack of expert testimony in this particular appeal automatically undermines his appeal.

The Board does not find the testimony of the Department's and Wayco's multiple expert witnesses that Wayco's reclamation of the Site achieved AOC to be credible. The record in this appeal establishes that the AOC justification for bond release surfaced in this appeal as an afterthought when the Department and Wayco realized that the standard it initially applied – the terracing alternative to AOC with the 35-degree slope requirement – was not authorized under the law and facts of this appeal. At the hearing, as discussed above, Mr. Harper, a key Department witness, was unable to explain whether the Department applied the AOC or terracing alternative to AOC standard when it approved Wayco's application for bond release. None of the experts who testified that the reclamation achieved AOC addressed the concern that the Department initially applied the terracing alternative to AOC standard when it approved Wayco's application. They also considered the 35-degree final slope requirement to be part of the AOC standard.

Mr. Harper admitted that he didn't know what the original slope on the property was because any topographical maps that showed the slope would have been completed prior to his becoming part of the project. (N.T. at 98-99). Further, Mr. Harper testified that the closest thing in the record to a map showing original slopes was Module 10, which described slopes as ranging from one to 12 percent. (N.T. at 99). Despite being a site inspector and one of the

Department's expert witnesses, Mr. Harper lacked this fundamental information. Mr. Latsha testified that if a small portion of the Site *had* been terraced, it wouldn't make a difference in terms of whether AOC was met. (N.T at 129). This is fundamentally incorrect from a regulatory perspective. Mr. Latsha also testified that he overlooked the fact that Wayco marked "35-degree terracing" on its completion report, saying "it's an error on my part." (N.T. at 134). Regardless of the fact that the Appellant did not present expert witnesses, we find that the testimony of the multiple expert witnesses proffered by the Department and the Permittee was not credible and leaves us unconvinced as to the legal basis for the Department's approval of Stage I and II bond release. The expert witness testimony was clearly self-serving statements that ignored key facts and was based on a fundamental misunderstanding of AOC requirements.

Even if there were no concerns with whether the AOC standard had been applied throughout this process (i.e., that the Department had applied AOC from its initial examination of Wayco's application for bond release and approved the release after finding AOC had been met) and the misapplication of the terracing alternative to AOC had not occurred, the Board would still find that Wayco's reclamation did not meet the related definitions of AOC and contouring.

The Board finds the Appellant's testimony regarding the state of his property prior to Wayco's processing operations on the Site as compared with the state of his property after Wayco left to be compelling. Put another way, the Appellant convinced the Board that his property was not returned to AOC, which is what the Department and Wayco insisted had been done.[19] The Appellant described the still present silt ponds on his property, which had not existed prior to Wayco's use of the Site for processing operations: "[T]he biggest concern is the

[19] Mr. Karnick had the same difficulty as the Board in trying to follow the Department's evolving or dueling justifications for its decision.

silt in the silt pond [. . .]. I'd say maybe it's eight, ten, or maybe even deeper feet deep. And I see no way that they can ever be dried out unless they got exposed to the air." (N.T. at 166). According to the Appellant's testimony, the silt ponds are unsafe due to being steep and saturated. (N.T. at 166-67). Further, Mr. Karnick "kind of figured if a guy uses your property for 15 years, he could put it back where it was" and this was not done, as water is trapped in the silt ponds and the silt is still in them. (N.T. at 169; 174). Taken together, the Board finds these statements to be compelling support for Wayco having failed to return the Site to AOC.

The surface configuration of the reclaimed land should resemble the general surface configuration prior to mining. 52 P.S. § 3303. Prior to mining, there were no large silt ponds on the Appellant's property. Although Wayco filled in the ponds and performed some minor grading, the ponds are still on the property and are visible on the surface. Because these ponds did not exist prior to Wayco's operations on the property and because they still exist on the property after Wayco's operations, the reclaimed surface of the Site does not resemble the surface configuration prior to Wayco's presence on the property. No amount of minor grading can hide the presence of the two large silt ponds on the Appellant's property.

Wayco's processing operations produced processing waste material – silt. This material was used in the construction and reclamation of the silt ponds and is still present in the ponds as they currently exist on the surface of Appellant's property. In other words, in reclaiming the Site, Wayco has left a pile of spoil material – silt – on Appellant's property that is not allowed under the definition of contouring. Spoil piles may not remain on the surface of a reclaimed property.

As addressed supra, the Appellant has testified that the reclaimed silt ponds have caused the aforementioned drainage problems on his property. The Board finds that his testimony is credible. Wayco's efforts to construct a drainage channel in one of the silt ponds provide support

for the Appellant's position. Why would Wayco attempt to improve drainage in and around the silt ponds if Wayco did not recognize the continued existence of drainage problems? For the reasons we have set forth, the Board finds that Wayco's reclamation of the Site does not meet the applicable AOC standard. To achieve AOC, Wayco needed to fully address the concerns listed above regarding the silt ponds that Wayco left on the Appellant's property.

Conclusion

During the pendency of this appeal, the Department and Wayco have, at different times, advanced two legal theories to justify the Department's decision to approve Wayco's application for bond release. First, prior to the hearing, they advanced the terracing alternative to AOC with the requirement of a final 35-degree slope measurement as the justification for the reclamation of the two silt ponds on the Site. Second, at the hearing, when the terracing alternative no longer seemed appropriate under the applicable Department regulations, the theory became that Wayco was allowed to leave the silt ponds in place because the reclamation met the related AOC and contouring reclamation standards despite the silt ponds' presence on the Appellant's property in their current form.

The Board rejects the Department's and Wayco's dueling justifications. Terracing of the two silt ponds with the 35-degree final slope requirement was never allowed for the reasons set forth in this Adjudication. It strains credulity to imagine that the retention of the silt ponds in their current form resembles the Site prior to Wayco's processing operations and meets AOC. After years of these processing operations, the silt ponds consist largely of waste or spoil materials, and the record is full of evidence to support the Appellant's claim that the two remaining silt ponds contain this waste or spoil material that prevents adequate drainage of Appellant's property. The statutory and regulatory definitions of contouring require that

reclaimed sites resemble the site prior to mining, and includes the removal of spoil or waste piles and adequate provisions for drainage. The reclamation of Appellant's property – which allowed the two large silt ponds to remain in their current form – meets none of these applicable requirements. The Board therefore sustains the Appellant's challenge and vacates the Department's approval of Wayco's application for bond release.[20]

CONCLUSIONS OF LAW

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

2. The Department is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301 *et seq.*; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq.*; the regulations promulgated pursuant to the Noncoal Act found at 25 Pa. Code Chapter 77; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated thereunder.

3. Pursuant to 25 Pa. Code § 1021.122(a), the Appellant has the burden of proof and burden of proceeding in these consolidated appeals.

4. The Appellant must show by a preponderance of the evidence that the Department has abused its discretion or committed an error of law in approving the action, or that its decision is not supported by the facts. 25 Pa. Code § 1021.122(a); *Wetzel v. DEP*, 2017 EHB 548; *Hummel v. DEP*, 2017 EHB 938; *Mirkovich v. DEP*, 2016 EHB 8; *Solebury School District v. DEP*, 2014 EHB 482; *Gadinski v. DEP*, 2013 EHB 246.

[20] Because the Board sustains the Appellant's appeal based upon the finding that the reclamation of Appellant's property did not meet the AOC reclamation standard, the Board does not have to resolve the additional arguments that the Department and Wayco advanced in support of the Department's decision.

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

6. The Department has the authority to approve the Stage I and II bond releases under appeal pursuant to Section Nine of the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3309, and Sections 241, 242, and 243 of Chapter 77, Noncoal Mining. 25 Pa. Code § 77.241-77.243.

7. Permitted areas must be reclaimed in accordance with applicable standards before bonds may be released. 25 Pa. Code § 77.243.

8. These applicable standards include appropriate backfilling and grading. 25 Pa. Code §§ 77.243, 77.591-77.596.

9. "Areas disturbed . . . shall be reclaimed by contouring, except terracing may be utilized if the operator demonstrates that the operation has extracted quantities of minerals so that contouring cannot be achieved with the remaining overburden and waste material." 25 Pa. Code § 77.591.

10. There are two situations where an alternate form of reclamation to Approximate Original Contour ("AOC") may be used. First, where the applicant demonstrates "that the proposed operation will be carried out over a substantial period of time and that the volume of mineral to be removed is large compared to the overburden to restore the area to approximate original contour. 25 Pa. Code § 77.593(1). Second, where the requirements of subsection (1) are not met and the applicant "demonstrates that the operation will either restore the land affected to

a condition capable of supporting the uses it was capable of supporting prior to mining or to a higher or better use. 25 Pa. Code § 77.593(2).

11. AOC is defined as "Reclamation of land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water and with adequate provision for drainage." 25 Pa. Code § 77.1

12. AOC was the correct reclamation standard to apply to the Site, because the site was never mined and used only for processing operations by Permittee. 25 Pa. Code § 77.591.

13. The 35-degree final slope requirement is a requirement related to the terracing alternative to AOC and it is not part of the AOC reclamation standard. 25 Pa. Code §§ 77.592-594.

14. Wayco's reclamation of Appellant's property did not meet the AOC reclamation standard. 52 P.S. § 3303; 25 Pa. Code § 77.1.

15. The terracing alternative to AOC and the related 35-degree final slope requirement is not applicable to the reclamation of Appellant's property because no mineral extraction occurred on Appellant's property and there were sufficient materials to achieve AOC. 25 Pa. Code §§ 77.591-594.

16. Neither of the two situations where an alternate form of reclamation to AOC applies in this appeal. 25 Pa. Code § 77.593.

17. The requirements of Stage I and II bond release, found in Section 243, subsection (b)(1) and (2), of Chapter 77 were not met because backfilling and regrading were not done in accordance with the law. 25 Pa. Code § 77.243(b)(1)-(2).

18. The Department's approval of the Stage I and II bond release was unreasonable, an abuse of discretion, and not in accordance with the facts or the law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER KARNICK	:	
	:	
v.	:	**EHB Docket No. 2016-135-M**
	:	**(Consolidated with 2016-116-M)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WAYCO SAND AND GRAVEL, Permittee	:	

O R D E R

AND NOW, this 24th of April, 2018, it is hereby ordered that this appeal is **sustained** and the Department's approval of Wayco's application for bond release is **vacated.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 24, 2018

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

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

For Appellant, *Pro Se*:
Peter Karnick
(via U.S. mail)

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor	:	**Issued: April 27, 2018**

OPINION AND ORDER ON
JOINT MOTION OF PERMITTEE AND INTERVENORS TO STRIKE
***AMICUS CURIAE* BRIEF FILED BY DAMASCUS CITIZENS FOR SUSTAINABILITY**

By Steven C. Beckman, Judge

Synopsis

The Board grants a Motion to Strike the *amicus curiae* brief of Damascus Citizens for Sustainability where it failed to meet the deadlines for submission set by a Board Order without providing a written explanation or filing a request to extend the deadline for filing as directed by the Board.

O P I N I O N

Siri Lawson (the "Appellant") has appealed the Department of Environmental Protection's ("Department") Approval No. NW9517 authorizing brine spreading for dust control in Sugar Grove and Farmington Townships in Warren County ("Department Approval"). The Department Approval authorized the spreading of brine on unpaved roads and lots in Sugar Grove and Farmington Township by Hydro Transport LLC ("Hydro Transport").

Four petitions to intervene have been filed in this appeal. The fourth petition was filed by the Damascus Citizens for Sustainability, Inc. ("DCS") on February 15, 2018, and denied in an opinion and order dated March 15, 2018. Following the denial of DCS's petition to intervene,

DCS filed the Motion by DCS for Leave to File an *Amicus Curiae* Brief in Support of Appellant ("Motion") on April 6, 2018. By order dated April 9, 2018 ("Order"), we granted DCS's Motion and set April 20, 2018, as the filing deadline for the *amicus curiae* brief, and April 30, 2018, as the filing deadline for any responses. Under 25 Pa. Code § 1021.25, the *amicus curiae* shall file the brief within the time prescribed by the Board. On April 20, 2018, the day the *amicus curiae* brief was due to be filed, DCS's counsel, Mr. Zimmerman, contacted the Board's Assistant Counsel by phone to request an extension on the filing date for the *amicus curiae* brief. Assistant Counsel responded that any request of that nature must be filed in writing with the Board. Mr. Zimmerman then explained that his computers were not connecting to the internet and his client had no electricity in the home. Assistant Counsel, after conferring with Judge Beckman, informed Mr. Zimmerman of two options: DCS could file the *amicus curiae* brief so that it would be at the Board at the start of business on Monday, provided he included a short explanation and a request for acceptance past the Order deadline; or, if it was not possible to ensure the *amicus curiae* brief would be at the Board Monday morning, Mr. Zimmerman could file a separate request for an extension of time with the Board. Mr. Zimmerman filed the *amicus curiae* brief on behalf of DCS on Monday, April 23, 2018, but failed to include an explanation or a request for an extension / late acceptance as required.

Following the late filing of the DCS *amicus curiae* brief, on April 27, 2018, Hydro Transport and Intervenors Farmington Township and PSATS filed a Joint Motion to Strike *Amicus Curiae* Brief Filed By DCS asserting that both the timeliness of the filing and scope of the arguments necessitate striking the *amicus curiae* brief. It is clear that the Board has the authority pursuant to 25 Pa. Code § 1021.161 to strike DCS's *amicus curiae* brief for failure to comply with the Board's Order or Board rules. Board Rule 1021.161 states that: "The Board may impose

sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019." While DCS is not a party in this matter, we see no reason that a person filing an *amicus curiae* brief should not be subject to appropriate sanctions when the situation warrants it. In this instance, the Board's Order of April 9, 2018, was clear and unambiguous in requiring the submission of DCS's *amicus curiae* brief on or before April 20, 2018. We understand that DCS had issues with the logistics of meeting that filing deadline and, therefore, the Board gave DCS the opportunity to address its issues and the untimely filing with two options, neither of which were pursued by DCS. DCS's failure to comply with the Board's Order and our rules and its decision to ignore the opportunity provided by the Board to rectify its late filing of the *amicus curiae* brief leads us to grant the Joint Motion to Strike.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIRI LAWSON	:	
	:	
v.	:	**EHB Docket No. 2017-051-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HYDRO TRANSPORT LLC, Permittee, and FARMINGTON TOWNSHIP, Intervenor	:	

O R D E R

AND NOW, this 27th day of April, 2018, is hereby ordered that the Joint Motion of Permittee Hydro Transport, LLC and Intervenors Farmington Township and Pennsylvania State Association of Township Supervisors to Strike *Amicus Curiae* Brief File By Damascus Citizens for Sustainability, is **GRANTED.**

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: April 27, 2018

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

For the Commonwealth of PA, DEP:
Michael A. Braymer, Esq.
Kayla A. Despenes, Esq.
(via electronic filing system)

For Appellants:
Rose K. Monahan, Esquire
Emily A. Collins, Esquire
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For Permittee:
Jean M. Mosites, Esquire
Shannon DeHarde, Esquire
(via electronic filing system)

For Farmington Township:
Timothy M. Zieziula, Esquire
(via electronic filing system)

For Pennsylvania State Association of Township Supervisors:
Scott E. Coburn, Esquire
(via electronic filing system)

For Damascus Citizens for Sustainability Inc.:
John J. Zimmerman, Esquire
(via e-mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2016-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 2, 2018**
	:	

OPINION AND ORDER ON
MOTION FOR RECONSIDERATION

By Steven C. Beckman, Judge

Synopsis

The Board denies a Motion for Reconsideration of an interlocutory decision of the Board where it is both untimely and fails to demonstrate extraordinary circumstances that justify further consideration by the Board.

O P I N I O N

On April 23, 2018, Appellant Maria Schlafke filed a Motion for Reconsideration ("Motion"). This was followed by a Supplemental Brief in Support of Motion filed on April 25, 2018, and an Answer to Appellant's Petition for Reconsideration and Memorandum of Law in Support of, filed by the Department on April 30, 2018. The Motion asks the Board to reconsider its November 15, 2017 Opinion and Order ("Order") that granted the Department a partial summary judgment. Ms. Schlafke requests reconsideration based on two recent Commonwealth Court decisions, *Brown v. Chester Cty Tax Claim Bureau & Chester Cty.*, 178 A.3d 925 (Pa. Cmwlth. 2018) and *B &R Res., LLC v. Dep't of Envtl. Prot.*, No. 1234 C.D. 2017, 2018 WL 1320232 (Pa. Cmwlth. Mar. 15, 2018). The Motion asks for reconsideration of an interlocutory decision of the Board and is properly denied because it is both untimely and fails to demonstrate

extraordinary circumstances that justify further consideration by the Board. (See 25 Pa. Code § 1021.151). It is untimely because it is well beyond the 10 days from the date of the Order as well as beyond 10 days from the date of the issuance of the Commonwealth Court decisions on which it relies. We also note that it was filed only 15 days before the hearing in this matter scheduled to begin May 8, 2018. We also find that the cases that Ms. Schlafke cites as the basis for her Motion do not clearly control the Board's decision in the Order and, therefore, do not constitute extraordinary circumstances.

Finally, we find that the reconsideration request is itself unclear and appears to be asking for us to reconsider a decision that we have not actually made at this point, the lawfulness and reasonableness of the civil penalty as applied to Ms. Schlafke. Ms. Schlafke asks us to reconsider our "decision to defer the issue of the reasonableness and appropriateness of the civil penalty as to Schlafke personally." In our Order, we found that there are issues of material fact regarding whether the imposed penalty is lawful under the applicable law and whether the penalty sought by the Department is a reasonable and appropriate exercise of the Department's discretion. The issues regarding those material facts remain and both the lawfulness of the penalty and whether it is reasonable and appropriate are issues to be decided following the upcoming hearing. As the Department recognized in its response to the Motion, the Board remains in the position to consider the legal principles enunciated by the Commonwealth Court in *B & R Resources*, to the extent they apply, when it considers the record established at the hearing.

Therefore we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARIA SCHLAFKE	:	
	:	
v.	:	**EHB Docket No. 2016-117-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 2nd day of May, 2018, following review of Ms. Schalfke's Motion for Reconsideration, Supplemental Brief in Support of Motion, and the Department's Answer to Appellant's Petition for Reconsideration and Memorandum of Law in Support of, it is hereby ORDERED that the Motion for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 2, 2018

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

For the Commonwealth of PA, DEP:
Kayla Despenes, Esquire
Angela N. Erde, Esquire
(via electronic filing system)

For Appellant, *Pro Se*:
Maria Schlafke
(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: May 8, 2018**

OPINION AND ORDER ON
APPLICATIONS FOR COSTS AND FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board awards reduced costs and fees under the Clean Streams Law to an appellant who had some degree of success on its groundwater degradation claims in challenging the renewal of a landfill permit issued under the Solid Waste Management Act. The Board denies an application for costs and fees filed by a permittee seeking fees from the appellant because the appellant prevailed at least in part on the merits of its case, and the permittee did not demonstrate that the appeal was brought in bad faith or for any other improper purpose.

O P I N I O N

Before us are two applications for costs and fees related to Friends of Lackawanna's ("FOL's") appeal of 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 Dunmore and Throop Boroughs in Lackawanna County. The appeal was vigorously litigated on all sides. After an 18-day hearing on the merits, we issued a 71-page Adjudication on November 8, 2017

in which we added a condition to Keystone's renewed permit requiring it within 60 days to develop and submit to the Department a groundwater assessment plan in accordance with 25 Pa. Code § 273.286 to address the ongoing groundwater degradation detected at Monitoring Well 15 (MW-15). *Friends of Lackawanna v. DEP*, 2017 EHB 1123. It was not disputed by any party that the contamination observed at MW-15, which has been present since at least 2002, is due to landfill operations. Although we dismissed FOL's appeal in all other respects, the appeal nevertheless revealed important information going forward regarding the Department's oversight of Keystone's operations, particularly with respect to groundwater issues.

On December 8, 2017, both FOL and Keystone filed applications for costs and fees pursuant to our rule at 25 Pa. Code § 1021.182. In its application, Keystone argues that FOL's appeal was a proceeding under the Solid Waste Management Act, 35 P.S. §§ 6018.101 – 6018.1003, not the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001, and, because there is no provision for fees in the Solid Waste Management Act, fees should not be recoverable by any party. However, Keystone argues in the alternative that, if the Board determines this is in fact a proceeding pursuant to the Clean Streams Law, then Keystone is the party entitled to recover fees as a prevailing party, not FOL. Keystone seeks a total of $482,412.54 in costs and fees *from FOL*, which it says represents a reasonable portion of the total costs and fees it incurred in defending the appeal.

FOL argues in its application that this was a proceeding pursuant to the Clean Streams Law because it says a primary purpose for its appeal was to address the groundwater contamination at the landfill, and it pursued objections related to this purpose throughout the course of the appeal. FOL points to our imposition of the permit condition in support of its argument that it was the prevailing party entitled to an award of fees. FOL seeks a total of

$791,175.61 in costs and fees from the Department, which represents the entire amount expended by counsel for FOL in this matter.

The Department, like Keystone, argues that this is a proceeding pursuant to the Solid Waste Management Act, not the Clean Streams Law, and fees should not be awarded. However, the Department asserts that, if the Board determines that fees are recoverable in this appeal, then any fees awarded to FOL should be apportioned between the Department and Keystone, and not borne by the Department alone. The Department reasons that in a third-party permit appeal where the Department and permittee shared in defense of the permit challenge, the burden of paying any fees should likewise be shared.

After all parties filed their respective responses to the applications, the Board scheduled a conference call with the parties to discuss how to move forward on the applications. Following the call, we issued an order providing that any party wishing to file any additional materials, including briefing or memoranda, in support of their existing papers on the pending applications for costs and fees could do so by March 26, 2018, and any party wishing to file materials in response to those materials could do so by April 10, 2018. The applications are now ripe for decision.

Standard

Under the Solid Waste Management Act, there is no provision for awarding attorneys' fees and costs. *See Twp. of Washington v. DER*, 1988 EHB 325, 328. However, Section 307(b) of the Clean Streams Law provides 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). 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-prong 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; and (3) if those two prongs are satisfied, we then determine the amount of the award. *Sierra Club v. DEP*, EHB Docket No. 2016-047-L, slip op. at 5 (Opinion and Order, Mar. 28, 2018); *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. The threshold criteria for an award varies depending on whether the applicant obtained a final ruling on the merits. If there is a final ruling on the merits, as in the case here, we look to the criteria established in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422 (Pa. Cmwlth. 1990).[1]

To be eligible for fees under *Kwalwasser*, an applicant must satisfy the following threshold criteria:

(1) The Board issued a final order;

(2) The applicant for fees and costs must be the prevailing party;

(3) The applicant must have achieved some degree of success on the merits; and

(4) The applicant must have made a substantial contribution to the determination of the issues.

[1] If there is no final ruling on the merits, the Board employs the catalyst test, requiring the applicant to show that (1) the Department provided some of the benefit sought in the appeal; (2) the appeal stated a genuine claim, i.e., one that was at least colorable, not frivolous, unreasonable, or groundless; and (3) its appeal was a substantial or significant cause of the Department's action providing relief. *Hatfield Twp., supra*, 2013 EHB 764, 776-77; *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 72; *Lower Salford Twp. Auth. v. DEP*, 2009 EHB 633, *rev'd on other grounds*, 9 A.3d 255 (Pa. Cmwlth. 2010).

Kwalwasser, 1988 EHB 1308, 1310; *Crum Creek, supra*, 2013 EHB 835, 838. *See also Big B Mining Co. v. Dep't of Envtl. Res.*, 624 A.2d 713, 715 (Pa. Cmwlth. 1993); *Alice Water Protection Ass'n v. DEP*, 1997 EHB 840, 842.

In considering whether an appeal was a proceeding pursuant to the Clean Streams Law, we have 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). *See also Wilson v. DEP*, 2010 EHB 911. 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

Longenecker v. DEP, 2016 EHB 872, 874; *Borough of Kutztown v. DEP*, 2016 EHB 189, 191-92; *Angela Cres Trust, supra*, 2013 EHB 130, 135-36; *Wilson, supra*, 2010 EHB 911, 914-15.

Clean Streams Law Proceeding

This appeal is at least in part a proceeding pursuant to the Clean Streams Law. Even though the permit renewal was issued under the Solid Waste Management Act, FOL raised and

pursued throughout the appeal numerous concerns related to groundwater contamination resulting from the operation of the landfill.[2] *See Lyons v. DEP*, 2011 EHB 447, 448 (finding that an appeal of a water obstruction and encroachment permit issued under the Dam Safety and Encroachments Act was at least in part a proceeding pursuant to the Clean Streams Law because appellants addressed issues related to water quality throughout the proceedings). In FOL's prehearing memorandum, it raised concerns about what it believed was contamination being detected at monitoring wells 15, 29U, and 29UR in support of a larger argument that Keystone was causing widespread groundwater pollution while not complying with the regulations for performing groundwater assessment and abatement. (FOL PHM at 3-7, 39-41.) FOL pursued these concerns at the hearing on the merits, offering testimony from its own expert hydrogeologist, and eliciting testimony from expert hydrogeologists from the Department and Keystone. Testimony on groundwater issues comprised nearly half of the total hearing testimony. Indeed, Keystone concedes in its own application for fees that "the bulk of the hearing involved fact and expert testimony involving FOL's various groundwater-related

[2] *See, e.g.,* Notice of Appeal at ¶ 55: "KSL [Keystone] has caused and continues to cause groundwater contamination, including from the currently-operating Phase II portion of the facility."; *Id.* at ¶ 56: "The Department has admitted that KSL is causing groundwater pollution, and has erred in allowing it to continue."; *Id.* at ¶ 58: "Department regulations place the burden on the permittee to 'affirmatively demonstrate[]': a) that the landfill 'will not cause surface water pollution or groundwater pollution;' and b) compliance with both the Solid Waste Management Act and the Clean Streams Law, among other laws. 25 Pa. Code § 271.101."; *Id.* at ¶ 59: "KSL has failed to carry its burden, has failed to prove that it will not cause such pollution and has failed to prove that it will comply with the law." *Id.* at ¶ 60: "KSL has a substantial hurdle to meeting its burden because it is substantially in violation of the law by, *inter alia*, contaminating the groundwater already."; *Id.* at ¶ 67: "Department approval of a renewal of KSL's operations permit despite KSL's multiple problems – including landfill fires and groundwater pollution – violates the Solid Waste Management Act, the Clean Streams Law, associated Department regulations, and Article I, Section 27 of the Pennsylvania Constitution."; *Id.* at 69: "Groundwater pollution is a nuisance under (and therefore a violation of) the Solid Waste Management Act and the Clean Streams Law."; *Id.* at 70: "The Department erred in approving a renewal of KSL's operating permit because KSL is causing a nuisance, including by polluting waters of the Commonwealth in violation of the Solid Waste Management Act and the Clean Streams Law. 35 P.S. §§ 6018.502(d), 6018.601, 35 P.S. 6018.610; 35 P.S. §§ 691.301, 691.307, 691.401, 691.611; 71 P.S. § 510-17."

claims." (Keystone App. at 4.) Not surprisingly, a significant portion of FOL's post-hearing brief addressed groundwater issues.

The regulation at the center of the permit condition imposed in our Adjudication, 25 Pa. Code § 273.286, is aimed at protecting waters of the Commonwealth during landfill operations. It falls under Subchapter C of the municipal waste landfill regulations, which contains various operating requirements, including ones pertaining to water quality protection and water quality monitoring. Section 273.286 was promulgated as part of a comprehensive revision to the municipal waste regulations in 2000. 30 Pa.B. 6685 (Dec. 23, 2000). The revisions relied in part on statutory authority under the Clean Streams Law:

> The Clean Streams Law (CSL) (35 P. S. §§ 691.1— 691.1001), which in section 5(b) of the CSL (35 P. S. § 691.5(b)) grants the [Environmental Quality] Board the authority to formulate, adopt, promulgate and repeal the rules and regulations as are necessary to implement the provisions of the CSL and which in section 402 of the CSL (35 P. S. § 691.402) grants the Board the authority to adopt rules and regulations requiring permits or establishing conditions under which an activity shall be conducted **for any activity that creates a danger of pollution of the waters of this Commonwealth or that regulation of the activity is necessary to avoid such pollution.**

Id. (emphasis added). Although we have previously found that merely having the Clean Streams Law as one of a regulation's promulgating authorities is not enough on its own to render an appeal a Clean Streams Law proceeding, *Angela Cres Trust*, 2013 EHB at 139, we view Section 273.286 as falling squarely within the ambit of protecting water quality.

Section 273.286 is one of several regulations designed to ensure that a municipal waste landfill is operated in such a way that it is protective of, and not degrading to, the waters of the Commonwealth. *See, e.g.,* 25 Pa. Code § 273.241 (landfill shall be operated to prevent and control surface and groundwater pollution; operator may not cause or allow water pollution within or outside the site); 25 Pa. Code § 273.281 (landfill shall install, operate, and maintain a

monitoring system that can detect entry of contaminants into groundwater or surface water). The Solid Waste Management Act also requires a permit applicant to set forth in its application how it will comply with the requirements of the Clean Streams Law, among other statutes, and provides that an operator shall continue to comply with the Clean Streams Law or be subject to possible violations, penalties, or permit revocation. 35 P.S. § 6018.502(d).

Since there is no provision for awarding attorneys' fees under the Solid Waste Management Act, we must presume that the Legislature did not intend for fees to be awarded in appeals brought solely pursuant to the Solid Waste Management Act. At the same time, we must balance this against "Pennsylvania's strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions." *Solebury Twp., supra*, 928 A.2d 990, 1004 (Pa. 2007) (citing *Lucchino, supra*, 809 A.2d 264, 269 (Pa. 2002)). In some respects, the Clean Streams Law is a statute that is remedial (or perhaps reactionary) to the industries and activities generating pollution. Whether a case is pursuant to the Clean Streams Law does not necessarily turn on whether a discharge permit has been issued for the activity, or whether the Department's action was a direct result of a provision in the Clean Streams Law, but rather if an activity affects waters of the Commonwealth, including any physical, chemical, or biological changes to those waters.

Thus, while FOL's appeal was of a renewal of a solid waste management permit, and indeed, many of its objections pertained to various aspects of landfill operations unrelated to ensuring adequate protection of the waters of the Commonwealth, i.e., thermal events, odors, carbon monoxide gas migration, the appeal nevertheless also encompassed issues related to water quality, thereby implicating the Clean Streams Law. We cannot view the subject action of the appeal in a vacuum with blinders on to the groundwater component of FOL's case, and we

cannot ignore the fact that the appeal revealed that Keystone is degrading waters of the Commonwealth, as shown in MW-15, a point that no party disputed. Therefore, we conclude that this component of FOL's appeal was a proceeding pursuant to the Clean Streams Law.

Of course, that is certainly not to say that any challenge to a Solid Waste Management Act permit will always also be a proceeding pursuant to the Clean Streams Law. Rather, this appeal shows that landfill operations can implicate water quality concerns, and we should not ignore that intersection either in deciding the merits of an appeal in response to a proper challenge or in deciding an application for fees that follows from that appeal. When a party's challenges are premised upon maintaining the integrity of waters of the Commonwealth, and those challenges reveal ongoing and sustained groundwater degradation, as in the case here, the party bringing those issues to light passes the threshold consideration of determining whether a proceeding is pursuant to the Clean Streams Law for purposes of a fees application.

Whether Fees were Incurred

Keystone and the Department argue that, even if this is a proceeding pursuant to the Clean Streams Law, FOL has not actually "incurred" the fees its counsel seek, as required by Section 307(b). They argue that FOL has not established that, as an organization and party to this appeal, it has incurred the costs it seeks to be reimbursed for, as opposed to its counsel or some other entity not a party to the appeal.

We have held that, in order to incur fees and costs, "a party must become liable to or subject to those expenses." *Beth Energy Mining Co. v. DER*, 1995 EHB 148, 157. We have also held that these expenses "are incurred so long as the work to which they pertain has been performed. Whether the fees have been paid is not relevant to the question of whether they have been incurred." *Raymond Proffitt Found. v. DEP*, 1999 EHB 124, 143. We see no reason to

depart from this standard here. FOL has provided extensive documentation of the hours worked by counsel and the costs expended during this appeal. (FOL App., Ex. E, F.) It is clear that the work was performed, and we witnessed much of it in the various motions and responses that were filed as well as over the course of the 18-day hearing. FOL has also submitted an affidavit from one of its attorneys, averring that his law firm has an agreement with FOL for it to pay the fees and costs for the work done on its behalf, and the law firm does not have an agreement with anyone other than FOL to pay for the work done on FOL's behalf. (FOL Reply Brief, Ex. A.)

Keystone says that it needs to conduct discovery and have a hearing on whether FOL in fact incurred the costs and fees it seeks. It says that we need to order FOL to produce any fee agreement it has with its attorneys so FOL can prove that it incurred all of the costs and fees it seeks to recover. We do not think such an intrusion into representation agreements is warranted. We see very little to be gained in conducting a mini-trial on the fees applications in this case, particularly where we reached a final ruling on the merits. We are satisfied that FOL incurred the fees and costs in this proceeding.[3]

Threshold Criteria

Turning to the *Kwalwasser* criteria, we have little difficulty concluding that FOL has satisfied those criteria here. The Board issued a final order in our Adjudication and found that FOL prevailed at least in part on the merits of its appeal of the permit renewal. Because of FOL's efforts, we added a condition to Keystone's permit requiring it to conduct a groundwater assessment in accordance with 25 Pa. Code § 273.286. Absent FOL's appeal, we have serious doubts that the Department on its own would have done anything to require Keystone to conduct a groundwater assessment after allowing the groundwater degradation to persist for 14 years.

[3] Keystone's motion for leave to conduct discovery and for an evidentiary hearing on the issue of whether FOL incurred fees is denied.

Although Keystone and the Department highlight the notice of violation (NOV) that was issued by the Department regarding MW-15 mere days before the hearing commenced, and argue that this somehow preemptively nullified FOL's success in this appeal, we continue to believe, as expressed in our Adjudication, that the NOV was issued for no other reason than to bolster the Department's litigation position. Further, the NOV did not require Keystone to develop a groundwater assessment plan pursuant to Section 273.286, and it did not remedy the Department's error in issuing the permit renewal without requiring that Keystone submit such a plan. FOL made a substantial contribution to the determination of the issue of groundwater degradation at MW-15. It has met the *Kwalwasser* criteria.

Amount of the Award

Having determined that FOL has satisfied the preliminary hurdles for a fee award, we turn to the reasonable amount of the award. In employing our discretion to determine the appropriate amount of fees to award in a particular case, we consider factors such as:

- The fee applicant's degree of success;
- The extent to which the litigation brought about the favorable result;
- The fee applicant's contribution in bringing about the favorable result;
- The extent to which the favorable result matches the relief sought;
- Whether the appeal involved multiple statutes;
- Whether litigation fees overlap fees unrelated to the litigation itself;
- How the parties conducted themselves in the litigation, including in regards to settlement;
- The size, complexity, importance, and profile of the case;
- The degree of responsibility incurred and risk undertaken.

Hatfield Twp., 2013 EHB 764, 781 (citing *Hatfield Twp. Mun. Auth. v. DEP*, 2010 EHB 571, 589); *Solebury Twp. v. DEP*, 2008 EHB 658, 673-74.

Among these factors, one of the keys in this appeal in devising a reasonable fee award is the extent to which the appeal involved multiple statutes, and in this case, a constitutional provision. *Crum Creek*, 2013 EHB at 838; *Solebury Twp. v. DEP*, 2008 EHB 658, 674. This appeal primarily involved the Solid Waste Management Act, the Clean Streams Law, and Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art I, § 27. Again, just as we must honor and respect the Legislature's decision to allow for a fee award under the Clean Streams Law, so must we honor and respect its decision *not* to provide for fee awards under the Solid Waste Management Act.

FOL argues that it is entitled to all of its fees because it is simply too difficult to divide the hours and costs expended on a claim by claim basis. We agree that, where all claims share a common core of facts and interrelated legal theories, fees and costs incurred in support of all of those claims should be awarded. *See Crum Creek*, 2013 EHB at 839; *Pine Creek Valley Watershed Ass'n, supra*, 2008 EHB 705, 708-09; *Twp. of Harmar v. DER*, 1994 EHB 1107, 1136-38. We disagree, however, that all of FOL's claims in this case share such a common core of facts and interrelated legal theories. While it is not possible or practicable to assign time FOL spent, say, on a particular day of document review or a particular deposition to one claim or another, it is possible to assign a general level of effort to FOL's divisible claims using its filings in this case as an admittedly rough approximation of the effort expended.

FOL pursued six basic claims in its appeal: (1) groundwater contamination, (2) nuisances (defined broadly) (e.g. odors, air emissions and odors, traffic, gas migration), (3) leachate management, (4) sewerage, (5) compliance history, and (6) Article I, Section 27 of the

Pennsylvania Constitution. The effort devoted to nuisances and compliance history relates too heavily to the Solid Waste Management Act to allow for an award of fees under the Clean Streams Law. FOL did not achieve any success on its sewerage issues, so we will eliminate those fees from possible contention as Clean Streams Law fees. Even though poor leachate management can lead to groundwater contamination, we believe it is much more about how to properly run a landfill, which is a Solid Waste Management Act issue. We are not aware that either the Legislature or the courts have provided for fee awards for FOL's constitutional claims, and FOL has not argued that it is distinctly entitled to an award of fees for that work. That leaves groundwater contamination. That claim directly involved water quality and should be attributed in part to work undertaken pursuant to the Clean Streams Law.

Although the groundwater issue is only one of six claims, it is not accurate to say that it involved only one-sixth of the work. There is no question that it was a dominant issue in the case. It is obviously impossible to assign an exact percentage to the groundwater claim. In an effort to impart some rationality to the process, we have gone back over FOL's notice of appeal, prehearing memorandum and post-hearing brief, the 4,366-page transcript, and our Adjudication to assess what percentage of the effort should fairly be attributed to the groundwater work.

There were three types of work: (1) work related exclusively or almost exclusively to Solid Waste Management Act issues (e.g. nuisances); (2) work related exclusively or almost exclusively to the groundwater issue (e.g. hydrogeologist testimony); (3) mixed work. Mixed work includes work that FOL needed to do before it could even get to the Clean Streams Law claims themselves, such as its need to overcome objections regarding its standing, the doctrine of administrative finality, and prosecutorial discretion, which was not insubstantial given Keystone and the Department's reliance on those defenses. Another example is testimony from

Department witnesses about the groundwater issues in the context of testimony regarding how the Department made its decision to renew the permit. Our goal was to come up with rough numbers, not reread every line of testimony or every word in FOL's 307-page brief, for example. Admittedly, some judgment was involved.

About 1,900 pages of the 4,366-page transcript directly involved the groundwater issues, or 43-percent. About 800 pages related to mixed issues, or 18-percent. The breakdown for FOL's notice of appeal was about 30-percent Clean Streams Law, 30-percent mixed. The prehearing memorandum was about 25-percent Clean Streams Law, 28-percent mixed. 49-percent (150 of 307 pages) of FOL's post-hearing brief directly involved the groundwater issues. 16-percent (49 of 307 pages) involved mixed issues with a groundwater component. Of our 71-page Adjudication, about 24-percent involved the groundwater issue and 38-percent involved mixed issues. When we average these calculations, we come up with an average of 32-percent Clean Streams Law and 26-percent mixed. These are consistent with a general impression of the proceedings, having managed the appeal over the last three years.

Two further reductions of these percentages are appropriate before doing an apportionment between Clean Streams Law and Solid Waste Management Act work. Even though there was a Clean Streams Law component to much of the work, *all* of the work in this case fundamentally related to the operation of a landfill pursuant to the Solid Waste Management Act, including the groundwater issue. It is metaphorical that our Adjudication primarily cited Keystone for failing to comply with its regulatory duty under 25 Pa. Code § 273.286, which requires a study when groundwater "degradation" as opposed to "pollution" occurs. It is true that Section 273.286 implements the Clean Streams Law, but it is fundamentally a waste regulation. We did not cite Keystone for directly violating the Clean Streams Law. Therefore,

we will reduce the percentage assigned to groundwater issues as discussed above by an additional 50-percent and the percentage assigned to the mixed issues by 75-percent. So instead of apportioning the effort as 32-percent Clean Streams Law and 26-percent mixed, we will apportion the fees and costs as 16-percent Clean Streams Law plus 6.5-percent mixed for a total level of effort related directly and indirectly to the Clean Streams Law of 22.5-percent. 22.5-percent of FOL's fees is $178,014.51.

The next factor that we consider is FOL's degree of success with respect to the Clean Streams Law portion of the case. FOL set out to prove that there was widespread groundwater contamination at the site. At a minimum, it sought to show that the site has not been properly characterized due in part to inadequate groundwater monitoring across the whole site. It suspected a threat to a nearby reservoir. FOL was unable to prove any of this. FOL was only successful in proving that Keystone has failed to perform a proper groundwater assessment in the vicinity of MW-15 in light of *undisputed* groundwater degradation in that area. FOL's success in drawing that effort into light was an important and worthwhile achievement, but it must be said that it represents a very limited degree of success when compared to what it was trying to achieve.

Furthermore, FOL failed to achieve its ultimate objective, which was a revocation of the permit renewal or at least a remand with comprehensive consequences. In that regard, we held:

> Although the groundwater at the site is clearly a public natural resource entitled to protection under the constitution, and there is, of course, no right to pollute water simply because it is already polluted, *CAUSE v. DEP*, 2007 EHB 632, 689-90, context matters. As part of our calculus in evaluating whether the Department's decision to renew Keystone's permit was reasonable in spite of the groundwater degradation, we include the fact that MW-15 is a shallow well with very low flow measuring acid mine drainage associated with decades of historical coal mining. The water mixes in with billions of gallons of acid mine drainage-impacted water from numerous old mines in the valley and is ultimately discharged through old mine tunnels into the river. Some of the parameters involved are naturally

> occurring. The levels are not extraordinarily high. There has been no showing of an adverse effect on any use of the water, and no showing of any immediate threat to the public health or safety.

Friends of Lackawanna, 2017 EHB 1123, 1174. In view of FOL's limited degree of success, we will further reduce its fees and costs award by 90-percent, which brings it down to $17,801.45 (10-percent of $178,014.51). *See Twp. of Harmar*, *supra*, 1994 EHB 1107, 1137 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (courts should focus on the significance of the overall relief obtained by the applicant).

Given the admittedly drastic reduction in the fee award requested by FOL, we considered awarding no fees at all. However, there is little doubt that the groundwater contamination being seen at MW-15 would not have been properly investigated absent FOL's litigation. As discussed in our Adjudication, after 14 years, the Department's NOV purportedly addressing the issue was wholly inadequate. FOL undertook a monumental task and undertook a considerable risk in a case of considerable public importance. Keystone and the Department's joint defense of the permit renewal was, to say the least, vigorous. FOL has advanced the goals of the Clean Streams Law by ensuring that groundwater degradation is properly investigated, and its efforts will hopefully eventually result in some improvement in the watershed involved. FOL's effort has brought out noticeable deficiencies in the Department's historic oversight of the facility as the agency statutorily charged with the duty and responsibility of implementing the Clean Streams Law. In view of these other criteria for calculating an appropriate fee award, we see no need to increase or decrease the amount of the award that we derived from the apportionment and degree-of-success criteria.[4]

[4] We note that we have no reason to question the reasonableness of the rate charged by FOL's counsel of $225 per hour. FOL provided documentation that the rate is below the rate used by Philadelphia Community Legal Services, as well as an affidavit from another environmental law practitioner attesting to the reasonableness of the rate. (FOL App., Ex. C, D.)

Department Imparting Fees Burden to Keystone

FOL has only sought fees from the Department. However, in the Department's response to FOL's application, the Department asserts that any fees that are assessed should be apportioned between the Department and Keystone. The Department argues that Section 307(b) of the Clean Streams Law is phrased broadly and it does not specify from which party fees may be awarded to an applicant. The Department suggests that in a situation of a third-party appeal of a permit where both the Department and permittee defend the issuance of the permit, the burden of a fee award should be shared. The Department also notes differences in arguments pursued by itself and Keystone over the course of the litigation on topics such as administrative finality and FOL's standing, where the Department mounted a less vigorous defense than Keystone. Keystone, of course, opposes the Department's position on this issue.

The Department has not provided any case law to justify its argument that we should order Keystone to partially absorb the burden of the fees sought from the Department. In the past, under a different fee provision, we have rejected this argument, taking the view that it is ultimately the Department's responsibility to scrutinize permit applications to ensure that they comply with the law before issuing a permit. *Twp. of Harmar*, 1994 EHB at 1146; *Jay Twp. v. DER*, 1987 EHB 36, 48-49. We are not persuaded by the Department's attempt to drag Keystone into being held responsible for the payment of fees to FOL in an appeal of a permit the Department issued (and, after reviewing Keystone's renewal materials, "did not hesitate for a second" before approving), particularly where FOL has not requested any fees from Keystone in its application or argued that Keystone should be liable for any portion of the fees.

Keystone's Application for Costs and Fees

As noted at the outset, Keystone has also filed an application seeking to recover from FOL a portion of its total costs and fees expended on the appeal, in the event we determined that the appeal is a proceeding pursuant to the Clean Streams Law, as we have done. Keystone contends that it is a prevailing party (along with the Department) entitled to recover fees because FOL failed to succeed on many of the groundwater issues it raised in its appeal. However, we have already determined that FOL is the prevailing party, and because we are awarding fees to FOL as a prevailing party, it makes little sense for us to also award fees to Keystone. We have already made the assessment of the degree to which FOL was a prevailing party in relation to the other litigants, and the result of that assessment is imbued in the ultimate award we have determined. We have reduced the award commensurate with FOL's relative degree of success on the groundwater issues.

Furthermore, in seeking fees from a third-party appellant, we have required that a permittee show that the appellant brought the appeal in bad faith. In *Alice Water Protection Association, supra*, we held that "a permittee seeking to recover attorney's fees from a citizens' group or private individual in an unsuccessful appeal of a permitting action must demonstrate, in addition to the [*Kwalwasser*] criteria, that the appeal was brought in bad faith or with the intent to harass or embarrass the permittee." 1997 EHB 840, 843. This notion has been echoed by our Supreme Court, finding that public policy considerations have prompted Pennsylvania courts to liberally construe fee provisions "to justly compensate parties who have been obliged to incur necessary expenses in prosecuting lawful claims **or in defending against unjust or unlawful ones**." *Lucchino*, 809 A.2d at 269 (Pa. 2002) (quoting *Tunison v. Cmwlth.*, 31 A.2d 521, 523 (Pa.

1943)) (emphasis added). Thus, Pennsylvania generally awards fees only to parties who succeed in their claims or to parties who are forced to defend against baseless claims.

Notably, our Adjudication in *Alice Water* dismissed the citizens' group appeal of the transfer of a coal mining permit in every aspect, *Alice Water Protection Ass'n v. DEP*, 1997 EHB 108, but we still did not find bad faith at the fees stage. Here, we have found that FOL has achieved at least some success on the merits, which supports the legitimacy of its appeal. FOL advanced colorable claims throughout the appeal, and its success with respect to MW-15 alone demonstrates that its appeal was not brought in bad faith. Although we rejected many of FOL's other claims, we did not find that the claims were frivolous or insincere, merely that FOL did not produce sufficient evidence to prevail on those claims. *See Lyons*, *supra*, 2011 EHB 447, 450 (merely because appellants did not ultimately prevail did not mean they were not motivated by legitimate concerns or that their case lacked colorable grounds). In *Lyons*, we found that "fees might be appropriate if it is clear that there was no colorable basis for an appeal, or the appellant's goal was to do nothing more than harass, embarrass, or annoy, or the appellant was animated by fraudulent, dishonest, or corrupt behavior." 2011 EHB at 449. We have no indication of any of that with respect to FOL. There is no evidence that the appeal was brought in bad faith or with any intent to harass Keystone, and Keystone has made no demonstration in that regard.

We have recognized that allowing attorney's fees to be collected from private individuals and citizens' groups would undoubtedly have a chilling effect on the constitutional right of those individuals to petition the government through an appeal before the Environmental Hearing Board. *Alice Water*, 1997 EHB at 845. We reaffirm that stance here. Keystone has provided us

with no persuasive reason why we should reconsider our long-standing precedent on this issue. Keystone's application is denied.[5]

We issue the Order that follows.

[5] In consideration of Keystone's motion for leave to file a reply to FOL's reply brief, and FOL's response in opposition thereto, Keystone's motion is denied. Keystone's reply, attached to its motion, did not factor into the consideration of this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 8th day of May, 2018, it is hereby ordered that the Appellant's application for costs and fees is **granted in part**. The Appellant is awarded costs and fees totaling **$17,801.45** to be paid by the Commonwealth of Pennsylvania, Department of Environmental Protection. The Permittee's application for costs and fees 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

*** Judge Steven C. Beckman files an opinion concurring in part and dissenting in part.**

DATED: May 8, 2018

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

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

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

For Permittee:
David Overstreet, Esquire
Jeffrey Belardi, Esquire
Christopher R. Nestor, 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	:	

CONCURRING IN PART AND DISSENTING IN PART OPINION OF JUDGE STEVEN C. BECKMAN

I concur in part and dissent in part from the majority's decision. I concur in the decision to deny Keystone's application for cost and fees. I dissent from the majority's decision to grant in part the application for costs and fees of the Appellant, Friends of Lackawanna ("FOL"). I conclude that the proper exercise of the Board's broad discretion to award fees pursuant to the Clean Streams Law under 35 P.S. § 691.307(b) would deny FOL's application in its entirety. Based on my reading of the facts and the law, I think that a denial of all fees and costs claimed by FOL is warranted in this case.[1]

First, I think it is a close question whether this case is properly treated as a proceeding under the Clean Streams Law. The first factor that the majority cites in determining whether an appeal is a proceeding pursuant to the Clean Streams Law is the reason the appeal was filed, i.e. the purpose of the litigation. FOL's purpose in initiating and pursuing this appeal was to seek the reversal of the Department's decision to renew Keystone's landfill permit under the Solid Waste Management Act and its regulations. Groundwater issues that are the basis for the majority's finding that this was a Clean Streams Law proceeding were raised by FOL in support

[1] Because I think that FOL's claim should be denied in its entirety, I also concur in the majority's decision to deny Keystone's motion for leave to conduct discovery and for an evidentiary hearing on the issue of whether FOL incurred fees, albeit for a different reason.

of the Solid Waste Management permit challenge and any Clean Streams Law issues were at best tangential to the primary purpose of this litigation. This point is evidenced by the fact that the Board never mentions the Clean Streams Law or its implementing regulations in its lengthy adjudication in this case.

I also find that while FOL may have technically prevailed on its claim that the Department's decision to renew Keystone's landfill permit was unreasonable and a violation of the Department's trustee duties under Article 1, Section 27 of the Pennsylvania Constitution (See *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1193, Conclusion of Law 15), this was largely a hollow victory. The Board did not reverse the Department's permit renewal decision, but instead ordered that a revision be made to the permit to add a condition that required the preparation and submittal of a groundwater assessment plan related to groundwater degradation in one monitoring well. Among the factors that the majority states that the Board considers in determining the reasonable amount of a fee award are the applicant's degree of success and the extent to which the favorable result matches the relief sought. Certainly the most significant factor is the degree of success. FOL had very little success in this litigation in my opinion and the main outcome of the Board's decision, the upholding of the permit renewal, is inconsistent with the relief sought by FOL. These factors clearly influenced the majority's decision to greatly reduce the fee award in this case, but I believe that these factors, in conjunction with my concern over whether this truly was a Clean Streams Law case, led me to conclude that we should have exercised our discretion to deny any fees or costs to FOL.

I have one other issue that I think warrants discussion and further supports a denial of FOL's application. The Board has a rule governing an application for costs and fees found at 25 Pa. Code § 1021.182. The rule states that the application should provide the required information in sufficient detail to enable the Board to grant the relief requested. Implicit in the

Clean Streams Law fee provision and the Board's fee jurisprudence, along with the Board's rule on the application for costs and fees, is that the party applying for fees should ensure that the fee request is both reasonable in light of the underlying Board ruling and provides enough detail to allow the Board to review the application and determine which fees and costs are related to the successful claims of the applicant. FOL's application does not meet this standard. Instead the Board was faced with an application that claimed $791,175.61 and made no effort to segregate the fees or cost on a claim by claim basis because FOL asserted that doing so would be too difficult. If it would be too difficult for FOL given its presumed knowledge of its work and the players involved, is it reasonable to expect the Board to do so in this case? Given the obvious lack of success on some of its claims, it certainly should have been clear to FOL that a large portion of its fees and costs would be challenged and that it was unlikely to recover the full amount. Instead of accounting for that reality in its application, and providing sufficient detail in the descriptions of hours claimed and the costs requested, FOL simply punted on any effort to segregate the fees and costs and dumped the issue into the Board's lap. As a result, the Board majority was required to devise a way to impart some rationality to the sorting out of the requested fees and costs. This led to the majority reviewing the parties' filings, our adjudication and counting transcript pages to attempt to roughly determine a percentage of the time that was related to the groundwater issues. I commend the majority for its effort but, in my opinion, this is not a proper way for fee applications to proceed in front of the Board.

I believe that our jurisprudence and rules require that the applicant provide an application to the Board that provides sufficient detail on the nature of the work for which the fees are claimed, including an effort by the applicant to segregate fees consistent with the Board's ruling in the underlying case. The applicant is in control of this information and how it is recorded and presented to the Board. FOL's description of its work was better than some that

I have reviewed in the past, but in many instances it still lacked sufficient detail to allow the Board to determine how that work was related to its various claims. I find that FOL's approach in its application was not reasonable and failed to meet the Board's requirements. Rather than sort through the application and attempt to divine what percentage of the fees and costs were related to the claim on which FOL achieved its limited success, I would have denied the application on the basis that it lacked sufficient detail to enable the Board to grant the requested relief. (See 25 Pa. Code § 1021.182(d)).

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 8, 2018

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN C. GLANCE	:	
	:	
v.	:	**EHB Docket No. 2017-061-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 11, 2018**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

The Board grants in part and denies in part the Appellant's motion for summary judgment in an appeal challenging an order issued by the Department of Environmental Protection alleging violations of the Dam Safety and Encroachments Act. The motion is denied with regard to the Appellant's challenge to the Department's jurisdiction where the Appellant has not demonstrated as a matter of law that the Department does not have jurisdiction to regulate a lake on which the Appellant has an earthen pier and wooden boat dock. The motion is granted with regard to the Appellant's argument that the Department must obtain a warrant or other order from a neutral judicial officer before conducting a search of the Appellant's property.

O P I N I O N

Introduction

Justin C. Glance (the Appellant) owns property that borders Lake Pleasant in Venango Township, Erie County. On June 26, 2017, the Department of Environmental Protection (Department) issued an Administrative Order (order) to the Appellant for alleged violations of

the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq*. (Dam Safety Act). The Appellant appealed the order on July 30, 2017 at Environmental Hearing Board (Board) Docket No. 2017-061-R. The matter currently before the Board is a Motion for Summary Judgment filed by the Appellant on February 23, 2018. The Department responded to the motion on March 26, 2018. The Appellant did not file a reply to the Department's response as is permitted by the Board's rules at 25 Pa. Code § 1021.94a(k). This matter is now ripe for decision.

Background

The Appellant's property abuts Lake Pleasant, which he contends is "a privately-owned lake, controlled by the property owners surrounding the lake." (Appellant's Statement of Undisputed Material Facts, para. 4; Ex. B.) According to the Department's order, on April 21, 2016 the Department inspected the eastern boundary of the Appellant's property and observed an earthen pier and wooden boat dock projecting into Lake Pleasant. (Department's Administrative Order, para. F – Exhibit to Notice of Appeal.) The order directs the Appellant to take certain action to come into compliance with the Dam Safety Act, including the submission of an application for a Water Obstruction and Encroachment Permit or a restoration plan for removal of the pier and boat dock. Additionally, paragraph 1 of the order directs the Appellant to "allow Department personnel to access the Site during daylight hours to inspect the earthen pier and wooden boat dock located on the eastern boundary of the Site and determine compliance with this Order." (Department's Administrative Order, para. 1 – Exhibit to Notice of Appeal.) As of the date of the filings in this matter, the Appellant had not permitted the Department access to the property.

In his motion for summary judgment, the Appellant asserts that the Department's demand for access to his property is unconstitutional and violates the Dam Safety Act. He further asserts that the Department lacks jurisdiction over Lake Pleasant's docks and other encroachments.

Discussion

The Board may grant a motion for summary judgment if the record indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Property One, LLC v. DEP*, 2017 EHB 1207, 1212 (citing *Lexington Land Developers Corp. v. DEP*, 2014 EHB 741, 742). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Id.* (citing *Clean Air Council v. DEP and MarkWest Liberty Midstream and Resources*, 2013 EHB 346, 352). In evaluating a motion for summary judgment, the Board views the record in the light most favorable to the nonmoving party, and we resolve all doubts as to the existence of a genuine issue of fact against the moving party. *Id.* (citing *Perkasie Borough Authority v. DEP*, 2002 EHB 76, 81); *Benner Township Water Authority v. DEP*, 2017 EHB 1048, 1050 (citing *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 893). Summary judgment is generally only appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Id.* at 1050-51 (citing *PQ Corporation v. DEP*, 2016 EHB 826).

The Appellant contends that the Department's order is both unconstitutional and a violation of Section 16 of the Dam Safety Act which addresses "investigations and searches" conducted pursuant to the Act. Section 16 of the Dam Safety Act states as follows:

> (a) The department is authorized to make such inspections, conduct such tests or sampling, or examine books, papers and records pertinent to any matter under investigation pursuant to this act as it deems necessary to determine compliance with this act and for this purpose, the duly authorized agents and employees of the

> department are authorized at all reasonable times to enter and examine any property, facility, operation or activity.
>
> (b) The owner, operator or other person in charge of such property, facility, operation or activity, upon presentation of proper identification and purpose for inspection by the agents or employees of the department, shall give such agents and employees free and unrestricted entry and access, and upon refusal to grant such entry or access, the agent or employee may obtain a search warrant or other suitable order authorizing such entry and inspection. It shall be sufficient probable cause to issue a search warrant authorizing such examination and inspection if there is probable cause to believe that the object of the investigation is subject to regulation under this act, and access, examination or inspection is necessary to enforce the provisions of this act.

32 P.S. § 693.16. Section 16(b) makes it clear that the Appellant was initially entitled to refuse entry to his property, and, when faced with this refusal, the Department was required to obtain "a search warrant or other suitable order" authorizing entry and inspection. It is the Department's contention that its Administrative Order fulfills the requirement of "other suitable order."

The Appellant argues that the Department's order violates the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, which protect individuals from unwarranted searches and seizures. Specifically, Article I, Section 8 of the Pennsylvania Constitution reads as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, or without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I, § 8. The Appellant cites to *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014), wherein the Pennsylvania Supreme Court stated, "As a general rule, for a search to be reasonable under the Fourth Amendment or Article I, Section 8, police must obtain a warrant supported by probable cause and issued by an independent judicial officer, prior to conducting the search." *Id.*

at 107 (citing *Horton v. California*, 496 U.S. 128, 134, n. 4 (1990)). The Appellant further directs us to *Warrington Township v. Powell*, 796 A.2d 1061 (Pa. Cmwlth. 2002), in which the Pennsylvania Commonwealth Court held that Fourth Amendment privacy concerns apply not just to criminal searches but also to administrative inspections. *Id.* at 1067 (citing *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29, 18 L. Ed. 2d 930 (1967)). In *Warrington Township*, the township sought to conduct a warrantless search of an auto body shop as part of the township's annual fire safety inspection. The Common Pleas Court issued an order directing the owners of the auto body shop to permit the township access to their property. On appeal, the Commonwealth Court affirmed the order of the lower court as to the public portions of the auto body shop but reversed it as to those areas not open to the public. The Court disagreed with the lower court that government agencies may make warrantless administrative searches of all commercial property for any legitimate and important reason. In reaching its ruling, the Commonwealth Court differentiated between closely or heavily regulated businesses, which may be subject to warrantless searches when certain conditions are met, and those that are not closely or heavily regulated, for which there is more of an expectation of privacy. Here, where the subject of the Department's order is the private property of an individual, the expectation of privacy is even higher.

The Appellant argues that the Department's order cannot be characterized as an "other suitable order" as set forth in Section 16(b) of the Dam Safety Act because to do so frustrates the constitutional requirement that the order must be issued by a neutral judicial officer prior to the Department conducting a search. We agree with the Appellant that the Department's reliance on its own order to meet the requirements of Section 16(b) of the Dam Safety Act is problematic. The Department cannot be both the entity issuing the order *and* the entity attempting to use the

order to gain access to private property. Clearly, if the legislature had intended that the Department itself should make the decision about whether it is appropriate to enter private property pursuant to its regulatory authority under the Dam Safety Act, it would not have required the Department to obtain a "search warrant or other suitable order" in the first place. We read the language "other suitable order" as requiring an order obtained from a judicial officer who is tasked with the role of reviewing the evidence to determine if there is probable cause for entry to the property. This role clearly cannot be played by the Department itself. In order to give meaning to the aforesaid language of Section 16(b) of the Dam Safety Act, such "other suitable order" must be issued by "an *independent* judicial officer, *prior* to conducting the search." *Gary, supra* at 107. An order issued by the very agency that is seeking to conduct the search defeats the purpose of Section 16(b).

The Department is not required to obtain a search warrant or court order to enter property in every instance. Where the property in question is subject to a permit, generally one of the conditions of the permit is that the Department has reasonable access to the property. Additionally, a statute may provide the Department with access to property in certain circumstances. *Warrington Township, supra* at 1066-67 (citing *Donovan v. Dewey*, 452 U.S. 594, 600, 69 L. Ed. 2d 262 (1981) ("[A] warrant may not be constitutionally required for an administrative search for commercial enterprises that are highly regulated and where the regulatory scheme is so comprehensive and particular that it in effect secures the protections of the warrant process and serves notice on the regulated business that it will be subject to periodic inspections.") Here, however, where there is no permit providing the Department with access to the Appellants' property, and the statute in question requires the Department to obtain a warrant or other comparable order prior to conducting the search, the Department must comply with the

protections afforded private citizens under the Fourth Amendment; Article I, § 8 of the Pennsylvania Constitution; and Section 16(b) of the Dam Safety Act. Those provisions are set in place to ensure that the Department has probable cause before entering the property of someone who is not subject to a permit.

The Department asserts that the Environmental Hearing Board fulfills the role of neutral judicial officer reviewing the Department's need to conduct a search. However, as the Appellant points out, this review occurs only *after* the order is issued and only if an appeal is taken. The requirement of a neutral judicial officer to review the need for a search is lost when the Department itself issues the order. *Contra Weaver v. DEP,* 2013 EHB 486, 491 (upholding Department order to search appellant's property which was reviewed in the context of a supersedeas hearing). The Appellant in this case has clearly demonstrated that in order to meet the requirements of Section 16(b) of the Dam Safety Act, the Department must obtain a search warrant or other suitable order from a neutral judicial officer, and an after-the-fact appeal to the Environmental Hearing Board does not meet that requirement. Therefore, paragraph 1 of the Department's Administrative Order directing the Appellant to "allow Department personnel to access the Site during daylight hours to inspect the earthen pier and wooden boat dock located on the eastern boundary of the Site and determine compliance with [the] Order" does not meet the requirements of Section 16(b) of the Dam Safety Act, and summary judgment is granted to the Appellant on this issue.

As to the Appellant's contention that the Department lacks jurisdiction over docks or other encroachments on Lake Pleasant, we find that the Appellant has not demonstrated that he is entitled to judgment as a matter of law on this issue. It is the Appellant's position that Lake Pleasant is not a navigable lake and, for that reason, does not fall under the jurisdiction of the

Department. In contrast, the Department argues that it has authority under the Dam Safety Act to regulate "any body of water," including a "lake." 32 P.S. §§ 693.3 and 693.4; 25 Pa. Code §§ 105.1 and 105.3(a)(4). As the Department points out in its response, the Board recently addressed the question of the Department's jurisdiction under the Dam Safety Act in *Corsnitz v. DEP*, EHB Docket No. 2016-030-M (Adjudication issued February 23, 2018). In *Corsnitz*, the appellants argued that the Department did not have jurisdiction over artificial wetlands as a matter of law. The Board disagreed, finding that the Department has jurisdiction over all bodies of water, including artificial wetlands. *Corsnitz, slip op*. at 27-28. The Appellant has provided no legal authority in support of his argument that the Department's authority over a body of water is determined by its navigability. Therefore, the Appellant has not demonstrated that he is entitled to summary judgment on the question of the Department's jurisdiction.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUSTIN C. GLANCE	:	
	:	
v.	:	**EHB Docket No. 2017-061-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 11th day of May, 2018 it is hereby ordered as follows:

1) The Appellant's Motion for Summary Judgment is granted in part and denied in part.

2) If the Department of Environmental Protection wishes to inspect the Appellant's property without permission from the Appellant, it must comply with the requirements of Section 16(b) of the Dam Safety and Encroachments Act, 32 P.S. § 693.16(b), by first obtaining a search warrant or other suitable order from a neutral judicial officer.

3) In all other respects, the Appellant's Motion for Summary Judgment is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: May 11, 2018

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

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