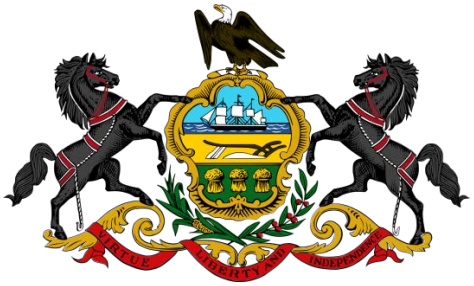
Environmental Hearing Board

Adjudications and Opinions



2019
VOLUME II

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

2019

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: 2019 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2019.

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

2019 EHB DECISIONS SUBJECT MATTER INDEX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHEILA VOGELSANG MCCARTHY	:	
	:	
v.	:	**EHB Docket No. 2019-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADELPHIA GATEWAY, LLC	:	**Issued: July 10, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to dismiss filed by the Department where, under the Air Pollution Control Act, an individual who comments on a plan approval application is entitled to receive actual notice of the Department's action on the application. In such a case, the 30-day appeal period for the commenter runs from the time she received actual notice, not from the date of publication of notice in the *Pennsylvania Bulletin*.

O P I N I O N

Sheila McCarthy, proceeding *pro se*, has appealed the Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval No. 09-0242 to Adelphia Gateway, LLC ("Adelphia") for the construction, operation, and maintenance of the Quakertown natural gas compressor station located in West Rockhill Township, Bucks County. In her notice of appeal, McCarthy says she has property less than 500 feet from the proposed compressor station.[1] McCarthy objects to the issuance of the plan approval on four grounds. In

[1] McCarthy has a Florida mailing address but also lists a property address in Quakertown, Pennsylvania.

short, she contends that the Department improperly relied on Adelphia's projected emissions data, that other pollution control technologies should have been implemented as Best Available Technology (BAT) irrespective of cost, that the Department failed to assess the noise that will be generated from the compressors, and that other, more appropriate alternative locations for the compressor station should have been evaluated.

The Department has moved to dismiss McCarthy's appeal on the grounds that it is untimely.[2] The Department asserts that notice of the issuance of Adelphia's plan approval was published in the *Pennsylvania Bulletin* on May 4, 2019, 49 Pa.B. 2301, and points out that McCarthy's notice of appeal was not received by the Board until June 5, 2019, more than 30 days after the *Bulletin* notice. The Department relies on our rule on timeliness of appeals, which generally provides that, if notice of an action is published in the *Pennsylvania Bulletin*, an appeal from a third party must be filed with the Board within 30 days of publication or the Board lacks jurisdiction over the appeal. 25 Pa. Code § 1021.52(a)(2)(i). However, the Department overlooks a distinct caveat that "jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, **unless a different time is provided by statute**…" 25 Pa. Code § 1021.52(a) (emphasis added). Our rule provides a default provision for timely appeals, but that default can be supplanted if a statute provides otherwise.

The Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, is such a statute containing its own notice and appeal provision that is applicable here. Under Section 10.2 of the Act, "[a]ny person aggrieved by an order or other administrative action of the department issued pursuant to this act or **any person who participated in the public comment process for a plan approval or permit** shall have the right, within **thirty (30) days from actual or constructive notice** of

[2] Adelphia has not weighed in on the motion.

the action to appeal the action to the hearing board…." 35 P.S. § 4010.2 (emphasis added). As we have stated before, "as a legal matter, it is true that where a statute requires specific actual notice to a party, notice in the *Pennsylvania Bulletin* would not be sufficient to begin the 30-day appeal period." *Arpino v. DEP*, 2009 EHB 579, 581 (citing *Clabbatz v. DEP*, 2005 EHB 46, 48); *Fontaine v. DEP*, 1996 EHB 1333, 1347 (same). *See also Stoystown Water Borough Auth. v. DEP*, 1997 EHB 1089 (denying motion to dismiss where appellant was entitled to but did not receive personal notice of a complete permit application under the coal mining regulations).

In her letter to the Board in response to the Department's motion,[3] McCarthy asserts that she submitted comments to both the Department and the Federal Energy Regulatory Commission regarding the Adelphia compressor station. Thus, under the Air Pollution Control Act, she was entitled to actual notice of the issuance of the plan approval. And indeed, the Department sent her actual notice. McCarthy attaches a Department letter to her appeal addressed to "Concerned Citizen" that advises her that the plan approval was issued and states, "As a commenter, DEP is notifying you that your concerns/comments were addressed and can be found in the Comment and Response document located at the website link above." Importantly though, in her notice of appeal McCarthy states that she did not receive the letter sent by regular mail until May 11, 2019. Accordingly, McCarthy had 30 days from that date, June 10, 2019, to file her appeal with the Board. The appeal is timely, and the Department's motion is denied.

We issue the Order that follows.

[3] Ms. McCarthy's letter response did not comply with our rules governing responses to dispositive motions in that it did not contain numbered paragraphs, 25 Pa. Code § 1021.91(e), and it did not contain a supporting memorandum of law or brief, 25 Pa. Code § 1021.94(c). Although we expect all parties, even those proceeding *pro se*, to comply with the Board's rules, McCarthy's procedural deviation here does not warrant dismissal of her appeal. *See Williams v. DEP*, 2018 EHB 856, 859 n.2.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHEILA VOGELSANG MCCARTHY	:	
	:	
v.	:	**EHB Docket No. 2019-049-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADELPHIA GATEWAY, LLC	:	

O R D E R

AND NOW, this 10th day of July, 2019, 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: July 10, 2019

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER STOCKI, JR., AND SCRAP ENTERPRISES, INC./SEI, INC.	:	
v.	:	**EHB Docket No. 2018-111-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 10, 2019**

OPINION AND ORDER ON
MOTION FOR SANCTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants in part a Department motion for sanctions for the appellants' failure to provide sufficient answers in response to written discovery requests. The Board shifts the burden of proceeding to the appellants, precludes the appellants from calling any expert witnesses, and limits the appellants to calling the fact witnesses identified in their discovery responses.

O P I N I O N

Walter Stocki, Jr., Scrap Enterprises, Inc., and SEI, Inc. (hereinafter "Stocki") filed this appeal from a $92,625 civil penalty assessment that the Department of Environmental Protection issued against them alleging that Stocki violated the Solid Waste Management Act, 35 P.S. § 6018.101, *et seq*. The Department served its first set of interrogatories, request for production of documents, and requests for admissions on February 15, 2019. Stocki did not respond. After failing to amicably obtain responses, the Department on April 2, 2019 filed a motion to compel responses, as well as deem admitted the unanswered requests for admissions. On April 8, 2019,

Stocki responded to the Department's motion, and filed an answer to the Department's requests for admissions with the Board, but did not otherwise answer the existing discovery requests. We issued an Order denying the Department's request to deem admitted the previously unanswered requests for admission, but otherwise granted the Department's motion to compel, ordering Stocki to provide answers to the Department's discovery requests by May 1, 2019. When Stocki had not responded to the discovery by June 10, 2019 in spite of the Board's order, the Department filed the motion for sanctions that is now before us. The Department asks us to dismiss Stocki's appeal or impose certain lesser sanctions as we see fit, and award it costs and attorney's fees.

Stocki answered the motion for sanctions on June 25. Its only excuse for not complying with the Board's Order was that the parties had agreed to a 90-day extension of the deadline to complete all discovery. It added that the Department had not been prejudiced by the late responses. This time, Stocki did serve discovery responses on the Department. It did not attach its responses to its answer to the motion, but in a letter dated June 27, 2019 filed with the Board, the Department did. The Department complains in its letter that the interrogatory responses, sent 55 days after the deadline imposed by the Board's order, are neither verified nor adequate in substance. The entirety of the document production response consisted of a few receipts and a scope of work and invoice from 2019 that the Department says is irrelevant to the action under appeal. The Department also points out that, while the overall discovery period was extended by 90 days, it did not alter the time for Stocki to respond to the Department's existing written discovery requests. The Department renewed its request for sanctions in its letter response.

The purpose of discovery is to allow both sides of an appeal to gather information, plan their trial strategy, better explore settlement, and discover strengths and weaknesses of their

respective positions. *McGinnis v. DEP*, 2010 EHB 489, 493; *Am. Iron Oxide Co. v. DEP*, 2005 EHB 779, 781. The Board's Rules of Practice and Procedure state 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 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161. Pursuant to Pa.R.C.P. No. 4019, sanctions are appropriate where a party fails to serve answers or objections to interrogatories or where a party fails to respond to a request for production of documents. Pa.R.C.P. No. 4019(a)(1)(i); Pa.R.C.P. No. 4019(a)(1)(vii). Sanctions are particularly appropriate where a person fails to respond to a Board Order regarding discovery. Pa.R.C.P. No. 4019(a)(1)(viii); *Schlafke v. DEP*, 2013 EHB 678; *DEP v. Klecha*, 2012 EHB 80.

Stocki's discovery responses are in fact not verified as required by Pa.R.C.P. No. 4006(a)(1). Indeed, it appears Stocki did not participate in the preparation of its counsel's responses at all. In addition, we must agree that the interrogatory answers are woefully deficient. Stocki has failed to answer them fully and completely as required by Pa.R.C.P. No. 4006(a)(2). First, the Department asked the standard expert interrogatories, but Stocki's only answer to the request to identify its experts was "Representative of S.C.E. Environmental." Stocki's terse answer to the request for a description of the subject matter of expert testimony was: "Conditions at the site; the nature and extent of remediation efforts." In response to the request to identify the facts and opinions supporting the expert's opinions, Stocki answered, "Representatives of S.C.E. Environmental will testify that the alleged soil contamination is not as pervasive as initially suggested after testing. The opinion is based upon their background, training, and experience in

soil testing and environmental clean-up." These responses do not comply with Pa.R.C.P. No. 4003.5 concerning the discovery of experts, and Stocki provided no expert report that would otherwise stand in for the answers to expert interrogatories. Aside from the substantive shortcomings, the answers are not signed by the expert. Pa.R.C.P. No. 4003.5(a)(1)(B). Stocki offers no excuse for its inadequate responses. In cases such as this, we have precluded the party from calling any experts at the hearing on the merits. *See, e.g., DEP v. Colombo*, 2012 EHB 370; *DEP v. Land Tech Eng'g, Inc.*, 2000 EHB 1133. Expert testimony is often at the heart of Board proceedings, and full disclosure of expert opinions is an essential prerequisite to orderly and fair proceedings. *CMV Sewage Co. v. DEP*, 2010 EHB 725, 729. *See also Gintoff v. DEP*, 2017 EHB 147, 153; *DEP v. EQT*, 2016 EHB 489, 493. Precluding expert testimony as a sanction is appropriate in this case. Pa.R.C.P. No. 4003.5(b). Stocki will not be permitted to call any expert witnesses at the hearing on the merits.

In contrast to the expert interrogatories, Stocki has identified the names (only) of its fact witnesses, (Interrogatory Response 9), albeit with no information about the subject of their proposed testimony as requested other than that they will testify about "[t]he location and extent of the alleged soil contamination within Appellants' real property," (*see* Interrogatory Response 1, 2, 10, 16, 17). In accordance with the Rules of Civil Procedure and Board precedent, Stocki will be limited to calling the witnesses identified. Pa.R.C.P. No. 4019(i); *Liddick v. DEP*, 2017 EHB 27, 29; *Cnty. Comm'rs, Somerset Cnty. v. DEP*, 1995 EHB 1015, 1052-53.

The responses are deficient in other respects as well. Stocki's answers to the Department's contention interrogatories are either nonexistent or too short to be of any use. In response to interrogatories requesting reports, notes, and other documents containing relevant information, Stocki answered there were none, and reserved the right to supplement, even though

some documents were included in the response to document requests, and given the objections set forth in Stocki's notice of appeal, there must be other relevant documents. We hereby caution that we will be receptive to excluding any surprise exhibits at the hearing that have not been previously identified if the Department objects as a discovery sanction. This is not a complete list of deficiencies. Suffice it to say that an overarching sanction is appropriate to cover the obvious prejudice to the Department and its ability to prepare to answer Stocki's objections as set forth in its notice of appeal.

Although the Board has dismissed an appeal as a sanction when an appellant has failed to respond to discovery and a Board Order granting a motion to compel, *Smith v. DEP*, 2010 EHB 547, we will not impose that sanction in this case, notwithstanding the Department's request that we do so. Instead, in addition to the limitations mentioned above regarding expert and fact witnesses, we will shift the burden of proceeding from the Department to Stocki. Stocki will be required to file the first prehearing memorandum and present the first case in chief at the hearing. *See Dirian v. DEP*, 2012 EHB 357. The Department will retain the burden of proof.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER STOCKI, JR., AND SCRAP ENTERPRISES, INC./SEI, INC.	:	
v.	:	**EHB Docket No. 2018-111-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of July, 2019, it is hereby ordered that the Department's motion for sanctions is granted, as follows:

1) Going forward the Appellant shall bear the burden of proceeding in this appeal;

2) The Appellant may not call any expert witnesses; and

3) The Appellant is limited to calling the fact witnesses named in its interrogatory responses.

The Department's request for fees and costs is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: July 10, 2019

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

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(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2018-057-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	**Issued: July 19, 2019**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for partial summary judgment due to genuine issues of material fact and inadequately developed legal arguments.

O P I N I O N

Environmental Integrity Project and Clean Air Council (hereinafter collectively the "Council") are challenging the Department of Environmental Protection's issuance of air emission Plan Approval No. 23-0119H ("Plan Approval H") to Sunoco Partners Marketing & Terminals, L.P. ("Sunoco"). Plan Approval H authorizes Sunoco to install the West Warm Flare at Sunoco's Marcus Hook Industrial Complex in Marcus Hook, Delaware County, Pennsylvania. The West Warm Flare will replace an existing, permitted flare known as the Ethylene Complex Flare. For deeper background on recent developments at the Marcus Hook facility the reader may refer to our recent Adjudication in *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L (Adjudication, Jan. 9, 2019), *appeal pending*, No. 145 C.D. 2019 (Pa. Cmwlth.). Sunoco will use the West Warm Flare to control and destroy vapor streams that are associated with

operations at its facility and an adjacent facility (Braskem). In order for the West Warm Flare to function, it will, among other things, use steam from the previously permitted auxiliary boilers at the facility.

In connection with the plan approval that is the subject of this appeal, Sunoco needed to surrender volatile organic compound (VOC) emission reduction credits (ERCs) because Plan Approval H exceeded the New Source Review (NSR) threshold for VOCs. Sunoco surrendered 106.83 tons of VOC ERCs (82.18 tons of VOCs attributable to Plan Approval H times a multiplier of 1.3). 106 tons of the ERCs that Sunoco obtained were generated as a result of the shutdown of Maryland-based Crown Cork & Seal USA, Inc. in 2015. Maryland has a reciprocity arrangement with Pennsylvania for the trading and use of ERCs. Both Pennsylvania and Maryland approved the transfer of the ERCs. The Department approved the use of the ERCs for Project H. The remaining .83 tons of ERCs came from VOC ERCs generated in 1994 by over-control at the former Marcus Hook refinery and do not appear to be at issue at this time.

The Council's appeal of Plan Approval H includes eight pages of objections. Currently before us is the Council's motion for partial summary judgment. The Council's motion is limited to some issues regarding the ERCs. It argues that the Department issued the plan approval in spite of the fact that Sunoco acquired nearly all of its required credits from Maryland without having first demonstrated that local credits were unavailable. It argues that Sunoco failed to demonstrate that the use of the ERCs would achieve "ambient impact equivalence." It argues that Sunoco failed to show that the ERCs that were used include the same conditions, limitations, and characteristics the emissions would have had if emitted by the generating facility. Finally, it argues that the Department wrongfully failed to require VOC ERCs reflecting

an increase in emissions from the auxiliary boilers based upon the West Warm Flare's demand for steam.

The Council does not attempt in its summary judgment materials to make an affirmative showing that the use of the ERCs was improper. Instead, it complains that Sunoco *failed to demonstrate* and the Department *failed to determine* that the criteria for the use of the ERCs had been satisfied. For example, the Council argues that Sunoco improperly failed to demonstrate that ERCs are not available in the facility's nonattainment area. It does not argue that appropriate credits are available, and indeed, it specifically declines to do so. (Brief at 7 n.1.) Similarly, it makes no effort to show that the ERCs will fail to achieve ambient impact equivalence; it simply argues that the Department erred by failing to make a determination one way or the other. The Council's approach makes it unlikely from the start that its issues can be resolved on summary judgment. The absence of evidence does not necessarily equate to evidence of absence. Proving a negative while theoretically possible can be quite difficult. Sunoco and the Department can simply respond that they did perform the required analysis, which is exactly what they have done here in part, which leaves us with a genuine issue of disputed fact.

Further, whether the appropriate regulatory criteria have in fact been met is more important than whether the analysis was performed. It is not always necessary or appropriate to remand a permit for further analysis if the Board is able to conclude based upon its own record that the correct result was achieved. *See, e.g., Bennington Investment Group, LLC v. DEP*, EHB Docket No. 2015-190-M (Adjudication, July 8, 2019). Still further, in cases involving regulatory interpretation such as this one, we need to know based upon a solid record what the Department's interpretation is and the basis for that interpretation before we can consider

deferring to it. We have no such record here. Indeed, the meaning of some of the regulatory requirements at issue is far from clear and inadequately explained by any of the parties. In some instances the Council presents highly technical arguments without any reference to explanatory, supportive expert opinion. Finally, not all of the Council's arguments are easily severable from the other issues in the case, which renders partial summary judgment impractical.

The Board's rules provide for summary judgment if the record indicates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Nat'l Fuel Gas Midstream Corp. v. DEP*, 2014 EHB 914, 915. Summary judgment will only be granted in the clearest of cases. *Clean Air Council v. DEP*, 2013 EHB 404, 406 (citing *Macyda v. DEP*, 2011 EHB 526). All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Clean Air Council*, 2013 EHB 404, 406 (citing *Rozum v. DEP*, 2008 EHB 731). This appeal does not qualify as "the clearest of cases."

Although we are denying the Council's motion, some discussion of the issues may be helpful in directing future proceedings. The first issue raised is the question of waiver. Sunoco and the Department to various degrees contend that the Council failed to include the issues raised in its motion as objections in its notice of appeal, and therefore, they argue that the Council is precluded from pursuing them further. We disagree. It is true that allegations not raised in a notice of appeal are generally waived. *Clean Air Council v. DEP*, 2018 EHB 245, 250; *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. *Clean Air Council*, 2018 EHB 245, 250; *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. Dep't of Envtl. Res.*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991). "[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.

All of the issues in the Council's motion for partial summary judgment relate to the ERCs, including its argument that the Department required too few VOC ERCs by ignoring the increased emissions from the auxiliary boilers. The Council objected in its notice of appeal that "[t]he Department improperly approved of Sunoco's selection of emission reduction credits ('ERCs' or 'credits'), in violation of the Clean Air Act and Pennsylvania Code." (NOA ¶ C.14.) All of the issues in the Council's motion are within the genre of this objection. The Council's inclusion in other paragraphs in its notice of appeal of examples of the Department's alleged errors regarding ERCs does not limit the generality of this objection. In addition, the Council objected in its notice of appeal that "[t]he Department improperly accepted and adopted Sunoco's miscalculation of the West Warm Flare's potential to emit…." (NOA ¶ A.1.) It also objected that, "[b]y accepting Sunoco's improper potential to emit calculations, the Department underestimated the West Warm Flare's potential to emit." (NOA ¶ A.6.) Again, the fact that the Council goes on to elaborate in subsequent paragraphs does not limit the generality of its basic issue for purposes of the waiver claim. We are told that extensive discovery was taken on these issues, and neither Sunoco nor the Department has claimed any prejudice or surprise. Accordingly, there has been no waiver and the Council is entitled to pursue these issues going forward.

Turning to the merits, the Council has raised an interesting issue of regulatory interpretation, but we do not have enough to go on to resolve it at this juncture. At the risk of oversimplification, the Council's argument is that Sunoco should have obtained ERCs sourced from Pennsylvania, not Maryland.[1] The regulation at 25 Pa. Code § 127.208(7) requires that a facility needing ERCs must demonstrate that sufficient offsetting ERCs have been acquired *from the nonattainment area of the proposed facility*. 25 Pa. Code § 127.208(8) then provides that a facility may only use ERCs from other nonattainment areas "[i]f the facility…demonstrates that ERCs are not available in the nonattainment area where the facility is located…." Because credits were apparently available in Pennsylvania, the Council says Sunoco failed to demonstrate and the Department failed to determine that the use of Maryland credits was permitted.

The Department in response relies on the following subsection, 25 Pa. Code § 127.208(9). That subsection provides:

> For the purpose of emissions offset transfers at VOC or NOx facilities, the areas included within an ozone transport region established under Section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which are designated in 40 CFR 81.339 (relating to Pennsylvania) as attainment, nonattainment or unclassifiable areas for ozone, shall be treated as a single nonattainment area.

The Department says Pennsylvania and Maryland are both part of the statutorily created ozone transport region (OTR). Because areas included within the OTR are all part of a single nonattainment area, Subsection 127.208(7) is satisfied in the Department's view.

The Council replies that the Department is improperly ignoring the part of the regulation that specifically refers to OTR areas "established under Section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which are designated in 40 CFR 81.339 (relating to Pennsylvania)." Proving the Council's point, the Department repeatedly quotes the regulation in its brief with a deletion

[1] Query whether the Council would have been satisfied if the ERCs had been generated in Erie, 400 miles away, instead of Baltimore, 60 miles away.

indicated by an ellipsis of that phrase. The reason why this may be significant is that all of the areas designated in 40 CFR 81.339 are in Pennsylvania. Taken together, in the Council's view, these regulations require that a facility within the ozone transport region in Pennsylvania must generally acquire VOC credits from an area among those *within Pennsylvania*. The facility may only obtain VOC credits from a source outside Pennsylvania if it demonstrates that credits are not available within the same *Pennsylvania* nonattainment area. In one of the rare cases where the Department acknowledges the regulatory parenthetical in its brief, it says the phrase is provided simply as a matter of convenience to the reader on where Pennsylvania designations may be found, but the Council cites 1 Pa.C.S. § 1922(2), which says, when it comes to statutory (or in this case regulatory) interpretation, all phrasing should be assumed to have meaning. Although not discussed by the parties, we note that the regulatory definition of "nonattainment area" also cites to 40 CFR 81.339: "[a]n area designated by the EPA under Section 107 of the Clean Air Act (42 U.S.C.A. § 7407) in 40 CFR 81.339 (relating to Pennsylvania)." 25 Pa. Code § 121.1. We look forward to the parties' further elucidation of this issue.

Sunoco does not join in the Department's argument. Instead, it makes the alternative argument that 25 Pa. Code § 127.208(5) trumps the other parts of Section 127.208. Subsection (5) reads:

> ERCs may be obtained from or traded in another state, which has reciprocity with the Commonwealth for the trading and use of ERCs, only upon the approval of both the Commonwealth and the other state through SIP [State Implementation Plan] approved rules and procedures, including an EPA approved SIP revision. ERCs generated in another state may not be traded into or used at a facility within this Commonwealth unless the ERC generating facility's ERCs are enforceable by the Department.

The first problem with this argument is that there is no evidence the Department used it as a basis for approving the use of the Maryland ERCs. Indeed, the Department does not adopt the

argument in its response to the Council's motion. In addition, we have not been referred to "an EPA approved SIP revision," and we have no idea what it means for the ERC generating facility's ERCs to be "enforceable by the Department." The Council takes issue with Sunoco's claim that Subsection (5) is inconsistent with the other parts of Section 127.208. Once again, this issue will require further explanation at the hearing.

Somewhat more generally than the interstate issue, the Council next argues that Sunoco failed to demonstrate compliance with Section 127.208(3). That Subsection states that, to use and transfer ERCs in Pennsylvania, facilities need to

> demonstrate to the satisfaction of the Department that the ERCs proposed for use as offsets will provide, at a minimum, ambient impact equivalence to the extent equivalence can be determined and that the use of the ERCs will not interfere with the overall control strategy of the SIP.

The Department refers to this as the ambient impact equivalency test. The record on whether the Department applied the ambient impact equivalency test is mixed. The Council says Sunoco and the Department simply ignored this important test. It says there is no indication of application of the test anywhere in the permit file. It points to deposition testimony of George Eckert, the Department's reviewing engineer for this project, that specifically concedes he did not consider Section 127.208(3). It does not point to any testimony from its own witnesses to show that the ERCs fail the test, which doubtless explains why it repeatedly limits itself to arguing that the Department failed to make the required determination.

Sunoco attempts to explain away or perhaps excuse Mr. Eckert's testimony. It says the Department is not bound by Mr. Eckert's testimony. It says the Department is not required to make a *written* determination, and it points out that the Department's answers to interrogatories verified that the Department in fact applied the test, at least as of the time it answered the interrogatories. The Department notably does not mention Mr. Eckert's testimony on this point

in its response to the motion for partial summary judgment. Instead, it relies on the affidavit of a central office employee that does not so much say that the Department performed the required analysis before issuing the plan approval, as the ERC transfer itself in fact satisfies the test. The Council complains in its reply that this affidavit comes out of the blue. It complains more generally that the Department is repeatedly justifying decisions after the fact that should have been made *before* the plan approval was issued. This issue is clearly not ready for resolution on summary judgment.

Along similar lines, the Council argues that the Department failed to apply 25 Pa. Code § 127.208(4), which requires that

> ERCs shall use the same conditions, limitations and characteristics, including seasonal and other temporal variations in emission rate and quality, as well as the maximum allowable emission rates the emissions would have had if emitted by the generator, unless equivalent ambient impact is assured through other means.

Again, the record is mixed. Mr. Eckert testified at his deposition that he only considered Subsections (2) and (7) of Section 127.208, which obviously leaves out Subsection (4). The Council makes the same arguments about the absence of anything in the record to show the Department considered the issue.

The Department does not address Section 127.208(4) separately. Sunoco says the Council has no evidence to prove that the ERCs do *not* include the same conditions, limitations, and characteristics, including seasonal and other temporal variations in emission rate and quality, as well as the maximum allowable emission rates the emissions would have had if emitted by the generator, whatever that means. It says the Department is not required to make a written finding. It says that the Department verified in its answer to an interrogatory that the ERCs satisfy Section 127.208(4). It adds that, even if the Council had somehow shown that the ERCs at issue do not "include the same conditions, limitations and characteristics…as well as the maximum

allowable emission rates the emissions would have had if emitted by the generator," it has failed to show that "equivalent ambient impact" is not "assured through other means." 25 Pa. Code § 127.208(4).

Our biggest problem with this argument is that no party provides any helpful guidance on the meaning of Subsection (4). The regulation is hardly clear on its face. The parties rely on EPA documents of dubious admissibility. The Council presents complicated technical arguments regarding $PM_{2.5}$ without any reference to supporting explanatory expert opinion. Once again, the record is not sufficiently developed at this point for us to understand with any degree of confidence what the Department did and whether the regulatory requirement has been satisfied. Summary judgment is not appropriate.

The Council finally argues that the Department issued the plan approval without requiring sufficient VOC ERCs. It says the Department and Sunoco failed to account for the increased emissions from the auxiliary boilers due to the West Warm Flare's demand for steam.

There does not appear to be any dispute that the new flare will result in increased emissions from the previously permitted auxiliary boilers. Sunoco and the Department strenuously argue PTE calculations must be done on a source by source basis, and the flare and the boilers are different sources. However, the Department and Sunoco may be missing the point of the Council's objection as we think we understand it. The plan approval at Part VII #002 states that there will be 82.18 tons of VOCs attributable to *the project*. The Department in its brief says 82.18 tons of VOCs are attributable to *Plan Approval H*. If ERCs must account for emissions from the project as a whole, it is not clear why admittedly increased emissions from the boilers admittedly associated with the project would not also be included. Stated another way, if the project covered by Plan Approval H involves multiple sources, why was only one of

those sources included in the ERC calculation? The Council cites deposition testimony of Mr. Eckert and Colin McGroaty, Sunoco's permitting consultant, that seems to support the Council's position that the boiler emission increase should have been included in the ERC calculation.

Sunoco goes on to argue that the flare was treated as a new source even though it really is not a new source but instead is replacing another flare. It says the boilers are not a new source and the increased emissions were accounted for in advance by Plan Approval B. The Council points out the inconsistency here. If the old flare does not cancel out the new flare, it is not clear why the Department can rely on the boilers' emissions related to the old flare to cancel out the boiler's emissions from the new flare.

Once again, we find ourselves unable to resolve this issue in the context of a motion for partial summary judgment. The record is not free from doubt. In addition, this issue seems to overlap with other issues in the notice of appeal that the Council has not raised in its motion for partial summary judgment, which makes it inappropriate to deal with separately.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2018-057-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	

O R D E R

AND NOW, this 19th day of July, 2019, it is hereby ordered that the Appellants' motion for partial summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 19, 2019

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

For the Commonwealth of PA, DEP:
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For Permittee:
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Thomas R. DeCesar, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2017-080-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: July 19, 2019**

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

A motion for partial summary judgment filed by the Appellant is denied. An error in the General Information Form submitted with the application has been corrected and there is no continuing relevance of that error to the permits under appeal.

O P I N I O N

Introduction

Herbruck's Poultry Ranch, Inc. (Permittee) proposes to operate a concentrated animal feeding operation (CAFO) in Mercersburg, Franklin County, Pennsylvania, consisting of eight layer barns designed to house 2.4 million chickens. The operation will also include a manure storage building. In connection with its proposed operation, Permittee applied for and obtained from the Department of Environmental Protection (Department) a Water Quality Management Permit (permit) and authorization for coverage under the General NPDES Permit for Concentrated Animal Feeding Operations PAG-12 (PAG-12). The permit and PAG-12 coverage have been appealed by Montgomery Township Friends of Family Farms (Appellant).

Currently before the Board is a Motion for Partial Summary Judgment filed by the Appellant. The Appellant's motion centers on what it alleges to be incorrect information provided by the Permittee during the permit application process. The Department and Permittee have also filed motions to dismiss paragraphs 16-18 of the notice of appeal dealing with air quality issues, and those motions are addressed in a separate opinion.

Background[1]

In connection with its proposed operation, the Permittee applied for a Water Quality Management Permit and submitted a Notice of Intent for coverage under NPDES General Permit PAG-12. Included with the application materials was a General Information Form. According to the Department, the General Information Form is used as a means of coordinating its internal review when several permits may be required for a single project. Question 13 of the General Information Form asks, "Will the project involve operations (excluding during the construction period) that produce air emissions (i.e., NOX, VOC, etc.)? If 'Yes,' identify each type of emissions followed by the amount of that emission." In response to Question 13, the Permittee answered "No." Because the "no" box was checked, the Permittee did not submit any estimate of air emissions. The Department acknowledges that this was an error by the Permittee and that the operation will produce air emissions. (See Department's Brief in Support of Motion to Dismiss, filed June 6, 2018.) Nonetheless, the Department contends that, despite the Permittee's error and failure to provide air emission estimates, the matter was referred to the Department's air program for review.

In an Opinion and Order issued on August 20, 2018, the Board considered dispositive motions filed by the Department and the Appellant.[2] The motions centered on the air issues

[1] Much of the background is taken from the Board's earlier opinion at *Montgomery Township Friends of Family Farms v. DEP and Herbruck Poultry Ranch, Inc*., 2018 EHB 749.

raised in the Appellant's appeal and the lack of air emission estimates provided by the Permittee in the General Information Form. Among other things, the Board concluded that because the Permittee had never corrected the error in the General Information Form and failed to provide air emission information to the Department, there were genuine issues of material fact that prevented the granting of either motion. *Montgomery Township Friends of Family Farms v. DEP and Herbruck Poultry Ranch, Inc*., 2018 EHB 749.

Following the issuance of the Board's Opinion, the Permittee submitted the air emission information required by the General Information Form. According to the Department, it is in the process of evaluating the information and has yet to make a decision related to air permitting. The Appellant's Motion for Partial Summary Judgment centers on the question of whether the Permittee's failure to submit the air quality information at the time of the PAG-12 review prevented the Department from issuing the PAG-12 coverage.

Discussion

Summary judgment may be granted if the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(m). The Board views dispositive motions in the light most favorable to the nonmoving party. *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Lawson v. DEP*, 2018 EHB 513. We may grant a dispositive motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The Appellant directs us to Section 92a.25 of the Department's NPDES regulations which states in relevant part as follows:

> The Department will not process an application or NOI [Notice of Intent] that is incomplete or otherwise deficient. An application for

[2] The Permittee also filed a memorandum in support of the Department's motion.

> an NPDES individual permit is complete when the Department receives an application form and supplemental information completed in accordance with this chapter and the instructions with the application.

25 Pa. Code § 92a.25. Based on the language of Section 92a.25, the Appellant contends that the Department abused its discretion when it processed and authorized the Permittee's Notice of Intent for coverage under the PAG-12 General Permit despite the lack of air emission information submitted with the application.

The Appellant acknowledges that the Permittee has now submitted air quality information to the Department. However, the Appellant disputes that the Permittee's late submission corrects what it considers to be the Department's error in authorizing coverage under the PAG-12 General Permit in the first place. The Appellant also contends that the information provided by the Permittee contains technical deficiencies, based on email exchanges between the Department and Permittee.

We agree with the Appellant that the air emission information should have been provided to the Department with the General Information Form. It was not; it was provided to the Department after the issuance of the Water Quality Management Permit and authorization of PAG-12 coverage. However, although this was an error, we do not see the continuing relevance of this error in the appeal of the Water Quality Management Permit and PAG-12 coverage. As the Board held in *O'Reilly v. DEP*, 2001 EHB 19, 51, "There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them." As the Department explains in its brief, the air emission information has been turned over to the Department's air program to determine whether an air permit is required. The same process would have been followed had the information been provided with the General Information Form. Indeed, the Department contends that when the

application and General Information Form were submitted to the Department, its Clean Water Program coordinated with its Air Quality Program "as it would have if the air emission box on the General Information Form had been correctly checked 'Yes.'" (Department Brief in Support of Motion to Dismiss, p. 2-3) Whether the information submitted by the Permittee is inaccurate or deficient is a question of material fact.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2017-080-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 19th day of July 2019, it is ordered that the Appellant's Motion for Partial Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: July 19, 2019

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

For the Commonwealth of PA, DEP:
Curtis Sullivan, Esquire
(via electronic filing system)

For Appellant:
William J. Cluck, Esquire
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For Permittee:
Jacob H. Kiessling, Esquire
Randall G. Hurst, Esquire
Paul J. Bruder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2017-080-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: July 19, 2019**

OPINION AND ORDER ON MOTIONS TO DISMISS
FILED BY THE DEPARTMENT AND PERMITTEE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Where it is not clear that the air issues raised in Paragraphs 16-18 are outside the scope of this appeal, the Department's and Permittee's motions to dismiss are denied.

O P I N I O N

Introduction

Herbruck's Poultry Ranch, Inc. (Permittee) proposes to operate a concentrated animal feeding operation (CAFO) in Mercersburg, Franklin County, Pennsylvania, consisting of eight layer barns designed to house 2.4 million chickens. The operation will also include a manure storage building. In connection with its proposed operation, Permittee applied for and obtained from the Department of Environmental Protection (Department) a Water Quality Management Permit (permit) and authorization for coverage under the General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) PAG-12 (PAG-12 General Permit or PAG-12). The permit and PAG-12 coverage were appealed by Montgomery Township Friends of Family Farms (Appellant).

Currently before the Board are motions filed by the Department and Permittee seeking to dismiss paragraphs 16, 17 and 18 of the notice of appeal dealing with air quality issues. They assert that those issues are not ripe for adjudication since the Permittee has not applied for nor has the Department made a decision on an air permit. The Department previously sought to dismiss those paragraphs of the notice of appeal in a motion filed on June 6, 2018. The Board denied the motion and found that issues of material fact existed concerning inaccurate and/or incomplete information set forth in the General Information Form submitted by the Permittee as part of its application. *Montgomery Township Friends of Family Farms v. DEP and Herbruck Poultry Ranch, Inc*., 2018 EHB 749. Following the Board's Opinion, the Permittee submitted new information to the Department which it contends resolves the questions of material fact raised by the Board in its prior decision. The Appellant has also filed a motion for partial summary judgment which is addressed in a separate opinion.

Discussion

The Board views dispositive motions in the light most favorable to the nonmoving party. *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Lawson v. DEP*, 2018 EHB 513. We may grant a dispositive motion only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Paragraphs 16-18 of the Appellant's notice of appeal read as follows:

> 16. Herbruck in its General Information Form claimed there are no air emissions.
>
> 17. To the contrary, the Herbruck CAFO will likely generate significant emissions of particulate matter and volatile organic compounds.
>
> 18. These air emissions require Herbruck to obtain an air pollution plan approval and Title V permit under the Clean Air Act and Air Pollution Control Act.

According to the Department and Permittee, the error in the General Information Form has been corrected and the requisite air emission information has been submitted to the Department. They argue that the issues of material fact that prevented the Board from granting the Department's earlier motion have been resolved. They further argue that the air quality issues raised in Paragraphs 16-18 are outside the scope of this appeal since the Department has not taken action on an air permit. While we agree that the Permittee has submitted air information to the Department, it is not clear that dismissal of Paragraphs 16-18 is warranted at this time. According to the Department, it is still evaluating the air emission estimates and has not decided whether the Permittee is required to obtain an air pollution plan approval and Title V permit. (Department Brief in Support of Motion to Dismiss, p. 3.) As the Appellant points out, we are now nearly two years from when the authorization for PAG-12 coverage was approved, yet there has been no decision by the Department on the air permitting question. Although both the Department and Permittee argue that the air quality issues raised by the Appellant are not appealable until the Department makes a final decision on the air permitting question, neither addresses the question of what happens if the Department never makes a decision.

The Board has recognized that "the Department, when reviewing one permit application, should not ignore the effect the project may have on media or conditions typically permitted under other programs." *See Hudson v. DEP*, 2015 EHB 719, 740, and *Tinicum Township v. DEP*, 2002 EHB 822, 834-35 (both citing *Oley Township v. DEP*, 1996 EHB 1098). As stated in *Hudson*, "a holistic approach is actually mandated under case law regarding the Department's statutory and regulatory obligations." 2015 EHB at 740. This is further supported by the Department's NPDES regulations, under which the PAG-12 was issued. Section 92a.36 requires the following:

> The Department will not issue an NPDES permit unless the application is complete and the documentation submitted meets the requirements of this chapter. The applicant, through the application and its supporting documentation, shall demonstrate that the application is consistent with:
>
> *****
>
> (2) Other applicable environmental laws and regulations administered by the Commonwealth, Federal environmental statutes and regulations. . . .

25 Pa. Code § 92a.36.[1]

As we noted earlier, a dispositive motion may only be granted where there is no genuine issue of material fact and the law is clearly on the side of the moving party. Based on the relevant law and the record before us, we are not persuaded at this time that the issues raised in Paragraphs 16-18 are outside the scope of this appeal.

Following the issuance of this opinion, the Board will contact the parties regarding the scheduling of a status conference in this case.

We enter the following order.

[1] The Department argues that Section 92a.36 does not apply to General Permits, only to individual permits, because the language refers to the "issuing" of a permit, rather than the "authorization of coverage" under a permit. However, we find no basis for making this distinction. Moreover, Section 92a.54 contains a similar requirement, and reads in relevant part:

> The Department will deny coverage under a *general permit* when one or more of the following conditions exist: . . . (8) The Department determines that the action is necessary for any other reason to ensure compliance with the Federal Act, the State Act or this title.

25 Pa. Code § 92a.54(8) (emphasis added).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2017-080-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 19th day of July 2019, it is ordered that the Department's Motion to Dismiss Paragraphs 16, 17 and 18 of the Notice of Appeal and the Permittee's Motion to Dismiss Paragraphs 16, 17 and 18 of the Notice of Appeal are **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: July 19, 2019

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

For the Commonwealth of PA, DEP:
Curtis Sullivan, Esquire
(via electronic filing system)

For Appellant:
William J. Cluck, Esquire
(via electronic filing system)

For Permittee:
Jacob H. Kiessling, Esquire
Randall G. Hurst, Esquire
Paul J. Bruder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THREE RIVERS WATERKEEPER AND SIERRA CLUB	:	
	:	
v.	:	
	:	**EHB Docket No. 2018-088-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NRG POWER MIDWEST, LP	:	**Issued: July 24, 2019**

OPINION AND ORDER ON
MOTION TO STRIKE

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Board grants a Motion to Strike because an exhibit was not timely filed which resulted in prejudice to the opposing parties.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion to Strike the Department's Amended Exhibit D (Motion to Strike). Appellants contend they are prejudiced by the fact that this document was filed ten days late. Amended Exhibit D is the Affidavit of Sean Furjanic. Mr. Furjanic is employed by the Pennsylvania Department of Environmental Protection. Amended Exhibit D is filed in support of the Department's Motion for Summary Judgment. Not surprisingly, the Motion to Strike is opposed by the Department and the Permittee.

Background

Some brief background information is in order. On September 4, 2018, Appellants Three Rivers Waterkeeper and the Sierra Club filed their Notice of Appeal to an NPDES Permit issued

to the Permittee NRG Power Midwest LP by the Pennsylvania Department of Environmental Protection (Department). Three Rivers Waterkeeper and the Sierra Club appealed the permit which authorizes discharges from the Cheswick Power Generation Station into the Allegheny River and its tributary, Little Deer Creek. Appellants filed their First Amended Notice of Appeal on September 24, 2018.

On September 5, 2018, the Board entered Pre-Hearing Order No. 1, which set numerous deadlines in the case. The deadline for filing dispositive motions was set for April 3, 2019. On October 31, 2018 the parties filed a Joint Proposed Case Management Order which the Board adopted on November 1, 2018. On February 5, 2019 the parties requested an extension of the dispositive motion deadline until May 17, 2019. The next day, the Board entered an Order granting the extension.

On May 16, 2019, one day before the deadline for filing dispositive motions, the Department moved to extend the deadline for itself by eleven days to May 28, 2019. Later that same day, Counsel for the Appellants and Permittee joined in the Motion for Extension to File Motions for Summary Judgment as long as it also applied to them. On that same day, May 16, 2019, the Board granted the Motions.

On May 28, 2019 both the Department and the Appellants filed what the Permittee and Appellants later characterized as "dueling Motions for Partial Summary Judgment." Attached to the Department's Motion for Partial Summary as Exhibit D was a letter from Department Counsel. In this letter, she advised the Board that "the Department is waiting for an executed copy of the Affidavit of Sean Furjanic, Environmental Program Manager for the Department's Bureau of Clean Water to be delivered by the United States Postal Service. As soon as the Department receives the signed Affidavit, it will supplement this filing."

No party filed any objections at the time. Meanwhile, on May 31, 2019 the Department filed a Motion for Stay asking the Board to stay the expert discovery in the case pending the Board's rulings on the Motions for Partial Summary Judgment. On June 3, 2019, the Appellants filed a Response in which they opposed the Stay pointing out that the parties had specifically asked the Board to schedule the expert discovery after the filing of dispositive motions. The Board denied the Department's Motion for Stay on June 6, 2019.

In addition, on June 5, 2019 Counsel for all the Parties requested a further extension of the Summary Judgment deadlines specifically allowing the Permittee "to file all documents that it intends to file pursuant to Rule 94a(f) of the Board's Rules of Practice and Procedure" by June 19, 2019, and extending the deadline to July 19, 2019, for the parties to file Responses to the "Motions for Summary Judgment filed on May 28, 2019 and NRG's Rule 94a(f) filing." In addition, all Replies to the Responses would be due on August 2, 2019. On June 6, 2019 the Board entered an Order accordingly.

Ten days after filing its Motion for Partial Summary Judgment, on June 7, 2019 the Department filed Amended Exhibit D to its Motion for Partial Summary Judgment. Amended Exhibit D is the executed affidavit of Mr. Furjanic, dated May 30, 2019. Three days later, on June 10, 2019, Three Rivers Waterkeeper and Sierra Club filed their Motion to Strike the Department's Amended Exhibit D with supporting exhibits and a Memorandum of Law. The very next day, June 11, 2019, the Department filed its Answer to the Motion to Strike, a supporting Exhibit, and a Memorandum of Law. On June 19, 2019, the Permittee NRG Power filed a Response in Support of the Department's Opposition to the Appellants' Motion to Strike.

On July 16, 2019 the Board entered an Order extending the deadline to July 30, 2019 for filing Responses to the Partial Summary Judgment Motions filed on May 28, 2019 and June 19,

2019. In addition, the Board extended the deadline to August 22, 2019 for filing Replies to the Responses and extended the period for expert discovery by one week to September 13, 2019.

Motion to Strike

Appellants are asking the Board to strike Mr. Furjanic's affidavit because it was not filed at the same time as the Motion for Partial Summary Judgment in violation of both the Board's Rules and our Order of May 16, 2019. The Appellants claim they are prejudiced by the late filing because the affidavit contained information allegedly not revealed in discovery and they do not have the full time to review these facts as they would if the affidavit had been filed with the Motion for Partial Summary Judgment.

The Department argues that the Motion to Strike should be denied. The Department contends that the Appellants have a full six weeks since the filing of the Affidavit to prepare their Response to the Department's Motion for Summary Judgment which in its view is more than enough time. The Department concludes that there is no prejudice to the Appellants because of the tardy filing of the Affidavit.

Likewise, NRG points out that the Appellants suffered no prejudice by the late filing. NRG argues that if the Board were to grant the Motion to Strike we would be levying "a harsh penalty that would favor procedure over substance." NRG's Response, page 3.

DISCUSSION

The Department violated our Rules and Order when it did not attach the executed Affidavit in support of the Motion for Partial Summary Judgment. However, it amplified the error and compounded the problem by not seeking an Order of the Board granting an extension to file the Affidavit on a date certain. Simply sending a letter to the Board advising that it had not received the affidavit in the mail and indicating that it would be filed when received is not

sufficient. It is the responsibility of Counsel to adhere to our deadlines and make sure that any required documents are filed in a timely fashion.

In this electronic age, Counsel did not need to rely solely on the United States mail to obtain a copy of the affidavit from Harrisburg. We do not understand why the executed affidavit could not have been scanned, emailed to Counsel, and then electronically filed. After all, electronic filing is mandatory so the days of actually filing an embossed original affidavit are no more.

As former Chief Judge Krancer succinctly stated it is our duty to enforce our deadlines. "As for litigation obligations, these have to be followed in order to maintain the integrity of and respect for our legal process." *Petchulis v. DEP*, 2001 EHB 673, 678. Indeed, Judge Labuskes earlier this month imposed sanctions for the failure of a party to timely respond to a Board Order and provide sufficient answers to discovery requests. *Stocki v. DEP*, EHB Docket No. 2018-111-L (Opinion and Order on Motion for Sanctions issued July 10, 2019) s*lip op*. at 3-5.

The Board generally and this Judge in particular have been extremely liberal in granting extensions and adjusting deadlines at the request of counsel. As we have stated before and emphasize again, it is critical to the integrity of the litigation process that the deadlines we set, often at the request and suggestion of Counsel themselves (which is the case here), are viewed as both meaningful and important. A period of ten days between the filing of the "placeholder" Exhibit D and the Amended Exhibit D is not acceptable absent an Order authorizing such delay and resulted in prejudice to the Appellants. Parties and their counsel have a right to rely on our Orders and the deadlines they impose. *McGinnis v. DEP*, 2010 EHB 489, 493; *Am. Iron Oxide Co. v. DEP*, 2005 EHB 779, 781.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THREE RIVERS WATERKEEPER AND SIERRA CLUB	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NRG POWER MIDWEST, LP	:	**EHB Docket No. 2018-088-R**

O R D E R

AND NOW, this **24th** day of **July, 2019**, following review of the Appellants' Motion to Strike the Department's Amended Exhibit D (Motion to Strike), the Department's Answer, and the Permittee's Response in Support of the Department's Answer, it is ordered as follows:

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

2) The Department's Amended Exhibit D will not be considered by the Board in ruling on the Department's Motion for Partial Summary Judgment.

ENVIRONMENTAL HEARING BOARD

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

DATED: July 24, 2019

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
v.	:	**EHB Docket No. 2018-065-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 29, 2019**

OPINION AND ORDER ON
MOTION FOR SANCTIONS

By Michelle A. Coleman, Judge

Synopsis

The Board grants in part a motion for sanctions filed by the Department arising from the Appellants' failure to fully comply with a prior Board Order compelling discovery.

O P I N I O N

Before the Board is a motion for sanctions filed by the Department of Environmental Protection (the "Department") seeking sanctions against Appellants Hickory Hill Group, LLC and John Seitz (collectively "Hickory Hill") relating to discovery violations that were previously the subject of two motions to compel, which the Board granted in an Opinion and Order dated May 24, 2019 after receiving no response from Hickory Hill.[1] As detailed in our Opinion,

[1] The subject of Hickory Hill's appeal is a compliance order issued by the Department alleging, among other things, that Hickory Hill conducted earth disturbance activities without a permit and without implementing best management practices (BMPs), which resulted in the potential for sediment pollution to reach a stream in East Nottingham Township, Chester County. The order requires Hickory Hill to cease all earth disturbance activities, implement appropriate BMPs, delineate the wetlands on the property, and submit an NPDES permit application for stormwater discharges associated with construction activities. In its motion for sanctions, the Department tells us that Hickory Hill has complied with the first three requirements of the order and the only matter left unresolved is Hickory Hill's submission of the NPDES permit application.

Hickory Hill has largely stymied the Department's discovery efforts by failing to answer many of its discovery requests and generally ghosting the Department when it repeatedly reached out to Hickory Hill by email and phone. In granting the motions to compel, we ordered Hickory Hill to (1) answer the Department's second set of interrogatories by June 3, 2019, (2) serve the Department answers to its expert interrogatories or provide an expert report by June 7, and (3) provide Appellant John Seitz for deposition by June 28.

The Department asserts in its motion for sanctions that Hickory Hill failed to comply with our Order. The Department contends that Hickory Hill provided incomplete and/or unresponsive answers to the second set of interrogatories, never answered the expert interrogatories, and failed to make John Seitz available for deposition until after June 28. The Department emailed a letter to Hickory Hill on June 10 in an attempt to resolve the issues. (DEP Ex. J.) In the letter, the Department advised Hickory Hill that, if the Department did not receive a response by June 14, it would be filing a motion for sanctions with the Board. The Department says Hickory Hill never responded to the letter, and consequently the Department filed its motion on July 1. Hickory Hill opposes the motion, with its counsel generally asserting that it has done the best that it can given the serious medical condition of his client, John Seitz.[2]

With respect to sanctions, the Board's Rules of Practice and Procedure provide 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 (relating to sanctions regarding discovery matters).

[2] Hickory Hill's response was due on July 16, 2019, 25 Pa. Code § 1021.95(c), but it did not file a response until July 18, 2019. The Department has filed a motion to strike the response, which at times also reads like a rebuttal to the substance of the response. While we share the Department's frustration with Hickory Hill playing fast and loose with our rules, we elect to resolve the motion for sanctions on its merits.

25 Pa. Code § 1021.161. Under the Rules of Civil Procedure, sanctions are appropriate where, e.g., a party fails to serve sufficient answers to interrogatories or where a party fails to appear for a noticed deposition. Pa.R.C.P. No. 4019(a)(1)(i); Pa.R.C.P. No. 4019(a)(1)(iv). Sanctions are particularly appropriate where a person fails to respond to a Board Order regarding discovery. Pa.R.C.P. No. 4019(a)(1)(viii); *Schlafke v. DEP*, 2013 EHB 678; *DEP v. Klecha*, 2012 EHB 80.

Expert Interrogatories

Beginning with the expert interrogatories, the Department says that it has still not received anything from Hickory Hill. In its response to the Department's motion, Hickory Hill appears to take issue with the form in which the Department crafted its expert interrogatories, claiming that the interrogatories were directed to Hickory Hill's previously identified expert and not to Hickory Hill itself, and therefore, Hickory Hill or the expert apparently did not have to answer them under its reading of the Rules of Civil Procedure. (Response at 9.) Initially, if Hickory Hill had an issue with the interrogatories, it should have raised that issue by responding to, instead of ignoring, the Department's motions to compel. The time for substantive arguments on the content or format of the expert interrogatories has come and gone. *See* Pa.R.C.P. No. 4019(a)(2) (with respect to sanctions, a party's claim that the discovery sought is objectionable is not a valid excuse unless the party has filed an appropriate objection or sought a protective order).

Nevertheless, we still fail to understand the basis of Hickory Hill's complaint. Under the Rules of Civil Procedure, a party through expert interrogatories may require "the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Pa.R.C.P. No. 4003.5(a)(1)(B). The phrasing of the rule allows *the expert* to state the substance of the facts and

his/her opinions. *See also* Pa.R.C.P. No. 4007.4 (imposing a qualified duty to supplement discovery responses on a party *or an expert witness*). The Department's interrogatories did just that, asking the expert about his experience and his dealings with the site. We also note that the interrogatories were served on counsel for Hickory Hill by mail and email.

We recently granted a motion for sanctions against a party who failed to disclose the names of any experts and provided only a short, vague description of the experts' purported testimony. *See Stocki v. DEP*, EHB Docket No. 2018-111-L (Opinion and Order, July 10, 2019). Here, Hickory Hill has at least identified the name of an expert witness, but it has failed to answer any of the Department's expert interrogatories, even after being ordered by the Board to do so. As we said in *Stocki*:

> In cases such as this, we have precluded the party from calling any experts at the hearing on the merits. *See, e.g.*, *DEP v. Colombo*, 2012 EHB 370; *DEP v. Land Tech Eng'g, Inc.*, 2000 EHB 1133. Expert testimony is often at the heart of Board proceedings, and full disclosure of expert opinions is an essential prerequisite to orderly and fair proceedings. *CMV Sewage Co. v. DEP*, 2010 EHB 725, 729. *See also Gintoff v. DEP*, 2017 EHB 147, 153; *DEP v. EQT*, 2016 EHB 489, 493. Precluding expert testimony as a sanction is appropriate in this case. Pa.R.C.P. No. 4003.5(b).

Slip op. at 4. Accordingly, Hickory Hill will not be permitted to call an expert witness at the hearing in this matter. Pa.R.C.P. No. 4003.5(b).

Second Set of Interrogatories

In compliance with our Opinion and Order, Hickory Hill served the Department with answers to its second set of interrogatories on June 3, 2019. (DEP Ex. K.) The Department, however, has taken issue with the sufficiency of the answers. In its June 14 letter to Hickory Hill, the Department listed 14 items that it viewed as deficiencies in Hickory Hill's answers. The Department says it never received a response to its letter and now seeks to preclude Hickory Hill from introducing into evidence at the hearing any documents or information not identified in the

interrogatory answers. The Department also asks us to shift the burden of proceeding to Hickory Hill so that the Department does not have to present its case-in-chief first without the benefit of having the information it believes it was rightfully entitled to as part of discovery.

Some of the Department's complaints about the answers seem unnecessary. For instance, the Department asked Hickory Hill to identify on a map the specific locations of trees, holes, and debris.[3] Hickory Hill responded with generalizations, saying certain things were on the western part of the property or on the eastern part of the property. An E&S plan drawing previously provided to the Department by Hickory Hill shows that the parcel, at 1.9 acres, is not tremendously large so it seems that the features the Department wants to know about cannot extend over a vast area. (DEP Ex. E.) Hickory Hill's responses to these interrogatories are not perfect, but they do not necessarily warrant sanctions. *See Twp. of Paradise v. DEP*, 2001 EHB 1005, 1007 ("Whether or not to impose sanctions is wholly within the Board's discretion and must be appropriate given the magnitude of the violation.")

With that being said, some of Hickory Hill's answers are clearly deficient. For example, on four different occasions Hickory Hill responded to the Department's interrogatory by stating that the requested information is "not currently available" and, on three of those occasions, that it "will be provided" at some undefined point. In its response Hickory Hill says, "Appellant understands that he has the duty to update his answers as more information becomes available to him." Although these answers arguably fall within a party's duty to supplement, Pa.R.C.P. No. 4007.4(2), Hickory Hill's position ignores the fact that the interrogatories should have been answered months ago and that discovery was only extended in this matter for purposes of compelling answers from Hickory Hill. The Department served its second set of interrogatories

[3] The Department says it is trying to determine whether Hickory Hill's earth disturbance activities exceeded the one-acre threshold for an NPDES permit. *See* 25 Pa. Code § 102.5(a).

on March 22, 2019, and Hickory Hill was obligated to serve its answers within 30 days. Pa.R.C.P. No. 4006(a)(2). At some point discovery needs to end and a case needs to move forward. *See M.C. Res. Dev. Co. v. DEP*, 2017 EHB 330, 334.

In *Dubrasky v. DEP*, 2017 EHB 220, we considered a motion for sanctions that was filed in part following what the moving party viewed as deficient answers to interrogatories from the appellants. The moving party sought a sanction of dismissing the appeal, which we viewed as too harsh. Instead, we recognized that the answers indeed left certain things to be desired and held that the appellants would be bound by their answers at the hearing. We believe the same is appropriate here. Hickory Hill shall be bound by its answers at the hearing on the merits and shall not be permitted to expand upon them or introduce any documents that were sought by the Department and not provided. *Dubrasky*, 2017 EHB at 223-24; *Liddick v. DEP*, 2017 EHB 27, 29. *See also Stocki, supra*, slip op. at 5 ("Suffice it to say that an overarching sanction is appropriate to cover the obvious prejudice to the Department and its ability to prepare to answer Stocki's objections as set forth in its notice of appeal."). Recognizing the difficulty in making a blanket determination in this regard, the Department may raise objections at the hearing and we will preclude information or documents where appropriate on a case-by-case basis.

Deposition of John Seitz

The Department tells us that on May 28 it proposed four dates for John Seitz's deposition: June 21, June 25, June 27, and June 28. The Department followed up with counsel for Hickory Hill in person on May 30 while at another deposition, on June 10 in its letter, and on June 20 by phone. The Department avers that counsel for Hickory Hill stated on May 30 and June 20 that he had not heard back from Mr. Seitz regarding his availability for a deposition. On the afternoon of June 24, counsel for Hickory Hill left a voicemail for counsel for the

Department stating that Mr. Seitz could be deposed on July 2. This was apparently unacceptable to the Department since it fell outside of the June 28 deadline we set in our prior Order and the Department filed the instant motion on July 1. In its response, Hickory Hill details its counsel's sustained efforts to get in touch with Mr. Seitz and provides more information on the limitations of Seitz's schedule due to his medical treatments.

We are sympathetic to Mr. Seitz's illness and appreciate counsel for Hickory Hill's efforts in dealing with an unresponsive client, but this is Seitz's appeal, and again, at some point it needs to move forward to a resolution. The Department first noticed Seitz's deposition on April 2 for a deposition on May 2. We are now closing in on August and the deposition still has not occurred. At no point has Hickory Hill filed a motion for a protective order for Mr. Seitz or anything else with the Board seeking any sort of grace, such as a stay of these proceedings due to Seitz's condition. Although we are sometimes hesitant to prevent an appellant from testifying in his own appeal, *Gintoff v. DEP*, 2017 EHB 147, 152, we cannot endorse a party's wholesale refusal or inability to submit to a timely deposition. With that said, we would not have been offended by the deposition occurring on July 2, even though it was beyond our deadline. We will allow another two weeks for the deposition of Mr. Seitz. If he is unable to be deposed within that timeframe, he will be precluded from testifying at the hearing on the merits, and Hickory Hill shall assume the burden of proceeding in this appeal.

We grant the Department's motion for sanctions in accordance with the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
v.	:	**EHB Docket No. 2018-065-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 29th day of July, 2019, it is hereby ordered as follows:

1. The Appellants are precluded from introducing expert testimony at the hearing on the merits.
2. The Appellants are limited to using the evidence produced in response to the Department's discovery requests and they are bound by the information provided in their answers to the Department's interrogatories.
3. The Appellants shall make John Seitz available for a deposition to be held on or before **August 12, 2019**.
4. If John Seitz is not made available for deposition by August 12, 2019, he will be precluded from testifying at the hearing on the merits, and the Appellants shall assume the burden of proceeding in this matter.
5. The Department's motion to strike the Appellants' response to the Department's motion for sanctions is denied.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: July 29, 2019

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

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FOOD & WATER WATCH	:	
	:	
v.	:	**EHB Docket No. 2018-108-L**
	:	**(consolidated with 2017-114-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: August 9, 2019**
PROTECTION and KEYSTONE PROTEIN	:	
COMPANY, Permittee	:	

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for summary judgment filed by the appellant and the permittee. The permittee's motion based on the appellant's purported lack of standing is denied because, based upon the record as it currently exists, the appellant clearly has standing. Summary judgment on the remaining issues in the parties' motions, which among other things relate to the nutrient trading provisions in the permittee's NPDES permit, are denied because there are genuine issues of material fact and inadequately developed legal arguments.

O P I N I O N

On October 26, 2017, the Department of Environmental Protection (the "Department") issued NPDES Permit PA0266345 to Keystone Protein Company ("Keystone"). The permit was amended on September 27, 2018. The Appellant, Food and Water Watch ("Food & Water"), appealed both the original permit and the amended permit, and those appeals have been consolidated. The permit authorizes the discharge of treated wastewater from Outfall 001 at Keystone's poultry rendering facility to the Little Swatara Creek in Bethel Township, Lebanon

County. The wastewater may contain, among other parameters, nitrogen and phosphorus. Nitrogen and phosphorus are subject to mass and concentration limits spelled out on pages 2 and 3 of the permit. Nitrogen and phosphorus are nutrients. Too much nitrogen and phosphorus in the water can cause algae to grow faster than ecosystems can handle. The permit limits for nitrogen and phosphorus on pages 2 and 3 are designed to require Keystone to employ the proper technology to treat its waste, as well as to protect the uses of Little Swatara Creek. It is our understanding based on the existing record that Keystone must meet those limits no matter what.

Normally, that would be the end of the matter. But here, because Keystone is in the Chesapeake Bay watershed, the permit also contains requirements to ensure compliance with the United States Environmental Protection Agency's ("EPA's") Chesapeake Bay Total Maximum Daily Load ("TMDL") limits for nitrogen and phosphorous. The TMDL limitations are set forth on page 7 of Keystone's permit as "Net Total Nitrogen" and "Net Total Phosphorus" pounds per year. Such provisions are often referred to as "cap loads."

The cap loads for nitrogen and phosphorous on page 7 are more stringent on a calculated annual basis than the water quality or technology-based effluent limits on pages 2 and 3 of the permit. For example, the annual cap load of 380.5 pounds for phosphorous on page 7 is more stringent than the mass effluent limit of 18 pounds per day (average monthly) on page 3 (18 x 365 = 6,570 lbs). At the risk of oversimplification, the cap loads are designed to protect the water quality of the Chesapeake Bay. They really have nothing to do with Little Swatara Creek itself. And *vice versa*the permit limits on pages 2 and 3 are designed to protect the creek more than the Bay.

To an extent that we do not as of yet fully understand, the permit authorizes Keystone to use "credits" and "offsets" to comply with its Chesapeake Bay related limits. A credit is

> [t]he tradable unit of compliance that corresponds with a unit of reduction of a pollutant as recognized by DEP which, when certified, verified and registered, may be used to comply with NPDES permit effluent limitations.

(Permit Part C.I.B.) An offset is

> [t]he pollutant load reduction measured in pounds (lbs) that is created by an action, activity or technology which when approved by DEP may be used to comply with NPDES permit effluent limitations, conditions and stipulations under 25 Pa. Code 92a (relating to NPDES permitting, monitoring and compliance.) The offset may only be used by the NPDES permittee that DEP determines is associated with the load reduction achieved by the action, activity or technology.

(*Id.*) To repeat, the credits and offsets cannot be used to get around the Little Swatara Creek related limits. Unless we are missing something or misinterpreting its position, Food & Water is entirely incorrect in believing otherwise on this very important point.

Basically, Keystone's permit authorizes nutrient trading (aka nutrient credit trading, water quality trading, effluent trading, water pollution trading). Trading allows Keystone to meet its Chesapeake Bay related limits by using another source's excess nutrient reductions. The trading process is heavily regulated. *See* 25 Pa. Code § 96.8.

EPA encourages nutrient trading. So does the Department. Food & Water does not like it. It argues that allowing Keystone to use credits to meet its own effluent limits is not authorized by the *federal* Clean Water Act, 33 U.S.C. § 1251 *et seq.*, or the *federal* regulations promulgated thereunder. It also says that the nutrient trading provisions violate the *federal* Clean Water Act's public participation requirements, and their use necessarily endangers local water quality as a matter of law. Accordingly, it has filed this appeal. It is important to note at the outset that Food & Water has *not* argued that there is anything wrong with the trading provisions in the permit under Pennsylvania state law.

Currently before us are two motions for summary judgment. Keystone moves for summary judgment because it says Food & Water lacks standing. Secondly, it says that Food &

Water's objection that Little Swatara Creek is not being adequately protected lacks any record support. Food & Water moves for summary judgment on two grounds. First, it argues that the nutrient trading authorized by the permit violates *federal* law. Second, in an argument largely unrelated to nutrient trading, it contends that the Department has failed to ensure that Little Swatara Creek's water quality will be adequately protected. This second issue is the reverse of Keystone's second issue. The Department has not joined in Keystone's motion, but it has filed papers in opposition to Food & Water's motion.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-808. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the nonmoving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Standing

When an appellant is on notice that its standing is at issue, and then that standing is challenged in a motion for summary judgment filed after the close of discovery, the appellant must be able to point to evidence demonstrating the bases for its standing. *Wurth v. DEP*, 2000 EHB 155, 173. Food & Water has done so here.

Although an organization such as Food & Water can have standing in its own right, Food & Water is not claiming it has that kind of standing. Rather, Food & Water is relying on the standing of its members. Food & Water has representational standing if it demonstrates that at

least one of its members has standing. 35 P.S. § 7514(c); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013). A member (and therefore its organization) has standing if the member has a substantial, direct, and immediate interest in the outcome of the appeal. *Robinson Twp.*, 83 A.3d at 917. An interest is substantial as long as it surpasses the common interest of all citizens in procuring obedience to the law. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). In other words, there must be "some discernable adverse effect" to an interest other than that in ensuring compliance with the law. *Drummond v. DEP*, 2002 EHB 413, 423 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)). An interest is direct where there is a causal connection between the matter complained of and the harm alleged. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). Last, an interest is immediate where the causal connection is sufficiently close so as not to be remote or speculative. *Id.* However, the harm need not have already occurred or even be imminent to be considered immediate. *See Robinson Twp*., 83 A.3d at 920 ("[w]e need not wait until ecological emergency arises in order to find that the interest . . . is immediate."). *See also Funk v. Wolf*, 144 A.3d 228, 247-48 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) (holding that "expected" impacts of climate change that "could" harm plaintiff in the future are neither remote nor speculative). It is enough that there be a "realistic potential" that the challenged activity could adversely affect the individual's interest. *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643.

In the context of third-party appeals from the issuance of permits, this Board has held that members of an organization have standing if they (1) use the area potentially affected by the permitted activity (i.e. their interest is substantial), and (2) there is an objectively reasonable threat that the permitted activity may affect that use (i.e. their interest is direct and immediate). *Citizens for Pennsylvania's Future* (*"PennFuture"*) *v. DEP*, 2015 EHB 750, 753; *Citizen*

Advocates United to Safeguard the Environment, Inc. (*"CAUSE"*) *v. DEP*, 2007 EHB 632, 673. Recreational use of and aesthetic appreciation for an environmental resource can confer standing. *See Robinson Twp.*, 83 A.3d at 920 ("The protection of environmental and esthetic interests is an essential aspect of Pennsylvanians' quality of life . . ."); *CAUSE*, 2007 EHB at 673 ("A realistic potential of harm to a person's aesthetic appreciation of an environmental resource is enough to establish a right to appeal."). *See also Consol Pa. Coal Co., LLC v. DEP*, 2011 EHB 251, 253 (acknowledging "under repeated Board precedent," that recreational and aesthetic interests can establish standing).

Food & Water has identified two of its members, Debra Ryan and Ann Pinca. Ryan and Pinca use the Swatara Creek watershed for recreation and aesthetic appreciation. (Little Swatara Creek flows into Swatara Creek.) The record is overstuffed with examples of how Ryan and Pinca use and enjoy the Swatara Creek watershed. Indeed, it is curious that Keystone would devote its and the Board's resources to contesting the issue in light of this record. Pinca has lived a few miles from Swatara Creek for the past 40 years. Pinca's day-to-day routine regularly takes her on the roads near Swatara Creek, crossing over the creek several times a week, both downstream from and at Little Swatara Creek, the tributary into which Keystone has been authorized to discharge. When driving near and over the creek, Pinca enjoys observing the wildlife tracks along the creek bank and watching for birds that live by the water. In fact, she is an avid birdwatcher who enjoys taking walks along the Swatara, where the bird life is plentiful. Pinca's most recent walks occurred in mid-March 2019 and on May 4, 2019.

Debra Ryan has lived near the creek for most of her life and visits it with her children when they were small to wade in the water, play with their dogs, and fish along the banks. Ryan enjoys hiking along Swatara Creek paths and trails in areas downstream of the Keystone

discharge point. She has also spent time picnicking in a downstream recreation area in Hershey alongside the creek and looks forward to continuing to do so with her grandchildren on their frequent visits.

Pinca and Ryan engage in recreational activities, such as kayaking and wading, that take place in and on Swatara Creek itself, and therefore depend on the quality of the water. Ryan is a longtime kayaker who has put in along multiple downstream stretches of the Swatara Creek since taking up the activity in 2001. She also testified to wading in the water and fishing along the banks when her children were small, and she intends to take her granddaughters fishing in the Swatara Creek this summer, an activity which her family has long enjoyed. Similarly, Pinca has been kayaking with her husband in areas of the Swatara Creek that are downstream from the approved discharge point since purchasing her kayak in 2016. She also enjoys wading in the water. Ryan hikes along the creek paths, often with her sons' dogs, who drink from the creek on these occasions. She also enjoys watching the water life while kayaking. Likewise, Pinca enjoys walking alongside the creek as well as observing the watershed's bird life, which, as she testified, she believes to be dependent on a healthy aquatic ecosystem. There is ample evidence on record regarding Food & Water's members' regular use of Swatara Creek for kayaking, hiking, fishing, wading, bird-watching, and general aesthetic appreciation, in multiple locations downstream of the Little Swatara Creek discharge site. Because these activities depend on the quality of Swatara Creek water, Food & Water has established that its members clearly have a substantial interest in protecting the watershed from activities that could degrade the water quality on which they rely.

Keystone does not dispute that activities such as birdwatching, walking along the creek, and kayaking are the types of activities that could confer standing. What Keystone disputes is

that such activities confer standing regardless of how far from the discharge point they occur, how frequent they are, and how likely it is that they will be affected by the permitted discharge. Keystone argues that Pinca and Ryan's activities are too far from the discharge point, too infrequent, and there is no solid evidence that their remote use will be affected by the discharge. Keystone is wrong on all three counts.

First, it is somewhat ironic in this case that Keystone would complain that Pinca and Ryan's activities are too far from the discharge point. The permit conditions in contention are designed to protect the *Chesapeake Bay*. The regulatory authorities have determined, and Keystone has accepted, that Keystone's activities could adversely affect *the Bay*, so therefore, its discharge needed to be limited to protect the Bay. Even if distance were a factor, we do not see why a user of the Bay would not have the ability to challenge the permit as inadequately protective of the Bay. If the discharge has been determined to potentially impact the Bay, it necessarily follows that it must also affect the Bay's tributaries between the discharge and the Bay. Any use of the Bay or the tributaries between the discharge and the Bay is sufficiently proximate to confer standing.

In *Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017), the Commonwealth Court held that a ten-year old girl in Philadelphia had standing to seek a mandamus and declaratory judgment that state officials were not doing enough to combat climate change. The Court's holding is inconsistent with the notion advanced by Keystone that there is some sort of distance requirement in the standing analysis. Certainly no mention was made of any measurement between discharges and the petitioner's activities. Clearly, an adverse effect can manifest quite distantly.

The Board has never adopted a restrictive standard for where recreation must occur relative to a discharge point. To the contrary, it has consistently held that members who use a creek watershed have substantial interest in preventing any degradation that could affect such use. Relevant uses can take place well beyond just the particular creek segment in which discharges would occur. *Pa. Trout v. DEP*, 2004 EHB 349, 359; *Blose*, 1998 EHB at 635-637.

In *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, the Board found appellant-members who lived and recreated "in the vicinity" of a proposed commercial development site had substantial interest in the project sufficient to confer standing. *Id.* at 86. Members who took walks and watched for wildlife in the vicinity, drove over roads near the site, and generally enjoyed the aesthetic qualities of the area, including the stream and wetlands, had a "greater interest in the matter than the general public." *Id.* at 85-86. *See also Valley Creek Coalition v. DEP*, 1999 EHB 935, 943 (finding members who "walk, jog, picnic, study the ecology, and generally recreate beside the Valley Creek Watershed" had standing to appeal a stormwater discharge permit). Similarly, in *PennFuture, supra*, an appellant-member demonstrated substantial interest in a project area that he used for hiking, birdwatching, and taking photographs, even though the member had recently relocated out of state. 2015 EHB at 754. Keystone's reliance on our summary judgment ruling in *Stedge v. DEP*, 2015 EHB 31 for the proposition that activity must occur "immediately surrounding" a project site is misplaced. Once the appellant in that case testified at the merits hearing that he "enjoys the aesthetics of that area," the Board found his aesthetic interest conferred standing. *Stedge v. DEP*, 2015 EHB 577, 594.

In any event, this issue is largely academic because Pinca testified that some of her activities have and will take place at and near the Little Swatara Creek (namely driving, walking,

and kayaking), the very stream segment at which the discharge is set to occur. Even by Keystone's own measure, Pinca's activities are proximate.

Keystone next contends that Pinca and Ryan do not use or appreciate the creek often enough to confer standing. This position is equally devoid of merit. The Board is not particularly interested in counting up the times a person uses a resource, but putting that aside, the record here supports frequent use and enjoyment by Pinca and Ryan. Pinca has lived in the vicinity of Swatara Creek for four decades and appreciates its aesthetic qualities and bird life when driving over the creek several times a week. Additionally, she attested to using Swatara Creek for recreation for over 10 years. After purchasing their kayaks in 2016, Pinca and her husband kayaked downstream from the future discharge point on three or four occasions between 2016 and 2017. Since March 2019 alone, she has gone on at least two long walks along creek paths. Likewise, Ryan's use of the creek extends back 35 years, when she frequented the area with her small children. After taking up kayaking, Ryan would make weekly kayaking excursions during summer months, often launching from two different put-in locations on the Swatara Creek. She hiked along the downstream Swatara Creek paths at least seven times during the summer of 2018.

The frequency of these recreational activities is similar to that of appellant-members in *Groce v. DEP*, 2006 EHB 870, 894-895. In that case, the Board viewed an average of two to three visits annually over a period of years as "frequent[]" recreation in an affected area, even though the member's last visit occurred a full year before it took up the standing issue. *Id.* at 864. Similarly, in *PennFuture*, the Board concluded that hiking in the affected area on "several occasions" over a two-year period sufficiently demonstrated that the member "clearly uses the area. . . satisfying the first part of the [standing] requirement." 2015 EHB at 754. The record

shows that Ryan and Pinca have used the Swatara Creek over a span of many years, have done so recently, and on more than "several occasions." Keystone's attempt to characterize their activities as "occasional" and "infrequent" is contrary to the facts currently of record and the Board's established law.

Moreover, in *PennFuture*, even though the member had recently moved to a different state, the Board was satisfied with his expressed intention of returning "as often as possible" for future family visits and hikes. 2015 EHB at 754. Likewise, in *Groce*, a member who had visited an area in the past and "plan[ned] to do so in the future" sufficiently established use of the area in question. 2006 EHB at 866. Here, Ryan and Pinca's plans to continue using the Swatara creek for kayaking are significantly more concrete. While neither was able to kayak in the creek last summer, it was not for lack of trying. In June of 2018, Ryan purchased a kayak for her husband, as well as launch permits that gave them access to the Swatara Creek launch sites through 2020. She spent time visiting her old launch sites to check on kayaking conditions and finding a new put-in location to use. Had it not been for the heavy rains that she felt made the creek unsafe for kayaking last summer, Ryan would have kayaked in the Swatara in 2018. Weather permitting, she plans to both kayak in the Swatara and take her granddaughters fishing this summer. Consistent with Ryan's experience, Pinca was prevented from kayaking in 2018 by the heavy rainfall, which she said flooded the creek with dangerously high, turbulent water that was full of debris. Intent on resuming her kayaking when conditions improved, she nonetheless repurchased her kayak launch permit on July 20, 2018 and secured a reliable means of transporting her kayak for future trips. Conditions and weather permitting, she is planning to kayak with her husband on the Swatara this summer.

Lastly, Keystone says that Food & Water has not shown through such things as "technical evidence or computer modeling" that its discharge has a reasonable potential to impact the members' uses. Initially, we return to the fact that Keystone's permit has been determined to potentially impact users of the Chesapeake Bay. If there is a reasonable potential to impact the Bay, it necessarily follows that there is a reasonable potential to impact the tributaries between the discharge and the Bay and the users thereof, otherwise there would be no need for a permit to regulate such impacts.

Keystone confuses the standing inquiry with the determination on the merits. It is true that purely subjective apprehensions not grounded in reality are not enough to confer standing. The Board has repeatedly affirmed, however, that appellants need not prove that an adverse effect "will in fact occur" in order to meet the objectively reasonable threat standard. *See e.g.*, *Ziviello v. DEP*, 2000 EHB 999, 1004-05 ("At such a preliminary stage in the appeal process" a party is only required to prove an objectively reasonable threat of adverse effects, "rather than being required to show that adverse effects will in fact occur."); *PennFuture*, 2015 EHB at 754 ("Whether those alleged impacts will in fact occur is not the issue."). Rather, the causal link between the challenged activity and the adverse effect is sufficiently direct and immediate if there is a "realistic potential" of harm. *Friends of Lackawanna*, 2016 EHB at 643. In determining what constitutes a realistic threat, the Board has cautioned that an analysis of the merits has no place in the inquiry beyond determining a threat of harm is "more than pure speculation." *CAUSE*, 2007 EHB at 674.

Like many individuals who have successfully established standing to appeal a Departmental action, Ryan and Pinca are primarily worried about adverse impacts to their personal health and the environment. In particular, they are concerned that excessive nutrient

discharges into Little Swatara Creek will give rise to (1) health risks from recreating in polluted water, (2) damage to the Swatara Creek ecosystem, its aquatic life, and wildlife, and consequently, (3) diminished enjoyment and curtailment of their recreational and aesthetic activities. The Board has long held that when a challenged activity has the legitimately perceived potential to affect one's health or damage an environmental resource, such that it diminishes enjoyment of that resource, the activity is averse to an individual's use of an area. *See Friends of Lackawanna*, 2016 EHB at 643-44 (health concerns); *PennFuture*, 2015 EHB at 754 (environmental damage) *CAUSE*, 2007 EHB at 677 (health concerns); *Delaware Riverkeeper*, 2004 EHB at 631 (discouraged use of environmental resource); *Orix-Woodmont*, 2001 EHB at 86 (degradation of stream and its aquatic and wildlife).

Because Food & Water's members have articulated specific reasons for their concerns, their concerns are more than purely speculative under Board precedent. In *CAUSE*, the Board found an appellant-member had credible health and property concerns based on the possibility that a permitted activity could contaminate his groundwater. 2007 EHB at 676-677. Because the member lived near the facility in question and testified that groundwater emerged from springs and seeped onto his property, his apprehensions were justified, even though "the groundwater on or near [his] property may or may not be associated with the Site." *Id.* at 677. The threat is more direct here, where Ryan and Pinca's testimony reveals that the waters in which they recreate certainly will intermingle with Keystone discharges. Both detail a range of activities occurring downstream of the permitted discharge point, and there is no dispute that Keystone's discharges will flow to the areas in which they recreate.

Moreover, in *Friends of Lackawanna*, although feared health impacts of a nearby landfill had yet to materialize, the Board deemed member concerns credible based on the fact that they

could "cite specific reasons for those concerns," including potential for landfill fires, leaking leachate, and groundwater contamination. 2016 EHB at 644. Here, both members aver that their concerns are based on the fact that the permit would allow a new source of pollution into Little Swatara Creek. Pinca's environmental concerns are informed by her extensive reading about Chesapeake Bay water issues, and she is aware that nutrient pollution can cause harmful algae blooms, degrade water quality, and deplete water oxygen levels, thereby harming the aquatic ecosystem. Ryan shares the concern for Swatara Creek wildlife, based on her reasonable belief that excessive upstream pollution discharges will degrade water quality. Both members cite the fact that, based on their past kayaking experiences, there is the potential of coming into direct contact with the polluted water while recreating. Whether or not members' health will in fact be affected, or the ecosystem will in fact be harmed is "beside the point of the standing inquiry." *CAUSE*, 2007 EHB at 677. It is enough that members have credibly averred a "realistic potential" of harm by articulating the sensible reasons for their concerns. *See Friends of Lackawanna*, 2016 EHB at 643-44.

In addition, both members have testified that, knowing the permit will authorize a new source of pollution where there has not been in the past, they expect to enjoy their Swatara Creek activities less and may need to curtail their recreation altogether. For Pinca, knowing that the water will be more polluted makes it less appealing to kayak in and may cause her to instead travel to farther away and less convenient locations to kayak. Knowing the birdlife could be threatened will also cause her to enjoy her birdwatching less. Similarly, Ryan explains that her direct contact with potentially polluted water would diminish her enjoyment of the Swatara, not only out of worry for herself, but also for her husband, who has a compromised immune system. She would enjoy her kayaking trips less, would no longer plan to fish in the creek with her

granddaughters, and would stop hiking with family pets. In short, they will both derive less enjoyment from their recreation and aesthetic interest in the area due to Keystone's new discharges and may curtail their activities as a result.

Keystone appears to contend that pollution concerns must be backed with expert, scientific analysis to be considered objectively reasonable. This assertion is exactly wrong. The Board has never required–and has indeed outright rejected the need for–appellant-members to have an expert understanding of or scientific evidence proving a pollution risk. The Board's decision in *Delaware Riverkeeper* is particularly instructive on this point. 2004 EHB 599. In that case, the permittee challenged the sufficiency of appellant's standing based on the fact that it had done "no technical studies to show that the River will be adversely affected by the discharge," while permittee alleged to have technical evidence showing that it would not. *Id.* at 632. The Board flatly rejected this argument, finding the assertion that appellants needed technical evidence to establish standing to be "an erroneous belief." *Id.* The Board more recently rejected Keystone's contention in *Sierra Club v. DEP*, 2017 EHB 685. In *Sierra Club*, appellant-members expressed concerns that issuance of a landfill permit would pollute the waterway from which their drinking water was sourced and in which members canoed. *Id.* at 693. Once again, the permittee challenged members' standing by arguing that there was "no objective evidence" that the river at issue would be impacted by the landfill, further alleging that their expert modeling showed no human health or aquatic life risk. *Id.* at 696. The Board found this argument unavailing in light of its *Delaware Riverkeeper* holding, and reaffirmed that technical studies demonstrating the threat of harm were unnecessary to establish standing, even where permittees presented contrary expert evidence. *Id.*

For standing purposes, it does not matter that neither Ryan nor Pinca engaged expert consultants to confirm their fears, or that they themselves are not experts in the science of nutrient pollution, or even whether they could recite the names of the particular contaminants at issue during their depositions. It is enough that they are reasonably concerned Keystone's upstream discharges could pollute the waterway and adversely impact their activities, and that they could provide a basis for those concerns. *See Friends of Lackawanna*, 2016 EHB at 643-44; *CAUSE*, 2007 EHB at 677.

In sum, the record at this point clearly supports the conclusion that Food & Water, as representative of its members, has standing to appeal the Department's action. Keystone's motion for summary judgment for lack of standing must, therefore, be denied.

The Permit Phosphorus Limit Related to Little Swatara Creek

Food & Water's notices of appeal object that Keystone's permit "is unlawful because it does not insure the authorized trading will not lead to violations of local WQS [water quality standards]." (Objection No. 5.) Although the objection goes on at some length, the essence of the objection seems to be that "DEQ" failed to conduct an adequate analysis of whether the discharge that will be permitted by operation of trading under Keystone's permit will cause or contribute to violations of water quality standards that apply to Little Swatara Creek.

Food & Water has now seemed to refine--or perhaps more accurately, changed--its objection, at least for purposes of summary judgment. Instead of a sideways attack on the trading provisions, Food & Water now complains in its motion for summary judgment that the Department erred by simply cutting and pasting into Keystone's permit a generic 2 mg/l limit for phosphorus that originates in a Departmental guidance document and in 25 Pa. Code § 96.5(c). In its view, the Department instead should have performed a site-specific analysis that included

consideration of "Little Swatara Creek stream conditions" and the "specifics of the discharge." This objection seems to have little to do with the primary focus of Food & Water's objection as set forth in its notices of appeal, but we cannot say it is completely outside the genre of the objection either.

Food & Water by its own admission makes no attempt to show that Keystone's discharge will in fact cause or contribute to any violations of water quality standards. Indeed, it has not even identified the water quality standards to which it refers. It has not proposed a different effluent limit. It has not referred us to any information regarding "Little Swatara Creek stream conditions" or the "specifics of the discharge" that would possibly justify a more stringent limit. It has not identified any expert testimony of any threat to water quality standards or any other actual or potential harm. It instead argues that no expert testimony is necessary to support the kind of argument it is making. It does not describe what, in its words, a "real analysis" should have entailed, other than its passing allusion to "stream conditions" and "the specifics" of Keystone's discharge, and we are not sure how it will be able to do so without expert testimony.

In fact, Food & Water's contention that the Department did not conduct a "real analysis" has little record support. It essentially consists of an averment by its attorney that he searched the Department's files and did not find anything. Food & Water has not even referred to any record associated with any Department employees about what analysis they actually performed. As we recently said in *Clean Air Council v. DEP*, EHB Docket No. 2018-057-L, slip op. at 3 (Opinion and Order, July 19, 2019), wherein another appellant objected to the Department's analysis rather than its conclusion,

> [The Appellant]…simply argues that the Department erred by failing to make a determination one way or the other. The [Appellant's] approach makes it unlikely from the start that its issues can be resolved on summary judgment. The absence of evidence does not necessarily equate to evidence of absence. Proving a

> negative while theoretically possible can be quite difficult. [The Permittee] and the Department can simply respond that they did perform the required analysis, which is exactly what they have done here in part, which leaves us with a genuine issue of disputed fact.
>
> Further, whether the appropriate regulatory criteria have in fact been met is more important than whether the analysis was performed. It is not always necessary or appropriate to remand a permit for further analysis if the Board is able to conclude based upon its own record that the correct result was achieved. *See, e.g., Bennington Investment Group, LLC v. DEP*, EHB Docket No. 2015-190-M (Adjudication, July 8, 2019).

The Department has in fact come forward with evidence in its response to Food & Water's motion. The Department points to summary judgment record evidence that it *did* in fact consider site specifics in calculating Keystone's phosphorus limit. (*See, e.g.*, DEP Ex. 8.) The Department says it applied a conservative limit for phosphorus that applies to impaired waters even though the Department has conducted stream assessments of Little Swatara Creek that show that it is not impaired for aquatic life. The Department has cited record support for the proposition that it specifically determined that a discharge in compliance with the permit will not impact the impairment status of the creek. It points out there is no water quality criterion for total phosphorus other than the one set forth in Section 96.5 (if that is what it is), and Keystone's permit limit has been specifically designed to meet that standard. The Department says it is prepared to present expert testimony to back all of this up. It is not clear what more Food & Water would have had the Department do.

At this point it should be rather obvious that Food & Water is not entitled to summary judgment on this issue. Its unsupported charge that the Department conducted no "real analysis" compares unfavorably to the case for summary judgment we were presented with in *Borough of Ambler v. DEP*, 2007 EHB 364. In that case, even though the movant filed a three-inch stack of briefs, affidavits, and exhibits that included reference to expert opinion, we refused to grant summary judgment on whether the phosphorus limit in the appellant's permit (which just like

here was derived from Section 96.5), was unlawful or unreasonable as a matter of law at the summary judgment stage.

It is worth remembering that, in a third-party appeal such as this, the Department does not have the burden of proving the permit is lawful and reasonable; the appellant has the burden of proving that it is not. Although Food & Water at times attempts inconsistently to characterize this case as one where the Department performed no analysis at all, in reality its complaint is that it does not like the analysis the Department performed, i.e., it was not a "real analysis." This is an even weaker case for summary judgment than the case for summary judgment we rejected in *Clean Air Council*, which was based on an assertion that *no* analysis of any kind was performed.

Turning to Keystone's motion for summary judgment, not supported by the Department, Keystone argues that Food & Water's attack on the phosphorus limit is so devoid of factual and legal support that we should grant summary judgment in Keystone's favor on this issue. Although for the reasons discussed above the argument has some initial appeal, the inherent complexity of the issue makes us reluctant to grant summary judgment either way. Among other things, as pointed out in *Ambler*, the Department's phosphorus guidance and the phosphorus regulation are not exactly models of clarity. We note that the Department's opposition to Food & Water's motion is supported in significant part with affidavits prepared specifically for purposes of defeating summary judgment. With a technical issue of this nature, the Board would benefit from the live testimony if the issue is to be pursued. Lastly, the issue might at least to some extent overlap with other issues in the case. In the last paragraph in Food & Water's memorandum in support of its motion, it doubles back on an alleged connection between the use of the regulatory limit for phosphorus related to Little Swatara Creek and the trading provisions

related to the Bay. It is not clear to us how these two issues intersect, and a hearing might help sort that out.

Nutrient Trading

Last but certainly not least, Food & Water's primary contention is that the nutrient trading provisions in Keystone's permit are not authorized by, and fatally inconsistent with, the federal Clean Water Act. Without limitation to the foregoing, Food & Water adds that the permit's nutrient trading provisions violate the Clean Water Act's public participation requirements. Strikingly, Food & Water mentions in only the most fleeting and meaningless way that Pennsylvania has state statutes and regulations that directly relate to nutrient trading. Food & Water's position, then, is that even though the nutrient trading provisions in Keystone's permit comply with state law, the Department violated federal law and only federal law.

We are not necessarily suggesting that the Board lacks the authority to do what Food & Water is asking us to do; namely, overturn a permit that complies with state law because it violates federal law and only federal law. There appears to be some authority to support the conclusion that we can. *Food & Water Watch v. USEPA*, 5 F. Supp 3d 62, 85 (D.D.C. 2013). Food & Water only developed this preliminary issue at any depth in its reply brief. The other parties have not had an opportunity to fully respond. Food & Water cited a few cases in its reply brief for the proposition that it is "common practice" for state courts and boards to consider federal questions when adjudicating challenges to state-issue NPDES permits. However, we are not sure any of those cases involved a concession that state law was not violated. We also wonder how many cases dealt with federal regulations that had not been incorporated into the state's regulatory code. Food & Water does not cite incorporation here. If a permit complies with state law but violates federal law, isn't the problem with the state law? Food & Water has

not directly challenged any Pennsylvania regulations in this appeal. We are also curious about the contention of multiple parties that this Board *must* defer to EPA's interpretations of the Clean Water Act and regulation promulgated thereunder. These are just some of the unanswered questions that we have. In short, we believe the issue of the Board's authority, which touches upon cooperative federalism used in the implementation of the Clean Water Act, would benefit from further briefing, and perhaps further factual development. We are not comfortable proceeding to the merits of Food & Water's federal law challenges until these preliminary questions are more comprehensively addressed.

Aside from questions regarding the Board's role, the trading program has not been adequately explained in the parties' filings. Trading is a complex, controversial issue of potentially national importance. It is, perhaps, unrealistic to expect us to resolve its legality in the context of a summary judgment motion. The better course is to proceed to a hearing and an adjudication.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOOD & WATER WATCH	:	
	:	
v.	:	**EHB Docket No. 2018-108-L**
	:	**(consolidated with 2017-114-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and KEYSTONE PROTEIN	:	
COMPANY, Permittee	:	

O R D E R

AND NOW, this 9th day of August, 2019, it is hereby ordered that the Permittee's and the Appellant's motions for summary judgment are **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: August 9, 2019

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

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

For Appellant:
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Terry Bossert, Esquire
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Lindsay A. Berkstresser, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2019-069-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 28, 2019**
	:	

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Judge

Synopsis

The Board grants the Petition for Supersedeas with conditions intended to limit the impact of Erie Coke's operations during the time necessary to conduct a full hearing on the Department's denial of Erie Coke's Title V permit renewal application.

O P I N I O N

Background

Erie Coke Corporation ("Erie Coke") operates a facility located in Erie, Pennsylvania where it produces coke for use in the manufacture of cast iron products as well as other items. The Erie Coke facility consists of 58 coke ovens and associated equipment. Erie Coke's operations are covered by a Title V Operating Permit (Permit No. 25-00029) ("Title V Permit") issued by the Department of Environmental Protection ("DEP" or the "Department"). Erie Coke applied to the Department to renew its Title V Permit on August 28, 2017. Under its terms, Erie Coke's existing Title V Permit expired on February 28, 2018, while the Department continued its review of the renewal application. On February 4, 2019, the Department issued an Administrative Order to Erie

Coke listing various violations of the Department's air regulations and requiring Erie Coke to act to address the violations. ("February 2019 Administrative Order"). Erie Coke filed a Notice of Appeal of the February 2019 Administrative Order with the Environmental Hearing Board ("Board") on March 6, 2019. The pending appeal of the February 2019 Administrative Order is docketed with the Board as case number 2019-019-B. On May 9, 2019, the Department sent Erie Coke a Compliance Docket Notification notifying Erie Coke that Erie Coke and the identified violations were being placed on the Department's Compliance Docket. ("May 2019 Docket Notification"). On June 10, 2019, Erie Coke filed a Notice of Appeal of the May 2019 Docket Notification with the Board. The pending appeal of the May 2019 Docket Notification is docketed with the Board as case number 2019-050-B.

On July 1, 2019, the Department issued a letter denying Erie Coke's application to renew the Title V Permit ("July 2019 Denial Letter"). On July 2, 2019, Erie Coke filed a Notice of Appeal of the Department's denial of its Title V Permit renewal application. On July 3, 2019, after the close of business for the Board, Erie Coke filed an Application for Temporary Supersedeas and a Petition for Supersedeas ("Petition"). The Board held a conference call with the parties on July 5, 2019. Following the conference call, the Board issued an Order granting the Application for Temporary Supersedeas and ordered that the Temporary Supersedeas would remain in place until the Board ruled on Erie Coke's Petition. The Board also scheduled a hearing on the Petition starting on July 10, 2019. On July 6, 2019, the Department filed a Motion to Deny Petition for Supersedeas Without a Hearing ("Motion") and on July 8, 2019, the Department filed its Response in Opposition to Erie Coke Corporation's Petition for Supersedeas. Erie Coke filed a response to the Department's Motion on July 9, 2019. The Board issued an Order denying the Department's Motion on July 10, 2019. The hearing on the Petition was held at the Board's Erie facility over

six non-consecutive days ending on July 18, 2019. On July 19, 2019, the Board issued an Order requiring the parties to file simultaneous post-hearing briefs on or before August 7, 2019. Erie Coke and the Department filed post-hearing briefs on August 7, 2019. The Board held a settlement conference with the parties on August 23, 2019 but the parties have not agreed to a settlement. The Board is now ready to act on the Petition.

Standard

The Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). No action of the Department adversely affecting a person[1] is final as to that person until that person has had the opportunity to appeal the Department's action to the Board. 35 P.S. § 7514(b). A person challenging a Department action initiates that legal challenge by filing a notice of appeal with the Board which must be done within 30 days or the Board lacks jurisdiction over the appeal and the Department's action shall be final as to that person. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a). The filing of an appeal with the Board is an exercise of the person's due process right to have an independent quasi-judicial body determine the legality of a Department action that affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of the person. The due process right to a hearing in front of the Environmental Hearing Board before the Department's action becomes final is an important right and an appropriate check on the authority of the Department.

However, under our rules, the filing of an appeal with the Board does not automatically put the Department's action on hold while the parties and the Board proceed through the often-lengthy

[1] Person is defined as an "individual, partnership, association, corporation, political subdivision, municipal authority or other entity." 25 Pa. Code § 1021.2

hearing process of discovery, motions practice, a full hearing on the merits of the appeal and a final Board decision on the legality of the Department's action. For that to happen, the person filing the appeal must petition the Board to grant a supersedeas which is defined in the Board's rules as the "suspension of the effect of an action of the Department pending proceedings before the Board." 25 Pa. Code § 1021.2. Therefore, a Board ruling on a petition for supersedeas is a limited decision that addresses the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits of the appeal. It is not, nor is it intended to be, the final word on the legality of the Department's action. The Board may grant a supersedeas temporarily suspending the status of the Department's action "upon cause shown." 35 P.S. §7514(d). The ruling on a petition for supersedeas is committed to the Board's discretion as guided by relevant judicial precedent, the Board's own precedent and the balancing of relevant criteria applied to the specific facts of the case. *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co.*, 2017 EHB 38, 43 ("*CCJ I*") (citing *UMCO Energy Inc. v. DEP*, 2004 EHB 797); 25 Pa. Code § 1021.63(a). In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances. 25 Pa. Code § 1021.63(c).

The Board has discussed its approach to reviewing a supersedeas petition in several recent cases. See *CCJ I*, 2017 EHB 38; *Delaware Riverkeeper Network v. DEP*, 2016 EHB 41; and *Center for Coalfield Justice v. DEP and Consol Pennsylvania Coal Co.*, 2018 EHB 323 ("*CCJ III*"). As we have stated in those cases, a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need. *Delaware Riverkeeper Network*, 2016 EHB at 43; *CCJ I*, 2017 EHB at 41-42; *CCJ III*, 2018 EHB at 327. The petitioner bears the burden of demonstrating that a supersedeas should be granted. *Delaware Riverkeeper Network*, 2016 EHB at 43 (citing *Tinicum Twp. v. DEP*, 2008 EHB 123, 126). In ruling on a supersedeas petition and when

deciding whether sufficient cause has been shown for granting the supersedeas, **among** the factors to be considered by the Board are: 1) irreparable harm to the petitioner; 2) likelihood of the petitioner's success on the merits; and 3) likelihood of injury to the public or other parties, such as the permittee in third party appeals. 35 P.S. §7514(d)(1) (emphasis added). In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the regulatory factors, with a strong showing of a likelihood of success on the merits. *CCJ I*, 2017 EHB 38, 42 (citing *Hudson v. DEP*, 2015 EHB 719, 726). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *Id.* (citing *M.C. Resource Development v. DEP*, 2015 EHB 261, 265). To be successful, the petitioner's chance of success on the merits must be more than speculative; however, it need not establish the claim absolutely. *Id*. (citing *Global Eco-Logical Servs., Inc. v. DEP*, 2000 EHB 829, 831-32). Ultimately, it is up to the Board to consider the issues presented by the case in front of it, balance the factors it determines to be relevant, including, but not limited to, the three factors set out in the regulation, and based on that balancing, exercise its discretion to decide whether to grant, grant with conditions or deny a petition for supersedeas.

Analysis

Erie Coke's notice of appeal in this case challenges the Department's denial of Erie Coke's application for the renewal of the Title V Permit as set forth in the July 2019 Denial Letter. Erie Coke filed its Petition to request that the Board suspend the effect of the Department's denial while the appeal of that denial proceeds in front of the Board. The Department strenuously opposes the Petition and requested that the Board deny the Petition and vacate the temporary supersedeas that is currently in place and allowing Erie Coke to continue to operate. In addition to arguing about the facts and the relevant factors in this case, the Department set forth two further arguments in

support of its position that the Board should deny Erie Coke's Petition. We will address those two arguments before our review of the facts and the relevant factors in this case.

First, the Department argues that the Board cannot grant Erie Coke's Petition "because it would alter the status quo by permitting Erie Coke to operate and continue its unlawful activity." *Department's Post-Hearing Brief In Opposition to Erie Coke's Petition For Supersedeas ("DEP's Post-Hearing Brief"), at 10*. We agree with the Department that the Board generally will not issue a supersedeas that disrupts the status quo that existed at the time of the action by the Department. In fact, the main reason that the Board grants a supersedeas is to maintain the status quo until the Board can carry out its responsibility to hear the appeal and rule on the legality of the Department's action. Our disagreement with the Department on this issue centers on what constituted the status quo at the time of the Department's denial decision set forth in the Denial Letter. The Department contends that the status quo at that time was that Erie Coke lacked the required authorization to operate after its Title V Permit expired in February 2018. We disagree and hold that the status quo at that point in time was that Erie Coke was authorized to operate under a provision of the air quality regulations commonly referred to as the application shield.

Under 25 Pa. Code § 127.446, the air regulations provide that the "terms and conditions of an expired permit are automatically continued pending the issuance of a new permit when the permittee has submitted a timely and complete application and paid the fees required … and the Department is unable, through no fault of the permittee, to issue or deny a new permit before the expiration of the previous permit." The federal Clean Air Act contains similar application shield language. See Section 503(d) of the Clean Air Act, 42 U.S.C. § 7661b(d). No evidence was presented at the hearing regarding the timeliness of Erie Coke's application or whether the fees were properly paid so presumably Erie Coke satisfied those requirements for the application shield.

The Department's argument is that the application shield was not in place in this case because the permittee, Erie Coke, was at fault for the Department being unable to act on the renewal application before the expiration of Erie Coke's Title V Permit in February 2018. *DEP's Post-Hearing Brief, at 7*.

The record developed during the limited supersedeas hearing does not support the argument that the Department is attempting to make regarding the application shield. The evidence demonstrates that the Department and Erie Coke engaged in extensive back and forth discussions regarding the permit renewal application, both before and after the expiration of the Title V Permit in February 2018. However, the Department failed to present any evidence that it ever took the position that Erie Coke was operating without authorization after February 2018 or at any point prior to issuing the Denial Letter. The Denial Letter itself enclosed what the Department described as "a comprehensive list of violations which have been discovered at the facility as of the date of this letter." *DEP Exhibit ("Ex.") BB.* There is no violation on the list where the Department cites Erie Coke for operating without a permit or other authorization after February 2018. The February 2019 Administrative Order contains multiple allegations of violations of the air regulations by Erie Coke but, again, no violation is listed for operating without a permit or other authorization after 2018. In fact, in the February 2019 Administrative Order, the Department repeatedly sets forth several conditions in the Title V Permit as part of the applicable law and asserts that Erie Coke is in violation of several Title V Permit conditions. *See DEP Ex. RR, Paragraphs T through CCC*. None of the evidence regarding Department inspection reports of Erie Coke's operations cite a violation for operating without a permit or other authorization. Instead, Department inspection reports, completed as recently as June 2019, categorized the permit status and expiration date as follows: "Permit Shield." *See DEP Exs. S, T, and X*. These actions

are clearly inconsistent with the Department's contention that there is no application shield covering Erie Coke's operations and the Title V Permit's terms and conditions no longer apply to Erie Coke. If, as the Department argues, it believed that Erie Coke was operating without a permit or proper authorization since the Title V Permit expired in February 2018, we would expect that the Department would have asserted that position vigorously in the Denial Letter and the numerous communications it had with Erie Coke prior to that action. The evidence at the hearing demonstrates to our satisfaction that both Erie Coke and the Department acted in a manner consistent with the belief that Erie Coke's operations were covered under the application shield right up to the time of the denial decision.

The Department's claim in its post-hearing brief that the application shield does not apply because Erie Coke failed to provide required information in its application and thereby prevented the Department from acting on the application, is even further undercut by the evidence presented at the hearing involving a technical deficiency letter. A technical deficiency letter is the formal written notification sent by the Department to a permit applicant setting forth the information the Department needs to complete its review. There was no evidence presented that the Department issued a technical deficiency letter to Erie Coke prior to the expiration of the Title V Permit in February 2018. Mr. Eric Gustafson, the DEP program manager who denied the renewal application and signed the Denial Letter, stated that he believed that the need for additional information was conveyed to Erie Coke, possibly in an e-mail, in November 2018, but acknowledged that a formal technical deficiency letter was not sent to Erie Coke until June 19, 2019, less than two weeks prior to the issuance of the Denial Letter. (Hearing Transcript ("T.") at 1007). This is inconsistent with the argument set forth by the Department that the application shield was not in place after February 2018 because the Department was prevented from acting on

the renewal application because it lacked information from Erie Coke. Looking at the evidence presented, we conclude that the status quo at the time of the Denial Letter was that Erie Coke was operating under the application shield provided in the regulations. The parties' actions, including those of the Department, adequately demonstrate that this was the understanding of the parties in this case.

The second argument that the Department sets forth in its post-hearing brief is based on similar, although not identical, statutory and regulatory provisions governing supersedeas petitions in front of the Board. 35 P.S. § 7514(d)(2) of the Environmental Hearing Board Act states that a "supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." At 25 Pa. Code § 1021.63(b), this exact language appears with the exception that the term "shall not" is replaced by "will not." The Department takes the position that the Board is prohibited from granting Erie Coke's Petition by this provision. As a general proposition, we agree with the Department that this language acts to limit the Board's discretion when considering a supersedeas petition. However, pollution and injury to the public health, safety or welfare are broad terms subject to a certain degree of ambiguity and, contrary to the argument set forth by the Department, we hold that the Board still retains some degree of discretion to grant or deny a petition for supersedeas under this statutory and regulatory language. In particular, a problem arises when one applies the Department's absolutist position to the type of Department action challenged in this case, i.e. the denial of a permit renewal application. An applicant seeking a permit *renewal*, as opposed to a *new* permit, has ongoing operations that the Department previously agreed satisfied the legal requirements to receive a permit. The applicant is simply requesting permission from the Department to continue its ongoing permitted operations. The Department's position that the

Board is prohibited from issuing a supersedeas in the case of a denial of a permit renewal is problematic because in every case involving denial of a permit renewal application for an ongoing permitted facility, there is at least the threat, if not the actual existence of pollution or injury to the public health, safety or welfare. If that were not the case, there would be no need for a permit or permit renewal in the first place. Taking the Department's position to its logical conclusion, the Department could refuse to renew an air permit for a completely arbitrary reason, for instance, because the Department staff did not like the color of the cars being produced by an automobile factory. In the face of that decision, the applicant would be required to either violate the law and continue its operations without the required permit and face the prospect of significant civil penalties or to shut down its operations. Even if the Department's clearly arbitrary decision resulted in the immediate closure of the factory and put people out of work, the Department's position is that the Board could not grant a supersedeas petition and suspend the Department's clearly unreasonable action until the applicant for a permit renewal was granted a full and fair hearing by the Board. The Department's absolutist interpretation would effectively deny the Board the ability to maintain the status quo of the parties prior to a Department denial action which is, of course, the whole point of having the right to bring a supersedeas petition in the first place.

We do not think that the statutory and regulatory language was intended to foreclose the possibility of an existing permittee obtaining a supersedeas when challenging the denial of a permit renewal application. The Board has, in fact, granted a supersedeas in at least one prior case involving a challenge to a Department decision that would have forced the closure of an ongoing permitted operation. In *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, the Board considered a supersedeas petition requesting that the Board suspend the Department's revocation of an operating permit for a construction and demolition waste processing and transfer facility.

The Board, after balancing the applicable supersedeas criteria, granted a petition for supersedeas with special conditions designed to minimize any potential threat to the environment. See also *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, (The Board, after balancing the relevant factors, granted a conditional supersedeas despite finding that granting the supersedeas would likely result in ongoing pollution from trucks driving across a stream during the time the supersedeas was in place). While we ultimately conclude that the Department's argument that the Board is prohibited from ever granting a supersedeas in a case involving the denial of permit renewal application is not correct, the exercise of the Board's discretion in ruling on Erie Coke's Petition requires us to consider the potential for pollution or injury to the public health, safety or welfare that may occur during the pendency of any supersedeas. These concerns are some of the relevant factors that the Board will consider when conducting the required balancing of the competing interests necessary for us to reach our decision. Specifically, these issues are encompassed by the direction that we should consider the likelihood of injury to the public as part of our analysis. We will now turn our attention to reviewing the relevant factors in this case and determining how to appropriately balance those factors.

Relevant Factors

As discussed, the Board is tasked with considering and balancing relevant factors in reaching a decision on a petition for supersedeas. Among the factors to be considered are the three listed at 25 Pa. Code § 1021.63: (1) Irreparable harm to the petitioner; (2) The likelihood of the petitioner prevailing on the merits and (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals. The statement in the Board's rules, that these are "among the factors to be considered" makes clear that these three factors are not the only factors

that the Board can or should consider in appropriate cases, but they generally encompass the main issues of concern in a supersedeas proceeding.

Irreparable Harm to the Petitioner

Erie Coke asserts it will suffer irreparable harm if its Petition is not granted. Its claim for irreparable harm starts from the premise that absent a supersedeas, Erie Coke will be required to shut down the 58 ovens that make up the two coke batteries at the facility. Multiple witnesses for Erie Coke testified that the coke ovens at Erie Coke must be run on a continuous basis to maintain their structural integrity. T. at 57, 329-330. If the ovens are allowed to cool below their 2000-degree operating temperature, the bricks that make up the walls of the coke ovens will start to shrink and crumble, opening up gaps of several inches in the wall. *Id.* If that were to happen, Erie Coke contends that the coke ovens in its two batteries could not be re-started, and Erie Coke would no longer be able to make its only product. As a result, Erie Coke would be permanently out of business. Erie Coke argues that the resulting harm to Erie Coke from a decision to deny its Petition would be "complete, catastrophic and indisputably irreparable." *Erie Coke Corporation's Post-Hearing Brief in Support of Supersedeas ("Erie Coke's Post-Hearing Brief"), at 5.*

The Department does not contest Erie Coke's argument that if it is required to shut down its ovens, the integrity of the ovens would be permanently compromised and could not be re-started, thus destroying Erie Coke's business. T. at 1063-64. Instead, the Department asserts that nothing in its denial decision requires Erie Coke to immediately stop operating its coke ovens. The Department acknowledges that it is seeking a permanent injunction to shut down Erie Coke's facility in the Erie County Court of Common Pleas but asserts that there is no clear irreparable economic harm because that process will take time to play out and the outcome is uncertain. *DEP's Post-Hearing Brief, at 48-49.* The Department admits that the lack of a permit may

eventually result in the closing of Erie Coke but asserts that there is no Department order requiring Erie Coke to immediately shut down. *Id*.

The Board finds the Department's arguments that aim to minimize the impact of the permit denial on Erie Coke unpersuasive and inconsistent with the reality of the situation. While technically the Department is correct that its' denial decision did not order Erie Coke to shut down, in the absence of a supersedeas from the Board, any Erie Coke operations after the denial date violate Erie Coke's undisputed legal obligation to have a permit or other authorization covering operation of its coke ovens. The Department specifically pointed out that fact in one of the concluding paragraphs of its Denial Letter stating "[Y]ou are reminded that Section 6.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4006.1(b)(1), and 25 Pa. Code § 127.402 prohibits a person from operating any stationary air contamination source unless the Department shall have issued to such person a permit to operate such source under the Act." *DEP Ex. BB.* In the absence of a grant of a supersedeas from the Board, Erie Coke is faced with a classic "damned if you do and damned if you don't" choice. Erie Coke can either continue operating without the required permit or authorization and risk civil penalty liability that will quickly rise to millions of dollars given that the Department can assess $25,000 per day per violation or it can comply with the law and the Department's clear reminder in the Denial Letter and shut down its coke ovens thereby destroying its ovens and going out of business permanently. That strikes us as a clear-cut case for a finding of irreparable harm. The Department now suggests that there are other possible scenarios, but the evidence at the hearing does not support that any other scenarios were economically feasible or reflect the reality of the facts in this case. We have no doubt that if Erie Coke continued its operations without a permit and without a supersedeas from the Board, the Department would not only seek significant penalties but would use this major violation to support

both its denial decision in the upcoming proceedings before the Board and in its efforts to close Erie Coke down in the Erie County Court action. The catch-22 that the Department's denial decision created for Erie Coke supports a finding that Erie Coke would suffer irreparable harm absent the grant of a supersedeas in this case.

The Department argues that Erie Coke's claim of irreparable harm is less compelling because any harm it would suffer is in substantial part the result of its own actions. There is some truth to the Department's argument although Erie Coke disputes some of the facts and conclusions that the Department relies on for this position. The record reflects that early in the permit renewal process in 2017, the Department raised several concerns it had with Erie Coke's renewal application as well as its operating performance. T. 897-898, 915, 917-918, 921-922. Those issues persisted and were discussed with Erie Coke through correspondence and face-to-face meetings over a several month period while the Department continued its consideration of the permit renewal application. *Id*. Erie Coke's management appears to have started to get the message in late 2018, adding technical staff and hiring legal counsel to assist in environmental compliance matters. *See DEP Ex. QQ*. However, the Department remained frustrated by what it perceived as the failure of the management of Erie Coke to take seriously the Department's concerns leading to the Department's issuance of the February 2019 Administrative Order, the issuance of the May 2019 Docket Notification and ultimately the issuance of the Denial Letter on July 1, 2019. We will certainly consider the role that Erie Coke's management's actions played in putting Erie Coke in the position it finds itself in presently in reaching our final decision, however, at least as to the factor of irreparable harm, we think that Erie Coke has demonstrated that it will suffer irreparable harm if its Petition is denied.

Likelihood of Success on the Merits

Erie Coke's Notice of Appeal challenges the Department's decision and asserts that the Department acted unreasonably, arbitrarily, and capriciously, abused its discretion, and erred as a matter of law by denying the permit renewal application. In order to evaluate the likelihood that Erie Coke will be successful with its appeal, we start by reviewing the basis for the Department's decision as set forth in the Denial Letter which was admitted at the supersedeas hearing as DEP Ex. BB. The primary reason given in the Denial Letter for the Department's action is that the Department determined that Erie Coke lacked the intention or ability to comply as demonstrated by the compliance history of the facility. The Department further stated that Erie Coke had failed to submit requested or required information necessary to process the renewal application and listed four specific items of missing information. The Denial Letter listed three further determinations by the Department, including ongoing violations, a lack of adequate verification of compliance in the permit renewal application and Erie Coke's operation of air contamination sources and air pollution control equipment contrary to plans and specifications approved by the Department. In addition, the Department points to the placement of Erie Coke on the compliance docket as further justification for denial of the permit renewal application. The Department argues that Erie Coke failed to show during the supersedeas hearing that the Department's denial was unreasonable or contrary to the law and therefore, Erie Coke is unlikely to succeed on the merits of its appeal.

Erie Coke, of course, argues that the Department is incorrect and that it has shown that it has a reasonable probability of success on the merits. *Erie Coke's Post-Hearing Brief, at 15.* Erie Coke states that each of the reasons set forth in the Denial Letter are not supported by the evidence presented at the supersedeas hearing and that a fair reading of the evidence will show that the Department's denial decision was unreasonable and contrary to the law. Erie Coke also points out

that in a case where the magnitude of irreparable harm is great, the Board may relax the required showing on the merits that the petitioner must make, citing *Global Eco-Logical Services*, 1999 EHB 649; *Gary L. Reinhart, Sr. v. DEP*, 1997 EHB 401, 419 and *Keystone Cement Company v. DER*, 1992 EHB 590. 599. In addition, Erie Coke notes that the Board's consideration of the Department's denial at the full hearing will be *de novo*. This of course means that the Board will consider anew the evidence presented, including any physical or operational changes that have occurred at the Erie Coke facility by the time of the full hearing. Therefore, according to Erie Coke, the Board should consider the impact of Erie Coke's ongoing compliance efforts when considering the likelihood that it will prevail on the merits of its claim.

The Department's denial of Erie Coke's permit renewal application rests in large part on the Department's determination that Erie Coke lacks the intention or ability to comply with the requirements governing its operations. The Department included an extensive list of alleged violations as an exhibit to the Denial Letter. Many of these same violations form the basis of the Department's February 2019 Administrative Order and the Department's May 2019 Docket Notification. As we previously noted, Erie Coke has appealed these earlier Department actions and therefore, these Department actions are not final at this point as a matter of law.[2]

The Department presented testimony from Mr. Daniel Brophy, its principal inspector for the Erie Coke facility and Mr. Gustafson, in support of its determinations regarding the alleged violations. Their testimony discussed the facts supporting the violations and included pictures documenting some of the more recent violations. Many of the identified violations involved opacity issues associated with the battery stack. The emissions from the battery stack are

[2] The Board has discussed consolidating these two earlier appeals into this action with the parties since those actions are related to and underpin the denial action.

continuously monitored and the violations of the opacity limits are readily identified in the COMS reports. Erie Coke did not substantially challenge this category of violations but asserted that the COMs reports for recent months show improved performance. A second type of violation noted by the Department involved leaks and opacity problems associated with various parts of the oven battery identified as offtakes, lids and doors. Again, Erie Coke did not substantially challenge these violations but asserted improved recent performance. A third category of violations involved fugitive emissions from the ovens themselves. These violations involve a determination of opacity by a trained observer using a technique identified as Method 9. Erie Coke challenged the reliability of Method 9 in determining violations and we share some of those concerns. Method 9 relies on an individual estimating the degree of opacity of fugitive emissions based on a visual observation using controlled conditions related to the length of time of the observation and the position of the observer. T. 792-794. There appears to be an element of subjectivity to the determination of the degree of opacity using Method 9 and that gives us some pause as to this category of violations.

In addition to these opacity issues, the Department also pointed to violations associated with a piece of pollution control equipment known as the H2S Absorber and/or the Thionizer. The violations arise from Erie Coke's need to periodically take this equipment offline for maintenance. The time frame for maintenance appears to have varied from one day to up to one week. Because its operations are continuous, when this equipment is offline, Erie Coke is in violation of both a numerical emission limit for hydrogen sulfide, as well as a permit requirement that this equipment be in operation any time Erie Coke is operating its coke ovens. Erie Coke points out that the permit also requires that its pollution control equipment be properly maintained, that the Department has long been aware that Erie Coke was required to take this equipment offline periodically for

maintenance and that this was done in the past with at least tacit approval by the Department. The evidence at the hearing is clear that at least by late August 2017, the Department began to raise the need for a backup system that could control emissions when the H2S Absorber was offline. Erie Coke was not initially receptive to this idea and it was not until June 25, 2019, just prior to issuance of the Denial Letter, that Erie Coke submitted a plan approval request to the Department covering the future installation of this equipment. The testimony at the hearing showed that the Department is currently reviewing that request and that after it is approved, there will be a period of several months before the equipment is in place at Erie Coke.[3] Erie Coke argues that the submittal of the plan approval further demonstrates its intent to comply going forward.

The problem of course is determining when violations, contested and otherwise, rise to the level where one can conclude that the permit applicant lacks the necessary intention or ability to comply with the requirements and that a renewal application should be denied. Mr. Brophy testified that the Department does not require an applicant to be in perfect compliance to obtain a permit renewal. T. 852-853. According to Mr. Gustafson's extensive testimony on this topic, it appears that he concluded that the violations reached the required level based on an upward trend in the number of violations, particularly opacity violations, that were occurring largely in 2017 through early 2019, along with what he perceived to be Erie Coke's lack of willingness to cooperate with the Department and address the violations. The evidence presented generally supports Mr. Gustafson's view of events up to a point. The record from the hearing reflects that Erie Coke began to get the message that it needed to do a better job on environmental matters

[3] In addition to the violations that are discussed here, and which made up the bulk of the testimony concerning violations during the hearing, the Denial Letter lists other violations. including but not limited to, fugitive dust and malodors off the Erie Coke property. Given the limited nature of the supersedeas hearing and the limited testimony concerning these violations, the Board is not in a position to pass judgment on the impact that these violations had on the Department's denial decision or the likelihood that Erie Coke can successfully dispute these violations.

starting in late 2018. It began to hire new staff to address environmental compliance and made efforts to address the issues raised by the Department. *See DEP Ex. QQ*. Despite appealing the Department's February 2019 Administrative Order, Erie Coke has generally complied with the requirements of that Order, although admittedly not to level that the Department would like to see. Erie Coke argues that its recent efforts demonstrate that the Department is wrong in concluding that it lacks the requisite intent or ability to comply with the law. We think the evidence in the hearing regarding Erie Coke's recent efforts paints a mixed picture. Erie Coke appears committed to coming into compliance, admittedly in large part because of the dire consequences it faces if it does not do so. Each of the parties acknowledge that coming into compliance will take both time and financial resources, neither of which are in large supply at Erie Coke at this moment. The Department points to testimony from Erie Coke's witnesses stating that they are not sure that Erie Coke will ever be able to fully comply with the regulations. We understood that testimony to be a truthful acknowledgement of the challenges that Erie Coke faces along with a recognition that even well-managed and financed companies have periodic compliance issues, rather than an indication that Erie Coke lacked the intent or ability to comply.

The Department also cited the lack of certain information that it requested or required that Erie Coke provide to the Department as a basis for the denial of the permit renewal application. Mr. Anthony Nesselbeck, Erie Coke's environmental manager, testified that Erie Coke had provided this information to the Department in December 2018. T. 574-576. He stated that when he was contacted about the lack of this information in June 2019, he provided the Department a postal receipt showing that the information had been submitted six months earlier and subsequently provided the Department with a copy of the information after being informed that the Department could not locate the information. It is not clear from Mr. Nesselbeck's testimony that all of the

information listed by the Department in the Denial Letter was covered by the earlier submittal, but the Department did not offer direct testimony conflicting with the testimony of Mr. Nesselbeck. Therefore, it seems possible to the Board that Erie Coke may be successful in disputing this basis for the Department's denial decision.[4]

The Department also raised the fact that Erie Coke is on the Compliance Docket as a basis for its denial. Besides the fact that this decision is not final as we already discussed, we have concerns regarding the Compliance Docket process and its relationship to the Department's denial decision. The Compliance Docket is a mechanism to put a company on notice that the Department has determined that ongoing unresolved violations are a problem that will prevent the issuance of a permit. Our concern arises because the decision to resolve or not resolve a past violation is unilaterally controlled by the Department and is unreviewable until the Department takes an enforcement action, makes another decision based on the unresolved violation or places the violation on the Compliance Docket. In this case, Mr. Gustafson stated that at a point in 2018, the Department decided unilaterally that it would stop resolving Erie Coke's past violations by accepting penalty payments. T. 877, 1000-1001. That decision is entirely within the Department's discretion and we are not questioning that decision. The issue for us arises from the fact that Erie Coke lacked the means to challenge any unresolved violations until the Department issued the February 2019 Administrative Order. Erie Coke did challenge those violations and that challenge is ongoing in front of the Board, so they remain legally unresolved. These unresolved violations next became the basis for placing Erie Coke on the Compliance Docket. Erie Coke again

[4] The remaining reasons for the denial set forth in the Denial Letter appear, based on both their position in the letter and the lack of evidence presented regarding them in the hearing, to have played a lesser role in the Department's decision. The evidence that was presented in the hearing demonstrates that Erie Coke has addressed, or is in the process of addressing, the issues identified in the remaining reasons.

challenged that Department action and that challenge is also ongoing in front of the Board and the violations necessarily remain legally unresolved. The Department next argues that the presence of Erie Coke on the Compliance Docket supports its decision to deny the permit renewal application. Once again, Erie Coke challenged the permit denial decision and that challenge is in front of the Board and the violations necessarily remain legally unresolved. The only way to legally resolve any of these violations, short of a decision by the Board, is through the Department agreeing to a settlement that includes resolving the past violations. The Department is of course entirely free to unilaterally decide to settle or not settle this matter. It should be obvious at this point, however, that the whole process is circular on nature and only subject to Board review after the fact and therefore, the presence of Erie Coke on the Compliance Docket cannot stand on its own as a reason to deny the permit renewal application.

Ultimately, applying a lower standard for the required showing on the merits that is appropriate in this case given the magnitude of the harm to Erie Coke from a denial of the Petition, along with a recognition that the full hearing will be *de novo*, allowing new evidence to be considered by the Board that was not necessarily available to the Department at the time of its denial decision, we hold that Erie Coke has done enough in this hearing to convince the Board that there is a reasonable possibility that it will succeed in its challenge to the Department's action. In reaching that decision, it is important to remind the reader of the limited nature of a supersedeas hearing in general and the specific limitations in this case. The Denial Letter was issued on July 1, 2019, the Petition was filed late in the day on July 3, 2019, and the supersedeas hearing commenced on July 10, 2019. Both parties had little time to prepare for the hearing and line up the full slate of witnesses that could have been presented to the Board. A case of this magnitude would normally include months of discovery and depositions by the parties, along with extensive

pre-hearing preparation. The limited nature of the hearing preparation is inherent in the supersedeas process but also makes the Board appropriately cautious regarding the likely outcome of a full hearing. The Department's reasons for the denial of the permit renewal application are largely factual in nature and rely mainly on the number of violations and poor compliance history of Erie Coke. Erie Coke conceded that some of the violations cited by the Department were legitimate, presented credible challenges to other violations, and argued, with mixed success, that its compliance record was improving in the recent months leading up to the Denial Letter. At the same time, we also considered the fact that, to the best of Mr. Gustafson's knowledge, this was the first time the Department has ever denied the renewal of a Title V permit application. T. at 986. Based on our understanding of the evidence, and considering the situation presented by the Department's action, we conclude that Erie Coke should at least be provided an opportunity to argue its case at a full hearing and allow the Board to determine, based on a complete evidentiary record, whether Erie Coke has demonstrated by a preponderance of the evidence that the Department acted unreasonably or contrary to the law.

Likelihood of Injury to the Public or Other Parties

The Department and Erie Coke presented contrasting evidence at the hearing regarding the impact of Erie Coke's operations on the public or other parties and what would take place if the Board granted or denied the Petition. The Department presented testimony from five people, each of whom either lives, works or recreates in the area surrounding the Erie Coke facility. Erie Coke's evidence consisted of testimony from Dr. Allen Dittenhoefer regarding air emissions monitoring and a risk assessment he completed for the area around Erie Coke. We also heard testimony from a customer of Erie Coke about the impact its closing would have on the end users

of the coke and from two employees of Erie Coke about the impact on their lives and those of their fellow employees if Erie Coke permanently closed.

The Department asserts that the evidence presented by its five witnesses demonstrated substantial evidence of injury to the public and requires denial of the Petition. *DEP Post-Hearing Brief*, at 55. We first note that the likelihood of injury to the public is only one of the relevant factors that the Board considers in a supersedeas case and does not on its own require the denial of a supersedeas contrary to the Department's statement. Turning our attention to the testimony of the citizens who testified on behalf of the Department, the impacts cited consisted principally of malodors and the presence of black particles and dust that crossed their property and accumulated on their homes, cars and a boat. Mr. Steve Narusewicz testified that he lives 200 to 300 yards from the Erie Coke facility and has been living at his current residence since 1985. T. at 380-81. He stated that one to three times a year, he and his family experience odors and dust that he attributes to the coke plant that drive them indoors and require them to shut their windows. T. at 382-83. Mr. Narusewicz also testified that twice a year he must power wash his house and windows to clean off the accumulated dirt and dust. T. at 385. The other resident who testified, Mr. George Harmon, lives approximately 200 yards east of the Erie Coke facility along the lakeshore. T. at 411. Mr. Harmon testified that he experiences odors from the plant during walks as well as at home where at times he must close his windows because of the odor. T. at 413. He also testified that he sees black speckles on his car that he attributes to the coke plant. T. at 413-414. The Department also presented two witnesses, Mr. Scott Mellon and Ms. Catherine Cardoso, who are employees at the Pennsylvania Soldiers and Sailors Home located about three-tenths of a mile southwest of the Erie Coke Plant. T. at 398. Both Mr. Mellon and Ms. Cardoso testified that they periodically smell a strong odor that they attribute to the coke plant and that at times the odor,

and what Mr. Mellon described as a cloud or fog, requires them to close the windows at the Soldiers and Sailors Home and remain indoors. T. 398-399, 421-423. Mr. Mellon also stated that on what he described as a bad day, he experiences a black discharge if he blows his nose. He also testified that he knows the cloud/fog is coming because he experiences stinging eyes and his throat hurts. T. 403. The Department's final witness, Brandon Sutter, owns a boat that he docks at Lampe Marina located at a distance that Mr. Sutter estimated to be 600 to 1000 yards northwest of the coke plant. T. at 484-486. Mr. Sutter testified that he finds a black residue on his boat every time he uses it after there has been a south or southeast wind. T. at 486-487. He stated that as a result, he is required to frequently use a strong detergent to clean the black residue off his boat. T. 489-490. Mr. Sutter stated that the residue was coming from Erie Coke. T. 493.

Erie Coke's first witness on the issue of injury to the public was an expert witness, Dr. Allen Dittenhoefer. His testimony was largely centered on a 2019 risk assessment he completed under contract to Erie Coke. *Erie Coke Ex. 3*. The risk assessment used emission inventory data from Erie Coke and EPA dispersion models to evaluate the level of cancer risk posed by the coke plant emissions. Dr. Dittenhoefer stated that based on his risk assessment "there would be fewer – much fewer than one case of cancer if the plant would operate for one hundred years or more. Based on this statistical risk estimate, that would be – unlikely there to be any cancer directly attributable to coke oven emissions." T. at 25-26. Dr. Dittenhoefer also testified that earlier studies conducted by EPA "found that ecological risks for Erie Coke were not significant, that acute toxicity risks were not significant, and chronic non-cancer risk was not significant." T. 43.

Erie Coke also presented testimony from Mr. Jim Hansen, a vice president at a company identified as McWane, Incorporated. Mr. Hansen coordinates the purchase of foundry coke for all of McWane's foundries. T. 230. Mr. Hansen testified that Erie Coke was the sole supplier for

three of McWane's foundries. According to Mr. Hansen, the loss of Erie Coke as a coke producer would increase his cost of operations but because of the size and breadth of how many foundries McWane operates, he would be able to find alternative supplies albeit with some difficulty and at a higher price. T. 233, 239. Mr. Hansen expressed concern that there are only three domestic foundries in current operation and that the loss of Erie Coke would likely make it difficult, if not impossible, for some small companies to obtain coke supplies.

Erie Coke also provided testimony from two of its employees, Mr. Anthony Nearhoof, the current plant superintendent, and Mr. John Nelson, a current battery supervisor. Neither one was called principally to discuss the impact of the possible closure of Erie Coke on their lives and on other employees, but they were each asked limited questions on this topic. Mr. Nearhoof testified that he would likely have to sell his home and then work whatever job he could find to provide some type of living for his family. T. at 248. He also expressed concern as to how he would be able to afford tuition for his son who was just entering college as a freshman. *Id*. Mr. Nelson expressed similar concerns that the closure of Erie Coke would be detrimental to him and his family and that he was not sure what he would do without his job at Erie Coke. T. at 312. Both Mr. Nearhoof and Mr. Nelson said that there would be a negative impact on other employees at Erie Coke if the facility closed.

The evidence supports the conclusion that there would likely be some injury to the public if Erie Coke is granted a supersedeas. The nature and scope of that injury is less clear. The testimony from the Department witnesses largely consisted of concerns with odors and dust or particles. We are not discounting the fact that these things impact these witnesses' lives in a meaningful way, but the Department offered no significant testimony regarding health impacts or other types of injury beyond the testimony of these five witnesses. The Department appears to

recognize this shortcoming acknowledging in its post-hearing brief that the number of witnesses and depth of their testimony was limited given the nature of the supersedeas proceeding. *DEP Post-Hearing Brief*, at 56.

We are not sure how to credit Dr. Dittenhoefer's testimony. The Department effectively challenged some of the emissions data he used in his risk assessment causing us to question the validity of his conclusion regarding the overall cancer risk. At the same time, the Department did not present any study of its own nor did it convince us that Dr. Dittenhoefer's testimony regarding the lack of significant risk identified in the earlier EPA studies was incorrect. We also found Mr. Hansen's testimony regarding the impact on his company credible but overall it offered only limited support to Erie Coke's claim of significant injury to the public. He said his company may suffer increased costs but would likely be able to find other supplies of coke if Erie Coke went out of business. We think his testimony about the impact on other companies was largely speculative. Finally, we credit the testimony of Mr. Nearhoof and Mr. Nelson that the closure of Erie Coke would be detrimental to them and their families, but we are not sure that injury to a company's employees rather than the general public is the type of injury that the Board should consider most relevant in reaching its decision. Overall, we find that the evidence regarding the likelihood of injury to the public is mixed and best addressed by setting conditions on Erie Coke's operations during the limited time that any Board-ordered supersedeas would remain in place.

Conclusion

Erie Coke's Petition, resulting from the Department's denial of the permit renewal application, requires that the Board balance various competing interests. Our rules make clear that a Department decision is not final until there has been an opportunity to appeal that decision to the Board. Because of the unique circumstances in this case, the Erie Coke facility would be shut

down and the coke ovens damaged beyond repair before Erie Coke had a chance to challenge the Department's decision at a full hearing and receive consideration of its claim by the full Board. Once the coke ovens are destroyed, the right to appeal would essentially be moot and the Department's decision would be final as a practical matter if not a legal one. Such a result strikes us as fundamentally unfair given the unique circumstances posed by this case.

At the same time, we recognize that allowing Erie Coke's operations to continue, even for a limited time, extends the timeframe that people located in the area surrounding the facility will likely experience the negative impact of those operations on their lives. Those impacts are real and clearly disrupt the daily lives of the individuals who testified during the hearing. We are sympathetic to their concerns and have taken steps in this decision to try to address those concerns. The evidence presented at the supersedeas hearing suggests that Erie Coke is finally working to address the air issues at the facility, but it is certainly reasonable to question why it has taken so much time and effort by the Department to get Erie Coke's full attention on these issues. Even with that full attention, it is by no means certain that Erie Coke will be able to meet its obligations under the environmental regulations. If Erie Coke cannot convince the Board that the Department was wrong about its lack of intention and ability to comply with those requirements, it is difficult to imagine Erie Coke prevailing at the full hearing. We will have to see what the fully developed evidence presented at that hearing will demonstrate to the Board, but ultimately, we think that it is only fair to allow Erie Coke the opportunity to present its case.

When we consider the issues and the evidence presented at the supersedeas hearing, we conclude that we should grant the requested supersedeas. Erie Coke has presented enough evidence to persuade the Board that it has met its burden and demonstrated a need for a supersedeas. However, we also conclude that it is best to grant the supersedeas with a series of conditions to

address the concerns regarding the impact of allowing operations to continue at Erie Coke until the Board can decide the appeal. The conditions set forth in the Order are intended to limit the time that the supersedeas will remain in place and minimize the impact of the facility's operations during that time. Neither the Department nor Erie Coke gets everything that they wanted, and neither is likely to be entirely happy with this outcome. In the end, we hold that allowing Erie Coke to get a full hearing by granting the supersedeas while placing conditions on its operations that will hopefully minimize the environmental impacts during that time is the proper balancing of the relevant factors in this case. If Erie Coke is unwilling or unable to meet the conditions set by the Board, the Board will be able to address that and terminate the supersedeas. Further, there is nothing in this Opinion or Order that restricts the Department from continuing its inspections and taking appropriate enforcement action if it finds that Erie Coke has committed additional violations. Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2019-069-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of August, 2019, it is hereby ordered that the Petition for Supersedeas is granted with the following conditions:

1. The evidentiary hearing on Erie Coke's appeal will be held at the Board's Erie Facility beginning at 10 a.m. on February 3, 2020. No requests for extensions of the hearing date will be granted by the Board. Within 15 days of the date of this Order, the parties will submit to the Board a proposed Case Management Order setting forth proposed dates for pre-hearing deadlines.
2. During the time that the supersedeas remains in place, Erie Coke's operations shall be limited, in any 24-hour period, to pushing the lesser of either 75% of the ovens in service or thirty (30) ovens.
3. During the time that the supersedeas remains in place, Erie Coke shall not produce any Furnace coke.
4. During the time that the supersedeas remains in place, a minimum of 99% of the minutes of Erie Coke's battery stack emissions recorded by the COMS system shall comply with the 20% opacity limit. Compliance with this requirement shall be determined by dividing the number of recorded minutes that exceed the 20% opacity

limit by the total number of recorded minutes in a month. Erie Coke shall provide the Department air staff in the NWRO with the COMS data necessary to determine monthly compliance within five (5) business days of the end of the month.

5. During the time that the supersedeas remains in place, a minimum of 99.90% of the minutes of Erie Coke's battery stack emissions recorded by the COMS system shall comply with the 60% opacity limit. Compliance with this requirement shall be determined by dividing the number of recorded minutes that exceed the 60% opacity limit by the total number of recorded minutes in a month. Erie Coke shall provide the Department air staff in the NWRO with the COMS data necessary to determine monthly compliance within five (5) business days of the end of the month.
6. During the time that the supersedeas remains in place, Erie Coke shall meet the NESHAP standard for pushing emissions at least 99% of the time. Compliance with this condition shall be determined by dividing the number of monthly observations that comply with the NESHAP standard by the total number of monthly observations. Erie Coke shall provide the Department air staff in the NWRO with the NESHAP observation data necessary to determine monthly compliance within five (5) business days of the end of the month.
7. During the time that the supersedeas remains in place, Erie Coke's pushing emissions as measured by Method 9 shall not exceed 30% opacity more than 5% of the time and shall not exceed 20% opacity more than 12.5% of the time, measured on an instantaneous basis. Compliance with this condition shall be determined by dividing the number of monthly Method 9 observations exceeding the respective opacity standard (either 20% or 30%) divided by the total number of monthly Method 9

measurements. Compliance calculations shall be completed three ways: (1) using just Erie Coke's Method 9 observations; (2) using just the Department's Method 9 observations and; (3) using all the Method 9 observations made by Erie Coke and the Department. Erie Coke shall provide the Department air staff in the NWRO with Erie Coke's Method 9 observation data necessary to determine monthly compliance within five (5) business days of the end of the month.

8. During the time that the supersedeas remains in place, all coal at Erie Coke shall be stored within the coal storage yard. Any coal that is currently stored outside the coal storage yard shall be removed from Erie Coke's property or placed within the coal storage yard on or before September 15, 2019.
9. During the time that the supersedeas remains in place, all coke shall be stored within the fence line at Erie Coke's property. No coke shall be stored within 400 feet of the southern corner of the Lampe Marina parking lot. Any coke that is currently being stored within storage areas now prohibited for future storage shall be removed on or before September 10, 2019.
10. During the time that the supersedeas remains in place, all storage, handling or movement of coal and coke by Erie Coke shall be conducted in a manner designed to limit the likelihood of fugitive dust emissions arising from the activity. Erie Coke shall water any potential sources of fugitive dust when necessary to control dust emissions and will limit the storage, handling or movement of coal and coke when wind conditions make it likely that fugitive dust emissions will leave Erie Coke's property.
11. Erie Coke shall submit to the Department updated work practice and operations and maintenance plans that incorporate all permit requirements from Title V Operating

Permit No. 25-00029 and necessary operational thresholds by September 15, 2019. No later than the first shift on September 16, 2019, Erie Coke will implement the updated work practice and operations and maintenance plans.

12. Erie Coke will fully and consistently implement the compliance plan it submitted to the Department that was marked as ECC Exhibit 4 in the supersedeas hearing.
13. During the time the supersedeas remains in place, if Erie Coke shuts down Erie Coke's desulfurization system (H2S Absorber and/or Thionizer) for any reason, including routine maintenance, it shall, starting twelve (12) hours before shutting down the system, limit the number of ovens it charges to no more than twenty-four (24) ovens in a twenty-four (24) hour period.
14. Erie Coke shall submit a plan approval application within ninety (90) days of the date of this Order covering all coke side shed improvements that require plan approval from the Department.
15. Within thirty (30) days of the date of this Order, Erie Coke will deposit $1,000,000 in a newly established bank account separate from its current existing accounts. The use of the funds in the new account shall be limited to capital equipment purchases (including related engineering and consultant fees) arising from the projects listed in Erie Coke's July 5, 2019 Letter to Mr. James E. Miller of the Department (excluding the Wastewater Pretreatment project) *DEP Ex. DDD.* The new account shall remain in place so long as the supersedeas remains in effect and at no point during that time shall the balance in the new account fall below $300,000. Erie Coke shall within five (5) days of opening the account provide the Department with documentation evidencing the opening of the account and its full funding with $1,000,000. Within five (5) days

of the end of each month following the opening of the account, Erie Coke will provide the Department with documentation evidencing all transactions in the account including documents (invoices, etc.) sufficient to determine the nature and amount of all expenditures from the account.

16. Erie Coke will implement an internally developed environmental management system on or before September 30, 2019. On or before October 15, 2019, Erie Coke will have an executed contract with a third party to develop and implement an ISO 14001 compliant environmental management system. A copy of the executed contract (with redaction of financial information) shall be provided to the Department within five (5) days of the execution of the contract.
17. In addition to providing all the required information to the Department as specifically set forth in this Order, Erie Coke shall, during the time this supersedeas remains in place, maintain sufficient records and documentation at its facility to allow the Department to determine Erie Coke's compliance with these conditions. The records and documentation shall be available to the Department for review during the Department's normal inspection activities.
18. The Department may petition the Board to lift the supersedeas if it concludes that Erie Coke is out of compliance with any of the conditions set forth in this Order. Erie Coke will be provided an opportunity to respond to the Department's petition and the Board will then decide whether to grant or deny the Department's request to lift the supersedeas.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: August 28, 2019

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Douglas G. Moorhead, Esquire
Kayla A. Despenes, Esquire
(via electronic filing system)

For Appellants:
Paul K. Stockman, Esquire
C. Max Zygmont, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

D.F. BART BARTHOLOMEW, JR.	:	
	:	
v.	:	**EHB Docket No. 2019-022-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MANCHESTER TOWNSHIP, Permittee	:	**Issued: August 29, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion to dismiss filed by the Department where it is unclear whether appropriate notice procedures were followed concerning a Township's update to its Act 537 plan, and if not, whether that should be considered in evaluating the timeliness of an appeal.

O P I N I O N

D.F. Bart Bartholomew, Jr., proceeding *pro se*, has appealed the Department of Environmental Protection's (the "Department's") approval of an update to West Manchester Township's Act 537 Plan for the extension of public sewer lines along certain roads in the Township in York County and for the connection of properties located on those roads. Bartholomew lives on Haviland Road, which is one of the roads in the plan update that is to receive public sewerage. The Department approved of the Township's plan update by letter dated September 7, 2018. Notice of the approval was published in the *Pennsylvania Bulletin* on September 29, 2018. 48 Pa.B. 6281. Bartholomew appealed the plan update on March 28, 2019 after becoming aware of the approval through a letter he received from the Township on March

23, 2019. The letter from the Township advises Bartholomew that his home will be connected to the public sewer and provides a breakdown of the anticipated costs, which include a capacity reservation fee of $3,955 for the year 2020, a $660 annual sewer bill, a front foot assessment cost yet to be determined, and an unspecified lateral connection cost.

The Department has now moved to dismiss Bartholomew's appeal, arguing that the appeal is untimely. The Department cites to our rule at 25 Pa. Code § 1021.52(a)(2)(i), which generally provides that an appeal needs to be filed within 30 days of notice being published in the *Pennsylvania Bulletin* in order for the Board to have jurisdiction over the appeal. It points out that Bartholomew filed his appeal nearly six months after the *Bulletin* notice was published.

The Department filed its motion on June 24, 2019. The motion was deemed served on Bartholomew, a party served by mail, three days after the date of actual service and, accounting for the weekend, his response was due by July 29, 2019. 25 Pa. Code §§ 1021.13, 1021.35(b)(3), 1021.94(c). Bartholomew did not file a response on or before that date and instead, on August 1, he filed a motion to deny the Department's motion to dismiss. The accompanying certificate of service reflects that Bartholomew's motion was mailed out to the Department on July 31. On August 2, we issued an Order stating that we interpreted Bartholomew's filing as a response to the Department's motion, and establishing a date by which the Department could file a reply. (We will hereafter refer to Bartholomew's "motion to deny motion to dismiss" as his "response.")[1] Bartholomew opposes the motion, asserting, among other things, that the motion

[1] The Department in its reply brief complains at length about Bartholomew's failure to follow our procedural requirements in not filing a timely response to its motion. While we expect all parties to follow our rules regardless of whether or not they are represented by counsel, we note that the Department references three exhibits in its motion to dismiss, none of which are attached to the motion or supporting memorandum of law. *See* 25 Pa. Code § 1021.94(e) (documents relied on in supporting or opposing a dispositive motion shall be filed at the time of the motion or response or will not be considered by the Board). Bartholomew, in contrast, did attach the four documents referenced in his albeit late response. Our Pre-Hearing Order No. 1 advises parties up front where our rules can be found. *See* 25 Pa. Code

"presupposes that appropriate notice was given to the general public." The Township has not weighed in on the motion or entered an appearance in this matter.

The Board has the authority to grant a motion to dismiss where there are no material facts in dispute and where the moving party is entitled to judgment as a matter of law. *Lawson v. DEP*, 2018 EHB 513, 514; *Brockley v. DEP*, 2015 EHB 198, 198; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Ctr. for Coalfield Justice v. DEP*, 2018 EHB 758, 761; *Teska v. DEP*, 2012 EHB 447, 452; *Pengrove Coal Co. v. DER*, 1987 EHB 913, 915. Importantly, motions to dismiss will be granted only when a matter is free from doubt. *Plainfield Twp. v. DEP*, EHB Docket No. 2018-092-C, slip op. at 3 (Opinion and Order, Jan. 28, 2019); *Merck Sharp & Dohme Corp. v. DEP*, 2015 EHB 543, 544; *Northampton Twp. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Res., LP v. DEP*, 2007 EHB 611, 612.

What would normally be a straightforward determination of timeliness is complicated by the fact that Bartholomew has claimed in his notice of appeal and in his response to the motion that he and the rest of the residents of the Township did not receive "appropriate notice" of the plan update that will impact his and other homes. We are not aware of any provision in the Sewage Facilities Act, 35 P.S. §§ 750.1 – 750.20a, that entitles Bartholomew to receive personal or actual notice of the plan update. *Compare McCarthy v. DEP*, EHB Docket No. 2019-049-L (Opinion and Order, July 10, 2019) (denying motion to dismiss premised on untimeliness where Air Pollution Control Act entitles those who comment on a plan approval to actual notice of the Department's action). *See also* 25 Pa. Code § 1021.52(a) (providing default timeframes for filing

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Chapter 1021. The rules provide timeframes for responding to motions, as well as the requirements for what is to be contained in various types of motions and responses. We encourage all parties to adhere to our rules for the sake of fair and orderly proceedings.

an appeal "unless a different time is provided by statute"). However, there is a notice requirement in the sewage facilities planning regulations requiring a municipality to publish notice of a plan update in a newspaper of general circulation and afford a 30-day comment period. 25 Pa. Code § 71.31(c). The full text of the regulation provides:

> A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan's major recommendations, including a list of the sewage facilities alternatives considered. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

Id. Under Section 71.31(c), the municipality must submit to the Department evidence of the newspaper notice along with any written comments it received and the responses to those comments. Under Section 71.32, the Department, in deciding whether to approve or disapprove a plan or plan revision, must then consider whether the municipality has adequately considered any questions raised during the comment period. 25 Pa. Code § 71.32(d)(2).

None of the parties have addressed or mentioned these regulations. None of the parties have provided any clarity on whether the Township complied with Section 71.31(c) and published appropriate notice. At one point in his response Bartholomew seems to allude to a notice that may have been published before "changes" were made to the Township's plan update. He also attaches a March 2016 technical deficiency letter sent to the Township by the Department that, among other things, states the "30-day public notice is illegible," whatever that means. In any event, it is far from clear what the Township did with respect to the required notice and we should not be asked to speculate on this potentially important issue of material fact.

Our cases interpreting Section 71.31(c) have held that the relevant inquiry for assessing the adequacy of public notice of an Act 537 plan is whether an appellant had access to the plan to comment on it. *Green Thornbury Committee v. DER*, 1995 EHB 636, 664-65. *See also Wilson v. DEP*, 2015 EHB 644, 687-88; *Noll v. DEP*, 2005 EHB 505, 532; *Ainjar Trust v. DEP*, 2001 EHB 927, 980, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002). However, the timeliness of the appeal was not at issue in any of those cases. Instead, the appellants challenged the plans at least in part on the basis of allegedly inadequate notice after filing timely appeals. Further, no party here has addressed the issue of whether, even if notice was *not* published in accordance with Section 71.31(c), that excuses an otherwise untimely appeal, or would, for instance, provide a basis for *nunc pro tunc* relief (which Bartholomew has not sought).

As is likely obvious at this juncture, our unresolved concerns on both the facts and the law leave us unconvinced that dismissal is appropriate. "Motions to dismiss are only to be granted when a matter is free from doubt, and we typically proceed with caution when there are unresolved questions." *Plainfield Twp., supra*, slip op. at 4 (citing *Diehl v. DEP*, 2016 EHB 853). With the facts as they have been presented to us at this stage in the proceedings, we will deny the Department's motion to dismiss. This denial is without prejudice to the Department filing a subsequent motion that addresses the above issues.

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

D.F. BART BARTHOLOMEW, JR.	:	
	:	
v.	:	**EHB Docket No. 2019-022-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MANCHESTER TOWNSHIP, Permittee	:	

O R D E R

AND NOW, this 29th day of August, 2019, it is ordered that the Department's motion to dismiss is denied without prejudice to the Department filing a subsequent motion addressing outstanding issues of law and unresolved questions of material fact.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: August 29, 2019

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

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

For Appellant, *Pro Se*:
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1576 Haviland Road
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For Permittee:
West Manchester Township
380 East Berlin Road
West Manchester, PA 17408
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRAD PARSONS	:	
	:	
v.	:	**EHB Docket No. 2019-071-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 16, 2019**
	:	

OPINION AND ORDER
DISMISSING APPEAL

By Michelle A. Coleman, Judge

Synopsis

The Board dismisses an appeal where an appellant has not perfected his appeal in accordance with the Board's rules and has not responded to the Board's orders.

O P I N I O N

On July 10, 2019, Brad Parsons, proceeding *pro se*, filed an appeal of an order issued to him by the Department of Environmental Protection (the "Department"). Parsons attached only the first page of the order to his notice of appeal, which he filed by fax. Our rule governing the filing of a notice of appeal provides in part that "[i]f the appellant has received written notification of an action of the Department, the appellant shall attach a copy of that notification and any documents received with the notification to the notice of appeal." 25 Pa. Code § 1021.51(d). Accordingly, on July 11, 2019, we issued an Order to Parsons requiring him to perfect his appeal by filing a copy of the complete order he received from the Department. We gave him 20 days, until July 31, to file the complete order. *See* 25 Pa. Code § 1021.52(b) ("The appellant shall, within 20 days of the mailing of a request from the Board, file missing

information required under § 1021.51(c), (d) and (k) (relating to commencement, form and content) or suffer dismissal of the appeal.").

July 31 came and went without us receiving anything from Parsons. On August 5, 2019, we issued a Rule to Show Cause requiring Parsons to show cause why his appeal should not be dismissed as a sanction for failing to provide all of the information required by 25 Pa. Code § 1021.51. The Rule stated that it would be discharged if Parsons filed a complete copy of the Department order by August 26, 2019. Once again, August 26 passed by and we received nothing from Parsons. On August 29, staff from the Board reached out to Parsons by phone and explained that only the first page of the Department's order had been attached to his appeal and we needed a copy of the entire order. Parsons said he would fax in all of the pages of the order that day. That did not happen.

On August 30, the Department filed a letter detailing its efforts to confer with Parsons about settlement of the appeal, as required by Paragraph 5 of our Pre-Hearing Order No. 1. The Department stated that it reached out to Parsons via telephone on August 21, but his voicemail box was full so the Department emailed him on the same date. Parsons responded to the email on August 26, but he did not provide any availability to discuss settlement as requested by the Department. The Department emailed Parsons again on August 27 to ask for dates and times that they could speak but the Department had not heard back from Parsons as of the date of its letter filed with the Board.[1]

To date, after two months, Parsons has not perfected his appeal by filing a complete copy of the Department's order. It appears then that Parsons has no interest in pursuing his appeal before the Board. Filing a complete copy of the order he is seeking to appeal is not an onerous threshold requirement. Consistent with our precedent concerning appellants who have failed to

[1] The Department attached the email correspondence with Parsons to its letter.

perfect their appeals after multiple opportunities and after ignoring multiple orders of the Board, we conclude that dismissal of this appeal is appropriate. *See, e.g., Phelps v. DEP*, 2018 EHB 838, 839-40; *Kuncio v. DEP*, 2018 EHB 278, 279-80; *Lopez v. DEP*, 2018 EHB 63, 68; *Slater v. DEP*, 2016 EHB 380, 381-82; *Casey v. DEP*, 2014 EHB 908, 910-11; *Nitzschke v. DEP*, 2013 EHB 861, 862. *See also* Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514(c) ("If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person.").

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRAD PARSONS	:	
	:	
v.	:	**EHB Docket No. 2019-071-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of September, 2019, it is hereby ordered that the appeal in this matter is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 16, 2019

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

For the Commonwealth of PA, DEP:
Hannah G. Leone, Esquire
(*via electronic filing system*)

For Appellant, *Pro Se*:
Brad Parsons
(*via U.S. mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ETC NORTHEAST PIPELINE, LLC	:	
	:	
v.	:	**EHB Docket No. 2018-118-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 17, 2019**
	:	

OPINION AND ORDER ON
REVISED MOTION TO DISMISS APPEAL AS MOOT

By Thomas W. Renwand, Chief Judge

Synopsis

A Stipulated Order entered by the Commonwealth Court in response to a Petition to Enforce a Compliance Order of the Department does not supersede the underlying Compliance Order. Therefore, the Appellant's request that the Board vacate all or part of the Compliance Order is denied.

O P I N I O N

Introduction

This matter involves an appeal of a Compliance Order issued by the Pennsylvania Department of Environmental Protection (Department) to ETC Northeast Pipeline, LLC (ETC) on October 29, 2018. Currently before the Board is ETC's Motion to Dismiss Appeal as Moot. ETC asserts that the matter is moot because the Compliance Order has been superseded by a Stipulated Order entered by the Commonwealth Court. The Department agrees with ETC that the appeal should be dismissed as moot but opposes ETC's request to vacate the underlying Compliance Order.

The background of this matter is as follows. According to the Department, on September 10, 2018 ETC's Revolution Pipeline in Beaver County exploded, destroying a single-family home in Aliquippa, Pennsylvania and displacing its residents, the Rosati family. (Exhibit C to Department's Response, para. 1.)[1] The explosion and resulting fire also burned the Rosati family's garage, possessions, vehicles and surrounding trees and resulted in the evacuation of a number of residents in the vicinity of the explosion. (*Id*. at para. 3-4.) Additionally, according to the Department, the fire damaged high voltage electric transmission and distribution lines and caused the collapse of six utility towers. (*Id*. at para. 5.) It is the Department's contention that the explosion resulted from ETC's failure to stabilize miles of the Revolution Pipeline and from reckless construction activities that violated its state erosion and sedimentation control permit. (*Id*. at para. 6.)

Following the explosion, the Department issued a Compliance Order requiring ETC to temporarily stabilize the project and submit plans to permanently stabilize the project. ETC appealed the Compliance Order to the Board. The Department subsequently filed a petition with the Commonwealth Court to enforce the Compliance Order, contending that ETC had failed to meet the deadlines set forth in the order. *Department of Environmental Protection v. ETC Northeast Pipeline, LLC,* Commonwealth Court Docket No. 69 M.D. 2019. On March 26, 2019, the parties entered into a Stipulated Order in the matter before the Commonwealth Court. (Exhibit B to Department's Response.)[2]

[1] Exhibit C to the Department's Response to ETC's Motion is the affidavit of Daniel F. Counahan, Environmental Program Manager for the Department's Office of Oil and Gas Management, Southwest Regional Office.

[2] Exhibit B to the Department's Response is a copy of the Stipulated Order entered by the Commonwealth Court at Docket No. 69 M.D. 2019.

Currently before the Board is a motion by ETC seeking to dismiss the appeal as moot on the grounds that the Department's Compliance Order has been superseded by the Stipulated Order entered by the Commonwealth Court. Additionally, although not set forth in its motion or supporting memorandum of law, the proposed order to ETC's motion seeks to vacate the Compliance Order. The Department filed a response which joins in ETC's request to dismiss the appeal as moot but which opposes the language of ETC's proposed order seeking to have the Board vacate the Department's Compliance Order.

Discussion

ETC asks that the appeal be dismissed as moot and that the Department's Compliance Order be vacated. The Board may grant a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Bartholomew v. DEP*, EHB Docket No. 2019-022-C (Opinion and Order on Motion to Dismiss issued August 29, 2019), *slip op*. at 3; *Lawson v. DEP,* 2018 EHB 513, 514; *Klesic v. DEP*, 2016 EHB 142, 144; Mootness is one basis for granting a motion to dismiss. *Lawson*, 2018 EHB at 2015*; Klesic*, 2016 EHB at 144. A matter becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Id.*

There appears to be no disagreement between the parties that ETC's appeal of the Compliance Order is moot. Where the parties disagree is over the question of whether the Board, in dismissing the appeal, should also vacate the underlying Compliance Order. ETC proposes that the Board's order include the following language:

> To the extent that the Stipulated Order provided for deadlines by which ETC had to submit specified reports and denied ETC the ability to engage in earth disturbing activities, the Compliance Order is vacated.

(Proposed Order to ETC's Motion to Dismiss.)

It is ETC's contention that the Stipulated Order entered by the Commonwealth Court supersedes the Department's Compliance Order and renders the Compliance Order null and void. ETC relies on two Board opinions in support of its argument: *Farmer v. DEP*, 1993 EHB 1842, and *Avery Coal Co. v. DEP*, 1991 EHB 146, wherein the Board held, "Where an order of DER [now DEP] is superseded by a subsequent order which renders the earlier order null and void, any appeal taken from the earlier order must be dismissed as moot." *Farmer*, 1993 EHB at 1844 (quoting *Avery Coal*, 1991 EHB at 147). In *Avery Coal*, the Board further held, "[T]he Compliance Order which forms the basis of the appeals has been superseded. Since it has been superseded, it no longer has any legal effect." 1991 EHB at 148. ETC argues that the Stipulated Order has taken the place of, or superseded, the Compliance Order, and, therefore, under the holdings of *Farmer* and *Avery Coal*, the Compliance Order no longer has any legal effect.

The Department acknowledges that a Compliance Order can be superseded by a subsequent Department order or by a ruling of the Board. However, it disagrees that the enforcement of its order in Commonwealth Court causes the underlying order to become null and void. The Department further points out that there is nothing in the language of the Stipulated Order that indicates it supersedes the Compliance Order.

An examination of this issue forces us to dive deeply into the murky legal waters of administrative law. The Department's arguments give us pause as to the legal soundness of vacating all or part of a Department Compliance Order in the context of an appellant's motion to dismiss its own appeal. As the appellant, ETC could simply withdraw its appeal. However, it not only seeks a Board order dismissing its appeal as moot but also requests that the Board vacate the order from which the appeal was brought.

It is clear that an order of the Department may be superseded by a subsequent Department order or by a ruling from the Board as part of the administrative process. 25 Pa. Code §§ 1021.61-1021.63; *Avery Coal*, 1991 EHB at 147-48. Indeed, both of the cases relied on by ETC involve a Department order that was superseded by a subsequent Department order. However, as the Department points out in its memorandum of law, the Commonwealth Court's Stipulated Order "is a separate legal enforcement action that does not negate or supersede the underlying agency action, i.e., the Compliance Order." (Memorandum in Support of Department's Response, p. 3.) Here, the Stipulated Order was entered by the Commonwealth Court in response to an enforcement petition brought by the Department and resolved by means of a stipulation entered by the parties. Nothing in the Stipulated Order states that it vacates the Compliance Order; nor does it address the merits or lawfulness of the Compliance Order. As the Department correctly points out, "the enforcement of an agency's order does not cause that order to disappear." (Department Memorandum in Support of Response, p. 4.) Moreover, the Compliance Order and its findings may serve a purpose in future actions, such as permit reviews and civil penalty assessments. *Farmer*, 1993 EHB at 1845 (citing *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 494 A.2d 516 (Pa. Cmwlth. 1985)).

Even though the parties appear to agree that the appeal is moot, it is not clear whether ETC's motion was based on its assumption that the underlying Compliance Order would be vacated. Because this issue is not clear, we find that it would not be appropriate to grant the Motion to Dismiss Appeal as Moot and dismiss ETC's appeal at this time. Therefore, the motion is denied without prejudice, and ETC is directed to file a status report with the Board setting forth whether it intends to move forward with this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ETC NORTHEAST PIPELINE, LLC	:	
	:	
v.	:	**EHB Docket No. 2018-118-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 17th day of September, 2019, it is ordered as follows:

1) ETC's Motion to Dismiss Appeal as Moot is *denied without prejudice*.

2) ETC's request to vacate the underlying Compliance Order is *denied*.

3) On or before **October 1, 2019**, ETC shall file with the Board a status report indicating whether it intends to pursue or withdraw its appeal.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 17, 2019

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

For the Commonwealth of PA, DEP:
Melanie Seigel, Esquire
Nels Taber, Esquire
Richard Watling, Esquire
(*via electronic filing system)*

For Appellant:
Shoshana Ilene Schiller, Esquire
Robert D. Fox, Esquire
Jonathan Rinde, Esquire
Adam Podowitz-Thomas, Esquire
(*via electronic filing system*)

STEPHEN AND ELLEN GERHART	:	
	:	
v.	:	**EHB Docket No. 2017-013-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: September 25, 2019**

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

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board sustains in part an appeal of two permits authorizing the installation of natural gas liquids pipelines to the extent that the appeal challenges the classification of wetlands on the appellants' property impacted by the pipeline installation. The Board finds that a wetland on the property was a forested wetland before being clear-cut by the permittee and was improperly classified by the Department and permittee as an emergent wetland. The impacted portion of the wetland must be restored and replanted as forested in accordance with the permits and the permittee's approved plans.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the Commonwealth agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Oil and Gas Act of 2012, Act of February 14, 2012, P.L. 87, No. 13, 58 Pa.C.S. §§

3201 – 3274; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stipulation of the Parties No. ("Stip.") 2.)

2. Stephen and Ellen Gerhart own the property that is the subject of this appeal, which is located at 15357 Trough Creek Valley Pike, Union Township, Huntingdon County, PA 16652. (Stip. 1; Transcript of Proceedings page ("T.") 17.)

3. Sunoco Pipeline, L.P. ("Sunoco") is a foreign limited partnership doing business in Pennsylvania and maintains a mailing address of 535 Fritztown Road, Sinking Springs, PA 19608. (Stip. 3.)

4. On February 13, 2017, the Department issued seventeen Water Obstruction and Encroachments permits under 25 Pa. Code Chapter 105 to authorize stream, wetland, and floodway crossings and to protect water resources, and three Erosion and Sediment Control individual permits under 25 Pa. Code Chapter 102 to prevent erosion and sedimentation and to ensure adequate stormwater management for Sunoco's Mariner East II ("ME2") Pipeline Project. (Stip. 4, 15, 16.)

5. The permits incorporate by reference the attachments, reports, plans, plan drawings, supplements, and other materials that Sunoco submitted during the permit application process, and any subsequent amendments thereto of record with the Department, including Sunoco's "Aquatic Resources Report," "Impact Avoidance, Minimization, and Mitigation Procedures," and "Compensatory Wetland Mitigation Plan." (Stip. 62; Parties' Joint Exhibit No. ("J.Ex.") 1, 2, 14, 15, 16, 18, 19.)

6. The ME2 Pipeline Project involves the installation and maintenance of two pipelines—a 20-inch-diameter pipeline and a 16-inch-diameter pipeline—that will be used to

transport natural gas liquids across the southern tier of Pennsylvania between Chartiers Township, Washington County, and Marcus Hook Borough, Delaware County. (Stip. 5.)

7. Only one of the Chapter 105 permits (Permit No. E31-234) and one of the Chapter 102 permits (Permit No. ESG300015002) concern Huntingdon County and authorize the installation of the ME2 pipelines on the Gerhart property. (Stip. 15, 16, 17; J.Ex. 1, 2.)

8. This appeal only concerns those two permits to the extent they relate to the Gerhart property. (Stip. 18.)

9. The Gerhart property includes approximately 27 acres, approximately three of which have been condemned by Sunoco to construct the ME2 pipelines and which the parties have referred to as the "limits of disturbance" or "LOD." (Stip. 10; T. 18.)

10. The LOD consists of a 1.72-acre permanent right of way, a 0.58-acre temporary workspace right of way, and a 0.86-acre additional temporary workspace right of way. (Stip. 11; Appellants' Exhibit No. ("A.Ex.") 1.)

11. The initial wetland and stream survey on the Gerhart property was performed on June 24, 2014 by Sunoco's consultant, Tetra Tech. (Stip. 37; T. 475.)

12. Tetra Tech evaluated a 200-foot wide corridor through the Gerhart property generally consisting of 100-foot wide swaths on both sides of the proposed pipeline alignment. (T. 588.)

13. During the wetland survey, Tetra Tech identified two separate wetland features on the Gerhart property and labeled them as Wetlands L24 and L25. (T. 200-01; J.Ex. 14; A.Ex. 19 (at Fig. 6), 30.)

14. The pond on the western edge of the property was identified by Sunoco and has been referred to by the parties as Pond I4. (T. 48, 140, 606, 1004; J.Ex. 13.)

15. The stream system draining into Pond I4 was identified by Sunoco and has been referred to by the parties as Stream S-L41/S-L42. (T. 606; J.Ex. 13, 14 (at 3-37); A.Ex. 19 (at Fig. 8); Sunoco's Exhibit No. ("S.Ex.") 13.)

16. The stream system flows westerly toward Little Trough Creek and thereafter to the Juniata River, the Susquehanna River, and ultimately to the Chesapeake Bay. (T. 113-14, 1029-30.)

17. Schmid & Company, consultants retained by the Gerharts, conducted an initial survey and investigation of wetlands on the Gerhart property on March 17, 2016, and began to place flags marking the boundaries of the wetlands. (Stip. 48; T. 25, 46-49, 107, 124, 150-51, 222, 320-21, 409, 449; A.Ex. 25.)

18. At the time of Schmid & Company's March 2016 visit, Sunoco had not yet cut the trees within the pipeline corridor. (T. 49, 107, 124, 320-21, 409.)

19. Sunoco felled the majority of the trees within the LOD in late March and early April 2016. (Stip. 83.)

20. The trees were cut and let lay on the ground until at least June 2016. (T. 50-51, 390, 825.)

21. The remaining trees in the LOD requiring removal for pipeline installation were felled in spring 2018. (Stip. 84.)

22. The Department does not consider tree felling, the act of cutting down a tree, to be a regulated activity unless earth disturbance activities such as clearing and grubbing are also involved. (T. 1180-82.)

23. On April 27, 2016, a second field survey was performed by Tetra Tech and another consultant hired by Sunoco, Rettew. (Stip. 38; T. 233, 479, 644-45, 777-78; S.Ex. 5.)

24. Following the second field survey, Sunoco identified another wetland, labeled JH-2, located near the pond. (Stip. 39; T. 253, 644-45; J.Ex. 13; S.Ex. 5, 7.)

25. Sunoco truncated its horizontal directional drilling ("HDD drilling") temporary workspace in order to avoid impacting JH-2. (T. 489, 610; J.Ex. 13.)

26. Schmid & Company returned to the site on June 13 and June 20, 2016 to complete flagging of the wetlands that began in March 2016. (Stip. 51; T. 49-50, 124, 135-36, 327, 408-09.)

27. When Schmid & Company visited the site in June 2016, the pipeline corridor, including the wetlands within the limits of disturbance, had been clear-cut, cut trees were left laying on the ground, and stumps were left in place. (T. 50-51, 390.)

28. On September 7, 2016, Schmid & Company met with the U.S. Army Corps of Engineers at the Gerhart property to review Schmid & Company's flagging of wetlands in connection with a wetland jurisdictional determination the Gerharts were seeking from the Army Corps for their property. (Stip. 50, 52, 53; T. 117, 120, 143, 456-57.)

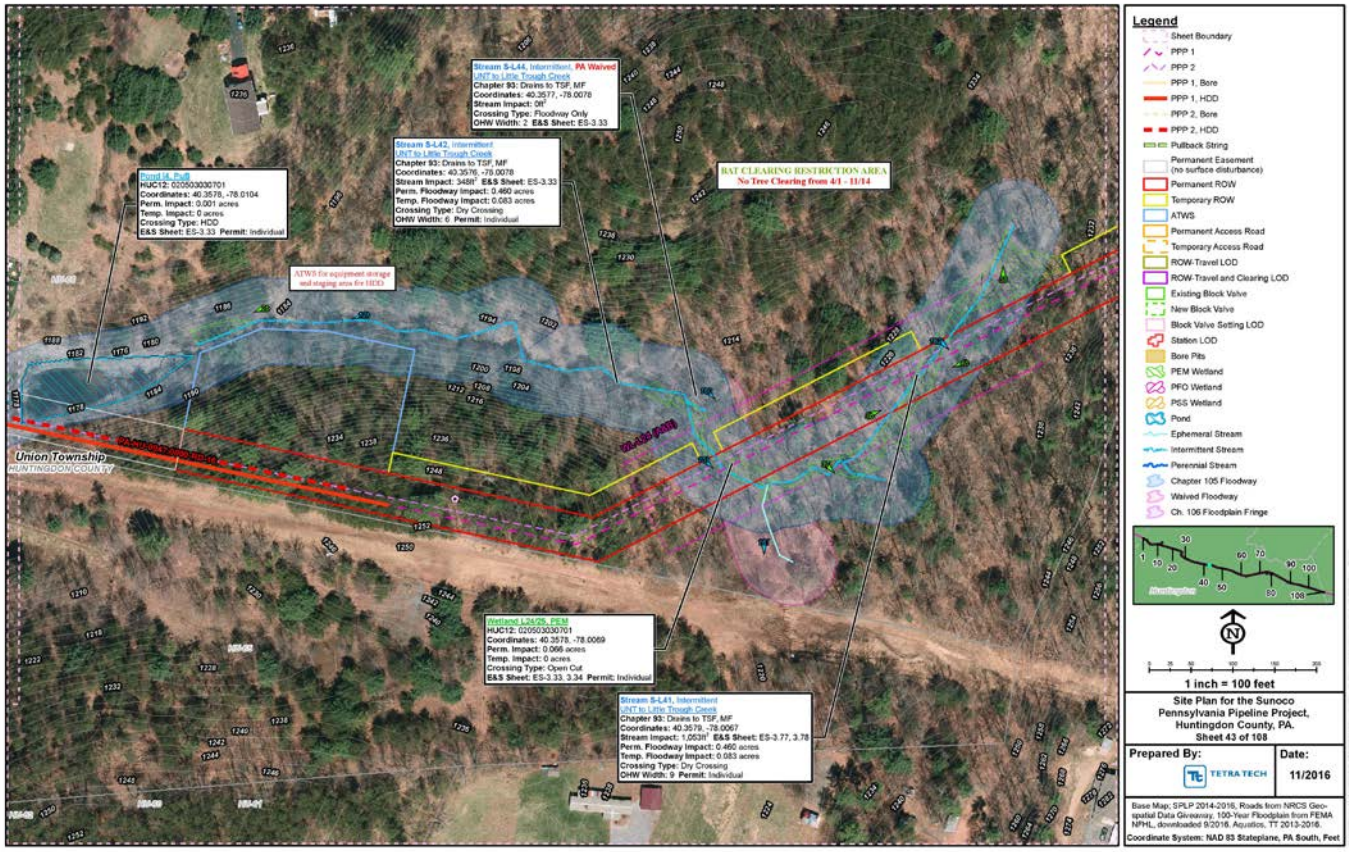
29. During its September 7, 2016 inspection, the Army Corps evaluated the wetland flagging done by Schmid & Company and requested that Schmid & Company adjust the flagging where it deemed appropriate. (Stip. 54.)

30. On September 28, 2016, Rettew returned to the Gerhart property and took GPS readings of wetland flags evaluated and/or adjusted by Schmid & Company and the Army Corps. (Stip. 56; T. 644-45, 791-93; S.Ex. 8.)

31. Sunoco agreed that Wetlands L24 and L25 are really parts of a single connected wetland, which has been referred to by the parties as Wetland L24/25. (J.Ex. 13; S.Ex. 7, 8. *See also* T. 47-48, 112-14, 201, 334-35, 408, 657, 757; A.Ex. 30.)

32. Sunoco's final wetland drawings identify Wetland L24/L25 as a larger, connected system, beginning approximately 110 feet from the eastern Gerhart property boundary. (J.Ex. 13; A.Ex. 19 (at Fig. 8); S.Ex. 13.)

33. Sunoco's November 2016 final site plan for the Gerhart property, which reflects Sunoco's determination of the streams and wetlands on the site, is as follows:



(J.Ex. 13.)

34. Wetlands JH-2 and L24/25 are not designated at exceptional value wetlands under 25 Pa. Code § 105.17. (Stip. 30, 33, 41, 42.)

35. The portions of Wetland L24/25 located within the permanent right of way total 0.066 acres, accounting for the pipelines' two crossings of the wetland of .03 acres and .036 acres. (T. 331, 450, 607, 626-27; J.Ex. 13.)

36. The stream system flows through Wetland JH-2 and Wetland L24/25. (J.Ex. 13; A.Ex. 19 (at Fig. 8); S.Ex. 13.)

37. The LOD includes two stream crossings, which contain a total of approximately 0.032 acres of streams. (Stip. 40.)

38. Stream S-L41/S-L42 is designated as Trout Stocking/Migratory Fishery and does not possess a special protection designation of high quality or exceptional value. (Stip. 46, 47; J.Ex.13.)

39. The Chapter 105 regulations contain a policy statement regarding the identification and delineation of wetlands, incorporating by reference the methodology contained in the 1987 *Corps of Engineers Wetland Delineation Manual* and any changes thereto, which would include the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region Version 2.0*. 25 Pa. Code § 105.451. (T. 845-46, 1023; J.Ex. 4, 5.)

40. Determining whether a wetland exists depends on three parameters: (1) hydrology, (2) hydric soils, and (3) hydrophytic vegetation. (T. 54, 56-59, 590, 715, 840-41.)

41. The Gerharts' contention to the contrary notwithstanding, the evidence does not support a finding that a wetland exists in the area east of a flag placed by Schmid & Company known as Flag A55, which was reevaluated by Schmid during its fifth visit to the site on March 29, 2017. (T. 136, 149, 410, 679, 1038-45; A.Ex. 20 (at Sample Point C).)

42. When identifying and delineating a wetland, permit applicants provide the Department with data sheets about the site, including a narrative, photographs, and plans describing the three parameters of hydrology, soil, and vegetation. (T. 1023, 1025-26.)

43. During the delineation process, permit applicants typically classify dominant wetland vegetation using terms derived from the Federal Geographic Data Committee's *Classification of Wetlands and Deepwater Habitats of the United States*, commonly referred to as the Cowardin Manual. (T. 544, 584, 710-11, 749, 802-03, 842-43, 853-54, 1024-25; J.Ex. 7.)

44. The Cowardin Manual uses classifications such as palustrine emergent (PEM), palustrine scrub shrub (PSS), and palustrine forested (PFO) when describing the dominant vegetation community types in a wetland, such as herbaceous, tree, and scrub shrub plants. (T. 853-56; J.Ex. 7 (at 33-37).)

45. A wetland's dominant vegetation is determined by figuring out the uppermost strata of vegetation—herbs, shrubs/saplings, or trees—providing 30-percent or more areal cover over the ground. (T. 66-68, 332, 731-32, 855-56; J.Ex. 7 (at 20).)

46. The wetlands on the Gerhart property are within the palustrine class, which generally encompasses relatively shallow non-coastal wetlands associated with small streams and ponds. (T. 82, 591-92; J.Ex. 7 (at 18-19).)

47. The Cowardin Manual's definition of palustrine emergent wetlands (PEM) provides: "In this wetland Class, emergent plants—i.e., erect, rooted, herbaceous hydrophytes, excluding mosses and lichens—are the tallest life form with at least 30% areal coverage. This vegetation is present for most of the growing season in most years. These wetlands are usually dominated by perennial plants." (T. 83-84, 855; J.Ex. 7 (at 33).)

48. The Cowardin Manual's definition of palustrine forested wetlands (PFO) provides: "In Forested Wetlands, trees are the dominant life form—i.e., the tallest life form with at least 30 percent areal coverage. Trees are defined as woody plants at least 6 m [meters] (20 ft) in height." (T. 84, 855; J.Ex. 7 (at 35).)

49. Some of the hydrophytic trees growing in the wetlands on the Gerhart property are red maple, pin oak, and green ash. (T. 245.)

50. Sunoco classified Wetlands L24/25 and JH-2 as PEM wetlands. (T. 554, 606-07, 615, 622; J.Ex. 13, 14; S.Ex. 5, 13.)

51. Wetland L24/25 is properly classified as a forested PFO wetland because there were hydrophytic trees of sufficient size to provide at least 30-percent areal cover rooted in and growing out of the wetland within its delineated boundaries before Sunoco clear-cut the pipeline corridor. (T. 107-08, 109-10, 152, 182, 235, 245-46, 298-99, 322-23, 333; S.Ex. 5 (at Photo 2, Photo 5).)

52. Proper classification of a wetland is important because classification drives restoration efforts and factors into compensatory wetland mitigation. (T. 593-94, 711-12.)

53. Under Special Conditions l, m, o, p, q, u, x, y, z, and ee in the Chapter 105 permit, all wetlands affected by the proposed project are required to be restored to preconstruction conditions including the presence of wetland soils, hydrology, and hydrophytic vegetation, in accordance with Sunoco's replanting plan. (J.Ex. 1, 19.)

54. The Chapter 105 permit requires restoration sites to be monitored by Sunoco for five years, with monitoring reports submitted to the Department every six months for the first two years and annually for the following three years. (J.Ex. 1 (at 12); T. 933.)

55. The Chapter 105 permit requires compensatory mitigation for the permanent conversion of vegetation from forested to emergent in PFO wetlands. (T. 636-37, 1018-23; J.Ex. 1 (at 11-12).)

56. This conversion primarily occurs in areas of the permanent right of way where trees cannot be planted directly overtop or within 10 feet to either side of the ME2 pipelines

because of safety concerns related to tree roots infiltrating the pipes. (T. 256-57, 267, 943-44; J.Ex. 19.)

57. Under the regulations, converted wetlands must be replaced both in terms of area and their functions and values at a ratio of 1:1. 25 Pa. Code § 105.20a.

58. Across the entire 300-mile length of the ME2 project, a total of 0.405 acres of PFO wetlands will be converted to PEM wetlands due to tree-planting restrictions above the pipelines. (Stip. 74; J.Ex. 19 (at 4).)

59. Sunoco has acquired two off-site wetland mitigation sites that total 1.63 acres, which exceeds the 0.405 acres of PFO wetlands that will be converted to PEM wetlands. (Stip. 75; T. 636-37; J.Ex. 1 (at 1), 19.)

60. One of the wetlands mitigation sites is in Cumberland County and totals 0.58 acres in area, which will be entirely forested. (T. 1020; J.Ex. 1 (at 12), 19.)

61. The total area of the PFO wetlands to be established at the Cumberland County mitigation site exceed a 1.5:1 ratio. (T. 1021-22.)

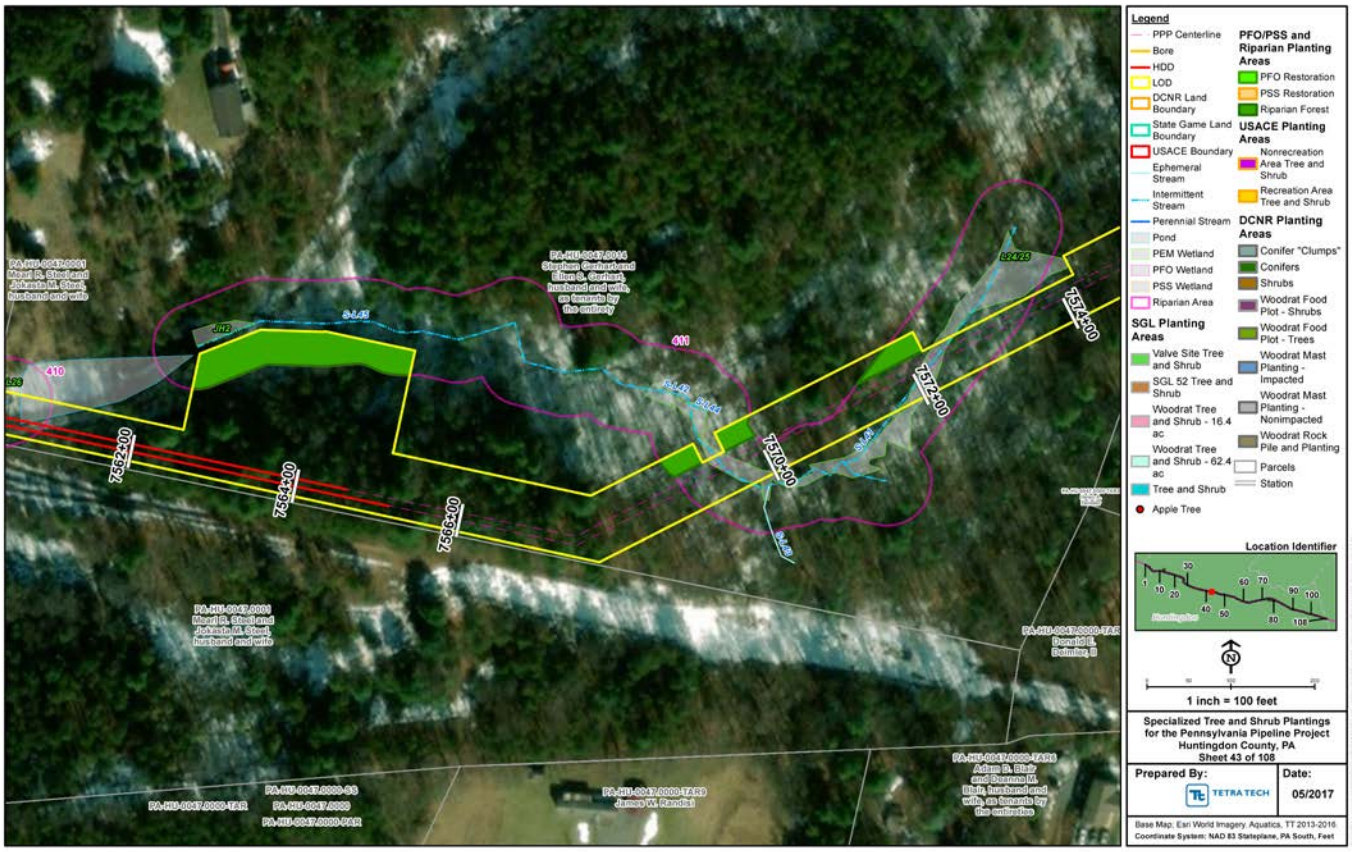
62. The erosion control regulations require the protection of riparian forest buffers when earth disturbance activity is proposed within 150 feet of a stream, lake, pond, or other body of water that has a designated use of high quality or exceptional value, which does not implicate the trout stocked fisheries streams on the Gerhart property. 25 Pa. Code § 102.14. (T. 1170-71.)

63. Nevertheless, the permits require Sunoco to replant forested riparian buffers on the Gerhart property that are impacted by construction and located in the temporary workspace right of way and additional temporary workspace right of way for a distance of 50 feet from the tops of the banks of the trout stocked fisheries streams. (T. 256, 632-34, 637, 952-53, 1170-72; J.Ex. 2 (at 16-17); S.Ex. 13.)

64. The Chapter 102 permit requires Sunoco to replant trees to the density similar to the density which existed prior to construction with no less than 60% uniform canopy cover upon maturation. (J.Ex. 2 (at 16-17).)

65. The Chapter 102 permit requires Sunoco to conduct maintenance and inspection of the riparian buffer replanting areas for a period of 5 years. (T. 1173-74; J.Ex. 2 (at 16-17).)

66. Sunoco's replanting plan sheet for the Gerhart property is as follows:



(S.Ex. 13.)

67. The Gerharts' contention to the contrary notwithstanding, the evidence does not support a finding that an additional unidentified stream exists in the area of Schmid's Flag A55 that was impacted by the ME2 project and would have been subject to the riparian forest

replanting requirements in the permits. (T. 1008-09, 1071-74, 1195-97; A.Ex. 19 (at Fig. 8, Fig. 15), 20 (at Map B).)

68. Installation of the pipelines under and through the wetlands, streams, and pond within the LOD on the Gerhart property has been completed, subject to continuing monitoring and restoration requirements. (Stip. 85; T. 24, 492.)

69. The pipelines were installed under and through Wetland L24/25 and Stream S-L41/S-L42 using an open trench construction technique. (Stip. 87.)

DISCUSSION

Stephen and Ellen Gerhart have appealed a Chapter 102 permit (No. ESG0300015002) and a Chapter 105 permit (No. E31-234) issued by the Department of Environmental Protection (the "Department") to Sunoco Pipeline, L.P. ("Sunoco"), authorizing Sunoco to install a segment of the Mariner East 2 ("ME2") pipelines, which as a whole will transport natural gas liquids across approximately 300 miles in Pennsylvania.[1] The Chapter 102 permit covers the earth disturbance associated with the pipeline installation, including erosion and sedimentation controls and post-construction stormwater management, while the Chapter 105 permit covers the wetlands and waterways crossed and impacted by the project. The Gerharts' appeal is limited to the portion of the ME2 project that traverses their property in Union Township, Huntingdon County. At the time of the hearing, the ME2 pipelines had already been installed on the Gerhart property, and some restoration had been completed.[2] (Stip. 85; T. 492.) The Gerharts have

[1] The two permits under appeal are among two other Chapter 102 permits and sixteen other Chapter 105 permits authorizing the installation of the entire ME2 pipeline project. All 20 permits were the subject of another appeal before the Board. *See* EHB Docket No. 2017-009-L.

[2] The merits hearing in this matter was originally scheduled to begin on August 29, 2018. The parties filed their pre-hearing memoranda in July and August 2018, along with extensive factual stipulations. However, due to the unavailability of one of the appellants, the hearing was postponed. The parties then

preserved three main arguments in their post-hearing brief: (1) that not all of the wetlands on their property were properly delineated, (2) that the wetlands on their property were improperly classified as palustrine emergent (PEM) instead of palustrine forested (PFO) in terms of their dominant vegetation, and (3) that Sunoco and the Department failed to identify all of the streams on their property.

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. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. 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.[3] *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). As a third party appealing the issuance of the two permits, the Gerharts

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agreed to begin the hearing on February 19, 2019. The hearing was held on February 19, 21, and 22, and March 25 and 27, 2019. The Board conducted a site view with all parties on June 17, 2019.

[3] Among other issues, the Gerharts have stipulated to waiving their challenges premised on the Department allegedly failing to act consistent with its duties under the Pennsylvania Constitution. (*See* Docket Entry No. 35 at ¶ 16.) Despite this, the Gerharts make an argument premised on Article I, Section 27 in their post-hearing reply brief. Sunoco has moved to strike this and two other portions of the reply brief in which the Gerharts cite statements allegedly made by the U.S. Army Corps of Engineers, and provide their own estimates of the number of trees that would need to be planted by Sunoco during site restoration. In the Gerharts' response to the motion to strike (which was tardily filed more than 15 days after the motion, 25 Pa. Code § 1021.95(c)), they do not contest striking the reference to Article I, Section 27. On the two other points raised by the motion, we do not think that it is necessary to strike these portions of the reply brief, but we have not relied on them in drafting this Adjudication. In addition, the Gerharts have apparently elected to not pursue other objections raised in their notice of appeal but not argued in their post-hearing brief. For instance, in their brief the Gerharts make a passing reference to the functions and values of wetlands on their property, but do not flesh out a coherent argument on the issue. (Brief at 48.) We confine ourselves to addressing the issues preserved and argued in post-hearing briefs. 25 Pa. Code § 1021.131(c) (issue not argued in a post-hearing brief may be waived); *Joshi v. DEP*, EHB Docket No. 2017-116-L, slip op. at 9 (Adjudication, May 17, 2019) (Board will only address issues or objections preserved in a party's post-hearing brief); *Wilson v. DEP*, 2015 EHB 644, 682 (same).

bear the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, EHB Docket No. 2017-116-L, slip op. at 9 (Adjudication, May 17, 2019); *Jake v. DEP*, 2014 EHB 38, 47.

In order to be successful in their appeal, the Gerharts must prove their case by a preponderance of the evidence. *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780). The preponderance of evidence standard requires that the Gerharts meet their burden of proof by showing that the evidence in favor of their proposition is greater than that opposed to it. *United Refining*, 2016 EHB 442, 449. The Gerharts' evidence must be greater than the evidence supporting the Department's determination that the issuance of the Chapter 102 and Chapter 105 permits, and approval and incorporation of Sunoco's plans into those permits, was reasonable, appropriate, and in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473. The evidence must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established by the Gerharts. *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L, slip op. at 49 (Adjudication, Jan. 9, 2019); *Noll v. DEP*, 2005 EHB 505, 515.

Wetland Delineation

The Gerharts assert there is a single interconnected band of wetlands that runs along both sides of a main stream (S-L41/S-L42) with short tributary branches traversing a portion of their property and terminating in a pond (Pond I4) on the western side of the site. Within this conceptual framework, the Gerharts contend that Sunoco and the Department failed to identify or properly delineate certain areas of wetlands. Wetland delineation involves the determination of whether a wetland exists, and if so, the boundaries of that wetland. Roughly speaking, wetland

delineation involves an analysis of hydrology, vegetation, and soils, which are the three accepted indicators of wetlands.

Sunoco hired the consultant Tetra Tech to go out and delineate and flag the wetlands it believed existed across the length of the ME2 pipelines, including the Gerhart site, which Tetra Tech visited in June 2014. Tetra Tech delineated two wetlands, which it labeled as Wetland L24 and Wetland L25. Sunoco then had another consultant, Rettew, go out and check Tetra Tech's work in April 2016. During this visit Sunoco identified and delineated another wetland near the pond, which it labeled as JH-2.

Schmid & Company was retained by the Gerharts to investigate the wetlands on their property. Dr. James Schmid and Stephen Kunz of Schmid & Company visited the property several times between March 2016 and March 2017. They determined that the wetlands were more extensive than Sunoco had delineated and hung their own flags marking what they believed were the appropriate wetland boundaries. Schmid eventually involved the U.S. Army Corps of Engineers, which agreed with Schmid's wetland delineation in certain respects and disagreed with Schmid in other respects, adjusting Schmid's flags accordingly. Sunoco's final plan for the site was revised to correspond with the flags that had been adjusted by the Army Corps, generally expanding the wetland areas from Sunoco's original 2014 delineation. (T. 200-01, 485-87, 617, 644-45, 791-92; A.Ex. 30; S.Ex. 8.) Sunoco decided that Wetland L24 and Wetland L25 are actually one connected wetland and relabeled it as Wetland L24/25. Wetland L24/25 runs along the eastern half of the stream and is crossed twice by the pipeline. (T. 607.) Sunoco's final plan for the Gerhart site included Wetlands JH-2 and L24/25. (Stip. 39; J.Ex. 13.)

The Gerharts first claim that Sunoco failed to fully delineate Wetland JH-2. JH-2 has been delineated by Sunoco on the north side of the stream, but the Gerharts assert that the

wetland also exists on the south side of the stream and was not delineated. Sunoco's original plan included a temporary workspace for assisting with the horizontal directional drilling ("HDD drilling") that was set up to drill and string the ME2 pipelines underneath the Gerharts' pond. The HDD drilling workspace would have encroached on and impacted JH-2 even on the north side of the stream, but Sunoco later truncated the workspace to stay to the south of the stream and avoid those impacts. (T. 489, 610; J. Ex. 13.) Nevertheless, the Gerharts say Sunoco did not properly delineate the southern boundary of the wetland and vaguely allege that "the Board cannot determine if Sunoco's efforts to limit their Additional Temporary Work Space was sufficient to not infringe on this section of the wetland or not." (Gerhart Brief at 37.)

We are puzzled why the Gerharts are pursuing this argument when they have produced no evidence of any impacts to the alleged wetland south of the stream. Indeed, referencing his own map, Dr. Schmid testified that the wetland he flagged in that area was "right at the edge of what is shown as yellow ATWS, additional temporary workspace." (T. 141; A.Ex. 19 (at Fig. 8).) Figure 8 in Dr. Schmid's expert report shows the top perimeter of the additional temporary workspace essentially coincident with the boundary of the purported wetland. (A.Ex. 19 (at Fig. 8).) There is no evident overlap in the workspace area occupied by Sunoco and the wetland said to exist by the Gerharts. The Gerharts have not explained to us why we should be concerned about a wetland that was not disturbed by the installation of the ME2 pipelines as authorized by the permits issued by the Department. With no discernible impacts, we find no error in the delineation of Wetland JH-2, and we see no need to make a gratuitous declaration as to the existence or absence of any wetland on land not affected by the project. *See Borough of Kutztown v. DEP*, 2001 EHB 1115, 1124 (Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake).

The Gerharts next focus on an alleged wetland consisting of 0.027 acres that they claim is located toward the eastern end of the property near the headwaters of the stream system and to the east of a flag placed by Schmid & Company known as Flag A55. The Gerharts assert that this wetland was destroyed by Sunoco when it installed the pipelines and, because it was not recognized as a wetland beforehand, Sunoco did not restore it as a wetland afterward in accordance with the restoration requirements in the permits.

As the party bearing the burden of proof, it is the Gerharts who must adduce enough evidence to prove that a wetland existed to the east of Flag A55 and was impacted by Sunoco's work. On this they have fallen short. The evidence of a wetland existing in this area is thin. Dr. Schmid's wetland data sheet for Sample Point C is dated June 13, 2016 and reflects a revised date of March 29, 2017. (A.Ex. 20 (at Appendix A).) Under the hydrology section, it states that it meets two secondary indicators of hydrology. However, Dr. Schmid admitted in testimony that there was no specific hydrology present during his September 2016 visit, although there was saturation when he returned in early 2017 and the data sheet states that the sample point was saturated to the surface during the March 2017 visit. (T. 136.) Dr. Schmid also conceded that "[w]e certainly would agree that that was not the world's wettest wetland." (T. 149.) It is unclear to us whether the hydrology indicators were cobbled together from three separate visits, but the lack of consistent hydrology undermines the strength of the Gerharts' assertion as to the existence of the wetland.

The Department's soil scientist, Andrew McDonald, also questioned the analysis of soils reflected on the wetland data sheet for Sample Point C. McDonald credibly testified that the information documented on the sheet does not actually satisfy the A11 indicator for hydric soils as it purports. (T. 1041-45.) Further, the soils section of the sheet relies at least in part on the

unsubstantiated hearsay opinion of a person from the Army Corps. Without stronger, more convincing support, the Gerharts have not established by a preponderance of the evidence that a wetland existed east of Flag A55.

Even if a wetland did exist east of Flag A55, it is unclear if and to what extent the wetland would have been impacted by Sunoco. The Gerharts are at times less than precise about the exact boundaries of the alleged wetland and how it may or may not intersect with Sunoco's temporary workspace or permanent right of way. For instance, they say that some of the 0.027 acres of wetland *may* have been located in the permanent right of way and the rest in the temporary right of way (Gerhart Brief at 37), but there is no clear indication from the Gerharts how much of the wetland would be subject to restoration if it was in fact impacted during pipeline installation.[4]

Wetland Classification

As opposed to delineation, which concerns the presence/absence of wetlands and their boundaries, wetland classification involves determining the type of wetland that exists. For our purposes here, the dispute over the type of wetland relates to the vegetation growing in and around the wetland, which is typically classified using what the parties refer to as the Cowardin Manual. (J.Ex. 7.) There is no dispute that the wetlands on the Gerhart property belong within the palustrine class of wetlands. However, the Gerharts say the wetlands on their property are palustrine forested (PFO), while the Department and Sunoco say that the wetlands are palustrine

[4] Sunoco points out that the Gerharts' graphical depictions of the alleged wetland have changed over time on their maps and figures. For instance, in a June 2016 letter to the Army Corps, the Gerharts depict Flag A55 outside the limits of disturbance and Flag A60 within the limits of disturbance. (A.Ex. 16 (at Focus Area D Map).) In an April 2017 letter to the Corps it is the opposite, with Flag A55 shown inside the limits of disturbance and Flag A60 shown outside the limits of disturbance. (A.Ex. 20 (at Map A).) While it is not necessarily unusual for flags to be adjusted from site visit to site visit based on seasonal conditions, etc. (T. 269-70), the Gerharts do not explain these changes in their briefs and they do not provide a specific indication of the boundaries of the alleged wetland.

emergent (PEM), albeit within a forested setting, meaning generally surrounded by a forest. The parties agree that the metric for differentiating between PFO and PEM lies in a determination of the tallest dominant form of vegetation with at least 30-percent areal coverage over the wetland. If the branches and leaves of trees cover 30-percent of the wetland then it is forested; if herbaceous vegetation such as ferns cover 30-percent of the wetland without a greater percentage of trees or shrubs then it is an emergent wetland. (T. 66-68, 332, 731-32, 855-56; J.Ex. 7 (at 20).)

The significance of the wetland classification type primarily comes into play in terms of restoration following the installation of the ME2 pipelines. (T. 593-94.) Under the Chapter 105 permit, if a wetland is impacted by pipeline installation, the wetland needs to be restored and replanted according to the type of vegetation that was growing in the wetland before it was disturbed—forested wetlands are replanted with forested species and emergent wetlands are replanted with emergent species such as meadow grass. (J.Ex. 1 (at 10-11), 18 (at 21-22).) In terms of the Gerhart property and this appeal, this dispute boils down to the replanting of approximately 0.066 acres of wetlands that were disturbed during the pipeline's two crossings of Wetland L24/25. (T. 331; A.Ex. 20 (at 2).) There is no dispute among the parties of the delineated boundaries of L24/25 within the limits of disturbance. (T. 330-31, 450), only the vegetative classification of that wetland.

The parties have spent an inordinate amount of time at the hearing and in their briefs arguing about whether a wetland can be classified as "forested" by way of overhanging tree cover originating from trees growing outside the delineated boundaries of the wetland. The Gerharts say it can, while the Department and Sunoco say it cannot. However, we think this is somewhat of a distraction from the more basic issue of whether there were in fact trees growing within the boundaries of Wetland L24/25 on the Gerhart property. We conclude there were.

We credit the eyewitness testimony of the Gerharts' experts that there were trees growing within the delineated boundaries of Wetland L24/25 before the area was mostly clear-cut in April 2016. Dr. Schmid and Mr. Kunz spent far more time on the ground at the Gerhart property than any other expert testifying in the case, and they are the only experts who were at the site before it was cut. Over the course of his nearly two days of testimony, Dr. Schmid was clear and unequivocal that hydrophytic trees existed in the wetlands and those trees were sufficient to provide more than enough areal cover for the wetlands to be classified as forested, PFO, not emergent, PEM. (T. 107-08, 109-10, 152, 182, 235, 245-46, 298-99, 322-23, 333.) We were not left with the impression from Dr. Schmid's testimony that it was a close call that Wetland L24/25 was PFO. He had a firm understanding of the difference between a forested wetland and an emergent one, testifying that, in an emergent wetland, "[t]here could still be a tree sticking up here or there," but it would still be emergent if herbaceous vegetation provided 30-percent cover and there was not a larger percentage of tree cover. (T. 83-84.) He further testified that, when making a cover determination, he is looking for gross differences of at least 50-percent cover, not whether cover just barely exceeds the 30-percent threshold. (T. 98.)

We found it not only curious but perhaps noteworthy that most of the experts for the Department and Sunoco never visited the site at all and merely opined on theoretical questions of how to classify wetlands based on cover, or relied on wetland determination sheets filled out by persons from Tetra Tech, none of whom presented any eyewitness testimony. Among Sunoco's witnesses, Christopher Embry of Energy Transfer Partners, who coordinated the ME2 permit application, only visited the site in April 2016 after the site had been clear-cut. (T. 479-82.) Stephen Compton, the Senior Director for Environmental Permitting at Tetra Tech, has not been on any site for the entire ME2 project. (T. 544.) Bradley Schaeffer of Tetra Tech, who oversaw

the permitting and wetland delineations for the ME2 project, and who testified extensively on the issue of wetland characterization, has not been to the site. (T. 638-39, 649.) Dr. Douglas Freese, who testified that he believed the wetlands were properly classified as PEM, has never been to the site, and based his opinion merely on reviewing wetland data sheets and a report prepared by Rettew. (T. 742, 744.) Martin Friday of Rettew was at the site twice, once in April 2016 after the site had been clear-cut, and once in September 2016 to map flagging from the Army Corps' visit. (T. 777, 791, 803-04.) We are struck by the fact that Sunoco did not have a single person testify who had been to the site prior to it being cut, and that Sunoco did not identify or call to testify anyone who was out in the field doing the initial wetland delineation for the Gerhart property.

The same is true of the Department's witnesses. David Goerman, the Department's water program specialist, has not been to the site, and based his opinions on his review of the record. (T. 843-44, 875.) Allyson McCollum, the Department's water quality specialist supervisor, who supervised the review of the 105 permit application, has not been to the site. (T. 904.) Andrew McDonald, the Department's soil scientist and permit reviewer for the 105 permit under appeal, was at the site twice—the first time to inspect Sunoco's tree clearing in April 2016, and the second time he stayed "no more than ten minutes" before abruptly leaving. (T. 1012, 1015.) Scott Williamson, the Department's environmental program manager for the waterways and wetlands program, who signed the Chapter 102 and 105 permits, testified that the Department does not go out to verify wetland boundaries and instead relies on the information presented in the application. (T. 1167-69.) Although we think it is entirely reasonable for the Department to rely on the information presented in permit applications, and it would be untenable for the Department to field-verify all the information presented on wetlands and streams in every application, we simply point this out because it reduces the Department's credibility for opining

on how Wetland L24/25 existed and what its dominant vegetation was *before* it was disturbed by Sunoco's clear-cutting.

Most of the Department's and Sunoco's witnesses relied at least in part on the wetland determination forms filled out by "A. Grech" and "A. Stott" of Tetra Tech in June 2014. (J.Ex. 14.) The forms are provided by the Army Corps and are the standard forms used when investigating and delineating wetlands. The forms contain sections addressing the three wetland indicators—hydrology, vegetation, and soils. The forms for Wetlands L24 and L25 (completed before they were relabeled as L24/25) in the vegetation section note nothing in the tree stratum and nothing in the sapling/shrub stratum for the wetland sampling points. The only vegetation noted on the two forms is in the herb stratum. However, "A. Grech" and "A. Stott" never testified and no one at the hearing ever explained who they are. Instead, all of the witnesses for the Department and Sunoco blindly relied on the forms completed by the mystery wetland assessors. In the absence of any sponsoring testimony from "A. Grech" and "A. Stott," we are troubled by the heavy reliance on Tetra Tech's wetland determination forms.

In notable contrast to the Department and Sunoco's limited involvement with the Gerhart property, Dr. Schmid's testimony was grounded in personal observations spanning an entire year and beginning with an investigation of the site before it had been cut. To this end, we think it is useful to provide a sampling of Dr. Schmid's testimony as evidence of the existence of trees within the wetlands, the inaccuracy of Sunoco's forms, and of Dr. Schmid pushing back on the notion that this case is solely about trees rooted outside of the wetland providing cover (despite the parties' frequent insistence otherwise):

- "And where the site has not been cleared in the remaining polygons of wetlands that were identified by others as Palustrine emergent, these are obvious forested wetlands. They are full of trees. And the description of them as emergent is simply wrong. It

doesn't matter where anything is growing or not growing or what's overhanging anything, the trees are everywhere in those wetlands." (T. 107-08.)

- "It has nothing to do with where the trees are growing possibly outside the wetland. These trees are growing absolutely within the wetland itself, and there is no potential mistaking this for an emergent wetland." (T. 152.)

- "And I am very puzzled and perplexed as to where they may have come to their conclusions and what they may have based it on, and particularly, when people have not been out and looked at the site and haven't seen the hundreds of trees standing there today, as we meet in this room, in what have been designated PEM wetlands on the property. I mean, this is just impossible. It's error. Then one can try to backpedal and say, well, we didn't write them down on our data sheets so they weren't there, and then you go back and look and they really are there, and they didn't need to be there if they were nearby because they were only overhanging. That's all hogwash." (T. 298.)

- "And one can easily see the hundreds of trees standing there in the PEM wetlands." (T. 299.)

- "With respect to the [Tetra Tech] forms that document wetland conditions on the Gerhart property, the information on those data forms is not accurate. I say that because there were trees on the site in those wetlands in 2016, and where -- except where they had been clearcut for pipeline purposes, there are still many, many trees in those allegedly Palustrine wetlands -- Palustrine emergent wetlands, in 2019, and very simply an error on the part of the people making the records on the forms, they forgot to put down the trees. Why they should do that, I have no idea. Now…as a result, those forms do not accurately characterize the vegetation that is rooted in and growing in those wetlands." (T. 322-23.)

- "**Q. [from Sunoco's counsel:] And are you contending, in this case, that within the level -- the limits of disturbance, in the 0.066 acres of wetland, there are sufficient trees standing in the wetland to provide the 30 percent cover?**
  A. [from Dr. Schmid:] I believe so, particularly within the wetland polygons delineated by Tetra Tech, there is far more than 30 percent cover just by the trees rooted obviously within the wetlands." (T. 333.)

We credit Dr. Schmid's unwavering testimony that there were hydrophytic trees in the wetlands before it was cut and that the trees were sufficient to provide 30-percent areal cover on these relatively small areas of Wetland L24/25 impacted by the pipelines.

Less credible than Schmid's eyewitness testimony was the testimony of the only two people from the Department and Sunoco who did visit the site. It is true that Andrew McDonald

testified that he did not recall seeing stumps within the boundaries of the wetlands when he was at the site (T. 1014), but his testimony was far more equivocal than Dr. Schmid's and based on far less exposure to and personal knowledge of the Gerhart site. McDonald said he was at the site in April 2016 as part of a broader inspection effort of the ME2 pipeline to check on the tree clearing and ensure that encroachments and earth disturbance were not occurring. (T. 1012.) From what we can tell, he was not there specifically to inspect the wetlands. There are also indications that McDonald's presence on the site during his April 2016 site visit was relatively brief. Sunoco's witness Christopher Embry testified that the representative of the Department who was present at the April 2016 visit left after only 30-45 minutes, while Sunoco's representatives stayed on the site for several hours. (T. 480.)

With respect to Martin Friday of Rettew, he testified that any tree stumps remaining after the site had been clear-cut were not within the delineated wetlands. (T. 804.) However, Friday also acknowledged the presence of a tree rooted in Wetland L24, along with several obvious saplings, shown in one of Rettew's own photographs. (T. 787-89; S.Ex. 5 (at Photo 2).) Although he added the caveat that he did not believe it amounted to 30-percent cover, his admission nevertheless undermines the veracity of the wetland determination form for L24, which noted no trees and no saplings at all growing within the wetland. (J.Ex. 14.) Tetra Tech's form was completed nearly two years prior to Rettew's visit to the site, but it is hard to believe that all of the woody vegetation evident in the photograph, particularly the fully-grown tree, would have sprung up in two growing seasons. And even if the saplings had grown between 2014 and 2016, their presence still cuts against the PEM classification reflected in Sunoco's permit application materials. Furthermore, Dr. Schmid strongly pushed back on Martin Friday's opinions of the wetlands on the site, which is illustrative of the greater issue with Sunoco's

witnesses relying on Tetra Tech's forms: "And [Martin Friday] also, more importantly, in my view, overlooks the presence, the physical presence, of trees, and many trees, within the delineated wetlands that he was asked to observe and verify. And I find that inexplicable….He is accepting the Tetra Tech delineation there and their characterization." (T. 235.)

We are, then, presented with a witness credibility issue. On the one hand, we have the Gerharts' experts who were out on the site several times beginning in March 2016 before it was clear-cut. On the other hand, we have Sunoco and the Department's experts, only two of whom have actually been to the site, and none of them before it was clear-cut. Weighing competing expert testimony is one of the Board's core functions, since so many of our cases at bottom amount to a battle of the experts. *See DEP v. EQT*, 2017 EHB 439, 497, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. "We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

Here, it is not that we find Sunoco and the Department's experts unqualified or incredible, but their opinions are drastically undermined by their limited interaction with the Gerhart site. Having various experts read someone else's wetland determination sheets and agree with them is cumulative without being persuasive. Dr. Schmid has been studying and

working with wetlands for more than 40 years and we found him to be credible and convincing as he testified repeatedly and consistently that there were in fact trees rooted within the boundaries of the delineated wetland.

Before moving on from this point, we note that there are also telling concessions in the Department's and Sunoco's briefs. For instance, Sunoco says "there were few, if any, trees rooted within the wetlands," (Sunoco Brief at 47), which obviously stands in contrast to what Sunoco put forth in its forms and which almost every one of its experts relied on to claim Wetland L24/25 was PEM. Similarly, the Department says that the Gerharts' photographs of the wetlands "do not show sufficient trees or stumps within the wetland" to determine the wetlands are PFO, not PEM. (DEP Brief at 47-48.) But again, Tetra Tech's wetland determination forms said there were *no trees at all*. Implicit in these assertions is the admission that the data sheets are wrong and that there were trees in the wetlands. Sunoco and the Department's experts simply take it for granted that the data sheets someone else filled out are accurate and provide an echo chamber opinion that, because there are no trees listed on the form, the wetland cannot be forested.

The Department next says that, even if we find that the Gerhart wetlands are PFO, it does not matter because there would be no change to the Chapter 105 permit, and the Department is already requiring Sunoco to complete a surplus of compensatory wetland mitigation by creating forested wetlands at a site in Cumberland County. The Department further argues that any errors in the wetland classifications are "harmless and immaterial" and do not warrant any remand or revocation of the permit. We agree that, since the Department and Sunoco have already provided for a greater ratio of wetland mitigation than the 1:1 minimum required by regulation, 25 Pa. Code § 105.20a(a), a finding that the Gerhart wetlands are forested does not require any

additional off-site mitigation. And while we also agree that revoking or remanding the permit is unnecessary here, that does not mean that the wetland classification errors are immaterial, particularly to a landowner such as the Gerharts who are impacted by a pipeline project.[5]

What matters here in terms of a finding of PFO is restoration of the wetlands. The Chapter 105 permit at Special Condition x. generally requires Sunoco to replant wetland areas in accordance with its replanting plans: "The permittee shall immediately restore all disturbed wetland areas to original contours, and replant with indigenous wetland vegetation in accordance with their restoration plans as presented in their permit application." (J.Ex. 1 (at 10).) For PEM wetlands, Sunoco's replanting plan provides restoring the site to a meadow condition: "Permanently revegetate impacted palustrine emergent (PEM) wetlands in accordance with plan sheet ES-0.05 (Appendix B) that calls for Ernst Conservation Seed Mix No. ERNMX-122 Facultative Wet (FACW) Meadow Mix. Plant during the recommended planting season." (J.Ex. 18 (at 21).)

For PFO wetlands, the plan provides that sites should be restored with native trees planted up to 10 feet from the pipelines within the permanent right of way:

> During restoration, temporary workspaces in PFO wetlands will be planted with native tree species and the permanent ROW will be planted no closer than 10 feet from the proposed or existing pipelines with native trees. The remainder of the PFO wetland area within the permanent ROW will be restored to the wetland condition; however it will result in permanent conversion of PFO to the PEM wetland classification.

[5] Query what good it does a landowner who has forested wetlands converted to emergent on her property to have compensatory wetlands installed in an entirely different county. *See* 25 Pa. Code § 105.20a(a)(3) (replacement wetlands must generally be located adjacent to impacted wetland). As Dr. Schmid noted, "it's offsite distant mitigation rather than onsite mitigation…." (T. 269.) Can the landowner visit and appreciate the new wetlands? Andrew McDonald testified that the mitigation site in Cumberland County was chosen to account for the impacts from the ME2 project occurring from Blair County to Delaware County so as "to try and keep things close on a watershed basis." (T. 1019-20.) It is unclear how the Department defines the watershed in this instance. *See* 25 Pa. Code § 105.20a(a)(3) (replacement sites generally will not be approved by the Department unless the site is located within the same watershed as the impacted wetland).

(J.Ex. 18 (at 22).)[6] There is also an additional 105 permit condition applicable to PFO wetlands at Special Condition u.: "All PFO and PSS [scrub shrub] wetlands within the temporary ROW shall be replanted with woody species present in the wetland prior to the permittee conducting construction activities. The plantings need not mirror pre-construction maturity." (J.Ex. 1 (at 10).)

Accordingly, the record shows by a clear preponderance of the evidence that the Department's approval of Sunoco's restoration and replanting plans and incorporation of those plans into Sunoco's permits was not supported by the facts and was in error to the extent they allowed Sunoco to restore Wetland L24/25 as a PEM wetland. Sunoco is ordered to restore and replant Wetland L24/25 as a forested PFO wetland in accordance with all provisions applying to wetlands contained in the permits and Sunoco's plans. The approved restoration plan for the Gerhart property is hereby modified accordingly. (*See, e.g.*, S.Ex. 13.)

Stream Identification / Riparian Buffers

Finally, the Gerharts contend that Sunoco failed to identify all of the streams on the property, which they say results in less riparian forest buffer replanting than they are entitled to. The streams on the Gerhart property are designated as Trout Stocking/Migratory Fishing. (Stip. 47.) The permit requires, within the temporary right of way, 50 feet of planting from the top of the stream banks for trout stocked fisheries (TSF) and warm water fisheries (WWF):

> Prior to submission of the Notice of Termination, the permittee shall replant forested riparian areas in temporary right of ways along surface waters. Replanting shall be conducted for a minimum distance of fifty (50) feet landward from the top of both banks of warm water fisheries and trout stocked fisheries; 100 feet from cold water fisheries; and 150 feet from HQ/EV streams. The density of replanted trees shall be similar to the density that existed prior to the permittee

[6] The Gerharts do not contest that trees should not be planted within ten feet of the pipelines. (Gerhart Brief at 49.)

> conducting construction activities but shall provide no less than 60% uniform canopy cover upon maturation and shall be appropriate to the geographic location.

(J.Ex. 2 (at 16-17).) The Department tells us that, absent the conditions in the permit, there is no legal requirement for Sunoco to replant riparian forest buffers along TSF and WWF streams; the regulatory requirements apply only to exceptional value or high quality watersheds. *See* 25 Pa. Code § 102.14.

The Gerharts briefly focus on an alleged stream that they argue exists in the same area of the alleged wetland east of Flag A55, discussed *supra*. Once again, however, the Gerharts' arguments are vague and obtuse: "Appellants recognize that much of the riparian forested buffer along the eastern edge of the property would likely overlap with the required PFO restoration east of Flag A-55. However, the actual restoration, subject to further technical review, may have to be designed to accommodate both forested buffer restoration, with less concern about fostering a PFO wetland within the polygon, and full PFO restoration, with additional care taken to manage hydric soils. Further review will be required to establish the proper restoration." (Gerhart Brief at 50.) The Gerharts never come out and clearly say, assuming the stream exists, how much of a riparian buffer was impacted by Sunoco's workspaces and rights of way, and how much needs to be replanted and where.

The Gerharts' argument then quickly and unexpectedly morphs into a claim that they are not being provided enough documentation to ensure that wetland restoration and riparian buffer replanting are occurring in accordance with the permits. The Gerharts ask for the permits to be remanded to require Sunoco to submit documentation to ensure compliance with each permit condition. The Gerharts allege that if Sunoco is not required to submit compliance documentation then "the public must assume that there is no compliance." (Gerhart Brief at 51.)

Frankly, we do not have much to go on in the two pages the Gerharts devote to these issues in their brief. Their arguments are difficult to follow and lacking in evidentiary support. Regarding the alleged stream, one of Schmid's own figures shows the stream existing entirely outside the limits of disturbance. (A.Ex. 19 (at Fig. 15).) Another figure shows it extending very slightly into the limits of disturbance. (A.Ex. 20 (at Map B).) Andrew McDonald testified that, even if a stream were there, he did not believe there would be any practical impact in terms of riparian replanting. (T. 1072-74.) For one thing, McDonald said that the permit only requires replanting outward from the banks of a stream, not from the top of the headwaters of a stream, where there may have been some forested area within the limits of disturbance. (T. 1008-09.) Scott Williamson of the Department agreed that there would be no effect if the stream does exist. He pointedly noted that the temporary right of way had already been eliminated in the area of the alleged stream and that the 50-foot replanting area would likely only extend into the permanent right of way where replanting is not required by the permits. (T. 1195-97; A.Ex. 19 (at Fig. 8).) The Gerharts have failed to establish by a preponderance of the evidence that a stream exists east of Flag A55 and that it should be subject to riparian forest replanting.

Further, the Gerharts have not provided any convincing reason to remand the permit or insert additional, undefined conditions to require the submission of compliance information to the Department and the Gerharts. We think the permits contain adequate conditions for Sunoco to demonstrate compliance. Special Condition l. of the Chapter 105 permit requires Sunoco to take pre-construction photographs of each crossing of streams and wetlands and maintain a record of pre- and post-construction conditions at the site and submit that documentation to the Department within 90 days of completing the work under the permit. (J.Ex. 1 (at 8).) Special Condition n. requires Sunoco to submit monitoring reports to the Department for five years after

construction documenting the hydrology of the streams and wetlands crossed by the project, with semiannual reports the first two years and annual reports thereafter. (*Id.* (at 8-9).) The condition also requires Sunoco to submit a written plan to correct any loss of hydrology. (*Id.*) Special Conditions y. and z. then require Sunoco to submit monitoring reports for six years regarding the stream and wetland plantings and ensure at least an 85-percent survival rate. (*Id.* (at 11).) The Chapter 102 permit at Special Condition XVII. requires maintenance and inspections of replanted riparian forest areas for a five-year period to ensure establishment and proper functioning. (J.Ex. 2 (at 16-17).)

In their reply brief, the Gerharts say these conditions are too ambiguous to be of any use, and the time at which the monitoring period begins is undefined. But the Gerharts never say what conditions they believe should be added to the permit to ensure that Sunoco is properly complying. They do not tell us what would be a less ambiguous requirement, in their view. The Gerharts have not given us cause to conclude that the permits are inadequate based on any monitoring or compliance issues.

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. As third-party appellants appealing the Department's issuance of two permits, the Gerharts bear the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, EHB Docket No. 2017-116-L, slip op. at 9 (Adjudication, May 17, 2019); *Jake v. DEP*, 2014 EHB 38, 47.

3. The Gerharts must prove by a preponderance of the evidence that the Department's decision to issue Chapter 102 Permit No. ESG0300015002 and Chapter 105 Permit No. E31-234 and approve and incorporate Sunoco's restoration plans into those permits

was not reasonable, appropriate, supported by the facts, or in accordance with the applicable law. *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 473; *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017); *Shuey v. DEP*, 2005 EHB 657, 691 (citing *Zlomsowitch v. DEP*, 2004 EHB 756, 780).

4. The resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board. *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

5. The Gerharts have not met their burden of proof to demonstrate that an additional wetland exists on their property to the east of Flag A-55.

6. The Gerharts have not met their burden of proof to demonstrate the existence of an additional stream that would be subject to riparian buffer replanting requirements.

7. The Gerharts have not met their burden of proof to demonstrate that the permit conditions are inadequate to ensure that Sunoco complies with the law.

8. The Gerharts have satisfied their burden of proof to demonstrate that Wetland L24/25 was a PFO wetland prior to Sunoco clearing the pipeline corridor.

9. Sunoco must restore Wetland L24/25 as a PFO wetland in accordance with the permits and Sunoco's replanting and restoration plans. This Adjudication and Order serves as a modification of Sunoco's permit; no remand is necessary. *Pequea Twp. v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN AND ELLEN GERHART	:	
	:	
v.	:	**EHB Docket No. 2017-013-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	

O R D E R

AND NOW, this 25th day of September, 2019, in accordance with the preceding Adjudication, it is hereby ordered that this appeal is sustained in part. It is further ordered as follows:

1. Wetland L24/25 is a palustrine forested (PFO) wetland; and
2. Permit No. ESG0300015002, Permit No. E31-234, and Sunoco Pipeline L.P.'s restoration and replanting plans are hereby modified to provide and require that Wetland L24/25 must be restored as a PFO wetland.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 25, 2019

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEST ROCKHILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2019-039-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADELPHIA GATEWAY, LLC	:	**Issued: September 25, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal from an air quality plan approval for lack of jurisdiction because the U.S. Court of Appeals for the Third Circuit has held that it has original and exclusive jurisdiction to review federally-delegated Department permitting decisions associated with interstate natural gas pipeline projects.

O P I N I O N

West Rockhill Township filed this appeal from the Pennsylvania Department of Environmental Protection's (the "Department's") issuance of Air Quality Plan Approval No. 09-0242 to Adelphia Gateway, LLC ("Adelphia"). The plan approval authorizes Adelphia to construct and operate a compressor station and metering station in West Rockhill Township, Bucks County, known as the Quakertown compressor station. The compressor station is part of the Adelphia Gateway Project. Adelphia filed an application with the Federal Energy Regulatory Commission (FERC) seeking a Certificate of Public Convenience and Necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), for the Adelphia Gateway Project. The Project

involves the purchase, construction, and operation of natural gas transmission facilities in Delaware and Pennsylvania, as well as new pipeline laterals, meter and regulator stations, and compressor stations. One such compressor station is the Quakertown compressor station.

Adelphia has filed a motion to dismiss the Township's appeal. It argues that this Board lacks jurisdiction to review the plan approval because the U.S. Court of Appeals for the Third Circuit has original and exclusive jurisdiction to review the plan approval. The Township opposes the motion, but unfortunately that opposition is futile.

Under the Federal Natural Gas Act, the United States Courts of Appeals have "original and exclusive jurisdiction over any civil action for the review" of a state administrative agency's "action" taken "pursuant to Federal law to issue…any permit, license, concurrence, or approval" that federal law requires for the construction of a natural gas transportation facility. 15 U.S.C. § 717r(d)(1). The Third Circuit has now repeatedly ruled that it has original and exclusive jurisdiction to review Department-issued permits that are required under federal law for an interstate natural gas pipeline project regulated under the Federal Natural Gas Act. *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1648 (2019); *Del. Riverkeeper Network v. Sec'y of the Pa. Dep't of Envtl. Prot.*, 870 F.3d 171 (3d Cir. 2017) (holding that the Third Circuit has jurisdiction to review the Department's issuance of a water obstruction and encroachment permit required under Clean Water Act Section 401 for the Orion Pipeline); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 372-73 (3d Cir. 2016). Indeed, within the last few weeks the Third Circuit ruled that it has original and exclusive jurisdiction over a challenge to the Department's decision to issue coverage under an NPDES permit to a FERC-regulated pipeline for the discharge of water used to conduct hydrostatic testing, thus rejecting once again an argument that

the Department's decision must be first reviewed by Pennsylvania's Environmental Hearing Board. *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, __ Fed. Appx. __, No. 17-3299, 2019 U.S. App. LEXIS 24316 (3d Cir. Aug. 15, 2019). The Court had this to say:

> The Natural Gas Act provides us with original and exclusive jurisdiction to hear "any civil action for the review of an order or action of a…State administrative agency…to issue, condition, or deny any permit, license, concurrence, or approval." Despite this broad grant of review, Riverkeeper argues that the Court lacks jurisdiction to hear its petition because the matter is not ripe. It asserts that the Department's decision must be first reviewed by Pennsylvania's Environmental Hearing Board, and is therefore not a final order or action. However, we have previously addressed this question in *Riverkeeper III* [903 F.3d 65, 70-75]. There, we held that a final decision by the Department is a final agency action and is ripe for review. The Department's decisions are "immediately effective" and "[t]he Department and the Board are entirely independent agencies." Riverkeeper gives us no reason to disturb that conclusion here. Its petition is ripe, and we have jurisdiction to hear the merits of the claim.

Id. at *6-7 (footnotes omitted). Although the Opinion is labeled "NOT PRECEDENTIAL," it tends to remove any doubt that the *Delaware Riverkeeper* cases apply in Pennsylvania notwithstanding the Court's arguably inconsistent statements with respect to New Jersey proceedings at issue in *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018).

Here, the Adelphia plan approval was issued pursuant to the Department's federally-delegated authority in part under a federal statute, the Clean Air Act, 42 U.S.C. §§ 7401 – 7671q, and the plan approval was required by FERC. (*See* Adelphia Exhibit A, Environmental Assessment at 30 (Table A-7, Environmental Permits, Approvals, and Consultations for the Project), 122, and 198 at ¶9.) We see no legitimate basis for distinguishing air quality plan approvals from the other governmental actions at issue in the *Riverkeeper* cases. Because the Department's issuance of the plan approval for the FERC-regulated Quakertown compressor station is required by federal law and issued pursuant in part to federal law, the *Riverkeeper* cases compel us to conclude that its review is subject to the exclusive jurisdiction of the Third

Circuit. Our disagreement with the Third Circuit's rulings is as futile as the Township's opposition to the motion to dismiss.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEST ROCKHILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2019-039-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADELPHIA GATEWAY, LLC	:	

O R D E R

AND NOW, this 25th day of September, 2019, upon consideration of the motion to dismiss filed by Adelphia Gateway, LLC and the response thereto, it is hereby ordered that the motion is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 25, 2019

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

ERIE COKE CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2019-069-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 26, 2019**
	:	

OPINION AND ORDER ON DEPARTMENT'S MOTION TO AMEND INTERLOCUTORY ORDER GRANTING PETITION FOR SUPERSEDEAS

By Steven C. Beckman, Judge

Synopsis

The Board denies the Department's Motion requesting that the Board amend its Supersedeas Opinion and Order to certify two questions for immediate appeal to the Commonwealth Court. Certifying the two questions will not materially advance the ultimate termination of Erie Coke's appeal of the Department's denial of its Title V Permit renewal application and neither of the two questions involves a controlling question of law.

Background

Erie Coke Corporation ("Erie Coke") operates a facility located in Erie, Pennsylvania where it produces coke for use in the manufacture of cast iron products as well as other items. On July 1, 2019, the Department of Environmental Protection ("DEP" or the "Department") issued a letter denying Erie Coke's application to renew its Title V Permit governing Erie Coke's air emissions. On July 2, 2019, Erie Coke filed a Notice of Appeal of the Department's denial of its Title V Permit renewal application. On July 3, 2019, Erie Coke filed an Application for Temporary Supersedeas and a Petition for Supersedeas ("Petition"). Following a conference call on July 5, 2019, the Board issued an Order granting the Application for Temporary Supersedeas

and ordered that the Temporary Supersedeas would remain in place until the Board ruled on the Petition. The Board also scheduled a hearing on the Petition starting on July 10, 2019. The hearing on the Petition was held at the Board's Erie facility over six non-consecutive days ending on July 18, 2019. The parties filed post-hearing briefs on August 7, 2019. On August 28, 2019, the Board issued its Opinion and Order on Petition For Supersedeas granting a supersedeas with 18 conditions ("Supersedeas Opinion and Order"). On September 9, 2019, the Department filed a Motion To Amend Interlocutory Order Granting Petition for Supersedeas ("Motion") and a Memorandum in Support of the Motion ("Memorandum") requesting the Board to amend its Supersedeas Opinion and Order so that the Department could seek an appeal to the Commonwealth Court. In the Motion, the Department asserts there are two controlling questions of law as follows: 1) "Whether Section 7514(d)(2) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(2), and 25 Pa. Code § 1021.63(b) require a separate finding that pollution or injury to the public health, safety or welfare will not exist or is not threatened during the period in which any supersedeas would be in effect?" and (2) "Whether the Board can grant supersedeas with conditions that are less restrictive than applicable duly-promulgated regulations?". (Motion, at 2-3). On September 19, 2019, Erie Coke filed a response opposing the Motion. The Board is now ready to rule on the Motion.

Standard

The Board's Supersedeas Opinion and Order in this case is an interlocutory order. Interlocutory orders may only be appealed by permission of the appellate court. *Clean Air Council v. DEP*, 2018 EHB 120, 121, citing *Waste Mgmt of Pa. v. Dep't of Envtl. Prot*., 107 A.3 273 (Pa. Cmwlth. 2015). Permissive appeals of our interlocutory orders 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 by permission may be taken 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).

A party may only petition the appellate court for permission to appeal if the interlocutory order contains the pertinent language of 42 Pa. C.S. § 702(b). If the order does not include such language, the party seeking permission to appeal must request the lower court or government unit, the Board in this case, to amend its order to include the requisite language. The procedure for seeking amendment by the Board is found in the Board's Rules at 25 Pa. Code § 1021.153.

In deciding to amend an interlocutory order, the Board is called on to offer an honest appraisal whether it believes an immediate appeal to the Commonwealth Court would be worthwhile. *Clean Air Council v. DEP*, 2018 EHB 120, 122 citing *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. In reaching our decision, we assess the following three criteria: (1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter. *Id.* If the moving party fails to satisfy one (or more) of these criteria, their request necessarily fails. *Clean Air Council v. DEP*, 2013 EHB 437, 440. Further, our decision of whether to amend an interlocutory order is discretionary. *Becker v. DEP*, 2016 EHB 65, 70. In exercising that discretion, we also take into consideration that, because an interlocutory order is

not final, it is not appealable except in remarkable circumstances and, in general, these types of appeals are not favored by the law. *Clean Air Council v. DEP*, 2018 EHB 120, 121.

Discussion

Our candid assessment of the Department's Motion that we amend the Supersedeas Opinion and Order to include the requested language is that allowing an immediate appeal to the Commonwealth Court on the questions set forth by the Department would not be worthwhile. The principal reason that amendment is not warranted is our conclusion that allowing an immediate appeal will not materially advance the ultimate termination of this case. Certifying the Department's questions, in our opinion, would likely delay resolution of this case rather than advance it. Furthermore, we are not convinced that the two questions posed by the Department are controlling questions of law.

The interlocutory order that the Department seeks to appeal is an order granting a supersedeas. As we explained in our Supersedeas Opinion and Order, the purpose of a supersedeas is to suspend the effect of the Department action pending proceedings before the Board. Therefore, the issuance of a supersedeas is "a limited decision that addresses the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits of the appeal. It is not, nor is it intended to be, the final word on the legality of the Department's action." (Supersedeas Opinion and Order, at 4.) The Board has been reluctant to certify supersedeas orders for appeal because, by their very nature, they do not decide the underlying issues in the case. *See UMCO v. DEP*, 2004 EHB 832. As Judge Labuskes stated in *UMCO* "[a] supersedeas order is a singularly inappropriate vehicle for an interlocutory appeal. By definition, a supersedeas order does not actually establish any law or precedent on the merits." *UMCO* at 839. That is equally true in this case. The two questions

that the Department seeks to certify for appeal address the Board's authority to grant a supersedeas but fail to address the underlying issue in this appeal – the Department's denial of Erie Coke's permit renewal application.

The first question for which the Department seeks review asks whether the Board is required to make a separate finding as to whether pollution, the threat of pollution, or injury to the public, exists during the supersedeas period. The second question asks whether the Board may grant a supersedeas with conditions that the Department asserts are less restrictive than "applicable duly-promulgated regulations." (*See* Motion. at 3.) The Department only raises concerns with three of the eighteen conditions found in the Board's Supersedeas Opinion and Order. If the Commonwealth Court were to agree with the Department's argument on the first question, it seems likely, based on our experience with the Commonwealth Court, that it would remand the first question to the Board, instructing it to make the requested finding. The Department appears to agree with this when it states that if the Commonwealth Court determines that the Department's interpretation is correct, "then the Board must make a threshold finding" whether pollution, the threat of pollution or injury to the public exists during the supersedeas period. (Memorandum, at 10). If the Commonwealth Court agreed with the Department on the second question, it would likely reform our Supersedeas Order and Opinion by striking the three conditions that the Department views as improper. Neither remanding the question to the Board for a further finding nor striking three of the eighteen conditions set forth in our Supersedeas Order and Opinion would, in our opinion, materially advance the resolution of this case.

Moreover, even if the Commonwealth Court strikes down our Supersedeas Opinion and Order in its entirety, rather than remanding and/or reforming it, Erie Coke's appeal would not be *legally terminated*. The underlying legal issue in this case, the denial of Erie Coke's permit

renewal application, would not be resolved, or even advanced, by a decision regarding whether our Supersedeas Opinion and Order was properly issued. This is why, as Judge Labuskes said, a supersedeas order is a particularly inappropriate vehicle for proceeding with an interlocutory appeal. The Department appears to acknowledge in its Memorandum that a favorable ruling by the Commonwealth Court would not necessarily materially advance the termination of the case but attempts to avoid the impact of the issue by setting forth several arguments. The Department argues that once the supersedeas is terminated, Erie Coke will choose to shut down and the appeal will become moot and terminate, or, at a minimum, Erie Coke would be incentivized to reconsider its settlement position. (Memorandum, at 10.) The Department also asserts that even if Erie Coke does not immediately shut down, a decision on the first question will provide probative evidence regarding the ultimate issue in this appeal. *Id*. It further argues that allowing an immediate appeal will cause Erie Coke to demonstrate its ability to comply with the regulatory requirements before a hearing in this matter. (Memorandum, at 17.) We find the Department's arguments unpersuasive.

Even assuming the Department prevails on their appeal, and the Erie Coke facility suffers damage in the absence of a supersedeas, as a legal matter, Erie Coke's appeal of the Department's denial remains a viable legal claim. Unless Erie Coke decided unilaterally to withdraw its appeal, the parties and the Board would continue to proceed with the pre-hearing tasks and hearing on the merits. The Department's claim that the appeal would become moot and thereby terminate, *may* come to pass as a practical matter. However, this prediction strikes us as a tenuous basis for concluding that certifying the Department's questions for appeal would materially advance the termination of this case. The remaining Department arguments regarding creating an incentive for settlement and demonstrating compliance involve, at best, wide-ranging

speculation by the Department about possible outcomes and seem to be a poor basis for a finding that allowing an appeal would materially advance termination of this case.

Additionally, our determination that granting the requested amendment to our Supersedeas Opinion and Order will not materially advance the termination of this case is influenced by the steps we have taken to ensure a prompt resolution of this matter before the Board. First, we note our Supersedeas Opinion and Order set a hearing date in the underlying appeal for February 3, 2020 and stated that no requests for extensions of this hearing date would be granted. Then, after issuing our Supersedeas Opinion and Order, the Board issued another order that established the necessary pre-hearing deadlines required to meet the February 3rd start date for the evidentiary hearing. As a result, the evidentiary hearing on the Department's denial of Erie Coke's permit renewal application will start slightly more than five months after the issuance of the supersedeas and just seven months after the Department's denial action itself. The timeframe set to hear this case is significantly accelerated from the normal timeframes for actions in front of the Board and was specifically designed to minimize the time that the supersedeas would need to remain in place. Given this timeframe, we believe that an appeal to the Commonwealth Court of the Supersedeas Opinion and Order would likely delay resolution of this matter rather than materially advance its resolution. Accordingly, we will not amend our Supersedeas Opinion and Order and certify the Department's questions for immediate appeal.

Our conclusion that allowing an immediate appeal from our Supersedeas Opinion and Order will not materially advance the ultimate termination of this case alone is a sufficient basis for our denial of the Department's Motion. *See Rausch Creek, L.P. v. DEP*, 2013 EHB, 851, 858 (noting there was no need to discuss remaining two criteria after finding one criterion was not met). However, our conclusion that the two questions the Department requests that we certify

are not controlling issues of law in this appeal, further supports our denial of the Department's Motion[1]. Turning to the Department's first question, it claims the cited statutory and regulatory provisions require the Board to make a separate finding that pollution or injury to the public will neither exist nor be threatened during the period in which any supersedeas would be in effect. The Department asserts that the Board determined that it was not required to make a finding on this issue prior to balancing the supersedeas factors. This "determination," it argues, makes this a controlling question of law that is appropriate for certification.

The Department's assertion regarding the Board's "determination" is, as a factual matter, inconsistent with the Board's actual decision in this case. In our Supersedeas Opinion and Order, we discussed the statutory and regulatory provisions cited in the Department's question. (Supersedeas Opinion and Order, at 9-11.) Contrary to the Department's contention that we determined we were not required to make a finding on this issue, we implicitly, and arguably explicitly, reached the requested finding. We stated, "in every case involving the denial of a permit renewal application for an ongoing permitted facility, there is at least the threat, if not the actual existence of pollution or injury to the public health, safety or welfare. If that were not the case, there would be no need for a permit or a permit renewal in the first place." (*Id.* at 10.) In addition to the underlying premise of the Department's question being incorrect, we also think that the issue is not a pure question of law. In reaching our decision, we discussed those statutory and legal provisions in the specific factual context of this case involving a permit renewal application decision for an existing facility. We concluded that in this specific context,

[1] The issues of whether there is a controlling question of law and whether an appeal will materially advance the ultimate termination of the case are clearly related concepts. A decision by the Commonwealth Court on a true controlling question of law would obviously materially advance the ultimate termination of the underlying case. In the absence of a true controlling question of law, it is difficult to see how an appeal would ever advance the termination of the underlying case.

the statutory and regulatory provisions should be read to allow the Board to issue a supersedeas to maintain the status quo. We think that the question proposed by the Department is a mixed question of fact and law since the requested finding requires that the factual setting of the case be considered in reaching that decision. We do not think that you can properly address the issue the Department is attempting to raise without considering the factual context. In addition, a question that is based on whether the Board has made a finding that the Department contends is required strikes us as unlikely to present a controlling question of law. Board findings are generally based on facts and law and do not typically resolve pure legal questions.

The Department's second question is not a controlling question of law and involves a mixed question of fact and law. Furthermore, the premise of the question is again inconsistent with what the Board actually stated in it Supersedeas Opinion and Order. The Department posits the question as "whether the Board can grant supersedeas with conditions that are less restrictive than applicable duly-promulgated regulations." (Motion, at 3.) There is no dispute that our rules allow the Board to issue a supersedeas with conditions. 25 Pa. Code § 1021.63(c). As previously stated, the Motion and Memorandum only addresses three of the eighteen conditions set by the Board. A challenge to the legality of a limited subset of the conditions set by the Board in a supersedeas order is hardly controlling of the actual issue at the heart of the case, the Department's denial decision. A ruling on the question set by the Department would likely not address the remaining 15 conditions in the Supersedeas Opinion and Order and, as a result, it cannot be said to control the case.

It is also clear that the Department's question requires knowledge and consideration of the facts in this case. The Department spends several pages in its Memorandum reviewing the specific regulations it contends are more restrictive than the conditions set by the Board and then

discusses the specific facts of Erie Coke's alleged compliance and non-compliance with the regulations. As demonstrated by the Department's own Memorandum, you cannot even analyze the premise of the question without considering the underlying facts of this case. Finally, the Department states that the Board has usurped the statutory authority of the Environmental Quality Board to promulgate regulations, conflicts with the delegation of the authority to the Commonwealth under the Clean Air Act and asks whether the challenged conditions are *ultra vires*. (*See* Memorandum at 15.) The Board very clearly stated that there is "nothing in this Opinion and Order that restricts the Department from continuing its inspections and taking appropriate enforcement action if it finds that Erie Coke has committed additional violations." (Supersedeas Opinion and Order, at 28.) The Department's hyperbolic statement that the Board has acted *ultra vires* and usurped certain authority is not supported by the actual language of our decision. A posited question of law that is not factually accurate in its underlying premise cannot, in our opinion, satisfy the requirement that it be a controlling question of law.

We find that amending our Supersedeas Opinion and Order to allow for an appeal of our interlocutory order is not proper in this case. Doing so would not advance the ultimate termination of this matter and would more likely delay the resolution of the case. In addition, we do not think the questions on which the Department is seeking review are controlling questions of law for the purpose of allowing an immediate appeal. At best, they are mixed questions of law and fact on a preliminary procedural issue that will have no bearing on the decision on the underlying issue in the appeal. Moreover, they are not premised on a fair or accurate reading of the Board's opinions and actions as set forth in the Supersedeas Opinion and Order. Therefore, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ERIE COKE CORPORATION	:	
	:	
v.	:	**EHB Docket No. 2019-069-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 26th day of September 2019, it is hereby ordered that the Department's Motion to Amend Interlocutory Order Granting Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: September 26, 2019

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

For the Commonwealth of PA, DEP:
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Douglas G. Moorhead, Esquire
Kayla A. Despenes, Esquire
(via electronic filing system)

For Appellants
Paul K. Stockman, Esquire
C. Max Zygmont, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EIGHTY FOUR MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2019-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 30, 2019**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion for summary judgment because there are genuine issues of material fact and legal arguments that will require further development.

O P I N I O N

The following facts are not disputed. On December 27, 1985, the Commonwealth of Pennsylvania, Department of Environmental Resources, the predecessor to the Department of Environmental Protection (the "Department"), issued Coal Refuse Disposal Area Permit No. 63743702 to BethEnergy Mines, Inc. The permit was transferred to Eighty Four Mining Company ("Eighty Four") in 1994. The permit authorized BethEnergy and then Eighty Four to dispose coal refuse at the Mine 84 Refuse Area. The permit was renewed several times between 1990 and 2015. The coal refuse disposed at the Mine 84 Refuse Area came from coal extracted from the Mine No. 84. Coal extraction at the mine ceased in 2009 and it was sealed and abandoned in 2011.

On June 26, 2015, Eighty Four again applied to renew the permit. Eighty Four in its initial permit renewal application did not specifically ask that the permit be limited exclusively to

reclamation activities and reclamation activities only. However, in response to Department comment letters, Eighty Four submitted a reclamation plan dated September 7, 2018 as a supplement to its application. (*See*, DEP Ex. B, Special Condition 43.)

On July 8, 2019, the Department renewed Eighty Four's permit. The permit continues to require Eighty Four to reclaim the site, but now it must do so in accordance with its September 2018 reclamation plan. With the exception of a few details, the permit approved and incorporated the reclamation plan that had been submitted by Eighty Four as a supplement to its permit application. (DEP Ex. B, Special Conditions 43-45.) Curiously, the permit also authorized Eighty Four to place course coal refuse from its Monongalia County Coal Mine operations at the Eighty Four Refuse Area "for reclamation purposes." (DEP Ex. B.)

Eighty Four has filed this appeal from the July 8, 2019 permit renewal. Three days after filing its appeal Eighty Four also filed a motion for summary judgment. Eighty Four's argument is straightforward. It argues that we should rescind and revoke the permit because it did not specifically ask for a reclamation-only permit, yet that is what the Department issued. It says the Department has no authority to issue a reclamation-only permit unless a permit applicant specifically asks for such a permit. The Department opposes the motion, arguing that a permit applicant does not always get to control all of the terms and conditions of a permit by what it chooses to include in its application. The Department says Eighty Four's argument taken to its logical extreme would mean an applicant could apply for a permit with no duty to reclaim the site, and the Department would be compelled to issue such a permit if it issued a permit.

A motion for summary judgment may be granted when the pleadings, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1 and 1035.2(a); *Diehl v. DEP*, 2018

EHB 18, 23-24. Summary judgment will only be granted in the clearest of cases. *Clean Air Council v. DEP*, 2013 EHB 404, 406 (citing *Macyda v. DEP*, 2011 EHB 526). All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Clean Air Council*, 2013 EHB 404, 406 (citing *Rozum v. DEP*, 2008 EHB 731). This appeal does not qualify as "the clearest of cases."

The first reason we are unable to grant summary judgment so early in this appeal is that we are not sure that Eighty Four has properly characterized the renewed permit as a reclamation-only permit. The permit authorizes the "placement" of Monongalia County Coal Company coal refuse at the site. (Ex. B. p. C-9.) As Eighty Four states in its reply brief, "The Reclamation-Only Permit expressly authorizes the placement of coal refuse from an active coal mine (and not the mine the Department insinuates is the only mine tied to the Mine 84 Refuse Area) to the Mine 84 Refuse Area, a coal mining activity which reveals that operations at the site are not ceased." (Reply Brief at 7.) Although the permit says the "placement" is "for reclamation purposes," the parties do not explain where to draw the line between "refuse disposal" and "refuse placement for reclamation purposes," if there is such a line. Section 3 of the Coal Refuse Disposal Control Act, 52 P.S. § 30.53, defines coal refuse disposal activities broadly to include the "storage, dumping or disposal" of coal refuse. The operable regulation defines "coal refuse disposal" as follows:

> The storage, placement or disposal of coal refuse. The term includes engineered features integral to the placement of the coal refuse including relocations or diversions of stream segments contained within the proposed fill area and the construction of required systems to prevent adverse impacts to surface water and groundwater and to prevent precipitation from contacting the coal refuse.

25 Pa. Code § 90.1. The regulation goes on to define "reclamation" as follows:

> Those actions taken to restore the area affected by coal refuse disposal activities as required by this chapter.

Id. In light of these rather vague statutory and regulatory provisions, we are not willing to simply assume that Eighty Four's permit is accurately characterized as a "reclamation-only permit," which is the essential factual predicate of Eight Four's legal argument. Once the legal issue is cleared up, we will need a better understanding of the facts to assess whether Eighty Four's placement of coal refuse is properly characterized as disposal or reclamation or both. Summary judgment with such an incomplete understanding of the facts and the law would be inappropriate.

The second reason we must deny summary judgment also has to do with the absence of a clear record to support another factual predicate to Eighty Four's legal argument. Eighty Four contends that it did not request a reclamation-only permit. However, in response to Department comments, it did in fact submit a reclamation plan as a supplement to its application, and it was that plan that the Department (with what appear to be certain minor details) approved and incorporated into the permit. Although our record at this point is extremely limited, the Department tells us that disposal operation had been ceased at the site in 2009, nine years before Eighty Four submitted a reclamation plan in September 2018 and well before it asked in April 2019 for permission to place Monongalia coal refuse at the site. This begs the question, putting aside the Monongalia refuse issue, what was Eighty Four requesting if not approval to reclaim a site that had been inactive for nine years? There is no suggestion that Eighty Four had any plans to reactivate the site in September 2018. We do not think it is necessarily dispositive that a permit applicant use magic words such as "we want a reclamation-only permit" to conclude that such a permit is in reality is what it is asking for. We will require further factual development regarding what transpired during the application process.

Thirdly, Eighty Four has not explained why the extreme remedy of rescinding and revoking the latest permit renewal that it has applied for is appropriate. It is not clear what the effect of such a Board Order would be, let alone whether such effect would be warranted.

Finally, Eighty Four in its motion relies very heavily on language in our recent Adjudication in *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2017-070-L (Adjudication March 18, 2019) (appeal pending), for the proposition that the Department can only issue a reclamation-only permit if an applicant specifically asks for such a permit. However, we see that rather unique case as having little precedential value here. In *Rausch Creek*, we held that the Department cannot renew a permit if there is no valid existing permit in place. The permit in *Rausch Creek* had been suspended by this Board. In contrast, in this case Eighty Four had a valid existing permit in place when the Department renewed it. Therefore, the fundamental holding of *Rausch Creek* does not apply here. We went on to hold that the Department cannot renew the permit of a forfeited operator who has made it unequivocally clear that it has no intention of complying with its permit, which was indisputably the case in *Rausch Creek.* Eighty Four obviously has not said it will not comply with the law going forward. We next held that the Department erred by attempting to renew a suspended permit without any regard for prior rulings of this Board that had established certain deficiencies related to the permit purportedly being renewed. Again, this case is distinguished by the fact that Eighty Four is not the subject of any pending Board Orders.

Attempting to justify renewing a superseded permit to a forfeited operator, the Department argued in *Rausch Creek* that it did not need to comply with the law regarding the renewal of permits for recalcitrant operators, or the basic prerequisites for permit renewals, or the Board's Orders regarding the specific permit in question because it was merely issuing a

reclamation-only permit. Its best authority for this argument was 25 Pa. Code § 86.55(i), which reads:

> If coal extraction, coal preparation and coal refuse disposal will not be conducted, and treatment facilities are not required after the permit expiration date, and if the remaining surface mining activities will consist solely of reclamation, including topsoil replacement and revegetation, the permittee may provide written notice to the Department of the reclamation in lieu of submitting a complete application for renewal and providing the public notice as required by this section. In these circumstances, the Department may renew the permit conditioned upon only reclamation activities occurring and no further coal extraction, coal preparation and coal refuse disposal occurring.

25 Pa. Code § 86.55(i). We rejected the Department's argument that it could disregard the statutory and regulatory prohibitions against renewing a recalcitrant permittee's permit if the Department was merely renewing the permit for reclamation-only. We said Section 86.55(i) only

> makes sense if there is a valid existing permit in place. The underlying requirements for a permit have already been satisfied. Unlike here, there is an adequate reclamation plan already in place, so a limited application requirement is appropriate. We do not believe this provision was intended to trump everything else in Section 86.55 regarding the requirements for a renewal. Subsection (i) envisions a situation where an otherwise compliant operator proposes to conduct reclamation only. Such operators need not submit a full-blown renewal application. There is nothing inconsistent between the reduced application requirements in Subsection (i) and the requirements in the other portions of the regulation that, *inter alia*, require that an operator be in good standing for its permit to be renewed. In short, we find no basis in the law for the Department's proposed exception for reclamation-only renewals.

Id., slip op. at 13-14. Importantly, we did not hold in *Rausch Creek* that the *only* time the Department can issue a reclamation-only permit is when an applicant specifically asks for one. Rather, we made the rather unremarkable observation that, *if* the Department intends to rely on Section 86.55(i) as the authority for issuing a reclamation-only permit as it tried to do in that case, both the Department and the applicant need to follow the requirements of that regulation.

Here, the Department has not relied on Section 86.55(i) as authority to issue a reclamation-only permit (if that is what it is) to Eighty Four.

In short, *Rausch Creek* does not stand for the proposition that Section 86.55(i) is an absolute limitation on the Department's authority. We did not address other potential sources of Departmental authority in that case, such as Sections 3.1(f) and 3.1(j) of the Coal Refuse Act, 52 P.S. §§ 30.53a(f) and 30.53a(j), which state that the Department has the power to:

> (f) Issue such permits and orders and conduct such inspections as may be necessary to implement the provisions of this act and the policies, rules and regulations, and standards adopted pursuant to the act.
>
> (j) Establish limitations on the duration of permits in accord with rules and regulations and establish conditions for permit issuance and renewals.

Nor did we mention 25 Pa. Code § 86.41, which states:

> A permit issued by the Department is subject to the following conditions:
>
> (1) The permittee shall conduct coal mining activities as described in the approved application, except to the extent that the Department otherwise directs in the permit that specific actions be taken.

We also did not touch on 25 Pa. Code § 90.167(b), which provides that temporary cessation of a coal refuse disposal operation may not exceed 90 days except under limited circumstances. If coal refuse disposal operations are ceased for a period longer than allowed by the regulation for temporary cessation, then the coal refuse disposal operation is, by operation of law, permanently ceased. The regulations clearly set forth an operator's obligations when operations at a coal refuse site is permanently ceased. Specifically, 25 Pa. Code § 90.168 states:

> Operations that are permanently ceased shall be backfilled or closed or otherwise permanently reclaimed in accordance with this chapter and the permit. All underground openings, equipment, structures or other facilities not required for monitoring, unless approved by the Department as suitable for the postmining land use, shall be removed and the affected land reclaimed.

Id.

At this point it should be abundantly clear that Eighty Four has not presented the "clearest of cases" that it is entitled to judgment in its favor. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EIGHTY FOUR MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2019-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 30th day of September, 2019, it is hereby ordered that the Appellant's motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: September 30, 2019

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

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(via electronic filing system)

For Appellant:
James V. Corbelli, Esquire
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(via electronic filing system)

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE, Permittee	:	**Issued: October 17, 2019**

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

By Richard P. Mather, Sr., Judge

Synopsis

The Board finds that the Appellant has not met its burden of proving by a preponderance of the evidence that the Department erred when it reviewed a Notification of First Land Application for application of biosolids on the Spicer Family Farms and issued a letter dated February 29, 2016 determining that the site is suitable for the land application of biosolids and that the permittee had complied with the general permit requirements for the first-time land application of biosolids on the site.

Background

Under Chapter 271 of Title 25 of the Pennsylvania Code, the Department of Environmental Protection ("Department" or "DEP") administers a regulatory program for "Beneficial Use of Sewage Sludge by Land Application," 25 Pa. Code Subchapter J (Sections 271.901-271.933). Under these regulations the Department is authorized to issue a land application of sewage sludge general permit if the general permit meets the applicable requirements specified in the regulations. *See* 25 Pa. Code § 271.902 (Permits and direct

enforceability). The current Chapter 271, Subchapter J regulations were promulgated by the Environmental Quality Board in 1997, and were designed to meet the United States Environmental Protection Agency ("EPA") regulations governing the land application of sewage sludge known as EPA's "503 Rule." *See* 27 Pa.B. 521 (January 25, 1997); 40 CFR Part 503 (53 FR 9387 (February 19, 1993). The Department's regulations meet EPA's requirements in its 503 Rule, but the Department's regulations contain a number of requirements that exceed the requirements in EPA's 503 Rule.

Under the requirements in Subchapter J authorizing the issuance of a general permit to allow the beneficial use of biosolids by land application the Department has issued General Permit PAG-08 (Beneficial Use of Biosolids by Land Application) which has been extended several times since it was first issued.[1] The Borough of Bellefonte ("Bellefonte") has applied for and received an approval for coverage under General Permit (PAG-08) for Beneficial Use of Biosolids by Land Application, permit number PAG-084814 which was last issued to Bellefonte in 2009.

Bellefonte is required to meet the requirements of PAG-084814 including the "Notification Requirements" in Section D. In Section D(1)(c) of PAG-084814, Bellefonte is required to use the Department's form for "Notification of First Land Application to the Department" under 25 Pa. Code § 271.913(g) when biosolids will be land applied to a new site for the first time. The Department is responsible for reviewing the site and for making a determination on whether the site meets the regulatory requirements for the land application of biosolids.

The Spicer Family Farms, LLC ("Spicer Family Farms") contacted Bellefonte to express interest in participating in Bellefonte's biosolid program under PAG-084814. Bellefonte

[1] PAG-08 was extended most recently in 2018. *See* 48 Pa.B. 1780 (3/24/18).

submitted a Notice of First Land Application to the Department under a cover letter dated January 13, 2016 regarding land application of biosolids on the Spicer Family Farms. After review, the Department issued a letter dated February 29, 2016 determining that the Spicer Family Farms site is suitable for the land application of biosolids under PAG-084814 and that Bellefonte had complied with the applicable permit requirements for the land application of biosolids on the site. The "Site Suitability Notice for Land Application Under Approved PAG-08 General Permit Coverage" for the Spicer Family Farms site was published in the Pennsylvania Bulletin on March 17, 2016. 46 Pa.B. 1328 (3/12/16). The Benner Township Water Authority ("Authority") filed its Notice of Appeal of the Department's action described in the Notice on April 1, 2016. The Authority challenges the Department's determination that the Spicer Family Farms site is a site suitable for land application of biosolids and that Bellefonte had complied with all applicable permit requirements.

The Authority owns and operates a public water system in Benner Township, Centre County. One source of water used by the Authority in its public water system is the Grove Park Well. The Authority participated in a program to develop a source water protection plan. The program is funded by the EPA and the Commonwealth of Pennsylvania and is administered by the Department. A draft Source Water Protection Plan was prepared and the Plan identified an area, called the "Aquifer Recharge Area" which is the area that encompasses the surface exposure of the bedrock aquifer formations that contribute groundwater recharge to the aquifer that feeds the Authority's wells. The Spicer Family Farms property is located within an area identified in the draft Plan as the "Aquifer Recharge Area." The Authority is concerned that Bellefonte's proposed land application of biosolids on the Spicer Family Farms property will adversely impact its source of water from the Grove Park Well.

FINDINGS OF FACT

Stipulated Findings of Fact[2]

1. Appellant Benner Township Municipal Authority ("Authority") is an "authority" as defined in Section 2 of the Municipality Authorities Act, 53 Pa. C.S.A. § 5602. The Authority owns and operates a public water system in Benner Township, Centre County. (Stip. 1.)

2. The Commonwealth of Pennsylvania Department of Environmental Protection ("Department" or "DEP") is the agency with the duty and authority to administer and enforce 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"); Sections 1905-A, 1917-A and 1920-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-5, 510-17 and 510-20 ("Administrative Code"), the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.*; the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, as amended, 53 P.S. § 4000.101 *et seq.*; and, the rules and regulations promulgated thereunder. (Stip. 2.)

3. The Borough of Bellefonte ("Bellefonte") is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal offices located at 236 West Lamb Street, Bellefonte, PA 16823. The Borough is the permittee for purposes of the approved land application of biosolids produced at the Bellefonte Wastewater Treatment Plant. (Stip. 3.)

4. Bellefonte generates biosolids for land application pursuant to an Approval for Coverage under the General Permit (PAG-08) for Beneficial Use of Biosolids by Land Application, permit no. PAG-084814, which was last issued to Bellefonte on May 8, 2009.

[2] On January 11, 2018, the Parties filed a Stipulation with the Board containing 117 numbered paragraphs. The Stipulations will be referenced as "Stip. #'s as set forth in this Adjudication.

(Stip. 4.)

5. PAG-08 has been extended through various notices in the Pennsylvania Bulletin with the most recent extension to April 2, 2018. 39 Pa.B. 3535 (7/11/09); 44 Pa.B. 1397 (3/08/14); 45 Pa.B. 1450 (3/21/15); 46 Pa.B. 1611 (3/26/16); 47 Pa.B. 1592 (3/11/17). (Stip. 5.)

6. Bellefonte is required to meet the requirements of PAG-084814, which was issued pursuant to the provisions of the Federal Clean Water Act, The Clean Streams Law, the Solid Waste Management Act and the Municipal Waste Planning, Recycling and Waste Reduction Act and predominately the regulations contained in Chapters 271, 285, and 287 of the Department's regulations. (Stip. 6.)

7. As part of the requirements contained in PAG-084814, Bellefonte is required to meet the "Notification Requirements" in Section D, the "Land Application Requirements" in Section E, and the "Land Application Restrictions" in Section F of that permit. (Stip. 7.)

8. In Section D(2)(c) of PAG-084814, Bellefonte is required to use the Department's form for Notification of First Land Application to the Department in accordance with 25 Pa. Code § 271.913(g) when biosolids will be land applied. (Stip. 8.)

9. In Section D(2)(c) of PAG-084814, upon receipt of the Notification of First Land Application, the Department is responsible for reviewing the site and making a determination on whether the site meets the regulatory requirements for land application of biosolids. (Stip. 9.)

10. In Section D(2)(c) of PAG-084814, land application activities may commence at the end of the 30-day timeframe even if DEP has not made a determination. (Stip. 10.)

11. Under cover letter dated January 13, 2016, Bellefonte submitted a Notification of First Land Application ("Notification of First Land Application" or "Notice") to the

Department for application of biosolids to a property known as the Spicer Family Farms. (Stip. 11.)

12. The Department received the Notice on January 22, 2016. (Stip. 12.)

13. The Notice evidences an intent and commitment to abide by the terms of the General Permit for land application of biosolids to agricultural land, PAG-084814. (Stip. 13.)

14. The Notice deals with the land application of biosolids for agricultural utilization, not the land application of domestic wastewater. (Stip. 14.)

15. The Notice included certain "Management Practice Requirements" and "Site Restrictions" that Bellefonte imposed on the farm. (Stip. 15.)

16. The Notice provided a signed copy of the Management Practice Requirements for the site. (Stip. 16.)

17. As one of the Management Practice Requirements, biosolids may not be applied to the land if the nitrogen from the manure produced at the site meets the nitrogen requirements to achieve realistic crop yields, unless a management plan is implemented to allow for the use of manure at another location consistent with 25 Pa. Code § 271.915(g). (Stip. 17.)

18. As one of the Management Practice Requirements, food crops with harvested parts that touch the biosolids/soil mixture and are totally above the surface shall not be harvested for 14 months after biosolids application, consistent with 25 Pa. Code § 271.932(b)(5)(i). (Stip. 18.)

19. As one of the Management Practice Requirements, food crops with harvested parts below the surface of the land shall not be harvested for 20 months after application of biosolids when the biosolids remain on the land surface for 4 months or longer prior to incorporation, consistent with 25 Pa. Code § 271.932(b)(5)(ii). (Stip. 19.)

20. As one of the Management Practice Requirements, food crops with harvested parts below the surface of the land shall [not] (sic) be harvested for 38 months after application of biosolids when the biosolids remain on the land surface for less than 4 months prior to incorporation, consistent with 25 Pa. Code § 271.932(b)(5)(iii). (Stip. 20.)

21. As one of the Management Practice Requirements, food crops, feed crops, and fiber crops shall not be harvested for 30 days after application of the biosolids, consistent with 25 Pa. Code § 271.932(b)(5)(iv). (Stip. 21.)

22. As one of the Management Practice Requirements, animals shall not graze on the land for 30 days after application of the biosolids, consistent with 25 Pa. Code § 271.932(b)(5)(v). (Stip. 22.)

23. As one of the Management Practice Requirements, turf grown on biosolids amended soil shall not be harvested for one year after application of biosolids when the harvested turf is placed on either land with a high potential for public exposure or a lawn, unless otherwise specified by DEP, consistent with 25 Pa. Code § 271.932(b)(5)(vi). (Stip. 23.)

24. As one of the Management Practice Requirements, public access to land with a high potential for public exposure shall be restricted for one year after application of the biosolids, consistent with 25 Pa. Code § 271.932(b)(5)(vii). (Stip. 24.)

25. As one of the Management Practice Requirements, public access to land with a low potential for public exposure shall be restricted for 30 days after application of the biosolids, consistent with 25 Pa. Code § 271.932(b)(5)(viii). (Stip. 25.)

26. As one of the Management Practice Requirements, the soil pH must be 6.0 or greater prior to land application unless DEP allows the increase of pH by application of biosolids

or other material in which case the soil pH shall be 6.0 or greater within 6 months following biosolids application, consistent with 25 Pa. Code § 271.915(e). (Stip. 26.)

27. The Notice provided a signed copy of the Site Restrictions for the site. (Stip. 27.)

28. As one of the Site Restrictions, Bellefonte Waste Water Treatment Plant ("WWTP") biosolids shall not be applied within 100 feet or less of a perennial stream or within 33 feet of an intermittent stream, consistent with 25 Pa. Code § 271.915(c)(l). (Stip. 28.)

29. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied within 100 feet of the edge of a sinkhole consistent with 25 Pa. Code § 271.915(c)(2). (Stip. 29.)

30. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied within 300 feet from an occupied dwelling unless the current owner has provided a written waiver consenting to activities closer than 300 feet, consistent with 25 Pa. Code § 271.915(c)(3). (Stip. 30.)

31. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied in an area without an implemented erosion and sedimentation control plan or a farm conservation plan, consistent with 25 Pa. Code § 27I.915(c)(4). (Stip. 31.)

32. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied within 300 feet of a water source unless the current owner has provided a written waiver consenting to activities closer than 300 feet, consistent with 25 Pa. Code § 271.915(c)(5). (Stip. 32.)

33. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied within 100 feet of an exceptional value wetland, as defined in 25 PA Code Section 105.17 (relating to wetlands), consistent with 25 Pa. Code § 271.915(c)(6). (Stip. 33.)

34. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied within 11 inches to the depth from the soil surface to soil mottling or the seasonal high water table, nor 3.3 feet to the depth from the soil surface to the saturated area of· the regional groundwater table, consistent with 25 Pa. Code § 271.915(c)(7). (Stip. 34.)

35. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied on slopes greater than 25%, consistent with 25 Pa. Code § 271.915(d)(l). (Stip. 35.)

36. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied greater than the calculated agronomic rate, consistent with 25 Pa. Code § 271.9l5(f). (Stip. 36.)

37. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied if it is likely to adversely affect a Federal or Pennsylvania threatened or endangered species, or its designated critical habitat, consistent with 25 Pa. Code § 271.915(a). (Stip. 37.)

38. As one of the Site Restrictions, Bellefonte WWTP biosolids shall not be applied on flooded, frozen, or snow-covered ground, except as expressly provided in a permit issued under Chapter 91, 92, or 105 of the Department's regulations, consistent with 25 Pa. Code § 271.915(b). (Stip. 38.)

39. The primary review of the Notice was conducted by Department employee Daniel Thetford. (Stip. 39.)

40. Daniel Thetford is employed as an Environmental Group Manager in the Sewage Planning Section of the Clean Water Program. (Stip. 40.)

41. Daniel Thetford holds a Bachelor of Science Degree in Environmental Soil Science from Pennsylvania State University. (Stip. 41.)

42. Since April of 2014, Daniel Thetford has been a Certified Professional Soil Scientist as designated by the Soil Science Society of America's Soil Certification Board. (Stip. 42.)

43. Daniel Thetford has reviewed soils information for the Department at over 350 sites in the Department's Northcentral Regional Office. (Stip. 43.)

44. Daniel Thetford has reviewed sewage facilities planning modules, alternate system designs, large-volume on-lot system designs, and notifications of first land application and has acted as an expert witness, among other items, for the Clean Water Program and the Department in general, for the Department's Northcentral Regional Office located in Williamsport, PA. (Stip. 44.)

45. As a Soil Scientist II, Daniel Thetford's duties included, but were not limited to, reviewing soils information to determine suitability for land application of sewage, biosolids and, occasionally other wastewaters. (Stip. 45.)

46. Daniel Thetford is qualified to determine soil series, write soil descriptions, measure slope, evaluate soil characteristics including redoximorphic features (evidence of a seasonal high-water table), evaluate depths to regional ground water, and determine site suitability for the application of wastewater, sewage sludge and biosolids. (Stip. 46.)

47. On November 12 and December 3, 2015, soil test pits were completed by the consultant for Bellefonte at the Spicer Family Farms tract in an effort to confirm the soil mapping. (Stip. 47.)

48. Bellefonte submitted a report on this testing with the Notification of First Land Application for the Spicer Family Farms tract. (Stip. 48.)

49. Bellefonte's consultant constructed twenty trenches on some, but not all, of the fields on which biosolids are proposed to be applied. (Stip. 49.)

50. Daniel Thetford was present for most, but not all, of the test pits that were completed on November 12, 2015. (Stip. 50.)

51. The trenches were typically 4 to 12 feet long. (Stip. 51.)

52. The purpose of the soil trenches was to characterize the soils on site. (Stip. 52.)

53. Due to their drainage classes, the soils mapped on the Spicer Family Farms tract are generally considered to be suitable for biosolids application. (Stip. 53.)

54. As the soils mapped on the Spicer Family Farms tract are generally considered to be suitable for biosolids application, due to their drainage classes, Mr. Thetford believed that confirmation of soil mapping would be sufficient to characterize the site's compliance with 25 Pa. Code § 271.915(c)(7). (Stip. 54.)

55. For the Spicer Family Farms tract, Mr. Thetford reviewed soil mapping data for primarily two purposes: (a) to determine the depth to the regional groundwater table and the seasonal high water table, and (b) to establish the surface slope of the land on the proposed application areas. (Stip. 55.)

56. Daniel Thetford believed that confirmation of soil mapping would be sufficient to characterize the site's compliance with 25 Pa. Code § 271.915(c)(7). (Stip. 56.)

57. Daniel Thetford did not personally select the number, spacing or location of the soil trenches (test pits) that were used to characterize the site. (Stip. 57.)

58. The Department makes the final determination if the characterization is sufficient. (Stip. 58.)

59. Soils determined to be present on the site, and confirmed via the soil trenches, include Hagerstown, Opequon, Hublersburg and Nolin soils. (Stip. 59.)

60. Mr. Thetford, using the soil information disclosed in the Notice and his observations at the site, accepted Bellefonte's determination that the depth to the water table and the surface slope of the proposed biosolids application areas on the site met regulatory requirements. (Stip. 60.)

61. For the fields proposed for land application of biosolids on the Spicer Family Farms property, the depth to regional groundwater tables and the seasonal high water table meet the regulatory minimums. (Stip. 61.)

62. Slopes on the portions of the Spicer Family Farms property that are intended for land application of biosolids meet the regulatory requirements. (Stip. 62.)

63. Eight of the trenches identified soils with the shallowest depth observed as less than twenty inches deep. (Stip. 63.)

64. Soils exposed in the test trenches varied in observed depth to bedrock from less than 4 inches to greater than the depth of observation with the deepest observation at 52 inches. (Stip. 64.)

65. In some cases, the depth of soil to bedrock varied by several inches within a single trench. (Stip. 65.)

66. The Notice states that "shallow depth to highly fractured bedrock (< 12 inches) was identified at seven locations." (Stip. 66.)

67. "A high amplitude of depth to bedrock" is expected in the area of the Spicer Family Farms property and was observed by Mr. Thetford. (Stip. 67.)

68. For all of the trenches where bedrock was exposed, the GeoDecisions report

characterized the bedrock as "highly fractured limestone." (Stip. 68.)

69. Bedrock is exposed at the surface (zero soil cover) on certain areas of the Spicer Family Farms property where biosolids are not proposed by Bellefonte. (Stip. 69.)

70. Geological mapping indicates that the entire Spicer Family Farms property is underlain by dolomite and limestone. (Stip. 70.)

71. Mr. Thetford advised the consultant preparing the Notice that current regulations do not consider this shallow depth to bedrock to be an impediment to permitting. (Stip. 71.)

72. Soils exposed in the trenches varied in observed depth to bedrock from less than 4 inches to greater than the depth of observation. (Stip. 72.)

73. The deepest observation was 52 inches in Trench 15. (Stip. 73.)

74. Bedrock is exposed in certain areas of the farm. (Stip. 74.)

75. However, the areas identified as having extensive bedrock outcrops are not proposed for application. (Stip. 75.)

76. Daniel Thetford did not consult with a geologist concerning the information in the Notice. (Stip. 76.)

77. However, minor geologic evaluation of a site is necessary. (Stip. 77.)

78. Identification of limestone geology is important so that closed depressions and sinkholes can be anticipated. (Stip. 78.)

79. One shallow closed depression was identified in Field 8A as needing a buffer for isolation distances. (Stip. 79.)

80. Beyond the field review of the site, Daniel Thetford also reviewed the documents provided by Bellefonte to support the agricultural utilization of biosolids on the site including soil sampling and example agronomic rate calculations. (Stip. 80.)

81. Daniel Thetford believed that the sampling was representative for those fields. (Stip. 81.)

82. Soils reduce pollutants which can bind on soils, pollutants that can be acted on by microbial life, and nutrients and pollutants that can be taken up by plants. (Stip. 82.)

83. The allowable application rate for biosolids on agricultural land is based on, in part, cumulative pollutant loading rates for some pollutants such as metals, and the "agronomic rate" for nitrogen. (Stip. 83.)

84. Plants growing in and on the soils are able to remove nitrogen from the soil and available water through their root systems. (Stip. 84.)

85. In PAG-084814, "agronomic rate" is defined as "([t]he annual whole sludge application rate (dry weight basis) designed: (1) [t]o provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, silvicultural crop, cover crop, horticultural crop, or vegetation grown on the land; and (2) [t]o minimize the amount of nitrogen in the biosolids that passes below the root zone of the crop or vegetation grown on the land to the groundwater." *See also* 25 Pa. Code § 271.907. (Stip. 85.)

86. The Notice included "example" calculations of the agronomic rates for the Spicer Family Farms property for two fields and two potential crops. (Stip. 86.)

87. One for each crop type anticipated to be grown in the upcoming year. (Stip. 87.)

88. The “example” calculations were provided on a standard worksheet provided by the Department. (Stip. 88.)

89. The Department considers example calculations as evidencing the ability of the permittee to properly compute an application rate at the time of biosolids application based on the agronomic rate for each field and crop to be grown. (Stip. 89.)

90. The standard worksheets state that the crop nitrogen needs used in the computation of agronomic rate can be obtained from soil analysis, historical data or from values which appear in the *Penn State Agronomy Guide*. (Stip. 90.)

91. The "example" calculations used nitrogen needs for corn and nitrogen uptake rates for alfalfa that are identical to the rates for those crops set forth on the tables in the *Penn State Agronomy Guide*. (Stip. 91.)

92. The *Penn State Agronomy Guide* provides nitrogen need or uptake for each kind of crop in pounds of N per unit of crop yield. (Stip. 92.)

93. The example calculations completed by Bellefonte did not include a complete discussion of how expected nitrogen uptake was calculated. (Stip. 93.)

94. Water that moves through soil can have contaminants removed from it. (Stip. 94.)

95. Nitrogen uptake can take place by plant roots that come in contact with nitrogen-containing available water, thereby removing that nitrogen from the water percolating through the soil. (Stip. 95.)

96. Other contaminants or pollutants which are not taken up by plants can bind to soil rather than staying in the percolating water or may be acted on by microbial life. (Stip. 96.)

97. Plant rooting depth varies with the species of plant, but is also limited by the available rooting depth above a root-limiting layer like bedrock. (Stip. 97.)

98. Thomas M. Randis is employed as an Environmental Program Manager for the Clean Water Program in the Department's Northcentral Regional Office and provides supervision over staff in the Sewage Planning Section, Operations Section, Permitting Section and Biosolids program. (Stip. 98)

99. Mr. Randis holds a Bachelor of Science in Fisheries Biology from Mansfield University. (Stip. 99.)

100. As part of his normal duties in the Northcentral Regional Office, Mr. Randis provides guidance, assistance in interpretation of the all applicable laws and regulations, technical and procedural assistance, and supervisory direction to all staff under the Clean Water program, including the Biosolids program. (Stip. 100)

101. Mr. Randis approves or disapproves all Department permitting actions originating in the Clean Water program of the Northcentral Regional Office. (Stip. 101.)

102. Mr. Randis provided direction and procedural clarifications to Daniel Thetford prior to, and during, his review of the Notification of First Land Application. (Stip. 102.)

103. Daniel Thetford reviewed the Notification of First Land Application and, together with Thomas Randis, determined that the site is suitable for the land application of biosolids. (Stip. 103.)

104. As a part of the Department's review, Mr. Thetford completed a First Land Application Notice & Site Suitability Review form. (Stip. 104.)

105. The data, facts and conclusions stated in the Notice were evaluated and accepted by Mr. Thetford as meeting the requirements for notification. (Stip. 105.)

106. After review, the Department—through Mr. Thetford—issued a letter, dated February 29, 2016, determining that the site is suitable for the land application of biosolids under PAG-084814 and that Bellefonte complied with the applicable permit requirements for first-time land application for the site. (Stip. 106.)

107. The "Site Suitability Notice for Land Application Under Approved PAG-8 General Permit Coverage" for the Spicer Family Farms site was published in the Pennsylvania Bulletin on March 12, 2016. 46 Pa.B. 1328 (3/12/16). (Stip. 107.)

108. State and Federal regulations establish Maximum Contaminant Levels for Public Water Supplies for arsenic, cadmium, chromium, mercury and nitrates. *See* 25 Pa. Code § 109.202; 40 C.F.R. § 141.62. Action levels are established for lead and copper. *See* 25 Pa. Code § 109.1102; 40 C.F.R. § 141.80. (Stip. 108.)

109. Bellefonte has established discharge limitations for industrial waste concentrations of certain metals and other pollutants. (Stip. 109.)

110. All of the constituents of the Bellefonte biosolids, which are regulated by 25 Pa. Code § 271.914, are at acceptable levels as established by the regulations. The regulated constituents are: arsenic, cadmium, copper, lead, mercury, molybdenum, nickel, PCBs, selenium and zinc. (Stip. 110.)

111. Biosolids are not septic tank effluent. (Stip. 111.)

112. One source of water used by the Authority in its public water system is the Grove Park Well. (Stip. 112.)

113. The Authority participated in a voluntary program to develop a source water protection plan which was funded by the EPA and the Commonwealth of Pennsylvania through funding administered by the Department. (Stip. 113.)

114. SSM Group, Inc. prepared a draft source water protection plan, dated April 2016, for the Authority. (Stip. 114.)

115. The April 2016 draft Source Water Protection Plan identified an area, called the "Aquifer Recharge Area," which is the area that encompasses the surface exposure of the

bedrock aquifer formations within the respective fault blocks. These features contribute groundwater recharge to the aquifer that feeds the Authority's wells. (Stip. 115.)

116. The Spicer Family Farms property is located within the area identified in the April 2016 draft Source Water Protection Plan as the "Aquifer Recharge Area." (Stip. 116.)

117. The maximum contaminant level for nitrates in a public water system is 10 mg/L. (Stip. 117.)

118. Thomas J. Sweeney, Jr. is a Soil Scientist and Biosolids Coordinator for the Department. (N.T. 587); (DEP Ex.2[3] D-5.)

119. Mr. Sweeney has assisted in developing material for, and instructing at, the training course required for biosolids generators and land appliers. (N.T. 589-590; DEP Ex. D-5.)

120. Mr. Sweeney teaches the agronomic loading rate portion of that training course. (N.T. 590; DEP Ex. D-5.)

121. Since 1997, Mr. Sweeney has reviewed approximately 350 notifications of first land application of biosolids under the Department's Chapter 271, Subchapter J regulations. (N.T. 591; 25 Pa. Code Ch. 271, Sub. J.)

122. Mr. Sweeney expressed an expert opinion on the management practices that are contained within the Department's Chapter 271, Subchapter J regulations, how those regulations and management practices are protective of the environment, the purpose of the agronomic and cumulative pollutant loading rate calculations and requirements, and, the groundwater monitoring and protection as it relates to the land application of biosolids. (N.T. 592-594.)

[3] The Department's exhibits that were admitted into evidence in this matter will be referenced as "DEP Ex."

123. Mr. Sweeney testified that the EPA used a risk assessment process to determine the pollutants that should be regulated in biosolids and the allowable concentrations for the land application of biosolids in developing the federal regulations known as EPA's "503 Rule." (N.T. 601; DEP Exs. D-6, 7, 8, including Appendix A (503 Rule), Pages DEP 001271-001287.)

124. The current Chapter 271, Subchapter J regulations went into effect in May of 1997 and were informed by EPA's 503 Rule. (N.T. 595; N.T. 600; 25 Pa. Code Ch. 271, Sub. J.; DEP Ex. D-8, Appendix A on Pages DEP 001271-DEP 001287.)

125. The Department's regulations go beyond the EPA 503 Rule to add Pennsylvania threatened or endangered species, to add one meter depth to the regional groundwater table, to add a 100-foot buffer to a sinkhole, to increase the stream buffer to 100 feet for a perennial stream and 33 feet for an intermittent stream, to include a 300-foot buffer from an occupied dwelling, to require soil test for background samples for certain pollutants, to require that the soils' pH be maintained at 6.0 or higher, to establish sampling for PCBs, to add a limitation on PCBs, to include a 90% value of the cumulative pollutant loading rate as a trigger number, to require an implemented farm conservation plan or agricultural erosion and sedimentation control plan, to add training requirements, and to add permitting requirements.[4] (N.T. 605-06, 635, 663; 25 Pa. Code §§ 271.915(a), 271.915(c)(7), 271.915(c)(3), 271.915(c)(l), 271.915(c)(2), 271.915(h), 271.915(e), 271.913(h), 271.919(2), 271.915(c)(4), 271.915G), and 271.902; (DEP Ex. D-1, Section F.1.a. on Page DEPOOOl 71, Section F.1.e. on Page DEPOOOl 71, Section E.2. on Page DEPOOOl 71, Section F.1.g. on Page DEPOOOl 71, Part E.2 on Page DEPOOOl 71, Section E.1. on Page DEPOOOl 71, SectionF.l.f on Page DEPOOOl 71, and Section H. on Page DEPOOOl 72.)

[4] Note that the Department used 25 Pa. Code § 271.904 to establish Appendix 1 of PAG-08. (DEP Ex. D-1, DEPOOOl 78); *see* DEP Ex. D-3, Page DEP000146 (citing to 271.904 for the "Soil pollutant concentrations in accordance with Appendix 1 of PAG-08").

126. The EPA did not do a risk assessment for managing nitrogen but instead chose to use management practices including agronomic loading rate to do so and to protect groundwater from nitrate pollution. (N.T. 603-604; DEP Ex. D-6, Step N-7 on Page DEP000432, "Management Practices" on Page DEP000483.)

127. The Department also uses management practices including agronomic loading rate to manage nitrogen and to protect groundwater from nitrate pollution. (N.T. 604; 25 Pa. Code § 271.915, generally; 25 Pa. Code § 271.915(c)(4); DEP Ex. D-1, Section F.1.c. on Page DEPOOOl 71.)

128. There is no minimum soil depth in either the federal or the state's biosolids regulations. (N.T. 583; DEP Ex. D-8, Appendix A on Pages DEP001271-DEP001287 (EPA 503 Rule)); 25 Pa. Code Chapter 271, Subchapter J.

129. The Department understands that there are benefits to land-applying biosolids and there are potential risks as well. (N.T. 597.)

130. The Department's regulations governing the land application of biosolids and the permits that allow such activities require certain management practices, treatment requirements, site requirements, notice requirements, recordkeeping requirements, training requirements and other requirements to make sure the risks associated with biosolids are managed. (N.T. 597; 25 Pa. Code Ch. 271, Sub. J.; DEP Ex. D-1.)

131. The management practices are an ensemble of practices that complement each other to protect public health and the environment. (N.T. 600; 25 Pa. Code § 271.915.)

132. Ralph Stewart has been the Borough Manager for Bellefonte for over 17 years. (N.T. 491.)

133. Robert Cook is the superintendent for Bellefonte's wastewater treatment plant.

(N.T. 517.)

134. When Mr. Cook first started his employment as the plant operator in 1990, Bellefonte's biosolids program was just getting started. (N.T. 517-518; *see* also N.T. 494.)

135. Most of the nitrogen in biosolids is organic nitrogen that needs to be converted to nitrate-nitrogen through a process of mineralization. (N.T. 624.)

136. The primary benefits of biosolids are as a fertilizer and soil conditioner. (N.T. 596.)

137. Since 1990, Bellefonte has never had a violation regarding its biosolids program. (N.T. 519, 498-499, 856.)

138. Bellefonte has a Biosolids Quality Enhancement Plan to enhance the quality of its biosolids. (N.T. 550; 25 Pa. Code § 271.921; DEP Ex. D-1, Section A.4. on Page DEP000169.)

139. The Spicer Family Farms property has been farmed since at least 1961. (N.T 24, 290, 269, 395-396.)

140. The Spicer Family Farms property does not produce enough manure on its farm to meet all of the nutrient needs of its crops. (N.T. 538-539; DEP Ex. D-27, Page DEPOOOl 15 (for example, dairy cows—2,155 lbs. N from manure; farm crop needs 23,700 lbs. N) and Page DEPOOOl 16 (for example, heifers—217 lbs. N from manure; farm crop needs 23,700 lbs. N); N.T. 356.)

141. Since the Spicer Family Farms does not produce enough manure to meet its needs, it could import manure, use chemical fertilizers, or use biosolids. (N.T. 357, 539.)

142. One of the main advantages of adding manure or biosolids is to improve the organic composition and workability of the soil. (N.T. 137-138.)

143. As the Spicer Family Farms generates and applies its own manure, Bellefonte will not apply biosolids to all of the fields proposed in the Notification of First Land Application in any given year. (N.T. 555-556, 539, 552-553; DEP Ex. D-2.)

144. As of January 24, 2018, Bellefonte had not yet applied any biosolids at the Spicer Family Farms site. (N.T. 532, 536, 496.)

145. The Spicer family contacted Mr. Cook to express the Spicer Family Farms' interest in participating in Bellefonte's biosolids program. (N.T. 519, 524, 499.)

146. Mr. Cook gave the Spicer family a tour of the wastewater treatment plant, went through all the books and the 30-day notice requirement so they understood what was involved with the land application of biosolids. (N.T. 519.)

147. Mr. Stewart testified that Bellefonte's costs to prepare the Notification of First Land Application were estimated to be around $15,000. (N.T. 500.)

148. In the Notification of First Land Application, GeoDecisions evaluated and mapped certain fields for proposed land application of biosolids. (DEP Ex. D-2, DEP000068-DEP000103); (DEP Ex. D-2, DEP000070 ("Acreages of the fields being considered for biosolids application ... ").)

149. The designation of the fields on the Spicer Family Farm property came from the Soil Conservation Plan map prepared by the Natural Resources Conservation Service ("NRCS") with Mr. Cook breaking out some of the fields into an "A" designation to represent a separate crop or to designate an area where Bellefonte may not land apply biosolids. (N.T. 527, 529, 543; DEP Ex. D-2, DEP000079, DEPOOOl 17, DEPOOOl 18.)

150. Daniel Thetford testified that Bellefonte having obtained the farm Conservation Plan directly from NRCS was a good indicator that it was obtained correctly, that the plan was

on file with NRCS, and that it was approved. (N.T. 782; DEP Ex. D-2, DEP000117-DEP000131.)

151. Mr. Cook testified that Bellefonte ruled out the application to certain fields after reviewing the proposed application areas and Bellefonte did not obtain certain soil testing for some of those fields. (N.T. 572 ln. 25- 576 ln 19); *Compare* (DEP Ex. D-2, table on Page DEP000070*) with* (DEP Ex. D-2, Page DEP000056 (no soil test for Field 9); Page DEP000057 (Field 1 is 11 acres, does not include the 1.50 acres for Field lA); Page DEP000061 (Field 5 is 6 acres, does not include the 1.7 acres for Field 5A); Page DEP000064 (Field 8 is 16 acres which does include the 8.8 acres for Field 8A); (N.T. 760-762, 763-768.)

152. Mr. Cook testified that Bellefonte has no intention of applying biosolids to Fields 1A, 5A, and Field 9. (N.T. 573, 576, 574.)

153. Due to the field's size and location near the Buffalo Run stream, Bellefonte will not apply biosolids on Field lA. (N.T. 549; DEP Ex. D-2, DEP000144 which is identical to DEP00079[5].)

154. Due to the field's proximity to houses, Bellefonte will not apply biosolids on Field 9. (N.T. 549- 550; DEP Ex. D-2, DEP000144 which is identical to DEP00079.)

155. Due to the remaining area after setbacks are applied, Bellefonte will not apply biosolids on Field 5A. (N.T. 576; DEP Ex. D-2, DEP000144 which identical to DEP00079.)

156. Since the soil testing was not completed for Fields 1A, 5A and 9, even if Bellefonte changed its intentions in the future, it would need to provide the soil testing results prior to any land application of biosolids on those fields. (N.T. 573, 576, 549-550, 761-762; (DEP Ex. D-1, Section E.2. on Page DEPOOOI 71); 25 Pa. Code §271.913(h).

[5] See N.T. 551.

157. The soil chemistry data submitted for Field 8 includes the acreage of Field 8A as well and is representative of both Field 8 and Field 8A. (N.T. 762-763.)

158. For the fields where biosolids application is actually proposed, Daniel Thetford believes that the soil chemistry data supplied in the Notification of First Land Application met the Department's requirements. (N.T. 763; DEP Ex. D-2; N.T. 762-763.)

159. Mr. Thetford was qualified as an expert regarding the implementation of portions of the Department's regulations that appear at Chapter 271, Section 915, specifically the sections regarding utilizing mapping to ensure that biosolids are applied 11 or more inches from the seasonal high water table and 3.3 feet from the regional groundwater table, compliance with the 100-foot setback from sinkholes, the restriction on biosolids application to sites with 25% slope or less for agricultural utilization, and how soil principles were applied to the proposed application of Class B biosolids to the Spicer Family Farms tract. (N.T. 736-739); 25 Pa. Code §§ 271.915(c)(7), 271.915(c)(2), and 271.915.

160. The Department's site suitability determination letter does not relieve Bellefonte from complying with the provisions of PAG-084814 or applicable regulations. (DEP Ex. D-4; N.T. 477-478, N.T. 478- 479; DEP Ex. D-2); 25 Pa. Code Chapter 271, Sub. J.

161. Bellefonte was required to attach a copy of the Farm Conservation Plan in its Notification of First Land Application. (DEP Ex. D-2, Page DEP000012.)

162. Bellefonte met the requirement to attach a copy of the Plan to its Notification. (DEP Ex. D-2, Pages DEP000117-DEP00013 l; DEP Ex. D-3, DEP000146-DEP000147; N.T. 769- 770.)

163. If the Farm Conservation Plan is not implemented, Bellefonte would not be permitted to apply biosolids to the Spicer Family Farms pursuant to the applicable regulatory

provision and general permit requirements. 25 Pa. Code § 271.915(c)(4); (DEP D-2, Section F.l.f on Page DEPOOOl 71; N.T. 771- 772.)

164. The requirement to apply biosolids at a rate that is no greater than the agronomic rate is a continuing requirement that is applicable to Bellefonte's application of biosolids. 25 Pa. Code § 271.915(f); (N.T. 772; DEP Ex. D-1, Section F.l.c. on Page DEP000171.)

165. Mr. Thetford believes that compliance with the applicable regulations, both the short-term requirements and the long-term requirements, will protect the environment from biosolids application. (N.T. 477- 478.)

166. Bellefonte's consultant selected the locations for the trenches to confirm that the site was able to meet the regulatory requirements of 11 inches to the seasonal high water table and one meter to the regional groundwater table. (N.T. 446-447, 453, 456, 752.)

167. Sampling locations were sited to sample all landforms identified, to identify potential areas of rock outcrop, and to identify areas where soils had been thickened by accretion in swales. (DEP Ex. D-2, DEP000072.)

168. Bellefonte's consultant did not limit itself to only reporting the depths to the limiting zone or depths to the groundwater table but included soil descriptions from the trench observations as well. (N.T. 447.)

169. Mr. Thetford described how soil science principles were applied to the soil mapping for the Spicer Family Farms site. (N.T. 742-745.)

170. For the Spicer Family Farms site, Bellefonte decided to do actual deep test pits but that is not an absolute requirement because a test pit could be dug by hand or hand auguring could be performed. (N.T. 749.)

171. For the Spicer Family Farms site, a backhoe was used to excavate down on a slope about 3 feet and 6 inches in most cases or a little deeper for a length of about 4 to 6 feet to evaluate the horizons of the soils in the trenches. (N.T. 749-751.)

172. The excavated trenches were much more invasive than a soil core. (N.T.751-752.)

173. Typically, the most limiting characteristics of the soils and the depths were recorded for the entire test pit even if that was observed in only 5% of the test pit. (N.T. 753-754.)

174. Dr. Gary Petersen was qualified as an expert in soil science and agronomy. (N.T. 11.)

175. Dr. Petersen agreed that the soils underlying the Spicer Family Farms have developed from limestone. (N.T. 16.)

176. On November 12, 2015, Mr. Thetford observed that each of the test pits locations were within active agricultural fields with some containing cover crops or row crops and some containing residue of com crops. (N.T. 753.)

177. The Department's regulations provide options to verify the soil mapping including relying on the soil to demonstrate compliance with the 11 inches and 3.3 feet requirements and additional information can be offered from a soil scientist or soil describer to verify that the areas can meet those restrictions. (N.T. 749); 25 Pa. Code §§ 271.915(c)(7) and 271.915(h); (DEP Ex. D-1, Section D.l.c. on Page DEPOOO170.)

178. When he visited the site on November 12, 2015, Mr. Thetford did not observe any closed depressions on the Spicer Family Farms site that were outside of isolation distances or outside of application areas other than the closed depression noted on the map contained in the

Notification of First Land Application. (N.T. 463; DEP Ex. D-2, DEP000079; N.T. 758; DEP Ex. D-2, DEP00072; N.T. 445-446.)

179. Mr. Thetford did not observe any perennial or intermittent streams within the proposed biosolids application areas. (N.T. 754-755.)

180. On November 12, 2015, despite light rain occurring and rain experienced the previous evening, Mr. Thetford did not observe flow in the grass waterway when he was in that area. (N.T. 756-7; DEP Ex. D-2, DEP000144.)

181. Dr. Petersen evaluated, and criticized, the soil trench information as insufficient to validate the soil survey mapping. (N.T. 38-41.)

182. Dr. Petersen described a grid system and random sampling that would be needed to redraw the soil survey mapping. (N.T. 39-40.)

183. Mr. Sweeney would not use a grid system and random sampling approach for every land application site because the regulations for site suitability only require evaluating11 inches to the seasonal high water table requirement or one meter to the regional groundwater table requirement, not remapping the soil maps. (N.T. 621-622); 25 Pa. Code § 271.915(c)(7).

184. To evaluate compliance with 11 inches or one meter requirements a surveyor would go to the wet areas of the site that could be unsuitable or may have a shallow seasonal high water table. (N.T. 621.)

185. Mr. Thetford described how the location of the trenches were selected to focus on areas that might not meet the requirements of 11 inches to the seasonal high water table or one meter to the regional groundwater table. (N.T. 741-742, 453.)

186. Dr. Petersen did not use the trench information to evaluate drainage conceding that the soils are well-drained. (N.T. 38.)

187. Dr. Petersen did not conduct any excavations at the Spicer Family Farms site but only used a small shovel. (N.T. 130.)

188. Even prior to promulgation of the current regulations, agronomic loading rate has been a part of the Department's regulations to balance the nutrient needs of the crop to be grown with the nutrient content of the biosolids. (N.T. 601.)

189. Mr. Thetford reviewed the example calculation worksheets and checked the corresponding box on the site suitability review form to reflect that an example was provided in the Notification of First Land Application. (N.T. 766; DEP Ex. D-3, Page DEP000146.)

190. Mr. Sweeney testified as to how the standard worksheets can be used to calculate application rates. (N.T. 609-614; DEP Ex. D-2, Pages DEPOOO104-DEPOOO105 and Pages DEPOOO108-DEPOOO109.)

191. Every time that Bellefonte goes to land apply biosolids to a certain field, it completes a new worksheet. (N.T. 532-533.)

192. On the other sites to which Bellefonte has land-applied biosolids over the last 27 years, Bellefonte has never land-applied biosolids without completing the worksheets. (N.T. 532-533, 536-537.)

193. When Bellefonte applies biosolids at the Spicer Family Farms, it will complete a new worksheet for that particular field application. (N.T. 536.)

194. As a standard practice, Bellefonte always applies biosolids at a rate lower than the maximum application rate that is allowed to be applied to a certain field and records the actual amount that it applies. (N.T. 544.)

195. For the alfalfa fields, Bellefonte normally applies 10-12 tons of biosolids per acre which is lower than the maximum allowable amount. (N.T. 545-546.)

196. The *Penn State Agronomy Guide* provides that "[a]lthough the N recommendation for a legume is 0, and no yield response will result if N is applied, legumes will use some applied nitrogen, such as that from manure application." (DEP Ex. D-10, Page 32.)

197. Table 1.2-7 of the *Penn State Agronomy Guide* identifies that 50 pounds of nitrogen are removed per unit of yield for alfalfa. (DEP Ex. D-10, Page 32.)

198. There are phosphorous deficiencies that are identified on farm fields such as Field 3 at the Spicer Family Farms which had a calculated need of 70 pounds of phosphate per acre for alfalfa. (DEP Ex. D-2, DEP000059.)

199. When it applies biosolids at the Spicer Family Farms, Bellefonte will apply them to less than all of the fields in any given year and at less than the maximum application rate allowed. (N.T. 548, 552-553.)

200. Bellefonte normally applies biosolids in the spring after soils are suitable or in the fall, after the crop has been harvested, and normally only applies once per year if the crop is corn or soybeans. (N.T. 537.)

201. If the crop is alfalfa, there may be a second biosolids application but that does not often happen. (N.T. 537.)

202. Before applying biosolids to fields that have setbacks, Bellefonte marks the limitation areas with flags so it knows where biosolids should not be spread. (N.T. 542.)

203. At farms with animals, Bellefonte meets with the farmer every year to complete the Farm Manure Estimate Worksheet based on the current herd. (N.T. 542-543; DEP Ex. D-2, DEPOOOl 15.)

204. Dr. Petersen testified that there have been some improvements in hybrids, including corn hybrids, in the last 50 years so expected yields may be greater today than past table values. (N.T. 87.)

205. Dr. Petersen has seen data on farmers achieving greater crop yields than expected through their calculated nitrogen needs. (N.T. 144.)

206. There would not be an advantage to the farmer to overapply nitrogen to a farm. (N.T. 145.)

207. In his expert report, Dr. Petersen stated that he does not submit an opinion as to the depth of soil necessary to make the agronomic rate computations since this concept is agronomic rather than soil-science related. (N.T. 140-141.)

208. Dr. Petersen acknowledged that crops can grow in shallow soils. (N.T. 110, 115-116.)

209. Alfalfa and grasses can grow on shallow soils. (N.T. 141-142.)

210. Dr. Petersen observed crops growing on the Spicer Family Farms in areas where there was less than one meter of soil. (N.T. 115.)

211. Regarding his assumption that the EPA modeling presumed one meter of soil, Dr. Petersen acknowledged that the presumed one meter requirement was really one meter to groundwater. (N.T. 110-111; 113.)

212. The EPA risk assessment does not rely on a minimum one meter to soil requirement but rather it includes a one meter depth to groundwater requirement. (DEP Ex. D-7, Section 5.1.2.3.15 on Page DEP000613; DEP Ex. D-8, Table J-2 on Page DEP002153, Section J.2.7 on Page DEP002157.)

213. Dr. Richard R. Parizek was qualified as an expert in geology and hydrogeology. (N.T. 262.)

214. Neither Dr. Parizek nor Dr. Petersen have observed problems with crop growth on the Spicer Family Farms over the past 50 years. (N.T. 260-270, 395-396, 24, 290, 115.)

215. There is no federal or state requirement restricting the land application of biosolids to fields that contain at least one meter or 40 inches of depth to soil. (N.T. 616, 683-684.)

216. Mr. Sweeney disagreed with Dr. Petersen's interpretation that the EPA risk assessment suggested one meter or 40 inches of depth to soil because the risk assessment parameter that was referenced was one meter to groundwater. (N.T. 616-618; DEP Ex. D-7, Section 5.1.2.3.15 on Page DEP000613 ("depth to groundwater was less than 1 meter"); DEP Ex. D-8, Section J.2.7 "Depth to Ground Water" on Page DEP002157.)

217. The EPA 503 Rule set forth cumulative pollutant loading rates for certain pollutants for final use or disposal of sewage sludge. (N.T. 602; DEP Ex. D-8, Appendix A on Pages DEP001271-DEP001287.)

218. The EPA evaluated certain pathways of exposure in its risk assessment for the land application of biosolids with Pathway #14 being the lifetime exposure of a human drinking well water containing pollutants from biosolids that leached from soil to groundwater. (N.T. 602; DEP Exhibit D-6, Table 6 of DEP000105.)

219. EPA selected the most limiting pathway to establish the cumulative pollutant loading rates, none of which were based on Pathway #14. (N.T. 604-605; DEP Ex. D-6, Table 6 on Page DEP000405, Table 11 on Page DEP000461.)

220. The Department used the cumulative loading rates selected by the EPA in its regulations. DEP Ex. D-6, Table 11 on Page DEP000461; 25 Pa. Code § 271.914(b)(2).

221. Based on the requirement to apply biosolids at the agronomic loading rate, the annual application of each of the pollutants subject to cumulative pollutant loading rates would be very low and would take a significant number of years to achieve those concentrations. (N.T. 615; 25 Pa. Code § 271.914(b)(2); DEP Ex. D-1, Section E.1. on Page DEPOOOl 71.)

222. In January of 2016, the Spicer Family Farms site obtained data for the soil tests for most of the fields at the site. (DEP Ex. D-2, DEP000056.)

223. For all of the regulated constituents, the soils on the Spicer Family Farms were well under the Cumulative Pollutant Loading Rates established in 25 Pa. Code § 271.914 and PAG- 084814. (DEP Ex. D-2, DEP000056; DEP Ex. D-2, DEP000106 ("CPLRs lb./acre"); DEP Ex. D-2, DEPOOOllO ("CPLRs lb./acre"); DEP Ex. D-1, Sections E.1. and E.2. on Page DEPOOOl 71, and Appendix 1 on Page DEPOOOl 78); (Stip. 7); 25 Pa. Code § 271.914(b)(2)-Table 2, Pounds per Acre column.

224. Based on the amount calculated for each pollutant when biosolids are applied on each field, it could take a long time to reach the Cumulative Pollutant Loading Rates established in 25 Pa. Code § 271.914. (N.T. 155-159; DEP Ex. D-2, DEP000056; DEP Ex. D-2, DEPOOOl 10 ("CPLRs lb./acre"); DEP Ex. D-2, DEP000106 ("CPLRs lb./acre")); 25 Pa. Code § 271.914(b)(2)-Table 2, Pounds per Acre column.

225. Dr. Petersen testified that optimum soil pH would be 6.50 to 7.00. (N.T. 161; DEP Ex. D-2, Page DEP000014-Management Practice j.)

226. A soil pH of 6.0 or greater has some value in nutrient uptake and also with regard to binding metals or metal floating that would appear in the soil. (N.T. 161, 637.)

227. The soils pH for the fields tested at the Spicer Family Farms ranged from two fields with 6.3, three field within 6.6-6.9, and six fields at 7.0 or above. (DEP Ex. D- 2, DEP000056.)

228. Warren Miller is the Executive Director of the Spring Benner Walker Joint Authority and the operator/manager of the Benner Township Water Authority. (N.T. 179-180.)

229. The Grove Park Well was drilled by a developer in approximately 2010 or 2012 and the developer later turned over to the Authority the land under the well, the well, the water treatment system, and the distribution system. (N.T. 215-216, 219.)

230. Mr. Miller did not know what the nitrate levels were in the Grove Park Well when it was first drilled and used. (N.T. 217.)

231. State and Federal regulations establish Maximum Contaminant Levels for Public Water Supplies for arsenic, cadmium, chromium, mercury and nitrates. *See* 25 Pa. Code § 109.202; 40 C.F.R. § 141.62. Action levels are established for lead and copper. *See* 25 Pa. Code § 109.1102; 40 C.F.R. § 141.80. (N.T. 600.)

232. Mr. Miller testified that there are no metals in the Authority's water that are above action limits or that he is watching or concerned about. (N.T. 225.)

233. Dr. Petersen testified that metals like lead and copper can be captured by soils through cation exchange. (N.T. 22-23, 50.)

234. Some soils physically tie up pollutants. (N.T. 46, 50.)

235. Dr. Petersen testified that, when evaluating biosolids, nitrates are the concern in drinking water. (N.T. 75.)

236. Mr. Miller testified that, over the last two years, the nitrate concentration in the Grove Park Well probably has an average of about 8 mg/L. (N.T. 185.)

237. Based on data from 2015 through January of 2017, the sampled nitrate concentrations have varied from a low of 7.46 mg/L in July of 2015 to a high of 8.48 mg/L in January of 2015. (App. Ex. A-3; N.T. 185.)

238. Although no sample results for the fourth quarter of 2017 were offered into evidence, Mr. Miller testified that the result for that nitrate concentration testing was 8.68 parts per million. (N.T. 185.)

239. Bellefonte had not applied biosolids to the Spicer Family Farms property at any time during the Authority's water sampling. (N.T. 532, 536, 496-497; App. Ex. A-3.)

240. When it does apply biosolids, Bellefonte intends to apply less nitrogen than the amounts allowed based on the agronomic rate calculations. (N.T. 548, 552-553, 544.)

241. Dr. Petersen was not asked to evaluate any of the other agricultural area or possible on-lot or other sewage treatment systems within the Authority's aquifer recharge area for the Grove Park Well. (N.T. 134.)

242. In October of 2017, a new version of the Source Water Protection Plan was approved by the Authority. (N.T. 189; Permittee Ex. P-7.)

243. The October 2017 version of the plan had not been approved by the Department, so it is uncertain if that version will be the "final" plan. (N.T. 250-251; Permittee Ex. P-7.)

244. Dr. Parizek testified that he did not assist the Authority at all in the production of the Source Water Protection Plan except that the fracture traces very likely came from a figure that he produced in his expert report that he did not transfer to Figure 5 of the Bellefonte's Exhibit P-7. (N.T. 311-312; Permittee Ex. P-7, Figure 5.)

245. Mr. Miller testified that he is concerned about increased nitrate levels from additional manure and synthetic fertilizer being applied to agricultural fields near the Grove Park Well. (N.T. 206; App. Ex. A-2.)

246. Even if Bellefonte is not allowed to apply biosolids on the Spicer Family Farms site, the Authority's concerns about its nitrate levels do not go away. (N.T. 220.)

247. Dr. Petersen is not aware of any regulatory requirement for a farmer to test his or her soil for the presence of metals or pollutants when a farmer applies manure. (N.T. 107.)

248. Dr. Parizek testified that it is difficult to tell in which direction groundwater is flowing when it is affected by faults and rock layers. (N.T. 307-308.)

249. It is the fractures in the rock that make pathways for water to move and to store water. (N.T. 273.)

250. Comparing Appellant's Exhibit A-29 with the map contained in the Department's Exhibit D-2, Page DEP000079: the green letter "A" is in Field 1; the red "Probable Groundwater Divide" intersects a portion of Field 7; and, the well identified as #15 (921.64 water level) is the well for Everett and Carol Spicer's house which borders Fields 7 and 8. (App. Ex. A-29; DEP Ex. D-2, DEP000079; N.T. 264-266.)

251. The "Gatesburg Groundwater Trough" is indicated in red on Appellant's Exhibit A-29. (App. Ex. A-29; N.T. 267.)

252. Dr. Parizek testified that he could not preclude that groundwater under some parts, but not all of the Spicer Family Farms property, would go toward the Grove Park Well, and that water originating on the Spicer Family Farms property should make it to the Grove Park Well given time. (N.T. 308, 277.)

253. Dr. Parizek did conclude that groundwater pollutants to the northwest of Route 550 will pose little or no risk to the Grove Park Well. (N.T. 343-345, 382; DEP Ex. D-2, DEP000144 which is the same as DEP000079.)

254. The fields that are located northwest of Route 550 on the Spicer Family Farms property are Fields 1, 1A, 2, 3, 4, 5, 5A, 6 and 12. (N.T. 382; DEP Ex. D-2, DEP000144 which is the same as DEP000079; Permittee Ex. P-7, Figure 2b (note location of Route "550") and Figure 4 (note location of "Grove Well #1").)

255. Dr. Parizek testified that groundwater traveling from the Spicer Family Farm has a strong tendency to follow along a certain fracture trace and then plunge off to the south and east. (N.T. 315-316; Permittee Ex. P-7, Figure 5.) Flow zigzagging toward the Grove Park Well needs to cross seven different fracture zones to find its way to that well. (N.T. 317-318.) Dr. Parizek also admitted that groundwater could easily be swept into a completely different direction toward the Gatesburg trough. (N.T. 321-322.)

256. Even for the Grove farm fields located within Zone II and adjacent to the Grove Park Well, Dr. Parizek had trouble stating a conclusion that those fields in some way contribute to the Grove Park Well and those same difficulties would apply to the Spicer Family Farms tract. (N.T. 320-341, 405-406; App. Ex. A-2.)

257. Dr. Parizek testified that if the groundwater under the Grove fields flows in a way that bypasses the leader channels for the Grove Park Well it would not be helpful to eliminate the use of fertilizer on those fields. (N.T. 340-341; Permittee Ex. P-7; App. Ex. A-29.)

258. Dr. Parizek also testified to the difficulties of groundwater flow and biosolids monitoring on this site. (N.T. 322-324.)

259. There is no difference in nitrate levels if the nitrogen is applied from manure that was imported to the Spicer Family Farms or if the nitrogen was from the biosolids that were applied to the same field, the same soils, and at the same application rates. (N.T. 359-360.)

260. In his expert opinion, Mr. Sweeney testified that the application of biosolids in accordance with the agronomic and cumulative pollutant loading rates will be protective of the public health and the environment. (N.T. 626-627.)

261. The Department does not require groundwater monitoring around biosolids land application sites but uses the management practices that are consistent with the other nutrients that are being applied. (N.T. 627.)

262. The most significant management practice is the agronomic loading rate but beyond that, the buffers to wells, the 300-foot buffers to a water source, the 100-foot buffer to the edge of a sinkhole, the restrictions on when biosolids can be applied with regard to snow-covered, frozen, or saturated ground, and the biosolids treatment requirements all protect groundwater. (N.T. 627.)

263. In his expert opinion, Mr. Sweeney testified that the application of biosolids in accordance with the Department's Chapter 271, Subchapter J regulations, the permit conditions, and the management practices of those regulations, will not cause surface or groundwater pollution or adversely impact the private and public water supplies. (N.T. 627-628, 686.)

264. Mr. Thetford agreed that if Bellefonte complies with the site restrictions and agronomic loading rates at the time of actual application, that the information contained in the Notification of First Land Application indicates that Bellefonte will be able to comply with Section 271.902(g) of the Department's Rules and Regulations. 25 Pa. Code § 271.902(g); (N.T. 764-765.)

265. Section 271.902(g) of the Department's Rules and Regulations is a continuing requirement of any land application of biosolids that occurs in Pennsylvania. 25 Pa. Code § 271.902(g); (N.T. 765.)

266. Aside from Appendix 1 of PAG-084814, Mr. Thetford does not believe that additional or more stringent requirements were necessary to protect the public health and the environment from any adverse effect of a pollutant in the biosolids that Bellefonte proposed to apply to the Spicer Family Farms tract. (N.T. 765-767, 769; DEP Ex. D-1, DEPOOOl 78; DEP Ex. D-3, DEP000146) (25 Pa. Code § 271.904 for "Soil pollutant concentration in accordance with Appendix 1 of PAG-08"); 25 Pa. Code §§ 271.902(g) and 271.904.

267. Under the provisions of PAG-084814, Bellefonte has a duty to comply with terms and conditions of the general permit including the requirement to take all reasonable steps to minimize any adverse impact on the environment or human health resulting from noncompliance with the general permit. (N.T. 767-769; DEP Ex. D-1, generally, and Section M.1. on Page DEPOOOl 74, Section M.8. on Page DEPOOOl 75.)

268. Since 1995, Renee Swancer has lived adjacent to the Spicer Family Farms bordering Fields 4 and 5. (N.T. 412-413; DEP Ex. D-2, DEP000079.)

269. Ms. Swancer testified that she observed water exiting from Fields 7, 9 and 6 on July 24, 2016 during a heavy thunderstorm. (N.T. 415-419.)

270. During a heavier rain event on August 10, 2016, Ms. Swancer observed runoff from Fields 6, 7 and 9. (N.T. 419-420, 433.)

271. During a flooding event in the area on October 20-21, 2016, Ms. Swancer observed ponded water at a culvert on Route 550 but did not testify to the source of that water. (N.T. 421, 433.)

272. As Bellefonte had not yet applied any biosolids to any of the fields, none of the events described by Ms. Swancer involved Bellefonte's application of biosolids on the Spicer Family Farms site. (N.T. 532-556, 496-497.)

273. Manure from the Spicer Family Farms site has not washed onto Ms. Swancer's property. (N.T. 429.)

274. Since 1995, Ms. Swancer's drinking water well has not been contaminated. (N.T. 429.)

275. Dr. Petersen acknowledged that there are steps that farmers can and do take to minimize or reduce the runoff factor on sloped surfaces including strip cropping, sodding waterways, and contour farming. (N.T. 117-118.)

DISCUSSION

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 Appellant, Benner Township who filed this third-party appeal challenging the Department's decision to approve the Permittee's Notification of First Land Application for application of biosolids on the Spicer Family Farms property. 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 Sch. Dist. v. DEP*, 2014 EHB 482; *Gadinski v. DEP*, 2013 EHB 246.

In this appeal, the Authority has challenged the Department's determination that the Spicer Family Farms property is suitable for the land application of biosolids and disagrees that Bellefonte has complied with the general permit requirements in PAG-084814 for the first-time land application of biosolids on the site. The Authority must prove by a preponderance of the evidence that the site is not suitable for land application of biosolids. The Board has stated:

> "To prove one's case by a "preponderance of the evidence" means evidence in favor of the proposition must be greater than that opposed to it…It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established."

United Ref. Co. v. DEP, 2016 EHB 442, 449. The Authority must present evidence that the site is not suitable and its evidence must be greater than the evidence showing that the site is suitable.

The Authority may not simply raise an issue and then speculate that all types of calamities may occur. *United Ref. Co. v. DEP*, 2016 EHB at 449; *Ritter v. DEP*, 2017 EHB 729, 741; *Shuey v. DEP*, 2005 EHB 657, 711. A party may not simply come forward with a laundry list of potential problems and then just rest its case. When a party raises technical issues, it must come forward with technical evidence, and in many cases, it will need expert testimony to prove its case. *United Ref. Co. v. DEP*, 2016 EHB at 449. An appellant must prove by a preponderance of the evidence that the problems it alleges are likely to occur.

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 acted reasonably, lawfully, and in accordance with the facts when it approved the Notification of First Land Application. Our analysis begins with a discussion of the Appellant's objections to the Department's action because the Department claims that the Appellant waived several of its objections.

Appellant's Objections to the Department's Action

The Authority makes several related objections asserting that there are limits on the Department's authority when it implements its regulations. The Authority asserts that the Department ignored some of its regulations and failed to implement others as they were intended. The Authority asserts that the Department is not allowed to change regulatory standards and implement new standards of its own devising. Finally, The Authority asserts that the Department misapplied the Rules of Statutory Construction, which are applicable to regulatory interpretations, and effectively annulled several regulatory standards.

The list of regulations that the Authority asserts that the Department ignored, improperly modified, failed to implement or effectively annulled includes:

1) Section 271.902(g) (requirement to not apply biosolids so as to threaten surface and groundwater).
2) Section 271.914(a)(2) (requirement to not exceed Cumulative Pollution Loading Rate).
3) Section 271.915(c)(1) and (2) (requirements to not apply biosolids within 33 feet of an intermittent stream or within 100 feet of a sinkhole).

4) Section 271.915(c)(4) (requirement to not apply biosolids if a site is not covered by a soil conservation plan).

5) Section 271.915(f) (requirement to apply biosolids at agronomic rates).

The Authority further expands upon these regulatory-based objections and asserts that the Department erred by approving an erroneous calculation of the agronomic rate. The Authority also argues that the Department failed to properly implement the Cumulative Pollutant Loading Rate restrictions and the Department failed to confirm that the Spicer Family Farms property was covered by a soil conservation plan that is being implemented. Finally, the Authority asserts that there is no evidence of protection of groundwater, and the Department needed to investigate whether the proposed application of the biosolids was too near what appeared to be an intermittent stream.

Consideration of the Department's Three-Stage Waiver Argument

The Department contends that the Authority waived several of its objections when it failed to identify specific regulatory provisions in either its Notice of Appeal, its Pre-Hearing Memorandum or its Post-Hearing Brief. Under the Board's Rules and caselaw, there are requirements imposed on Appellants to preserve objections during the course of an appeal. *See* 25 Pa. Code § 1021.51(e) (a notice of appeal must set forth in separate numbered paragraphs the specific objections to the action of the Department); 25 Pa. Code § 1021.104(a)(2) (a prehearing memorandum shall contain a statement of the legal issues in dispute including citations to statutes, regulations and caselaw supporting a party's position); 25 Pa. Code § 1021.131(c) (any issues not raised in a posthearing brief are deemed waived). The Board will address the Department's three-stage waiver argument after a brief discussion of the Board's Rules. Failure to follow these Board Rules results in the objection or issue being deemed waived by the

Appellant. *Id.*; S*ee* e.g. *Williams v. DEP*, 1999 EHB 708, 710-712; *Ritter v. DEP*, 2017 EHB 729, 744-45.

Under the Board's Rules and caselaw, the Department contends that the Authority waived its objections or issues related to Sections 271.913(h) and 271.915(f) because these regulations were not identified in its notice of appeal notwithstanding their identification in the subsequently filed prehearing memorandum.[6] In addition, the Department further contends that the Authority also waived the objections or issues related to Sections 271.914(a)(2), 271.915(c)(1), 271.915(c)(2) and 271.3(b) because it failed to identify these regulatory provisions in either its notice of appeal or its prehearing memorandum.[7] Finally, the Department contends that the Authority waived its objections and issues regarding Sections 271.904 and 271.913(h) by not including these regulations on Page 28 of its posthearing brief or as one of the disputed legal issues in its posthearing brief.[8]

The Authority disputes that it waived virtually all of the objections and issues listed by the Department.[9] The Authority argues that its notice of appeal and its prehearing memorandum raised and preserved the issues set forth in its posthearing brief.

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[6] Section 271.913(h) requires that an applicant obtain a soil sample for a site proposed for biosolids application. 25 Pa. Code § 271.913(h). Section 271.915(f) imposes a requirement that persons apply biosolids at an agronomic rate as a general rule. 25 Pa. Code § 271.915(f).

[7] Section 271.914(a)(2) imposes a cumulative pollution loading rate requirement. 25 Pa. Code § 914.(a)(2). Section 271.915(c)(1) imposes feet buffer zone requirements for various types of streams. 25 Pa. Code § 271.915(c)(1). Section 271.915(c)(2) imposes a buffer zone requirement for sinkholes. 25 Pa. Code § 271.915(c)(2). Section 271.3(b) allows the Department to impose terms and conditions when issuing a permit. 25 Pa. Code § 271.3(b).

[8] Section 271.904 allows the Department to impose additional or more stringent requirements when necessary. 25 Pa. Code § 271.904. Section 271.913(h) requires that a person applying biosolids must obtain a soil sample prior to the first application. 25 Pa. Code § 271.914(h).

[9] Benner Township does acknowledge that it intended to drop its objection regarding 25 Pa. Code § 271.913(h) which imposes a requirement to submit a soil sample and analysis for each site where the applicant proposes to apply biosolids. At the hearing Mr. Thetford offered an explanation regarding the

It is true that allegations not raised in a notice of appeal are generally waived. *Clean Air Council v. DEP*, 2018 EHB 245, 250; *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).

While it is accurate to state that the Authority failed to list any regulatory sections in its notice of appeal,[10] under the Board's caselaw failure to list specific regulatory citation in an appellant's notice of appeal is not a fatal flaw if an objection falls within the "genre of the issue" contained in the notice of appeal. *Id.* The Board finds that the issues related to the specific regulatory provisions challenged by the Department fall within the genre of the issue contained in the Authority's notice of appeal. The Authority's notice of appeal consisted of the Board's notice of appeal form and attached correspondence. In response to Question 3 on the Board's form (Describe your objections to the Department's action in separate, numbered paragraphs), the Authority stated:

> The Benner Township Water Authority is concerned the application of biosolids near our Municipal Well Recharge Area may have negative impact and possible contamination of our public well. See attached correspondence.

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absence of soil samples and analysis for four fields listed in the notice, and Benner Township decided not to pursue the issue in its posthearing brief and it is therefore waived.

[10] See footnotes 7 and 8 at page 45.

The Authority's notice of appeal at page 1. The attached correspondence is a letter from the Authority to the Board dated April 1, 2016, in which the Authority described in a general narrative manner the nature of the Authority's concerns with the Department's action to allow the application of biosolids on the Spicer Family Farm. The Authority did not list specific regulatory provisions in its Notice of Appeal or in the attached correspondence, but in reading these materials broadly the Board finds that objections related to the specific regulatory provisions fall within the genre of the issue contained within the notice of appeal. An appellant is not required to specifically list every regulatory citation of every regulation related to its appeal in its notice of appeal or risk waiver of objections related to specific regulations.

The Department also argues that the Authority also waived additional legal issues concerning 25 Pa. Code §§ 271.914(a)(2), 271.915(c)(1), 271.915(c)(2) and 271.3(b) because these regulations were not cited in the Authority's prehearing memorandum. The Authority admits that it did not expressly mention the regulations implementing the cumulative pollutant loading rate at Section 271.914(a) and the setback requirements for intermittent streams at Section 271.915(c). The Authority states that it does not contend that the cumulative pollutant loading rate numbers in Section 271.914(a) will be violated, but the problem is there will be a significant risk to groundwater from applying metal containing biosolids. The Authority asserts that the cumulative pollutant loading rate requirement is not protective of groundwater when dealing with rocky soils and only a few inches of soil. The Board agrees with the Authority that the Authority is entitled to rely upon Section 271.914(a) to help explain its concern about protection of groundwater.

The Department also asserts that the Authority waived issues regarding Section 271.904 by not including these regulations as applicable regulations on Page 28 of its posthearing brief or

as one of the disputed legal issues in its posthearing brief. Section 271.904 provides the Department with authority, on a case-by-case basis to impose additional or more stringent requirements when necessary to protect public health or the environment. 25 Pa. Code § 271.904. The Authority did discuss this regulatory requirement on page 40 of its posthearing brief, as the Department concedes, but according to the Department this brief discussion is not enough to preserve the issue. The Board rejects the Department's waiver argument for two reasons. First, the Authority discussed the regulatory authority briefly in its posthearing brief which is sufficient to defeat the Department's waiver argument. Second, Section 271.904 does not directly impose duties on persons applying biosolids. Section 271.904 is a grant of regulatory authority to the Department to add additional or more stringent requirements on a case-by-case basis when necessary to protect public health or the environment. The Authority clearly asserted that the Department should have done more when it reviewed Bellefonte's Notice. The Board does not view the Authority's reference to the regulatory authority to require more, as a basis to waive the Authority's objection that the Department should have done more.

Department's Implementation of Regulatory Requirements

The Authority makes several related arguments regarding the Department's implementation of regulatory requirements governing the application of biosolids. The Authority asserts that the Department ignored some of its regulatory requirements and failed to implement others as intended.

The Department and Bellefonte assert that the Authority misunderstands the purpose of the Notification of the First Land Application. The Department reviews a Notice to determine whether the site is suitable for first-time land application. The Department does not actually approve or disapprove the use of a particular site under the general permit. *Stevens v. DEP*, 2002

EHB 249, 255-257. When the Department reviews and approves a Notification of First Land Application, the Department "simply verifies that the permittee is in compliance with applicable requirements. *Stevens v. DEP*, 2002 EHB at 257. The underlying regulatory requirements governing the actual land application and those under PAG-084814 remain applicable to Bellefonte's future land application. The Department reviewed Bellefonte's Notice and determined that the Spicer Family Farms property was suitable for the land application of biosolids and verified that Bellefonte had complied with the applicable requirements in the regulations and under PAG-084814 for first-time applications at the property. Approval of the Notice does not relieve Bellefonte from the obligation to comply with these requirements on an ongoing basis.

The Department also rejects the Authority's claim that it has disregarded regulatory requirements in favor of new requirements that are not in the regulations. The Department claims that it is the Authority that urges the Board to apply non-regulatory requirements in place of applicable regulatory requirements.

The Board agrees with the Authority that the rules of statutory construction set forth in the Statutory Construction Act, 1 Pa.C.S.A. § 19 *et seq.*, apply to regulations. *See Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 380. The Department is also not empowered to amend or materially change an existing regulation, *Dauphin Meadows v. DEP*, 2000 EHB 521, 527-28. There are, however, major disagreements between the parties regarding the existence or scope of regulatory requirements applicable to the Department's review and approval of Bellefonte's Notice. The Board will address the Authority's specific arguments regarding the Department's failure to comply with specific regulatory requirements in the following portions of the Adjudication in which the specific arguments are addressed in more detail.

Compliance with Cumulative Loading Requirements in Section 271.914(a)(2)

The Authority claims that the Department's approval of the Notice will lead to violations of the cumulative pollutant loading requirement in Section 271.914(a)(2) because this requirement is based upon capture of pollutants within soil that is one meter thick and the soils data in the Notice reveals that some of the Spicer Family Farms' soils are thinner than one meter (40 inches). By approving the Notice and allowing land application of biosolid on the site, the Department "risk[s] the discharge of inacceptable levels of toxic metals to the groundwater." Under Section 271.914(a)(2) the Authority asserts that the Department could have either limited land application to areas with at least a meter of soil or it could have imposed additional conditions to protect the environment. The Department did neither, and the Authority believes the Department's failure to properly implement Section 271.914(a)(2) is an abuse of discretion.

The Department disagrees that Section 271.914(a)(2) imposes a minimum depth of soil requirement in connection with the cumulative pollutant loading rates.[11] The Department argues that there are no state or federal requirement that impose the minimum depth of soil requirement advocated by the Authority. The one meter depth requirement related to the EPA risk assessment concerning the cumulative pollutant loading rate is a one meter depth to groundwater requirement and not a one meter minimum depth of soil requirement according to the Department.

Bellefonte agrees with the Department that there is no minimum depth of soil requirement in state or federal regulations. In addition, Bellefonte asserted that EPA's risk assessment evaluated 14 distinct pathways and established the cumulative pollutant loading rates

[11] The Authority recognizes that there is no minimum depth to soil requirement in the regulatory language, but the Authority argues that the one meter minimum depth of soil requirement is consistent with the "background, purpose, letter and spirit of Section 271.914(a)(2). The Board does not agree.

on the most restrictive pathway which was not pathway #14 (human lifetime drinking well water containing pollutants from biosolids that leached from soil to groundwater). According to Bellefonte, if there is enough soil to grow a crop, the potential for leaching pollutants to groundwater is properly minimized and there is no danger with the proposed application or the site when it comes to compliance with the cumulative pollutant loading rates that are applicable to the site.[12]

The Board agrees with the Department and Bellefonte that there is no minimum depth of soil requirement associated with the cumulative pollutant loading rate requirements in state or federal regulations or in PAG-08. *See* 40 CFR Part 503; 25 Pa. Code § 271.914(a)(2). The Authority has attempted to create a new requirement without any basis in the actual regulatory language. As the Department correctly pointed out, the only one meter requirement concerns one meter to groundwater and not a minimum one meter depth of soil as the Authority advocates.

The Authority presented no evidence that the proposed application of biosolids at the Spicer Family Farm site presented any concern regarding compliance with the applicable cumulative pollutant loading rates. The Department and Bellefonte established that so long as there was sufficient soil to grow a crop on the site, the potential for leaching contaminants to groundwater is minimized and there is little risk of exceeding the cumulative pollutant loading rates. The Authority has not met its burden to demonstrate that Bellefonte will violate Section 271.914(a)(2).

Calculation of Agronomic Rate Under Section 271.915(f)

The Authority contends that the Department failed in its duty to properly review the Notice by approving an erroneous calculation of the agronomic rate under Section 271.915(f).

[12] The Department relied upon the 25 Pa. Code § 271.904 to establish more stringent cumulative pollutant loading rates in PAG-08 than are in Section 271.914(a)(2). Bellefonte has to meet both sets of requirements.

The Authority asserts that the Notice only included "generic calculations" rather than using calculations reflecting specific site conditions and realistic corn crop yields based on prior site specific production data and therefore the Authority believes that the Notice does not meet the regulatory requirement to limit the passage of nitrogen below the root zone.[13] The Authority listed several examples to support its claim that the Department abused its discretion when it accepted the Notice and its impermissible "generic" calculation method. According to the Authority, the Department abused its discretion when Mr. Thelford failed to inquire as to: (1) the source of the corn and alfalfa crop yield data displayed on the example worksheet; (2) why Bellefonte proposed to apply biosolids to alfalfa fields with zero nitrogen needs; (3) how Bellefonte proposed to estimate nitrogen uptake by crops planted on areas with shallow rocky soils, as the soil maps on Fields 3 and 10; (4) how Bellefonte accounted for reduced yields resulting from application prior to any corn plant being present to take up the nitrogen before it is lost to groundwater; or (5) how the nitrogen need would be affected by crop rotation.

The Department disagrees with the Authority that it abused its discretion when it reviewed the Notice containing the Agronomic Rate worksheets. The Department asserts that the Authority has misapprehended the regulatory meaning of the Agronomic Rate requirements and definition in Section 271.915(f) and 271.907. *See* 25 Pa. Code §§ 271.907 and 271.915(f). According to the Department the regulatory requirement in Section 271.915(f) is a requirement that is applied when biosolids are actually land applied. When agronomic rates are calculated when biosolids are land applied, PAG-084814 further provides that they "must be calculated in

[13] Under Section 271.907 the definition of Agronomic Rate provides: The annual whole sludge application rate (dry weight basis) designed to do the following: (1) Provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, silviculture crop, cover crop, horticultural crop or vegetation grown on land; and (2) Minimize the amount of nitrogen in the sewage sludge that passes before the root zone of the crop or vegetation grown on the land to the groundwater. 25 Pa. Code § 271.907 (special definitions).

accordance with the most current version of the Department's Biosolids Training Manual. The *Penn State Agronomy Guide*, documented yields, or other applicable information sources may be used to determine appropriate yields and nutrient needs for the purpose of calculating applicable rates. The sources used to calculate rates must be provided with example calculations provided with the NOI or 30-day Notice, as appropriate." PAG-084814(F)(1)(c).

Bellefonte provided two examples of agronomic loading rate calculations with the Notice and the Department asserts that this was all that was required. The Department believe that Bellefonte has several options to calculate agronomic rates when it actually land applies the biosolids under PAG-084814 and Section 271.915(f), and that the Notice containing the two examples of the agronomic rate calculations were fully compliant with applicable requirements. The Authority believes that only one option is available and that is to use actual farm data when preparing examples of agronomic rate calculation for submission of the Notice of First Land Application. The Department disagrees and asserts that at the Notice stage actual farm data is not needed. Actual farm data is needed when Bellefonte actually land applies the biosolids and demonstrates compliance with the Agronomic Rate requirement in Section 271.915(f). At the Notice stage the Department asserts that Bellefonte need only demonstrate that it is able to complete an Agronomic Rate worksheet when it land applies biosolids in the future and the two example worksheet are ample evidence of Bellefonte's ability to properly complete an agronomic rate worksheet in the future.

Bellefonte agrees with the Department that the Authority has misread the regulatory requirements in Sections 271.907 and 271.915(f) by insisting that only actual farm data be used for predicting crop yields in the example worksheets submitted with the Notice. At the Notice stage, no biosolids have been land applied, and there is no way of demonstrating whether the

agronomic rate limitation in Section 271.915(f) has been exceeded. The agronomic rate limitation applies whenever biosolids are land applied and that does not happen at the Notice stage when the issue is only whether the site is suitable for land application.

The Board agrees with the Department and Bellefonte that the Authority has misconstrued the regulatory requirements in Sections 271.907 and 271.915. The Authority has selectively misread the *Penn State Agronomy Guide* to try to impose a new requirement that only actual farm data may be used at the Notice stage of the process to demonstrate that Bellefonte is capable of properly calculating the agronomic rate in the future when biosolids are actually land applied.

The regulatory requirement in Section 271.915(f) is applicable when biosolids are actually land applied and there is no means to ensure compliance with this regulatory requirement at the Notice stage of the process when the issue before the Department is whether the site is suitable for land application of biosolids. The examples that Bellefonte included with its Notice demonstrated Bellefonte's competence to properly calculate the agronomic rate at the correct time.

Bellefonte's competence to properly calculate the agronomic rate when biosolids are land applied in the future is strongly supported by Bellefonte's over 25 years of experience in land applying biosolids without incident. Moreover, Bellefonte testified that it always applies biosolids at a rate much lower than the calculated allowable agronomic rate in order to be conservative. Bellefonte's longstanding practice, that the Authority did not contest, supports Bellefonte's efforts to always comply with Section 271.915(f) when it actually land applies biosolids.

The Board also agrees with the Department's response to the Authority's objection to the alfalfa example. According to the Authority, the alfalfa agronomic rate example is not appropriate because alfalfa fields have zero nitrogen needs. Although the *Penn State Agronomy Guide* states that "the N recommendation for a legume is O, and no yield response will result if N is applied, legumes will use some applied nitrogen, such as that from manure application." Table 1. 2-7 of the *Penn State Agronomy Guide* states that 50 pounds of nitrogen is removed per unit of yield for alfalfa. The *Penn State Agronomy Guide* recognizes that manure is applied to alfalfa fields and that alfalfa can remove nitrogen. The *Penn State Agronomy Guide* when read in its entirety supports the Department's view that the *Penn State Agronomy Guide* allows the application of biosolids on alfalfa fields because alfalfa will remove some nitrogen.

Dr. Petersen was the Authority's agronomy expert and he based his testimony upon a requirement that soils needs to be 40 inches (one meter) or more deep in order to land apply biosolids and meet the agronomic loading rate requirement. Dr. Peterson also challenged the Department's use of soil survey mapping and relied upon his observations in the soil test pits to recommend the remapping of the soils maps.

The Department explained that there was no minimum depth of soils requirement in state or federal regulations that is applicable to the land application of biosolids. The Department also explained that the limited purpose of the soil test pits was to confirm that there were no areas that might not meet the regulatory requirements of 11 inches to the seasonal high water table or one meter to the regional groundwater table. The location of the soil test pits was not selected to validate the soil survey mapping, but it was selected to locate wet areas that might be unsuitable.

The Board agrees with the Department that there is no minimum depth to soil requirement and that the purpose of the soil test pits is to locate the seasonal high water table or

the regional groundwater table. The Board discounted Dr. Petersen's testimony because he based his testimony, in large part, on his misapplication of these factors.

Compliance with Groundwater Protection Requirements in Section 271.902(g)

Section 271.902(g) prohibits the application of sewage sludge "in a way that will cause surface or groundwater pollution…adversely affect private or public water supplies or cause any public nuisance." 25 Pa. § 271.902(g). The Authority claims that there is a high risk of non-compliance with this requirement that could adversely affect its Grove Park Well. The Authority's concern has two components. First, the Authority asserts that the Department failed to evaluate the Notice in light of site conditions on the Spicer Family Farms property that could allow pollutants in the land applied biosolids to reach the groundwater under the property. Second, once the pollutants reach the groundwater under the property, the Authority believes the pollutants can travel thousands of feet to its Grove Park Well. The Board will address each of these related components below.

The first part of the Authority's groundwater protection concern is based upon several site conditions on the Spicer Family Farms property. These site conditions include the presence of thin rocky soils, bedrock pinnacles, multiple sinkholes and highly fractured bedrock. The Authority believes that the regulatory setback requirements in Section 271.915(c) are inadequate to protect the groundwater under the Spicer Family Farm property in light of the site conditions. According to the Authority, little or no pollutant capture by the soils or plant uptake will occur under these site conditions when biosolids are land applied, and pollutants will reach the groundwater under the property. Once the pollutants reach the groundwater, they can be transported off-site to other locations.

The Department and Bellefonte disagree that the site conditions alleged by the Authority will allow pollutants in the land applied biosolids to reach the groundwater under the Spicer Family Farms property.[14] According to the Department and Bellefonte when Bellefonte complies with the regulatory site restrictions and the agronomic loading rates and the cumulative loading requirements, the information in the Notice indicates Bellefonte will also be able to comply with the groundwater protection requirements in Section 271.902(g). If Bellefonte complies with the agronomic loading rates there will not be a net addition of nitrogen to the groundwater under the Spicer Family Farms property. The Department asserts that its land application of biosolids program is more than just isolation distances. The Department's land application of biosolids regulations and permitting procedures are designed to address potential concerns, including any concerns with fractured bedrock, through management practices, treatment requirements and recordkeeping requirements. Finally, the Department and Bellefonte point out that Spicer Family Farms is an active agricultural operation, and there is no evidence that crops cannot thrive there despite any areas of shallow soils that might exist there.

The Board agrees with the Department and Bellefonte that the Authority has not met its burden to demonstrate that site conditions at the Spicer Family Farms property will allow pollutants from the land application of biosolids to contaminate the groundwater under the property. The Authority did not provide evidence to show that any of the identified site conditions will cause groundwater pollution. The Authority suggest that there are "multiple" sinkholes on the property. The record only identifies "One shallow closed depression" in Field

[14] There are two types of pollutants of concern to the Authority. First, there is a concern about nitrates and whether there will be sufficient plant uptake of the nitrates to prevent the nitrates from reaching the groundwater. Second, there is a concern about metals and whether there is enough soil to prevent them from reaching the groundwater. Each of these concerns are addressed by regulatory requirements that were previously discussed. *See* 25 Pa. Code § 271.914(a)(2) (Cumulative Loading Requirements) and 25 Pa. Code § 271.915(f) (Agronomic Rate Requirements).

8A as needing a buffer for isolation distances. (Stip. 78-79). The Authority did not provide any evidence at the Hearing to establish that there were "multiple" sinkholes or to establish that the buffer requirements for sinkholes in the regulations was inadequate to protect groundwater.[15]

The Authority asserted that there were numerous rock pinnacles on the site. The Parties stipulated that bedrock is exposed on the surface on certain areas of the Spicer Family Farms property where biosolids are not proposed for land application (Stip. 69-74-75). The Authority did not provide sufficient evidence to establish how the existence of these rock pinnacles or exposed bedrock would result in groundwater pollution when these areas were not proposed for application of biosolids. The Authority raised concerns about the fractured bedrock. The Department's expert witness, Thomas Sweeney testified that fractured bedrock is fully encompassed by the regulations and there is no need to take any special consideration to protect groundwater under Section 271.902(g); (N.T. 687). The Authority did not supply evidence to establish that fractured bedrock raised concerns that were not already addressed by the regulations.

The Authority's last site-condition concern is its claim that the Spicer Family Farms property has thin rocky soils on portions of the areas where Bellefonte proposed to land apply biosolids. The Authority's claim is based in large part on the several test pits that were excavated on the fields where land application of biosolids is proposed. According to the Authority thin soils will deter the soils from reducing pollutants which can bind on soils, pollutants which can be acted on by microbial life and nutrients and pollutants which can be taken up by plants. Pollutants which can bind on soils and which can be acted on by microbial

[15] Dr. Parizek testified that he observed multiple closed depressions on several fields at the Spicer Family Farms property, but he did not measure the depth or size of these closed depression. (N.T. 376). All of these closed depressions that he observed are shallow compared to the sinkhole in field 8A as shown in the exclusionary area. (N.T. 377). Dr. Parizek did not testify that the small shallow closed depressions he observed were sinkholes subject to the buffer restrictions in Section 271.915(c)(2).

life, are addressed by cumulative loading requirements in 25 Pa. Code § 271.914(a)(2). Pollutants and nutrients, which can be taken up by plants, are addressed by the agronomic rate requirements in 25 Pa. Code § 271.915(f). Both of these sections were previously discussed.

The Department and Bellefonte admit that shallow soils were identified in some of the soil test pits. Twenty test pits were excavated and eight of the trenches identified soils with the shallowest depth observed as less than twenty inches deep. (Stip. 49 and 63). Soil depth to bedrock varied from less than four inches to greater depth with the deepest observation at fifty-two inches. (Stip. 64). The Department and Bellefonte disagree with the Authority that soils observed in the soil test pits support the Authority's claim that the soils are too thin to allow the growing of crops. They assert that there need only be enough soil to support the growing of an agricultural crop, and if a farmer can produce an agricultural crop then the nutrients or the biosolids will be used and the soil that the crop is growing in will help minimize leaching into the groundwater. There is no dispute that the Spicer Family Farms is an active farm that has grown crops for many years.

The Board agrees with the Department and Bellefonte that the Authority has not met its burden to demonstrate the soils on the Spicer Family Farms are too thin to grow an agricultural crop. As was previously discussed, there is no minimum depth of soil requirement under state or federal requirements, and there is no doubt that agricultural crops have been grown on the Spicer Family Farms property for many years. The fact that there were some areas with thin soils observed in some of the soil test pits does not overcome the undisputed testimony that agricultural crops have been grown on the Spicer Family Farms property where Bellefonte proposed to land-apply biosolids.

The second part of the Authority's groundwater protection concern relies primarily upon the expert testimony of Dr. Parizek. The Authority asserts that Dr. Parizek established a hydrologic connection between the groundwater under the Spicer Family Farms property and the Grove Park Well. According to the Authority, if pollutants from the biosolids land applied to the Spicer Family Farms property reach the groundwater under the property, Dr. Parizek explained how this groundwater containing the pollutants could reach the Grove Park Well.

The Department and Bellefonte challenge the Authority's assertion that Dr. Parizek established a viable hydrologic connection between the groundwater under the Spicer Family Farms and the Grove Park Well. They assert that Dr. Parizek's testimony stopped short of establishing a hydrologic connection, and it was more likely that groundwater under the Spicer Family Farms property went in several other directions and not towards the Grove Park Well.

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). Weighing credibility and selecting among competing expert testimony is one of our most basic and important duties. *DEP v. EQT,* 2017 EHB 439, 497; *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and

circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case. *DEP v. EQT*, 2017 EHB at 497.

The Board agrees with the Department and Bellefonte that Dr. Parizek's testimony does not establish the conclusion proposed by the Authority that it is likely that groundwater under the Spicer Family Farms property will travel thousands of feet to the Grove Park Well. The Board recognized Dr. Parizek as an expert witness in geology and hydrology. (N.T. 262). The Board found that Dr. Parizek is well qualified and he credibly opined on several portions of his testimony. However, the Board finds that Dr. Parizek's testimony does not support the Authority's claim that groundwater under the Spicer Family Farms property will likely travel thousands of feet to the Grove Park well. On cross-examination, Dr. Parizek described the difficult and unlikely journey that groundwater would need to travel in order for it to reach the Grove Park well.

On cross examination Dr. Parizek made numerous concessions regarding the difficult and unlikely path that groundwater and pollutants originating on the Spicer Family Farms property would need to follow to reach the Grove Park Well. He agreed that groundwater flow zigzagging towards the Grove Park Well would need to cross seven different fracture zones to find its way to the Well. He testified that groundwater has a strong tendency to follow along a certain fracture trace and then flow to the south and east and not towards the Well. Dr. Parizek also recognized that the groundwater could easily be swept into a different direction towards the Gatesbury groundwater trough and away from the Well. He also concluded that groundwater containing pollutants to the northwest of Route 550 will pose little or no risk to the Grove Park

Well. When Dr. Parizek's testimony is viewed in its entirety, the Board finds that it does not support the Authority's desired conclusion that groundwater from under the Spicer Family Farms property will likely reach the Grove Park Well.[16] The strongest statement that Dr. Parizek made in support of the Authority's claim is that he could not preclude that groundwater under some, but not all parts of the Spicer Family Farms property, would go towards the Grove Park Well and that water originating on the property should make it to the Grove Park Well "given time." (N.T. 308, 277). This testimony does not assist the Authority in meeting its burden of proof that the groundwater will reach the Well.

In conclusion, the Authority did not meet its burden to establish either component of its groundwater protection objection under Section 271.904(g). The Authority did not establish that pollutants from the land application of biosolids would reach the groundwater under the Spicer Family Farms property or establish that groundwater under the property will likely flow to the Grove Park Well.

The Board should address one final point. The Department and Bellefonte attempt to deflect concerns about excess nitrates from land application of biosolids on the Spicer Family Farms property by suggesting that there are possible sources of excess nitrates nearer the Authority's Well that the Authority has not sought to control or reduce. Other farms are located much closer to the Grove Park Well, and the Authority had not engaged in discussions with any of the farmers to discuss its concerns with excess nitrates reaching its Well.

The Authority objects to the "Blame the Victim" argument that suggests that the Authority is not "doing something" to control or reduce excess nitrates from existing operation on farms nearer its Well. There is no question that nitrate levels in the current water supply are

[16] It is worth noting that Dr. Parizek did not express an opinion regarding groundwater flow to a reasonable degree of scientific certainty. Whether this was an oversight or intentional is not clear from the record.

already a concern. The Board agrees with the Authority that the current appeal is evidence that the Authority is doing something to address its concern with nitrate levels in its water supply from the Grove Park Well. Whether it could do more by discussing its concerns with other farmers whose farms are nearer its Well is not relevant to this appeal. The Board is only concerned with the Department's action under review in this appeal, and the Authority's objections to that specific Department action.

Compliance with Farm Conservation Plan Requirements in Section 271.915(c)(4)

The Authority asserts that evidence in the Notice and "additional evidence adduced at the Hearing indicates that the farm may not have an effectively implemented soil conservation plan sufficient to prevent the loss of biosolids-amended soils onto neighboring properties and waterway as required by regulation." Under Section 271.915(c)(4), sewage sludge may not be applied to agricultural lands…if it is:… "(4) In an area without an implemented erosion and sedimentation plan or a farm conservation plan." 25 Pa. Code § 271.915(c)(4). Ms. Swancer testified that she observed muddy runoff from at least three fields during heavy rain events. In addition, the Authority contends that Bellefonte had to obtain a copy of the 1992 Soil Conservation Plan for the Spicer Family Farm from the Natural Resources Conservation Service ("NRCS"). The Authority believes in light of these facts that the Department should have contacted the Spicer Family Farms to ensure it "had a copy of the 24 year old plan and was actually implementing it." Appellant's Post-Hearing Brief at 43. The Authority contends that the Department's failure to follow-up and confirm that the Conservation Plan was still valid and actually being implemented was an abuse of discretion.

The Department and Bellefonte disagree with the Authority that the Department abused its discretion when it reviewed the Notice but failed to directly contact the Spicer Family Farms

to insure that it had a copy of its Conservation Plan and that the Plan was actually being implemented. They disagree that the Authority's interpretation of the Authority's two key facts support the Authority's conclusion that the Spicer Family Farms did not have a Conservation Plan and the Plan was not being implemented. The two facts are that Bellefonte was told to secure a copy of the Conservation Plan from the NRCS rather than securing it from the Spicer Family Farms, suggesting perhaps the Spicer Family Farms no longer had a copy, and that neighboring property owner observed muddy runoff from at least three fields during rain events suggesting the Plan was not being implemented.

The Board agrees with the Department and Bellefonte that the facts identified by the Authority do not support its conclusion that the Department abused its discretion when it failed to question the Spicer Family Farms about its Conservation Plan as suggested by the Authority. Under Section 271.915(c)(4) sewage sludge may not be applied in an area without a farm conservation plan. In its Notice, Bellefonte attached a copy of the Conservation Plan and a signed confirmation from the Spicer Family Farms indicating its intent to adhere to the restriction in Section 271.915(c)(4) that sewage sludge not be applied to areas not having an implemented conservation plan. The fact that Bellefonte obtained a copy of the Plan from the NRCS and not Spicer Family Farms does not support the Authority's implied suggestion that Spicer Family Farm does not possess a copy of the Plan. There is, in fact, no evidence to support this implied suggestion. There is no question that a Conservation Plan for the Spicer Family Farm exists and a copy of the Plan was attached to the Notice along with the signed statement from the Spicer Family Farm that it intend to adhere to the restriction in Section 271.915(c)(4).

The Board is also not convinced that Ms. Swancer's observations regarding several instances when there was muddy runoff from several fields after storm events support the

Authority's conclusion that the Conservation Plan was not properly implemented in the past. The runoff events observed by Ms. Swancer occurred infrequently, and there is no additional testimony to suggest that the Conservation Plan was or was not being implemented during the few instances when Ms. Swancer observed runoff.

Section 271.915(c)(4) imposes a requirement on Bellefonte when applying biosolids.[17] The runoff events observed by Ms. Swancer occurred before the Notice was filed and they did not involve the application of biosolids which has not yet occurred. Bellefonte submitted a copy of the Conservation Plan covering the Spicer Family Farms along with the statement from the Spicer Family Farm that it was aware of the requirement in Section 271.915(c)(4). These facts were sufficient to satisfy Bellefonte's obligation at the Notice stage of the process and the additional facts alleged by the Authority did not create a new requirement for the Department to question whether the Spicer Family Farm had a copy of its plan. The Department did not abuse its discretion when it evaluated the circumstances involving the Spicer Family Farms' Conservation Plan and concluded that there was no violation of Section 271.915(c)(4).

Application of Biosolids on or Near a Waterway under Section 271.915(c)(1)

Under Section 271.915(c)(1) sewage sludge may not be applied to agricultural lands that are within 100 feet or less of a perennial stream or within 33 feet of an intermittent stream. 25 Pa. Code § 271.915(c)(1). The Authority claims that the "Notice proposes to apply biosolids in an area with what appears to be an intermittent stream, without applying the regulatory setback or evaluating the runoff potential from the area. The Notice indicated that there was a "grassed waterway" in Field 8 and Trenches 14 and 15 were in a "drainageway" crossing Fields 8A and

[17] Biosolids may not be applied to agricultural lands that does not have a farm conservation plan. 25 Pa. Code § 271.915(c)(4).

11.[18] The Authority claims that these areas appear to be an intermittent stream subject to the requirements in Section 271.915(c)(1).

The Department and Bellefonte challenge the Authority position that the "grassed waterway" in the area of Field 8 and the "drainageway" crossing Field 8A and 11 are intermittent streams subject to the buffer restrictions in Section 271.915(c)(1) concerning intermittent streams. They assert that there is a difference between an intermittent stream and stormwater features and the "grassed waterway" and "drainageway" mentioned above are stormwater features and not intermittent streams subject to the buffer zone restrictions in Section 271.915(c)(1).

The Board agrees with the Department and Bellefonte that the Authority has not met its burden of proof to establish that the areas it identified were intermittent stream triggering the buffer restrictions in Section 271.915(c)(1). The Department did not err or abuse its discretion when it evaluated the Notice and decided that the "grassed waterway" and "drainageway" were stormwater features and not intermittent streams.

The Authority had the opportunity at the hearing to present additional evidence to support its claim that these areas were in fact intermittent streams. The Authority presented no evidence to support its claim. The evidence in the record supports the Department's position that these areas were just stormwater features and not intermittent streams subject to the buffer restrictions in Section 271.915(c)(1).

The Board also rejects the Authority's argument that Mr. Thelford incorrectly added an additional unlawful criterion to the definition of intermittent stream. The Authority claims that Mr. Thelford improperly added an unlawful criterion that the area has "a defined bed and bank." The definition in Section 271.1 of "Intermittent Stream" provides:

[18] The Notice to apply biosolids to fields 8, 8A, 10 and 11.

> A body of water flowing in a channel or bed composed primarily of subshales associated with flowing water, which, during periods of the year, is below the local water table and obtain its flow from both surface runoff and groundwater discharge.

25 Pa. Code § 271.1. (definitions) When Mr. Thelford testified at the hearing he did not have the regulatory definition before him on the stand and his understanding that an intermittent stream has a "defined bed and bank" is consistent with the actual regulatory language that an intermittent stream is "a body of water flowing in a channel or bed…" Mr. Thelford did not add an "unlawful criterion" to the regulatory definition when he testified at the hearing.

When the Authority filed its appeal, it was concerned that the application of biosolids on the Spicer Family Farm near an area identified in the 2016 draft source Water Protection Plan as the Aquifer Recharge Area for its Grove Park Well may have a negative impact and possibly contaminate its Well. The Board recognizes that the Authority raised a legitimate concern regarding possible negative impacts to its Grove Park Well, but simply raising concerns is not sufficient to prevail in its appeal.

The Authority must do more than raise concerns. The Authority has the burden of proof in this appeal and it has not met it. The Authority simply raised a number of issues and then speculated that all types of calamities may occur. Coming forward with a laundry list of potential problems does not satisfy an appellant's burden of proof. *United Ref. Co. v. DEP*, 2010 EHB at 449. Having raised a number of concerns, the Authority was not able to prove by a preponderance of the evidence that the problems they allege were likely to occur.

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 Solid Waste Management Act, 35 P.S. §§ 6018 *et seq*., the Clean Streams Law, 35 P.S. §§ 691.1 *et seq*., the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101 *et seq*., and the rules and regulations promulgated thereunder including 25 Pa. Code Chapter 271.

3. Appellant, in this case the Authority, bears the burden of proof. 25 Pa. Code § 1021.122(c)(1).

4. Appellant must show by a preponderance of the evidence that the Department's action is unreasonable, contrary to law, not supported by the facts, or inconsistent with the Department's obligations under the Pennsylvania Constitution. *Logan v. DEP*, 2018 EHB 71, 90; *Solebury School v. DEP*, 2014 EH 482, *Gadinski v. DEP*, 2013 EHB 246, 269.

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 Authority has failed to carry its burden of proving that the Department acted unlawfully, unreasonably, or inconsistently with the facts when it approved Bellefonte's Notification of First Land Application to the Department to land apply biosolids on the Spicer Family Farms property.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENNER TOWNSHIP WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2016-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF BELLEFONTE	:	

O R D E R

AND NOW, this 17th day, October, 2019, it is hereby ordered that the above captioned appeal of Benner Township Water Authority is **denied.**

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 17, 2019

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

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

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(*via electronic filing system*)

For Permittee:
Jeffrey W. Stover, Esquire
Scott Wyland, Esquire
Isaac Wakefield, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF YORK COUNTY FAMILY FARMS	:	
v.	:	**EHB Docket No. 2018-042-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILLANDALE GETTYSBURG, L.P., Permittee	:	**Issued: November 4, 2019**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

The Appellant's Motion for Summary Judgment is denied where further factual development is necessary to resolve questions of material fact.

O P I N I O N

Introduction

This Opinion addresses a Motion for Summary Judgment filed by the Appellant, Friends of York County Family Farms (Appellant). Based on the record before the Board, the undisputed facts are as follows: Hillandale Gettysburg, L.P. is the operator of a concentrated animal feeding operation (CAFO) in Spring Grove, York County, Pennsylvania. The CAFO consists of 1.28 million total birds, housed in seven (7) barns. Barns 1, 2, 4 and 5 are belted house systems with manure stacking facilities at the end of each barn. Barns 3 and 6 are high rise layer houses with manure being stored beneath the layers. Barn 7 is an organic free-range layer house with manure stacking facilities at the end of the barn.

Agricultural operations meeting the definition of a concentrated animal feeding operation (CAFO) in Pennsylvania are required to obtain NPDES permit coverage. Eligible CAFOs may seek coverage under the PAG-12 General Permit. In certain instances, CAFOs may be required to obtain an individual permit. At the time that Hillandale originally sought coverage under the PAG-12, the method for obtaining coverage involved the submission of a Notice of Intent to the Department. A Notice of Intent is a notice to the permitting authority of an operator's intent to be covered under the general permit in question. By submitting the Notice of Intent, the operator certifies that its operation meets the eligibility conditions of the general permit.

Hillandale submitted a Notice of Intent to be covered under the then-existing 2013 version of the PAG-12 General Permit (2013 General Permit), and its coverage was approved by the Department of Environmental Protection on or about August 1, 2013. The authorization for coverage carried an expiration date of July 31, 2018.

On January 26, 2018, Hillandale again submitted a Notice of Intent, this time to renew its coverage under the 2013 General Permit since its authorization was expiring on July 31, 2018. However, the Department took no action on it presumably due to the fact that the 2013 General Permit – the master permit under which NPDES authorization for CAFOs had been granted – was set to expire on March 31, 2018, and the Department was in the process of adopting a new master permit. On April 1, 2018, the Department issued a new NPDES general permit for CAFOs – the 2018 General Permit.

The 2018 General Permit incorporated a number of changes to the permitting process, including the following: 1) With certain exceptions, the Department no longer requires the submission of a Notice of Intent to renew coverage; rather the submission of an annual report now serves as a permittee's notice to remain covered under the 2018 General Permit, and 2)

Authorizations to operate under the 2018 General Permit no longer carry five-year expiration dates; rather, coverage is renewed annually with the submission of an annual report. On April 4, 2018, the Department issued a letter to permittees who had been covered under the 2013 General Permit and explained the new procedures for coverage under the 2018 General Permit. With certain exceptions, permittees covered under the 2013 General Permit were extended coverage under the 2018 General Permit without being required to submit a Notice of Intent.

On April 30, 2018, the Appellant appealed the Department's grant of authorization for coverage to Hillandale under the 2018 General Permit. The matter now before the Board is the Appellant's motion for summary judgment. The Appellant asserts that the Department abused its discretion when it automatically extended coverage to Hillandale under the 2018 General Permit without requiring the submission of a Notice of Intent. The Appellant also argues that the Department's new model of annual renewal of coverage, rather than coverage carrying a five-year expiration date, fails to provide adequate opportunity for public participation in the permitting process.

The Board may grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(m); Pa. R.C.P. 1035.1; *Eighty-Four Mining Co. v. DEP*, EHB Docket No. 2019-099-L (Opinion and Order on Motion for Summary Judgment issued September 30, 2019), *slip op*. at 2-3; *Diehl v. DEP*, 2018 EHB 18, 22; *Property One, LLC v. DEP*, 2017 EHB 1209, 1212. Summary judgment may only be granted where the right to it is clear and free from doubt, when viewed in the light most favorable to the non-moving party. *Eighty-Four Mining, slip op.* at 2-3; *Diehl*, 2018 EHB at 22. All doubts as to whether genuine issues of material fact remain must be resolved against the

moving party. *Eighty-Four Mining, slip op*. at 3 (citing *Clean Air Council,* 2013 EHB 404, 406).[1]

Discussion

The Appellant argues that the Department's grant of automatic coverage to existing permittees under the reissued 2018 General Permit, without requiring the permittees to submit a Notice of Intent, was erroneous. It points to the Department's notice in the March 31, 2018 *Pennsylvania Bulletin* which stated:

> The PAG-12 General Permit will become effective on April 1, 2018, and will expire on March 31, 2023. *All permittees with existing coverage under the PAG-12 General Permit will be automatically covered under the reissued General Permit on April 1, 2018,* and will be subject to the terms and conditions of the reissued General Permit.

(Notice of Appeal, Tab A) (emphasis added).

The Department takes issue with the Appellant's contention that all CAFOs covered under the 2013 General Permit were automatically granted coverage under the 2018 General Permit. The Department asserts that it had the option to require the submission of a Notice of Intent where it thought it was appropriate. In support of its argument, the Department points to the following language in the 2018 General Permit:

> Submission of an NOI is not required for renewal of coverage under this General Permit and coverage is automatically extended for the duration of the final renewed, reissued or amended General Permit, unless DEP notifies the permittee in writing that

[1] A second scenario in which summary judgment may be granted is the following:

> 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.

Diehl, 2018 EHB at 23 (citing Pa. R.C.P. 1035.2(2)). The parties have not asserted that this scenario applies here.

> submission of an NOI is required. DEP may require submission of an NOI based on changes in the operation or the need for information to ensure coverage under the General Permit is appropriate.

(Department's Brief in Support of Response (Department's Brief), Ex. 3, p. 1.)

The Appellant argues that regardless of whether the Department had the option of requiring a Notice of Intent for certain permittees, it did not do so for Hillandale. Rather, it automatically extended coverage for Hillandale from the 2013 General Permit to the 2018 General Permit without requiring a Notice of Intent.[2] This is evidenced by the Department's letter of April 4, 2018 which was sent to Hillandale and other existing permittees:

> • **Renewal of Coverage –** *Unless specifically required by DEP, the submission of a Notice of Intent (NOI) to renew your coverage is no longer necessary under the 2018 General Permit.* The submission of CAFO Annual Reports ("annual reports") will serve as your notice of intent that you wish to remain covered under the PAG-12 General Permit. If you have already submitted your renewal NOI to DEP, DEP may return the NOI to you without taking an action if it is determined that processing your NOI is not necessary for you to maintain PAG-12 coverage.

(Exhibit 7 to Department's Brief) (emphasis added).

The Appellant argues that the Department's grant of automatic coverage to Hillandale violates Section 92a.23 of the NPDES regulations:

> **§ 92a.23. NOI [Notice of Intent] for coverage under an NPDES general permit.**
>
> (a) Except as provided for in subsection (c), eligible dischargers, who wish to be covered by a general permit, shall file a complete NOI [Notice of Intent] as instructed in the NOI [Notice of Intent] . . .
>
> (b) *****

[2] As noted earlier, Hillandale did submit a Notice of Intent for continuation of coverage, but it was submitted pursuant to the 2013 General Permit and was not acted on by the Department.

> (c) General permits for . . . CAFOs . . . must require that an NOI [Notice of Intent] be submitted for each issuance and reissuance of coverage under the general permit . . .

25 Pa. Code §§ 92a.23(a) and (c).

The Department argues that the Appellant's reliance on Section 92a.23 is misplaced. It asserts that this case does not involve the "issuance" or "reissuance" of coverage for Hillandale under the 2018 General Permit, but rather "continuing coverage" from the 2013 General Permit to the 2018 General Permit. The Department contends that it has a "longstanding practice" of continuing coverage from an expired general permit to a reissued general permit.

The Appellant accuses the Department of wordsmithing and providing no regulatory provision or case law in support of its argument. We agree that the Department provides little in the way of support for its argument. Additionally, it provides no explanation as to how a "continuation of coverage" differs from a "reissuance of coverage" under the new General Permit. For example, under what circumstances would a permittee's coverage be "reissued" as opposed to "continued" and what would the difference in process look like? Section 92a.23 of the regulations expressly states that a "[g]eneral permit for. . . CAFOs. . . *must* require that an NOI [Notice of Intent] be submitted for each issuance and reissuance of coverage under the general permit." 25 Pa. Code § 92a.23 (emphasis added). It is not clear that the 2018 General Permit meets this requirement. Although we are not strongly persuaded by the Department's argument, nonetheless, as we explained earlier, we may only grant summary judgment in the clearest of cases. Here, because there is some doubt and confusion over what constitutes the "reissuance of coverage" under a general permit, we decline to grant summary judgment on this issue. Factual development of this issue is likely to be helpful in understanding whether the

Department erred in failing to require Hillandale to submit a Notice of Intent to be eligible for coverage under the 2018 General Permit.

The Appellant also argues that the Department's newly implemented practice of allowing annual reports to serve as a permittee's continuation of coverage under the 2018 General Permit deprives the public of the opportunity to submit comments and participate in the permitting process as required by the regulations. Historically, a permittee has had to submit a Notice of Intent every five years to maintain coverage under the PAG-12. The submission of the Notice of Intent triggered a comment period and opportunity for public hearing. That practice has ended with the 2018 General Permit which in most instances allows a permittee's coverage to continue from year-to-year simply with the submission of an annual report.

Hillandale argues that the new system actually improves the public's ability to participate in the permitting process because it now has an opportunity to comment on an annual basis rather than every five years. To an extent, we agree with Hillandale. Having the ability to review and comment on an operator's request for coverage under a general permit on an annual basis, rather than every five years, on its face appears to provide the public with more opportunity to participate in the process. However, the Appellant argues that the new system fails to provide the public with transparency and timely notice. For example, the Appellant points out that Hillandale's annual report was received by the Department on December 27, 2018, yet notice of its receipt and a 30-day comment period was not published in the *Pennsylvania Bulletin* until six months later, on June 29, 2019. The *Bulletin* notice did not provide the contents of Hillandale's annual report; rather, it provided a link to a list of approximately 350 CAFOs that had submitted annual reports and stated that anyone wishing to view a CAFO's annual report could do so in

person "at the Department's regional office serving the county where a CAFO is located." 49 *Pa.B.* 3383.

The Department contends, first, that its notification in the *Pennsylvania Bulletin* was timely. It states that "annual reports that serve as an annual NOI are published for notice and public comment in the *Pennsylvania Bulletin* upon receipt and upon Department action." (Department's Brief, p. 10.) That does not appear to have happened here. First, the annual report was not published. Second, notice of receipt of the annual report and opportunity for public comment was not published until six months after the receipt of the annual report. Finally, it is unclear as to what is meant by "upon Department action" since there appears to be no Department action taken with regard to the annual reports.

The Department and Hillandale argue that the Appellant was not harmed by any delay in the publication of notice in the *Pennsylvania Bulletin*. The Department states that it provided Appellant's counsel with a copy of Hillandale's annual report on March 18, 2019, more than three months before the publication of notice of receipt in the *Pennsylvania Bulletin* (but still approximately three months after its receipt by the Department). (Deposition of Andrea Blosser, Exhibit 11 to Department's Brief.) The Department argues that if, after review of the annual report, the Appellant did not believe that Hillandale's proposed operation satisfied the eligibility requirements of the 2018 General Permit, the Appellant could have acted pursuant to 25 Pa. Code § 92a.54(f) which allows an interested person to petition the Department to revoke or terminate a CAFO's coverage under a general permit. We disagree that this provision makes up for a failure to provide adequate notice in the first instance.

Additionally, Hillandale argues that if a prospective appellant wishes to view an operator's annual report it may file a request under Pennsylvania's Right to Know Law, Act of

February 14, 2008, P.L. 6, *as amended*, 65 P.S. §§ 67.101 - 67.3104. However, while the initial response time under the Right to Know Law is five business days, there are a number of exceptions that allow an agency up to 30 calendar days to provide the information requested. *Id*. at §§ 67.901 and 67.902. In such instances, even if the requester filed its Right to Know request on the day notice is published in the *Pennsylvania Bulletin*, it might not receive the annual report until the last day of the appeal period.[3] And, if the requestor waited even one day after the publication of notice in the *Pennsylvania Bulletin*, he or she would not receive the annual report until after the right to appeal had terminated.

In summary, it appears that the submission of a Notice of Intent provided a more robust opportunity for the public's participation in the permitting process, and it is not clear that the submission of an annual report meets the same standard. None of the parties have discussed in detail how the new process differs from the manner in which the public received notice and an opportunity to comment under the 2013 General Permit. We have a number of questions regarding how the process works before determining whether it provides adequate notice and opportunity for public participation. We believe that further factual development will benefit us in making this decision. *Eighty-Four Mining*, *slip. op*. at 4.

In conclusion we enter the following order.

[3] In third-party appeals before the Environmental Hearing Board, appeals must be filed within 30 days of publication in the *Pennsylvania Bulletin* or within 30 days of actual notice where the action has not been published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRIENDS OF YORK COUNTY FAMILY FARMS	:	
	:	
v.	:	**EHB Docket No. 2018-042-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILLANDALE GETTYSBURG, L.P., Permittee	:	

O R D E R

AND NOW, this 4th day of November, 2019, it is ordered that 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

DATED: November 4, 2019

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

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Janna Elise Williams, Esquire
(*via electronic filing system*)

For Appellants:
William J. Cluck, Esquire
(*via electronic filing system*)

For Permittee:
Charles Haws, Esquire
Paul W. Minnich, Esquire
Christopher Naylor, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2018-041-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: November 4, 2019**

OPINION AND ORDER ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chief Judge

Synopsis

The Appellant's Motion for Summary Judgment is denied where further factual development is necessary to resolve questions of material fact.

O P I N I O N

Introduction

This Opinion addresses a Motion for Summary Judgment filed by the Appellant, Montgomery Township Friends of Family Farms (Appellant). Based on the record before the Board, the undisputed facts are as follows: Herbruck's Poultry Ranch, Inc. (Herbruck's) proposes to operate a concentrated animal feeding operation (CAFO) in Mercersburg, Franklin County, Pennsylvania, consisting of eight layer barns designed to house 2.4 million chickens. The operation will also include a manure storage building. In connection with its proposed operation, Herbruck's sought and obtained from the Department of Environmental Protection (Department) authorization for coverage under the General NPDES Permit for Concentrated Animal Feeding Operations PAG-12 (PAG-12).

Agricultural operations meeting the definition of a concentrated animal feeding operation (CAFO) in Pennsylvania are required to obtain NPDES permit coverage. Eligible CAFOs may seek coverage under the PAG-12 General Permit. In certain instances, CAFOs may be required to obtain an individual permit. At the time that Herbruck's sought coverage under the PAG-12 in 2017, the method for obtaining coverage involved the submission of a Notice of Intent to the Department. A Notice of Intent is a notice to the permitting authority of an operator's intent to be covered under the general permit in question. By submitting the Notice of Intent, the operator certifies that its operation meets the eligibility conditions of the general permit.

Herbruck's submitted a Notice of Intent to be covered under the then-existing 2013 version of the PAG-12 General Permit (2013 General Permit). On August 1, 2017, the Department approved Herbruck's authorization to operate under the 2013 General Permit. The authorization carried an expiration date of July 31, 2022.[1]

However, on March 31, 2018, the 2013 General Permit expired, and on April 1, 2018, the Department issued a new NPDES general permit for CAFOs – the 2018 General Permit. With certain exceptions, permittees who were covered under the 2013 General Permit were permitted to continue coverage under the 2018 General Permit without the submission of a Notice of Intent. This included Herbruck's, whose coverage under the old permit was automatically extended to the new one. With the issuance of the 2018 General Permit, the Department made a number of changes to the permitting process, including the following: 1) With certain exceptions, the Department no longer requires the submission of a Notice of Intent to renew coverage; rather the submission of an annual report now serves as a permittee's notice to remain

[1] Herbruck's authorization for coverage under the 2013 General Permit is the subject of an earlier appeal by Montgomery Township Friends of Family Farms (the Appellant) at EHB Docket No. 2017-080-R.

covered under the 2018 General Permit, and 2) Authorizations to operate under the 2018 General Permit no longer carry expiration dates; rather, coverage is renewed annually with the submission of an annual report. (Exhibit 7 to Department's Brief in Opposition to Appellant's Motion for Summary Judgment (Department's Brief)). On April 4, 2018, the Department issued a letter to permittees who had been covered under the 2013 General Permit and explained the new procedures for coverage under the 2018 General Permit. With certain exceptions, permittees covered under the 2013 General Permit were extended coverage under the 2018 General Permit without being required to submit a Notice of Intent. (Exhibit 7 to Department's Brief.)

On April 30, 2018, the Appellant appealed Herbruck's authorization for coverage under the 2018 General Permit. The Appellant frames its case as follows:

> This case is an appeal from the Department's approval of automatic coverage under the revised and reissued NPDES General Permit PAG-12 [the 2018 PAG-12 General Permit] effective April 1, 2018, and the continuation of coverage based on submission of the annual report rather than a complete Notice of Intent form for the proposed CAFO to be operated by Permittee in Montgomery Township, Franklin County.

(Brief in Support of Appellant's Motion for Summary Judgment (Appellant's Brief), p. 2.) In its motion for summary judgment, the Appellant argues that the Department abused its discretion and acted contrary to its own regulations when it automatically extended coverage to Herbruck's under the 2018 General Permit without requiring the submission of a Notice of Intent. The Appellant also argues that the Department's new model of annual renewal of coverage, rather than coverage carrying a five-year expiration date, fails to provide adequate opportunity for public participation in the permitting process.

The Board may grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94a(m); Pa. R.C.P. 1035.1; *Eighty-Four Mining Co. v. DEP*, EHB Docket No. 2019-099-L (Opinion and Order on Motion for Summary Judgment issued September 30, 2019), *slip op.* at 2-3; *Diehl v. DEP*, 2018 EHB 18, 22; *Property One, LLC v. DEP*, 2017 EHB 1209, 1212. Summary judgment may only be granted where the right to it is clear and free from doubt, when viewed in the light most favorable to the non-moving party. *Eighty-Four Mining, slip op.* at 2-3; *Diehl*, 2018 EHB at 22. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining, slip op*. at 3 (citing *Clean Air Council*, 2013 EHB 404, 406).[2]

Discussion

The Appellant argues that the Department's grant of automatic coverage to existing permittees under the reissued 2018 General Permit, without requiring the permittees to submit a Notice of Intent, was erroneous. It points to the Department's notice in the March 31, 2018 *Pennsylvania Bulletin* which stated:

> The PAG-12 General Permit will become effective on April 1, 2018, and will expire on March 31, 2023. *All permittees with existing coverage under the PAG-12 General Permit will be automatically covered under the reissued General Permit on April 1, 2018*, and will be subject to the terms and conditions of the reissued General Permit.

[2] A second scenario in which summary judgment may be granted is the following:

> 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.

Diehl, 2018 EHB at 23 (citing Pa. R.C.P. 1035.2(2)). The parties have not asserted that this scenario applies here.

(Notice of Appeal, Tab A) (emphasis added).

The Department takes issue with the Appellant's contention that all CAFOs covered under the 2013 General Permit were automatically granted coverage under the 2018 General Permit. The Department asserts that it had the option to require the submission of a Notice of Intent where it thought it was appropriate. In support of its argument, the Department points to the following language in the 2018 General Permit:

> Submission of an NOI is not required for renewal of coverage under this General Permit and coverage is automatically extended for the duration of the final renewed, reissued or amended General Permit, unless DEP notifies the permittee in writing that submission of an NOI is required. DEP may require submission of an NOI based on changes in the operation or the need for information to ensure coverage under the General Permit is appropriate.

(Department's Brief in Support of Response (Department's Brief), Ex. 3, p. 1.)

The Appellant argues that regardless of whether the Department had the option of requiring a Notice of Intent for certain permittees, it did not do so for Herbruck's. Rather, it automatically extended coverage for Herbruck's from the 2013 General Permit to the 2018 General Permit without requiring the submission of a Notice of Intent. This is evidenced by the Department's letter of April 4, 2018 which was sent to Herbruck's and other existing permittees:

> • **Renewal of Coverage –** *Unless specifically required by DEP, the submission of a Notice of Intent (NOI) to renew your coverage is no longer necessary under the 2018 General Permit.* The submission of CAFO Annual Reports ("annual reports") will serve as your notice of intent that you wish to remain covered under the PAG-12 General Permit. If you have already submitted your renewal NOI to DEP, DEP may return the NOI to you without taking an action if it is determined that processing your NOI is not necessary for you to maintain PAG-12 coverage.

(Exhibit 7 to Department's Brief) (emphasis added).

The Appellant argues that the Department's grant of automatic coverage to Herbruck's violates Section 92a.23 of the NPDES regulations:

> **§ 92a.23. NOI [Notice of Intent] for coverage under an NPDES general permit.**
>
> (a) Except as provided for in subsection (c), eligible dischargers, who wish to be covered by a general permit, shall file a complete NOI [Notice of Intent] as instructed in the NOI [Notice of Intent] . . .
>
> (b) *****
>
> (c) General permits for . . . CAFOs . . . must require that an NOI [Notice of Intent] be submitted for each issuance and reissuance of coverage under the general permit . . .

25 Pa. Code §§ 92a.23(a) and (c).

The Department argues that the Appellant's reliance on Section 92a.23 is misplaced. It asserts that this case does not involve the "issuance" or "reissuance" of coverage for Herbruck's under the 2018 General Permit, but rather "continuing coverage" from the 2013 General Permit to the 2018 General Permit. The Department contends that it has a "longstanding practice" of continuing coverage from an expired general permit to a reissued general permit.

The Appellant accuses the Department of wordsmithing and providing no regulatory provision or case law in support of its argument. We agree that the Department provides little in the way of support for its argument. Additionally, it provides no explanation as to how a "continuation of coverage" differs from a "reissuance of coverage" under the new General Permit. For example, under what circumstances would a permittee's coverage be "reissued" as opposed to "continued" and what would the difference in process look like? Section 92a.23 of the regulations expressly states that a "[g]eneral permit for. . . CAFOs. . . *must* require that an NOI [Notice of Intent] be submitted for each issuance and reissuance of coverage under the general permit." 25 Pa. Code § 92a.23 (emphasis added). It is not clear that the 2018 General

Permit meets this requirement. Although we are not strongly persuaded by the Department's argument, nonetheless, as we explained earlier, we may only grant summary judgment in the clearest of cases. Here, because there is some doubt and confusion over what constitutes the "reissuance of coverage" under a general permit, we decline to grant summary judgment on this issue. Factual development of this issue is likely to be helpful in understanding whether the Department erred in failing to require Herbruck's to submit a Notice of Intent to be eligible for coverage under the 2018 General Permit.

The Appellant also argues that the Department's newly implemented practice of allowing annual reports to serve as a permittee's continuation of coverage under the 2018 General Permit deprives the public of the opportunity to submit comments and participate in the permitting process as required by the regulations. Historically, a permittee has had to submit a Notice of Intent every five years to maintain coverage under the PAG-12. The submission of the Notice of Intent triggered a comment period and opportunity for public hearing. That practice has ended with the 2018 General Permit which in most instances allows a permittee's coverage to continue from year-to-year simply with the submission of an annual report.

Herbruck's argues that the new system actually improves the public's ability to participate in the permitting process because it now has an opportunity to comment on an annual basis rather than every five years. To an extent, we agree with Herbruck's. Having the ability to review and comment on an operator's request for coverage under a general permit on an annual basis, rather than every five years, on its face appears to provide the public with more opportunity to participate in the process. However, the Appellant argues that the new system fails to provide the public with transparency and timely notice. For example, the Appellant points out that Herbruck's annual report was received by the Department on December 21, 2018,

yet notice of its receipt and a 30-day comment period was not published in the *Pennsylvania Bulletin* until six months later, on June 29, 2019. The *Bulletin* notice did not provide the contents of Herbruck's annual report; rather, it provided a link to a list of approximately 350 CAFOs that had submitted annual reports and stated that anyone wishing to view a CAFO's annual report could do so in person "at the Department's regional office serving the county where a CAFO is located." 49 *Pa.B.* 3383.

The Department contends, first, that its notification in the *Pennsylvania Bulletin* was timely. It states that "annual reports that serve as an annual NOI are published for notice and public comment in the *Pennsylvania Bulletin* upon receipt and upon Department action." (Department's Brief, p. 10.) That does not appear to have happened here. First, the annual report was not published. Second, notice of receipt of the annual report and opportunity for public comment was not published until six months after the receipt of the annual report. Finally, it is unclear as to what is meant by "upon Department action" since there appears to be no Department action taken with regard to the annual reports.

The Department and Herbruck's argue that the Appellant was not harmed by any delay in the publication of notice in the *Pennsylvania Bulletin*. The Department states that it provided Appellant's counsel with a copy of Herbruck's annual report on March 18, 2019, more than three months before the publication of notice of receipt in the *Pennsylvania Bulletin* (but still approximately three months after its receipt by the Department). (Deposition of Andrea Blosser, Exhibit 11 to Department's Brief, p. 11.) The Department argues that if, after review of the annual report, the Appellant did not believe that Herbruck's proposed operation satisfied the eligibility requirements of the 2018 General Permit, the Appellant could have acted pursuant to 25 Pa. Code § 92a.54(f) which allows an interested person to petition the Department to revoke

or terminate a CAFO's coverage under a general permit. We disagree that this provision makes up for a failure to provide adequate notice in the first instance.

Additionally, although not raised in this appeal, in the related appeal of *Friends of York County Family Farms v. DEP and Hillandale Gettysburg, L.P.*, EHB Docket No. 2018-042-R, the permittee argues that if a prospective appellant wishes to view an operator's annual report it may file a request under Pennsylvania's Right to Know Law, Act of February 14, 2008, P.L. 6, *as amended*, 65 P.S. §§ 67.101 - 67.3104. However, while the initial response time under the Right to Know Law is five business days, there are a number of exceptions that allow an agency up to 30 calendar days to provide the information requested. *Id*. at §§ 67.901 and 67.902. In such instances, even if the requester filed its Right to Know request on the day notice is published in the *Pennsylvania Bulletin*, it might not receive the annual report until the last day of the appeal period.[3] And, if the requestor waited even one day after the publication of notice in the *Pennsylvania Bulletin*, he or she would not receive the annual report until after the right to appeal had terminated.

In summary, it appears that the submission of a Notice of Intent provided a more robust opportunity for the public's participation in the permitting process, and it is not clear that the submission of an annual report meets the same standard. None of the parties have discussed in detail how the new process differs from the manner in which the public received notice and an opportunity to comment under the 2013 General Permit. We have a number of questions regarding how the process works before determining whether it provides adequate notice and

[3] In third-party appeals before the Environmental Hearing Board, appeals must be filed within 30 days of publication in the *Pennsylvania Bulletin* or within 30 days of actual notice where the action has not been published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2).

opportunity for public participation. We believe that further factual development will benefit us in making this decision. *Eighty-Four Mining, slip. op*. at 4.

In conclusion we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2018-041-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 4th day of November, 2019, it is ordered that 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

DATED: November 4, 2019

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

For the Commonwealth of PA, DEP:
Curtis C. Sullivan, Esquire
Angela S. Bransteitter, Esquire
(via electronic filing system)

For Appellant:
William J. Cluck, Esquire
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For Permittee:
Paul J. Bruder, Jr., Esquire
Jacob H. Kiessling, Esquire
Randall G. Hurst, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2018-057-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	**Issued: November 22, 2019**

OPINION AND ORDER ON
PETITION FOR RECONSIDERATION AND
MOTION TO AMEND INTERLOCUTORY ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for reconsideration of an Order granting a motion in limine to preclude the testimony of an expert witness whose opinions were only disclosed a week before the appellants filed their pre-hearing memorandum where the appellants have not demonstrated extraordinary circumstances for reconsideration of the Order. The Board also denies a motion to certify that Order for immediate interlocutory appeal because granting the motion in limine does not present a controlling question of law over which there is substantial ground for difference of opinion and will not materially advance the termination of this appeal.

O P I N I O N

Clean Air Council and Environmental Integrity Project (hereinafter collectively the "Appellants") are seeking reconsideration of an Order we issued on October 24, 2019 granting a motion in limine filed by Sunoco Partners Marketing & Terminals, L.P. ("Sunoco") that precluded the Appellants from soliciting testimony from a recently identified expert witness.

Alternatively, the Appellants ask that we certify this issue for immediate interlocutory appeal to the Commonwealth Court.

The Appellants are challenging the Department of Environmental Protection's (the "Department's") issuance of air emission Plan Approval No. 23-0119H ("Plan Approval H") to Sunoco. Plan Approval H authorized Sunoco to install the West Warm Flare at Sunoco's Marcus Hook Industrial Complex in Marcus Hook, Delaware County, Pennsylvania. The West Warm Flare replaces an existing, permitted flare known as the Ethylene Complex Flare. Sunoco will use the West Warm Flare to control and destroy vapor streams that are associated with operations at its facility and an adjacent facility (Braskem). For additional background on the Marcus Hook facility, the reader may refer to our Adjudication in *Clean Air Council v. DEP*, EHB Docket No. 2016-073-L (Adjudication, Jan. 9, 2019), *appeal quashed*, ___ A.3d ___, No. 145 C.D. 2019, 2019 Pa. Commw. LEXIS 880 (Pa. Cmwlth. Oct. 1, 2019).

The Appellants filed their appeal on May 25, 2018. Shortly thereafter we issued our Pre-Hearing Order No. 1, which established a six-month deadline for the completion of discovery (November 26, 2018), and an additional month for the filing of dispositive motions (December 26, 2018). Following three requests on behalf of all parties to extend those deadlines, the discovery deadline was ultimately pushed to May 1, 2019, and the dispositive motion deadline was set at May 29, 2019. On May 29, the Appellants filed a motion for *partial* summary judgment on issues related to Sunoco's use of 106.83 tons of volatile organic compound (VOC) emission reduction credits (ERCs) in connection with Plan Approval H. In that motion, the Appellants argued that the Department improperly allowed Sunoco to use ERCs from a facility in Maryland instead of using local credits, that the Department and Sunoco failed to determine whether the use of the ERCs would achieve "ambient impact equivalence," that the Department

and Sunoco failed to determine whether the ERCs Sunoco used included the same conditions, limitations, and characteristics as the emissions that would have been emitted by the generating facility, and that the Department wrongfully failed to account for an increase in emissions from the facility's auxiliary boilers resulting from the West Warm Flare's steam demand.

The Appellants did not address the other objections set forth in their notice of appeal in their motion for partial summary judgment. Instead, the Appellants told us that they intended to take the remaining objections detailed across eight pages of their notice of appeal to a hearing and adjudication. Given that only partial summary judgment was being sought, we reached out to the parties soon after the motion was filed to schedule the hearing. Although we intended to schedule the hearing for October or November, we, along with the Department and Sunoco, accommodated the personal schedule of counsel for the Appellants and on June 6 we issued our Pre-Hearing Order No. 2, scheduling the hearing for December 9, 2019. Pre-Hearing Order No. 2 required the Appellants to file their pre-hearing memorandum by October 28, 2019, and the Department and Sunoco to file their pre-hearing memoranda by November 18, 2019, which the parties have now done.

On July 19, 2019, we issued an Opinion and Order denying the motion for partial summary judgment. Among other things, we noted the implausibility of granting partial summary judgment on the Appellants' arguments:

> The Council does not attempt in its summary judgment materials to make an affirmative showing that the use of the ERCs was improper. Instead, it complains that Sunoco *failed to demonstrate* and the Department *failed to determine* that the criteria for the use of the ERCs had been satisfied. For example, the Council argues that Sunoco improperly failed to demonstrate that ERCs are not available in the facility's nonattainment area. It does not argue that appropriate credits are available, and indeed, it specifically declines to do so. (Brief at 7 n.1.) Similarly, it makes no effort to show that the ERCs will fail to achieve ambient impact equivalence; it simply argues that the Department erred by failing to make a determination one way or the other. The Council's approach makes it unlikely

> from the start that its issues can be resolved on summary judgment. The absence of evidence does not necessarily equate to evidence of absence. Proving a negative while theoretically possible can be quite difficult….
>
> Further, whether the appropriate regulatory criteria have in fact been met is more important than whether the analysis was performed. It is not always necessary or appropriate to remand a permit for further analysis if the Board is able to conclude based upon its own record that the correct result was achieved. *See, e.g., Bennington Investment Group, LLC v. DEP*, EHB Docket No. 2015-190-M (Adjudication, July 8, 2019). …Finally, not all of the Council's arguments are easily severable from the other issues in the case, which renders partial summary judgment impractical.

Clean Air Council v. DEP, EHB Docket No. 2018-057-L, slip op. at 3-4 (Opinion and Order, July 19, 2019) (emphasis in original).

Following our Opinion, there was no activity on the docket until Sunoco filed a motion in limine on October 4, 2019. Sunoco sought to preclude the Appellants from availing themselves of the testimony of an expert witness whose identity was only revealed on September 13, 2019, and whose opinions had not yet as of that date been disclosed. The Department filed a letter in support of the motion on October 7. The Appellants opposed the motion in a response on October 21. We granted the motion in an Order dated October 24, 2019, relying on Rule 4003.5(b) of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 4003.5(b).

Reconsideration

The Appellants now ask for reconsideration or, in the alternative, interlocutory certification of our Order. Their request was filed on November 4. It incorporates and significantly expands in volume if not in substance upon the arguments laid out in their response to the motion in limine.[1] Sunoco responded on November 13, opposing both reconsideration and interlocutory certification. Sunoco tells us that the Department has concurred in its response. The Department has not filed its own response.

[1] For instance, the Appellants' memorandum of law in response to the motion in limine was eight pages, while their memorandum of law supporting reconsideration and interlocutory amendment is 21 pages.

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 that extraordinary circumstances justify consideration of the matter by the Board," 25 Pa. Code § 1021.151(a). *Rozum v. DEP*, 2018 EHB 289, 291. 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). Thus, "[r]econsideration 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." *DEP v. Danfelt*, 2012 EHB 519, 520 (quoting *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-79). *See also B&R Res., LLC v. DEP*, 2018 EHB 815. The official comment to 25 Pa. Code § 1021.151 states that reconsideration is an extraordinary remedy and is inappropriate for the vast majority of rulings issued by the Board.

The crux of the Appellants' argument on reconsideration is that we were not justified in granting the motion in limine—that the Appellants acted in full compliance with all applicable rules in identifying their expert well after the close of discovery and providing the substance of his opinions well after that, and that the Board misapplied the law on precluding expert testimony pursuant to Rule 4003.5 of the Rules of Civil Procedure.

The first reason why the Appellants' petition must be denied is that they essentially skip over the criteria for granting reconsideration. Indeed, their petition is a classic example of a party making the same arguments in a petition for reconsideration that were made in an earlier motion or response, except at a greater volume. In other words, the Appellants not only object; they *strongly* object. We have stated many times that this approach is simply not acceptable. *See New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 741, 745 (noting that the party seeking reconsideration simply repeated the arguments it made earlier and finding that "mere disagreement is not an appropriate basis for reconsideration."). *See also Starr v. DEP*, 2002 EHB 799, 808 ("Appellants have done little more than contend that the Board mistakenly applied the law. If reconsideration were available whenever a party disagreed with the Board's application of the law, reconsideration would cease to be an extraordinary remedy and would be granted as a matter of course.").

The Appellants have not explained how our Order granting the motion in limine rests on a legal ground or a factual finding that has not been proposed by any party. 25 Pa. Code § 1021.152(a)(1). They have not pointed to crucial facts that would justify a reversal of our decision and could not have been presented earlier. *Id.* at 1021.152(a)(2). In fact, the Appellants come right out and say in their petition that there is no dispute over the relevant facts. (Memo on Recon. at 4.) Nor have they demonstrated any extraordinary circumstances. *Id.* at 1021.151(a). On this basis alone, the Appellants' petition must be denied.

Although we could stop there, we will nevertheless address the Appellants' petition on its merits. The Appellants without so much as a hint of compunction argue that they should be allowed to call a last-minute expert to support their appeal. We need to put this request in its proper context before turning to an analysis of the law. First, the Appellants litigated this appeal

from May 2018 through September 2019 without giving any affirmative indication that they intended to present *any* expert testimony. Sunoco had originally served expert interrogatories to each of the Appellants on August 7, 2018 seeking, among other things, the identity of each expert witness expected to be called at trial, the subject matter of their testimony, the substance of their facts and opinions, and the grounds for each opinion. (Mot. in Limine, Tab A (at 10-11), Tab B (at 10-11).) The Appellants each responded on September 6, 2018 stating that they "ha[d] not yet identified any witnesses." (Mot. in Limine, Tab C (at 15), Tab D (at 15).) When the discovery period concluded after multiple extensions on May 1, 2019, the Appellants had still not identified any expert witnesses or otherwise amended their answers. Although the Appellants' failure to rely on expert testimony might have been somewhat surprising in another complex appeal of this nature, it was not particularly surprising in this case because Clean Air Council had just completed litigating its case without an expert in the recently concluded appeal that resulted in our January 9, 2019 Adjudication mentioned above (EHB Docket No. 2016-073-L). Given the Appellants' discovery answers, their filings, and Clean Air Council's past practice, Sunoco and the Department were entirely justified in approaching their defense of this appeal for nearly a year and a half and up to a few weeks before the hearing with the understanding that no experts would be called or required in defense in this appeal.

Then, at the eleventh hour, the Appellants revealed that they intended to rely on expert testimony. The Appellants jointly "supplemented" their discovery responses on September 13, 2019 to identify an expert witness for the first time, Dr. Ranajit Sahu. (Mot. in Limine, Tab E.) In their "supplemental" discovery response, the Appellants only provided broad topics on which Dr. Sahu was expected to testify:

> Appellants expect that Dr. Sahu will testify regarding (1) the West Warm Flare's potential to emit, including emissions from the steam boilers and from handling

> emergency flows; (2) the selection of the Lowest Achievable Emissions Rate (LAER) for the West Warm Flare; and (3) the requirements and demonstrations for the emissions reduction credits that Sunoco selected, including "ambient impact equivalence" under 25 Pa. Code § 127.208(3) and the "same conditions, limitations and characteristics" under 25 Pa. Code § 127.208(4).

(Mot. in Limine, Tab E (at 2).) Crucially, they did not state the subject of Dr. Sahu's facts and opinions on these topics or provide the grounds for those opinions, but instead said they would "produce as a supplemental answer the expert report of Dr. Sahu at such time as it is completed." (*Id.* at 2-3.) That report was provided to Sunoco and the Department on October 21, 2019, one week before the Appellants' pre-hearing memorandum was due, and perhaps not coincidentally, the same day the Appellants responded to Sunoco's motion in limine. The report was then filed as an exhibit to the Appellants' pre-hearing memorandum. It contains 29 pages of highly detailed technical opinions regarding, *inter alia*, Sunoco's potential to emit (PTE) calculations, the use of ERCs from the Crown Cork & Seal facility in Maryland, and the determination of LAER for the West Warm Flare. The Appellants for the first time proposed to fight in a battle of the experts never having told their opponents that there would be such a battle.

The Appellants' late revelation, whether intentional or not, has not merely changed how the Appellants intended to prove up the existing issues. Instead, by seeking to add an expert with never before identified opinions, they have on several key points changed the issues themselves. As we pointed out in our Opinion regarding partial summary judgment, the Appellants' case was largely built upon claims that Sunoco and the Department did not perform the required analyses. This is a question of fact (no analysis performed) and law (law requires such analyses) that at least arguably does not require an expert. Now, the Appellants have sought to materially change that approach to one that would include testimony about the technical propriety of the analyses

and the conclusions reached. The Appellants' effort to add an expert in reality disguises a far more fundamental change in the appeal.

For example (and without limitation), in their summary judgment papers the Appellants argued that Sunoco failed to demonstrate, and the Department failed to evaluate, that the ERCs used by Sunoco will provide "ambient impact equivalence." 25 Pa. Code § 127.208(3). But the Appellants' expert would take it several steps further and argue that the ERCs Sunoco used do not provide ambient impact equivalence because ozone formation is localized and pertinent modeling does not show that pollution reductions at the source of the ERCs would balance out increases at Marcus Hook. Similarly, the Appellants previously argued that Sunoco's potential to emit calculations are too low because Sunoco did not account for the West Warm Flare's increased steam demand on the auxiliary boilers, and because Sunoco did not account for emissions from emergency flows or emergency releases. The expert introduces what appear to be completely new and highly technical arguments on the calculations, such as (1) Sunoco's assumed 98% destruction efficiency for VOCs in the flare is unrealistically high; (2) Sunoco does not account for VOC emissions that will be generated by the flare itself as a result of combustion reactions; and (3) the NO_x emissions are underestimated because (we think) "a significant quantity of the flare gases will be or contain nitrogen. And, the presence of additional nitrogen in the waste gases to be flared can enhance the formation of NO_x, which would otherwise be only due to oxidation of atmospheric nitrogen." (*See* Sahu Report at 12-18.) There is nothing in the Appellants' supplemental discovery responses, let alone its earlier litigation in general, that would provide any indication that these arguments were forthcoming.[2]

[2] We should note that the Appellants have not attempted to expand upon or change every single aspect of their case. Several of the points in their pre-hearing memorandum may only require the application of facts to law, e.g., Regulation X required the Department to do X and the Department did not do it.

Expert discovery is to be conducted under tightly controlled circumstances as detailed in Rule 4003.5 of the Pennsylvania Rules of Civil Procedure.[3] *Tri-Realty Co. v. DEP*, 2015 EHB 184, 191-92. In response to expert interrogatories a party must identify expert witnesses expected to be called at trial *and* disclose the substance of the facts and opinions of the expert's anticipated testimony, either by answering the interrogatories directly or providing an expert report:

> A party may through interrogatories require
>
> (A) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
>
> (B) subject to the provisions of subdivision (a)(4), the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

Pa.R.C.P. No. 4003.5(a)(1). The Rule also spells out the consequence of failing to comply with the above provisions—the expert shall not be permitted to testify absent extenuating circumstances:

> An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule 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.

Pa.R.C.P. No. 4003.5(b). *See also DEP v. EQT*, 2016 EHB 489, 493.

The Appellants' do not dispute that the expert and his opinions were only recently revealed. Instead, they say that the tardy disclosure was entirely harmonious with the Rules of Civil Procedure and this Board's rules, and that the expert witness bar in Rule 4003.5(b) does not

[3] The Board has incorporated the Rules of Civil Procedure on discovery into our own rules. 25 Pa. Code § 1021.102(a).

even apply. The Appellants assert that Rule 4003.5 "emphatically does not require that an expert be hired or disclosure be made during the discovery period. The Rule does not state or suggest that." (Memo on Recon. at 5.) We think the suggestion is fairly strong given that the entire rule pertains to the "[d]iscovery of facts known and opinions held by an expert…," Pa.R.C.P. No. 4003.5(a), and indeed that entire chapter of the rules exclusively pertains to discovery, Pa.R.C.P. No. 4001 – 4009. The Appellants' imaginative reading begs the question: If Rule 4003.5 does not require disclosure of experts during the discovery period, then why would it require a party to serve expert interrogatories during the discovery period? Why have a rule on expert discovery at all?

The Appellants claim that "out of the hundreds of published decisions applying Rule 4003.5, not a single one holds that expert witnesses must be disclosed during the discovery period." (Memo on Recon. at 8.) It took little research to find a recent case saying precisely that. *See Casper v. Halstead*, 2016 Phila. Ct. Com. Pl. LEXIS 134 at *13-14 (2016) (Pa.R.A.P. 1925(a) opinion affirming an earlier ruling precluding an expert from testifying under Rule 4003.5 after the expert's report was produced a month after the deadline for completing discovery), *aff'd*, 168 A.3d 281, 2017 Pa. Super. Unpub. LEXIS 833 (Mar. 3, 2017). More importantly, we think that this Board has been quite clear on this point. In *Rural Area Concerned Citizens v. DEP*, 2010 EHB 337, 339, we stated "this Board has consistently held that expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries." (Citing *Midway Sewerage Auth. v. DER*, 1991 EHB 1445; *Chernicky Coal Co. v. DER*, 1985 EHB 360). *See also CMV Sewage Co. v. DEP*, 2010 EHB 725, 729 (same).

The Appellants cite a portion of the 1978 Explanatory Comment to Rule 4003.5 that provides: "If a party, in his answer to interrogatories, states that he has not yet retained his experts, he is under a duty to supplement his answer as provided by Rule 4007.4(1)." Rule 4007.4(1) imposes "a duty seasonably to supplement" a response to a discovery request seeking the identity of expert witnesses and the substance of their testimony. The Appellants say they did just that. But notably absent from the Appellants' arguments is any discussion of the word seasonable, which we think is the key assessment. Waiting a week before one's pre-hearing memorandum is due, and seven weeks before trial, to serve a comprehensive expert report that dramatically changes the focus of the case, which was originally requested in interrogatories served 14 months earlier, is not seasonable. We do not think a reasonable reading of the rules permits a party to use an indefinite, boilerplate response to create a loophole with open-ended authorization to supplement its expert discovery responses.

It bears emphasis that Rule 4003.5 requires not only the identity of the expert but also "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Pa.R.C.P. No. 4003.5(a)(1)(B). The Appellants repeatedly suggest that identifying Dr. Sahu's name and a few conclusory topics in mid-September should have calmed Sunoco and the Department's nerves. Indeed, not only would that be expected to have exactly the opposite effect, but it is *the substance* of an expert's testimony that is arguably of much greater importance to opposing parties than the mere identity of the expert and some topic sentences that do little more than roughly indicate the expert will testify on the issues raised in the appeal. The Appellants' "disclosure" of their expert in September is significantly different than the revelation of the expert's opinions in the report served on Sunoco and the Department

on October 21. Knowing the expert's name might yield an interesting Google search, but it is of little value without knowing that expert's opinions and the reasoning behind them.

A fundamental purpose of the discovery rules is to prevent surprise and allow a fair hearing on the merits. *Maddock v. DEP*, 2001 EHB 834, 835. *See also Midway Sewerage Auth. v. DER*, 1990 EHB 1554, 1560 ("It is a universally endorsed concept that justice in our trial courts is not served where lawyers use tactics designed for trial by ambush and unfair surprise."). To that end, "[i]dentification of expert witnesses at such a late stage defeats the purpose of discovery which is to prevent surprise and unfairness and to allow a fair hearing on the merits." *CMV Sewage*, 2010 EHB at 729. "It is unacceptable to allow a litigant to present an expert witness whose identity and opinions have not been properly disclosed during discovery." *McGinnis v. DEP*, 2010 EHB 489, 496.

Our Superior Court has cogently articulated why this is particularly apropos to the identification of experts and their opinions:

> The purpose of the discovery rules is to prevent surprise and unfairness and to allow a trial on the merits. When expert testimony is involved, it is even more crucial that surprise be prevented, since the attorneys will not have the requisite knowledge of the subject with which to effectively rebut unexpected testimony. By allowing for early identification of expert witnesses and their conclusions, the opposing side can prepare to respond appropriately instead of trying to match years of expertise on the spot. Thus, the rule serves as more than a procedural technicality; it provides a shield to prevent the unfair advantage of having a surprise witness testify.

Sindler v. Goldman, 454 A.2d 1054, 1056 (Pa. Super. 1982). An expert in a Board appeal can dramatically alter the orientation of the case, perhaps more so than in most cases at common law.

At some point it is simply unfair to the other parties to allow one party to fundamentally change its litigation strategy in the weeks leading up to a hearing. Perhaps the consideration would be slightly different if the Appellants had already identified some experts and were adding

a new expert on an issue that had been litigated for some time, or if an already-identified expert was adding data to or revising aspects of an existing opinion. But here, the Appellants pursued their case for well over a year without any experts at all.

The Appellants at one point acknowledge that Rule 4003.5 does not allow parties to disclose witnesses on the eve of trial, but they then fault the Board for not setting deadlines for expert discovery in a case management order. The Appellants say that our Pre-Hearing Order No. 1 sets a discovery deadline but not an expert disclosure deadline. They say that, apart from our Pre-Hearing Order No. 2 (which merely paraphrases our rule at 25 Pa. Code § 1021.104(a) concerning pre-hearing memoranda), "[n]o other provision in any Board order in this appeal sets requirements concerning expert witnesses." (Resp. to Mot. in Limine at 2.)

Our rules were revised nearly 15 years ago to eliminate the distinction between expert and non-expert discovery, specifically 25 Pa. Code § 1021.101 regarding prehearing procedure. As we explained in 2010 in *Rural Area Concerned Citizens v. DEP*, 2010 EHB 337:

> We would also like to take this opportunity to clear up any misconceptions about Board Rule 1021.101(a) dealing with pre-hearing procedure. That rule reads in relevant part as follows:
>
> > Upon the filing of an appeal, the Board will issue a prehearing order providing among other things, that:
> >
> > (1) **All** discovery shall be completed no later than 180 days from the date of the prehearing order.
> >
> > (2) The service of a report of an expert together with a statement of qualifications may be substituted for an answer to expert interrogatories.
>
> 25 Pa. Code § 1021.101(a)(l) and (2) (emphasis added).
>
> Under a prior version of the rule, discovery was segregated into fact discovery and expert discovery. The discovery period ran for 90 days and during this timeframe all requests for discovery – both expert and non-expert – were to be served. However, the response times differed depending on whether the request was for expert or non-expert discovery. *Non-expert discovery* followed the Pennsylvania Rules of Civil Procedure and required answers to be served within 30 days of service of the discovery request. Responses to *expert discovery* were

> not required to be served until 150 days after issuance of Pre-Hearing Order No. 1.
>
> **The rule was revised in 2005 to require that answers to *all* forms of discovery – both expert and non-expert – would be due 30 days after service of the discovery request; in other words, there is no longer a special timeframe for responding to expert discovery.** The revision to the rule was adopted in response to complaints from appellants that they have been unable to obtain information regarding the basis for the Department's action in the early stages of discovery because it often fell into the category of expert discovery and, therefore, did not have to be produced until after the close of the discovery period. The new rule allows parties to obtain expert information earlier in the discovery process. *Preamble to EHB Proposed Rulemaking 106-8,* 35 Pa.B. 2107 *et seq*….
>
> The Board still sees a number of cases where parties believe that they do not have to provide answers to expert discovery until the filing of the pre-hearing memorandum. **Let us be perfectly clear: Answers to expert discovery, which may include expert reports or answers to expert interrogatories, are due 30 days after service of the discovery request unless extended by the Board. Waiting to provide this information until the filing of the pre-hearing memorandum is a violation of the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure on discovery.**

Rural Area Concerned Citizens v. DEP, 2010 EHB 337, 341-43 (emphasis in italics in original, emphasis in bold added). *See also Cecil Twp. Mun. Auth. v. DEP*, 2010 EHB 551, 553-54 (same). The portion of the rule discussed in *Rural Area Concerned Citizens* remains the same today. It in no way allows a party to view discovery deadlines as meaningless with respect to experts. Parties are free to propose an alternative case management order, 25 Pa. Code § 1021.101(a)(4), and parties often do, but no such case management order was proposed in this case providing for separate expert discovery.

In addition, although our Pre-Hearing Order No. 2 and our corresponding rule require a list of expert witnesses and a summary of their testimony, a copy of their report, or their answers to expert interrogatories, these requirements *presuppose* that a party has already complied with its expert discovery obligations. The only way that it is appropriate for a party to identify an expert witness and their expected testimony for the first time in a pre-hearing memorandum (or

shortly before) is if the opposing parties never served expert interrogatories in the first place. *See DEP v. Angino*, 2006 EHB 278, 282; *Borough of Edinboro v. DEP*, 2003 EHB 725, 771.

The Board's rules and the duty of fairness to opposing parties should mean something. If the Appellants are permitted to proceed with a new expert adding essentially new claims under the circumstances presented here, we wonder why any party would need to be concerned about following the rules. Our ruling granting Sunoco's motion in limine is entirely consistent with Rule 4003.5 and the Board's own rules.

Of course, in the final analysis the decision whether to exclude an expert witness is a matter where we need to exercise our discretion on a case by case basis. The constellation of facts almost never perfectly aligns between one case and another. We bring our judgment to bear on the individual facts of this case while assessing them against precedents that, while they may not perfectly coincide, are nevertheless instructive. *See Feingold v. SEPTA*, 517 A.2d 1270, 1273 (Pa. 1986) (courts are to consider the individual facts and circumstances of each case in deciding whether to preclude expert testimony under Rule 4003.5). *See also Miller v. Brass Rail Tavern*, 664 A.2d 525, 532 n.5 (Pa. 1995). Although the language of Subsection (b) of Rule 4003.5 suggests a mandatory prohibition of a late expert, in exercising our discretion we typically consider the specific circumstances of the case and the relative prejudice to the parties. *Rhodes v. DEP*, 2009 EHB 237; *DEP v. Angino*, 2006 EHB 278; *Achenbach v. DEP*, 2006 EHB 218. In *Achenbach*, we considered the following factors when granting a motion to preclude expert testimony: (1) the prejudice caused to the opposing party and whether the prejudice can be cured; (2) the defaulting party's willfulness or bad faith; (3) the number of discovery violations; and (4) the importance of the precluded evidence. *Id.* at 223. Similar factors have been

employed by our Supreme Court. *See Feingold*, 517 A.2d at 1273. *See also City of Philadelphia v. FOP Lodge No. 5 (Breary)*, 985 A.2d 1259, 1270-71 (Pa. 2009).

The Appellants contend that there is no prejudice to Sunoco and the Department if we allow the Appellants to fundamentally change their case in chief by adding a new expert. Lacking any apparent sense of irony, the Appellants actually fault *Sunoco* for not filing its motion in limine sooner. To repeat, the opinions that Dr. Sahu would offer were only revealed a week before the Appellants filed their pre-hearing memorandum. It apparently took Dr. Sahu at least a month and a half to draft the 29 pages of opinions in his expert report, yet the Appellants say Sunoco and the Department can retain experts and come up with responsive reports in the few weeks remaining before the hearing. We would think it is abundantly clear at this point that the prejudice to Sunoco and the Department is self-evident. *CMV Sewage*, 2010 EHB at 731. The Appellants are presenting an entirely new witness, where before there was no expert testimony, to testify to multiple key issues that are themselves essentially new.

Of course, there is theoretically the option of delaying the hearing and allowing time for Sunoco and the Department to find and retain experts and generate expert reports. However, we are concerned with delaying the hearing further. We are told the new flare that is the sole subject of this appeal has been up and running for nearly a year, and the plan approval under appeal expired on October 13, 2019. Sunoco and the Department say the case is moot. Although we are not weighing in on the mootness argument one way or the other, further delaying the hearing does not seem to serve anyone's interests. If the flare is being operated pursuant to a plan approval issued in error, that situation should be addressed quickly. Postponing the hearing to allow for more discovery into the Appellants' dramatically new case, and for pre-hearing memoranda to likely be redone, is not an attractive option. All of this adds time and expense to

the administrative review of the permit. Permittees should not be required to hit a moving target and defend their permits indefinitely at never-ending expense. Sunoco is entitled to have the cloud hanging over its project resolved one way or another.

The Appellants say that the prejudice to themselves is great. They assert that Dr. Sahu's testimony is extremely important to their case, which seems like all the more reason they should have produced his expert opinions sooner. *See Kornberger v. Lehigh Valley Health Network, Inc.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1213 at *19, *aff'd*, 2018 Pa. Super. Unpub. LEXIS 2014 (June 11, 2018). We do not wish to minimize the importance of the testimony we are excluding. However, that importance was obvious from the beginning, *if* the Appellants had chosen to attack the conclusions of the analyses of Sunoco and the Department. To borrow language from the Appellants' response to the motion in limine in its characterization of the prejudice to the Department, "the prejudice is self-inflicted." (Resp. to Mot. in Limine at 7.) Whether from poor planning or otherwise, the Appellants' exigency is one of their own making. It is not, when viewed in combination with other factors, grounds for excusing the concomitant prejudice to the opposing parties.

Rule 4003.5 instructs that the failure to properly identify an expert and disclose the expert's opinions may be excused if the failure "is the result of extenuating circumstances beyond the control of the defaulting party…." Pa.R.C.P. No. 4003.5(b). However, the Appellants expressly disavowed the need to show any extenuating circumstances in their response to the motion in limine. They remarkably claimed that the "discussion of extenuating circumstances is beside the point. Appellants could not have disclosed an expert they had not yet identified. It is not that Appellants had mere extenuating circumstances regarding disclosure—disclosure was a literal impossibility." (Resp. to Mot. in Limine at 6.) We suppose it is true that

one cannot disclose something that does not exist, but that entirely misses the point of the rules and the duty of fairness to opposing parties and counsel. If the Appellants' logic held up, a party could wait until days before trial to seek out an expert so long as the party quickly disclosed its expert's opinions after identifying the expert. Implicit in the duty to make a timely disclosure is the duty to also satisfy the prerequisites for making a timely disclosure. Retaining an expert in a timely manner is an obvious prerequisite. The duty of timeliness relates to the litigation as a whole and the hearing in particular, not merely the time between the identification of a witness and the disclosure of their opinions.

Despite failing to see the need to show extenuating circumstances, in their response to the motion in limine the Appellants offered a litany of unconvincing excuses as to why the late-identified expert should be permitted to testify. The Appellants first noted that they responded to interrogatories asking for the identification of witnesses the same way that Sunoco and the Department did—that they had not yet determined who they would call to testify as fact or expert witnesses. The Appellants also said that the Department supplemented its discovery at the end of June and added more documents and witnesses. We are not sure why this is relevant to Sunoco's motion in limine or excuses the Appellants' conduct. The Appellants' remedy if they take issue with the Department's or Sunoco's discovery responses is to file their own appropriate motion, not use the conduct as a justification for their own behavior.

In a footnote to their motion in limine response, the Appellants observed that "[i]nterestingly enough, despite neither Sunoco nor the Department identifying testifying experts either, a grant of Sunoco's proposed order would exclude *only Appellants* from introducing expert testimony." (Resp. to Mot. in Limine at 7 n.2 (emphasis in original).) The Appellants seem to feel they are being treated unfairly. However, we are concerned that *all* the parties be

treated with equal fairness, and allowing the Appellants to proceed as they have would be unfair to Sunoco and the Department. The obvious reason that only the Appellants are being precluded from offering expert testimony is because only the Appellants attempted to introduce expert testimony at the last minute. In obvious and justifiable reliance on the Appellants' earlier litigation, neither the Department nor Sunoco has proposed to call any experts.

It is important to remember that the Appellants bear the burden of proof in this case. 25 Pa. Code § 1021.122(c)(2). They need to come forward with evidence showing that the Department's issuance of the plan approval was unreasonable, contrary to law, or not supported by the facts. Sunoco and the Department are defending the issuance of the plan approval. To a certain extent, the cases they put on are reflective of the case put on by the Appellants. If the Appellants have made the calculation that they can meet that burden of proof without an expert, which is precisely what Clean Air Council did in its earlier appeal of a Marcus Hook plan approval, then it obviously factors into the litigation strategy of the Department and Sunoco. Sunoco and the Department in turn may have made the reasonable calculation that they do not want to call their own experts and open them up to the Appellants' cross-examination if there is no opposing expert testimony in the first place.

The Appellants then pointed to our Opinion and Order denying their motion for partial summary judgment and said it was only after reading our Opinion that it became clear to them that they would need an expert witness, and that they notified the Department and Sunoco of their desire to retain an expert witness "as promptly as possible," 53 days after our Opinion was issued. The Appellants were apparently enlightened by statements we made in our Opinion such as: "The Council presents complicated technical arguments regarding $PM_{2.5}$ without any reference to supporting explanatory expert opinion[;]" and "[The Council] does not point to any

testimony from its own witnesses to show that the ERCs fail the test, which doubtless explains why it repeatedly limits itself to arguing that the Department failed to make the required determination." (Slip op. at 10, 8.)

Our statements do not seem particularly revelatory. And even so, we are not sure why we have to tell an appellant that it needs an expert witness in its own appeal, or why this sudden epiphany should excuse delinquent behavior in discovery. *See CMV Sewage*, 2010 EHB at 730 (rejecting an appellant's argument that a previous Board Opinion denying summary judgment made it clear that the appellant would need expert testimony and concluding that "None of CMV's reasons for its late disclosure rise to the level of justifiable extenuating circumstances beyond its control or otherwise excuse its conduct.") The Appellants are represented by able counsel who have significant experience litigating before the Board. Most Board appeals of even modest complexity benefit from, if not almost entirely turn upon, expert testimony, to say nothing of the inherent complexity of an air quality plan approval appeal. As we said in *Maddock v. DEP*, 2001 EHB 834:

> The nature of proceedings before this Board, more often than not, turns on conflicting expert testimony offered by opposing parties. To allow a party to produce such an expert, with the merits hearing approaching, when it could have hired the expert and produced his report sooner, unnecessarily precludes or severely limits an opposing party's ability to prepare for that expert testimony.

2001 EHB at 835.

Nevertheless, the Appellants' argument is undercut at least in part by the scope of Dr. Sahu's proposed testimony. As noted above, the Appellants' motion for partial summary judgment pertained to some issues regarding emissions reduction credits and the West Warm Flare's potential to emit. Yet, in the Appellants' discovery "supplementation," they said that Dr. Sahu would also testify about "the selection of the Lowest Achievable Emissions Rate (LAER)

for the West Warm Flare" (Mot. in Limine, Tab E (at 2)), which his report indeed addresses. But our Opinion and the Appellants' motion never mention LAER, so the Appellants telling us that our Opinion somehow prompted the Appellants to divine that they needed an expert on that issue is concerning.

The Appellants also disingenuously claimed that our "summary judgment ruling made trial a certainty." (Resp. to Mot. in Limine at 4.) But the Appellants only moved for *partial* summary judgment on the issues relating to ERCs. There are many other issues raised in the Appellants' notice of appeal, including the objection that the plan approval fails to satisfy LAER. Even if we *granted* the Appellants' motion for partial summary judgment in its entirety, the case would still be going to a hearing. Fully aware of this, we issued our Pre-Hearing Order No. 2 on June 6, 2019, scheduling the hearing even before we received the responses to the summary judgment motion. Another way of stating the Appellants' argument is that parties should be allowed to file a summary judgment motion, see how the Board rules, then decide whether to hire an expert. Although we would have thought it would go without saying, that approach is entirely unacceptable. The default assumption when commencing litigation should not be that a party will prevail on summary judgment, even partially. The default assumption should be that a case will go to a hearing on the merits, and all the preparations that are necessary prerequisites for going to a hearing should be completed.

The Appellants next attempt to rationalize their behavior by saying that experts are expensive and nonprofit entities do not have a lot of money. Again, we do not know why this somehow excuses surprising an expert witness on the opposing parties months after the close of discovery. We cannot create separate standards for expert disclosures depending on the relative

assets of the appellant in an individual case. The Appellants chose to bring this appeal, and in doing so they should have adequately prepared.

Interlocutory Appeal

Having denied reconsideration, we now turn to the Appellants' alternative request that we amend our Order granting the motion in limine to certify it for immediate appeal to the Commonwealth Court. Interlocutory appeals by permission are governed by Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 312. Rule 1311(a) states that an interlocutory appeal may be taken by permission pursuant to 42 Pa.C.S. § 702(b), which provides:

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

42 Pa.C.S. § 702(b) (emphasis added). 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). *See also* 25 Pa. Code § 1021.153.

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. *Clean Air Council v. DEP*, 2018 EHB 120, 122; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 836. We make our determination based on an assessment of the three criteria of

Section 702(b): (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. If the moving party fails to satisfy one or more of these criteria, their request necessarily fails. *Erie Coke Corp. v. DEP*, EHB Docket No. 2019-069-B, slip op. at 3 (Opinion and Order, Sep. 26, 2019); *Clean Air Council v. DEP*, 2013 EHB 437, 440. Our decision of whether to amend an interlocutory order is discretionary. *Becker*, 2016 EHB at 70; *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 550; *Mercy Hosp. of Pittsburgh v. Pa. Human Relations Comm'n*, 451 A.2d 1357 (Pa. 1982). In exercising that discretion we also take into consideration that, because an interlocutory order is not final, it is not appealable except in remarkable circumstances, and in general these types of appeals are not favored by the law. *Erie Coke*, slip op. at 3-4 (citing *Clean Air Council*, 2018 EHB at 121); *Clean Air Council*, 2013 EHB at 440; *BethEnergy Mines, Inc. v. DEP*, 1987 EHB 941, 943.

The Appellants have crafted three questions that they believe are questions of law central to our ruling on the motion in limine:

- Whether Pennsylvania Rule of Civil Procedure 4003.5(b) required Appellants to procure and identify expert witnesses, and produce their reports, by the close of discovery.
- Whether the sanction of exclusion of witnesses can be levied against Appellants if they did not violate any rules or orders.
- If the answer is no to each of these previous questions, did the Board abuse its discretion by granting Sunoco's motion in limine?

(Memo on Recon. at 18.) The Appellants then contend that these are controlling questions of law because "[w]hether Appellants can call any experts to testify on their behalf to support the claims raised in their appeal depends on the answers to the questions of law presented above." (Memo on Recon. at 18.) Initially, we reject the Appellants' conception and framing of these "questions of law." The question really is whether we should permit a party to spring an expert witness with extensive opinions on the opposing parties shortly before a hearing.

The Appellants are trying to divorce any underlying legal issues from the factual scenario surrounding their conduct. Granting the motion in limine was a judgment call, as it almost always is. As discussed extensively above, we considered the Appellants' inexcusably dilatory conduct in failing to identify, or by their own admission even attempt to obtain, any expert until months after the close of discovery, and we evaluated the effects of allowing or precluding the expert testimony. The entire point of the expert disclosure rules is so that the parties know the basic opinions that are going to be expressed by the expert along with the bases for those opinions. Those opinions came far too late in our judgment.

In support of their position, the Appellants cite *Waste Management of Pennsylvania, Inc. v. DEP*, 2014 EHB 300, where we amended our Opinion and Order denying summary judgment to certify it for interlocutory appeal. But that case involved a pure question of law regarding whether the Municipal Waste Planning, Recycling and Waste Reduction Act permitted a county to request voluntary payments from waste disposal facilities to help cover a deficit in the county's recycling funding. That issue was at the heart of the appellants' case and is drastically different than the discovery ruling we made here. Indeed, after the Commonwealth Court affirmed our decision, the appeal was withdrawn without further activity and before ever reaching a hearing. *See Waste Mgmt. of Pa. v. Dep't of Envtl. Prot.*, 107 A.3d 273 (Pa. Cmwlth.

2015). We think it would be difficult to find a controlling question of law in almost any order granting or denying a motion in limine of this sort. *Cf. B&R Res., LLC v. DEP*, 2018 EHB 815, 817 ("We do not see how this ruling, an interlocutory procedural ruling on the proper scope of discovery, involves a controlling question of law appropriate for certification to the Commonwealth Court or how doing so would materially advance the resolution of this case.").

We also fail to see how certifying the question would advance the ultimate termination of the matter. The hearing is scheduled to begin in a few weeks. Certifying our decision regarding case management would perforce result in an indefinite extension of that hearing as a practical matter. The presentation of facts would be put into question depending upon the Appellants' new approach. We would expect that new opinions would require new facts. Finally, we frankly do not see that there is substantial ground for difference of opinion on whether the Appellants should be allowed to proceed in complete derogation of our rules as they have.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL AND ENVIRONMENTAL INTEGRITY PROJECT	:	
v.	:	**EHB Docket No. 2018-057-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PARTNERS MARKETING & TERMINALS, L.P., Permittee	:	

O R D E R

AND NOW, this 22nd day of November, 2019, it is hereby ordered that the Appellants' petition for reconsideration of our Order dated October 24, 2019 and motion in the alternative to amend that Order for interlocutory appeal are **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 22, 2019

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

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
v.	:	**EHB Docket No. 2018-065-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 26, 2019**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT AND
MOTION TO STRIKE CROSS-MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis

The Board denies a motion for summary judgment filed by the Department where it is not clear as a matter of undisputed fact that the appellant undertook an acre or more of earth disturbance, thereby necessitating an NPDES permit. The Board grants a motion to strike a cross-motion for summary judgment filed by the appellant in conjunction with the appellant's summary judgment response because it was filed after the deadline for filing dispositive motions and it seeks judgment on issues beyond what was raised in the Department's summary judgment motion.

O P I N I O N

Appellants Hickory Hill Group, LLC and John Seitz (collectively "Hickory Hill") have appealed a compliance order issued by the Department of Environmental Protection (the "Department"), which alleges, among other things, that Hickory Hill conducted earth disturbance activities without a permit and without implementing best management practices (BMPs), and

that it failed to temporarily stabilize the site, which resulted in the potential for sediment pollution to reach a nearby stream in East Nottingham Township, Chester County. The order requires Hickory Hill to (1) cease all earth disturbance activities, (2) implement appropriate BMPs, (3) stabilize all disturbed areas, (4) delineate the wetlands on the property, and (5) submit a notice of intent for coverage under an NPDES permit for stormwater discharges associated with construction activities. We have been told that Hickory Hill has complied with all the requirements of the order except for the submission of the notice of intent for NPDES permit coverage.

The Department has now moved for summary judgment on the issue of the NPDES permit, arguing that the undisputed facts show that Hickory Hill's earth disturbance activities trigger the requirements for an NPDES permit. Hickory Hill opposes the motion, contending that not all of its activities qualify as "earth disturbance activities," that its activities at the site were separate projects undertaken in response to conditions as they were discovered, and that, even assuming that all its activities were "earth disturbance activities" and all part of a single project, the total area of disturbance still does not reach the one-acre regulatory threshold requiring an NPDES permit. Hickory Hill has also filed a cross-motion for summary judgment, which the Department has moved to strike.

Summary judgment may be granted when the record, including pleadings, depositions, answers to interrogatories and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-08. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the nonmoving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to

whether genuine issues of material fact remain must be resolved against the moving party. *Clean Air Council v. DEP*, 2013 EHB 404, 406 (citing *Rozum v. DEP*, 2008 EHB 731). Summary judgment will only be granted in the clearest of cases where the right is free from doubt. *Eighty Four Mining Co. v. DEP*, EHB Docket No. 2019-099-L (Opinion and Order, Sep. 30, 2019); *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217; *Macyda v. DEP*, 2011 EHB 526.

Many of the facts in this matter are not in dispute. In 2014, Hickory Hill purchased parcels of land along Hickory Hill Road, one of which is the subject of this appeal. The parcel is located at 1026 Hickory Hill Road and consists of 1.9 acres. The parties have referred to four different areas within the 1026 parcel as Areas 1-4. The 1026 site had historically been used as an outside storage area for a junkyard, and Hickory Hill intended to continue to use it that way when it purchased the property, but it was overgrown and portions of it contained unclean fill with rebar and broken concrete. (DEP Ex. B, Deposition of John Seitz (at 40-41).) Hickory Hill cut down trees, dug up buried junk, tires, and scrap metal with a backhoe, leveled existing piles of dirt, brought in fill to further level out the property, and spread asphalt millings with a bulldozer. (*Id.* (at 40-45, 48-50, 56, 59, 64).) Hickory Hill dug ten to twenty holes of varying sizes with some six to seven feet deep, and others only three to four feet deep. (*Id.* (at 62-64).) It estimated the largest hole it dug was eight feet wide by eight feet long by eight feet deep. (*Id.* (at 64).) Hickory Hill also replaced an old, existing pipe with a 24-inch HDPE pipe to carry stormwater. (*Id.* at 37-38.)

The primary disagreement between the parties is on the factual issue of whether Hickory Hill disturbed an acre or more of area. The Department says that it has calculated that Hickory Hill disturbed 1.3 acres of area. Hickory Hill says it only disturbed .93 acres of area. The one-

acre threshold is important because under the regulations it is the point at which a person conducting earth disturbance needs to obtain an NPDES permit:

> [A] person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a).[1]

Hickory Hill focuses on the language in 25 Pa. Code § 102.5(a) addressing a "larger common plan of development" and says that there were three separate projects involving earth disturbance: (1) replacing a pipe in Area 1; (2) removing weeds and trees from Areas 3 and 4, leveling out the land, and spreading asphalt millings; and (3) removing buried junk from Area 2. Specifically with respect to Area 2, Hickory Hill says that it was not part of any "plan" to prepare the property for use as a junkyard and auto storage lot because it was simply responding to the junk material it found buried and sticking up out of the ground. Therefore, Hickory Hill says that Area 2 should not be included in the overall disturbance, and the disturbance on Areas 1, 3 and 4 only totals .93 acres. However, Hickory Hill also claims that, even if you factor in the specific area of the individual holes it dug up in Area 2, the disturbance still falls short of the one-acre threshold.

In support of its contention that the earth disturbance exceeded one acre, the Department attaches to its motion an affidavit from Frank DeFrancesco, a compliance specialist in the Department's waterways and wetlands program for 26 years. (DEP Ex. D.) Mr. DeFrancesco avers that he performed areal calculations using a plan sheet map of the site supplied by Hickory

[1] Relevant to other aspects of the Department's order, we note that even absent an NPDES permit a person conducting earth disturbance activity still needs to implement erosion and sediment control BMPs for any size disturbance. 25 Pa. Code § 102.4(b)(1).

Hill and cross-referencing it to Google Earth aerial imagery showing the site before and after it was disturbed. Using the plan sheet, he divided the area of his understanding of the earth disturbance into 12 polygons, determined the square footage of each, and totaled it up to 1.3 acres. He then ran an aerial calculation using Google Earth to estimate an area of 1.4 acres. While we have no reason to doubt Mr. DeFrancesco's calculations, they are difficult to follow on paper. We only have his divided polygons and a list of his estimated square footage of each, but not the calculations behind the square footage estimates. Nor do we have a clear sense of the steps taken to obtain an aerial estimate in Google Earth.

We think the calculations of both parties would be best explained at the hearing on the merits where the respective sides can walk us through how they reach their numbers. Until then, we cannot conclude that this matter is free from doubt, which means summary judgment is inappropriate.[2]

Motion to Strike Hickory Hill's Cross-Motion

In conjunction with its response to the Department's motion on October 15, 2019, Hickory Hill also filed a cross-motion for summary judgment, seeking judgment on the other two violations noted in the Department's order—failure to implement and maintain E&S BMPs, and failure to provide temporary stabilization, both resulting in the potential for pollution to waters of the Commonwealth. On the Department's order, the stream identified as receiving potential pollution is an Unnamed Tributary to the West Branch of Big Elk Creek. In a footnote to the Department's motion for summary judgment, and in an attached affidavit from the person who issued the Department's order, the Department explains that it identified the wrong stream on the

[2] Hickory Hill also argues that placing and spreading asphalt millings is not an "earth disturbance activity" because asphalt millings are man-made materials, not "soil, rock or earth materials" as laid out in the regulatory definition. 25 Pa. Code § 102.1. Putting aside the merits of the argument, it is unclear to us to what extent the scope of tree removal and leveling in Areas 3 and 4 is different from the scope of spreading asphalt millings, but we look forward to further elucidation at the hearing on the merits.

order. The order should instead list an Unnamed Tributary to Little Elk Creek. (DEP Ex. D.) Hickory Hill latches onto this error and argues in its cross-motion that the two violations in the order are therefore "untrue," and the Board should grant judgment in favor of Hickory Hill on those violations.

On the same day the Department filed its reply brief in support of its motion for summary judgment, it also filed a motion to strike Hickory Hill's cross-motion, arguing that it is a dispositive motion that was filed more than a month after the September 12, 2019 deadline for filing such motions. Hickory Hill has not responded to the Department's motion to strike.

We recently confronted the issue of striking a cross-motion for summary judgment in *Joshi v. DEP*, 2018 EHB 771. In *Joshi*, the Department and the permittee filed a joint motion for summary judgment seeking judgment on the four issues raised in the appellant's notice of appeal. The appellant responded in accordance with our rules but included in his response a cross-motion for summary judgment and a statement of facts in support of that cross-motion. The appellant filed a single brief in support of his arguments in opposition to the joint motion for summary judgment and in support of his own cross-motion. The Department and permittee then filed a joint motion to strike the appellant's cross-motion. In our Opinion granting in part the joint motion to strike, we observed:

> Our rules do not provide for cross-motions filed after the deadline for filing dispositive motions. Mr. Joshi should have filed a motion asking the Board's permission to file an untimely motion for summary judgment. Any deadline (other than the jurisdictional deadline for filing an appeal) may be extended by the Board for good cause upon motion. 25 Pa. Code § 1021.12(a). Calling a motion a "cross-motion" has no real legal significance under the Board's rules. For example, calling a motion for summary judgment a "cross-motion" does not entitle the filer to simply disregard the deadline for filing dispositive motions set forth in our rules and orders.

Joshi v. DEP, 2018 EHB 771, 772-73.

In assessing the motion to strike in *Joshi*, we took into account certain considerations, such as the prejudice to the opposing parties, the status of the underlying litigation, the extent that the cross-motion raised issues beyond those raised in the original motion, and whether the interests of the parties would best be served by resolving the issues all at once. *Id.* at 773. In *Joshi*, we allowed the cross-motion to the extent that the appellant merely asked for judgment in his favor on the same issues raised in the Department and permittee's original joint motion for summary judgment. We struck the cross-motion to the extent it raised new issues not previously covered by the appellant's notice of appeal, but we did so without prejudice to the appellant's right to move to amend his notice of appeal to include those issues.

Assessing those factors here, we conclude that striking the cross-motion in its entirety is appropriate. Hickory Hill's cross-motion raises issues that are not at all covered in the Department's motion for summary judgment, which is confined to whether Hickory Hill disturbed an acre or more of land. We think this is a key consideration. It would be one thing if Hickory Hill asked for judgment in its favor on the acre of earth disturbance, but here it is raising completely different issues relating to separate alleged violations in the Department's order. Allowing this sort cross-motion would set a precedent that any party could raise any issue long after the dispositive motion deadline as long as they labeled it a "cross-motion." If Hickory Hill wanted to seek summary judgment on these issues, it should have filed its own summary judgment motion on or before the September 12 deadline.

Although we are striking the cross-motion, we do not think that Hickory Hill is advancing a winning argument. In our view, the important part of the violation is potential pollution to *waters of the Commonwealth*. The order could have said that alone. The error in the identified receiving stream is almost immaterial. Further, the Board has the authority to modify

an action of the Department and can potentially correct the order to have the appropriate stream identified. *See, e.g., Becker v. DEP*, 2018 EHB 283 (revising an order of the Department to account for the passage of time and changed circumstances); *Friends of Lackawanna v. DEP*, 2017 EHB 1123 (revising a waste management permit to add a new condition); *Stedge v. DEP*, 2015 EHB 577 (revising an authorization for permit coverage to add a new condition).

We issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HICKORY HILL GROUP, LLC/JOHN SEITZ	:	
	:	
v.	:	**EHB Docket No. 2018-065-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 26th day of November, 2019, it is hereby ordered as follows:

1. The Department's motion for summary judgment is **denied**.
2. The Department's unopposed motion to strike the Appellants' cross-motion for summary judgment is **granted**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: November 26, 2019

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

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

For Appellant:
Thomas J. Wagner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN FLOYD CAREY, SR.	:	
	:	
v.	:	**EHB Docket No. 2015-036-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 2, 2019**
	:	

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

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis

Pursuant to the Storage Tank Act and underlying regulations, the Department of Environmental Protection is authorized to order the permanent closure of underground storage tanks that were placed temporarily out of service in 2001. The Board's review of this matter is *de novo*. Where the tanks have been pumped to empty, and the record does not demonstrate a risk of harm to the public or the environment, the Appellant is granted additional time to fulfill his obligations under the Storage Tank Act. Additionally, the Board exercises its discretion to reduce the amount that the Appellant owes in registration fees.

Background

This matter involves an appeal filed by John Floyd Carey challenging an Administrative Order issued by the Department of Environmental Protection (Department) on March 2, 2015. The Administrative Order directs Mr. Carey to permanently close five regulated underground storage tanks for which he is the permittee and to pay $3,250 in back storage tank registration fees and $3,372.16 in back USTIF fees. A hearing in this matter was held on May 16, 2019 before The Honorable Thomas W. Renwand. Post-hearing briefs were filed by the Department

on July 19, 2019 and by Mr. Carey on September 20, 2019. Reply briefs were filed on October 1, 2019 and October 24, 2019 by the Department and Mr. Carey, respectively. This matter is now ready for adjudication.

FINDINGS OF FACT

1. The Department of Environmental Protection (Department) is the agency with the responsibility and duty to administer and enforce the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, as amended, 35 P.S. § 6021.101 et seq.; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17; and the regulations promulgated under the Storage Tank Act.

2. John Floyd Carey, Sr. is the permittee of property located at Route 120 Main Street, Village of Sinnemahoning, Gibsonia Township, Cameron County, PA 15861 (the property). (J.S. 1)[1]

3. Previously situated on the property was Carey's Country Store, consisting of a retail grocery store, an automotive Pennsylvania Inspection Station garage and a single-family dwelling (collectively referred to as "the store.") (J.S. 3)

4. The property also includes an underground storage tank system. (J.S. 4)

5. Mr. Carey purchased the store in 1995. (T. 106)[2]

6. When Mr. Carey purchased the store, he replaced the existing tanks and installed monitors. (T. 107)

7. The tanks purchased by Mr. Carey came with a 30-year warranty. (T. 107; Appellant Ex. A)

[1] J.S. refers to the parties' Joint Stipulation of Facts filed on May 15, 2019.

[2] T. refers to the transcript of the hearing on May 16, 2019.

8. For the Department's purposes, there are five regulated underground storage tanks on the property, which include one single tank and two tanks split into two chambers. The tanks consist of the following: a 12,000 gallon chambered tank, containing a 3,000 gallon chamber used for premium gasoline and a 9,000 gallon chamber used for regular gasoline; a 2,000 gallon tank used for kerosene; and a 2,000 gallon chambered tank, containing a 1,000 gallon chamber used for on-road diesel and a 1,000 gallon chamber used for off-road diesel.[3] (T. 16-17, 108; Appellant Ex. C)

9. There was a fire at the property on October 11, 2001 (T. 106)

10. On November 9, 2001, Mr. Carey submitted a registration form to the Department declaring the status of the underground storage tank system as "temporarily out of service" as of October 16, 2001. (J. S. 5)

11. On November 11, 2002, Mr. Carey had the kerosene tank, on-road diesel tank and off-road diesel tank pumped to one inch of product. (T. 113-14; Appellant Ex. H)

12. On November 17 or 18, 2002, Mr. Carey had the remaining tanks pumped to within one inch of product. (T. 114; Appellant Ex. H)

13. By letter dated April 11, 2003, the Department contacted Mr. Carey regarding a July 18, 2001 Notice of Violation. The April 11, 2003 letter stated that "the list of violations has been brought into compliance." (Appellant Ex. AAA)

14. By letter dated February 10, 2005, the Department approved a Remedial Action Completion Report submitted for Carey's Country Store on January 18, 2005. (Appellant Ex. UU)

[3] Because two of the tanks are divided into two compartments, Mr. Carey refers to the number of tanks as "three." For the Department's purposes, there are "five" regulated tanks. (T. 16-17, 108)

15. In a letter dated August 4, 2014, the Department notified Mr. Carey that "Department inspections have verified that the tanks are empty (ie. [sic] less than one inch of product)." (Appellant Ex. N)

16. In order for a tank to be considered "temporarily out of service," it must contain an inch or less of product. (T. 50)

17. Tanks that are temporarily out of service are not required to undergo monthly release detection. (T. 50-51)

18. The August 4, 2014 letter also advised Mr. Carey that "Department regulations specify that storage tanks may be in [temporary out of service] status for a period of three (3) years, after which they must be permanently closed or put back into service." (Appellant Ex. N)

19. The August 4, 2014 letter advised Mr. Carey that he owed $3,250 in storage tank registration fees and $3,372.16 in Underground Storage Tank Indemnification Fund (USTIF) fees." (Appellant Ex. N)

20. The Underground Storage Tank Indemnification Fund (USTIF) is an industry-wide insurance fund for underground storage tanks administered by the Pennsylvania Department of Insurance. (T. 18)

21. Owners of underground storage tanks pay into the insurance fund. (T. 17-18)

22. Mr. Carey has not paid into USTIF since November 2001. (T. 20)

23. The Department requires a registration fee of $50 per tank per year. (T. 20)

24. Mr. Carey had not paid registration fees for his tanks for approximately 17 years as of the date of the hearing in May 2019. (T. 22)

25. Mr. Carey's tanks have not been inspected pursuant to the Department's regulations since July 2001. (T. 23)

26. No corrosion testing of the tanks has been done since July 2001. (T. 25)

27. From April 11, 2003, at which time the Department notified Mr. Carey that all prior violations had been corrected, until its letter of August 4, 2014, Mr. Carey received no notice from the Department that the underground storage tanks were not in compliance. (T. 115-16)

28. On March 2, 2015, the Department issued the Administrative Order that is the subject of this appeal. (Department Ex. 2)

29. The Administrative Order requires Mr. Carey to pay $3,250 in back storage tank registration fees and $3,372.16 in back USTIF fees; retain the services of a Department-certified storage tank handler to oversee the permanent closure of the underground storage tanks on the property; and permanently close the underground storage tanks by June 30, 2015. (Department Ex. 2)

30. As of the date of the hearing, the registration and USTIF fees had not been paid, and the underground storage tanks had not been permanently closed. (T. 43)

31. At the time of the hearing, Douglas Overdorff had been employed by the Department for over 35 years. (T. 13) At the time of the hearing, he was an Environmental Protection Compliance Specialist in the Environmental Cleanup and Brownsfield Program. (T. 13-14)

32. Mr. Overdorff visited the property on April 18, 2019 and measured the amount of liquid present in the underground storage tanks. (T. 27; Department Ex. 17)

33. On April 18, 2019, the 9,000 gallon tank contained one-half inch of liquid; the 3,000 gallon tank contained two inches of liquid; the western 1,000 gallon tank contained 2 ¼

inches of liquid; the eastern 1,000 gallon tank contained 2 ¼ inches of liquid; and the 2,000 gallon tank contained 1 ½ inches of liquid. (T. 29-30; Department Ex. 17)

34. In order to determine how much of the liquid is petroleum product, the Department inspector uses "water-finding paste" which changes color if the liquid is partially water. (T. 30)

35. The testing done on April 18, 2019 showed that water was present in conjunction with petroleum product in the tanks. (T. 30-31; Department Ex. 19)

36. Based on Mr. Overdorff's readings, the following amount of product was present in the tanks on April 18, 2019: four gallons of gasoline in the 9,000 gallon tank; five gallons of gasoline in the 3,000 gallon tank; five gallons of petroleum product in the western 1,000 gallon tank; 10 gallons of petroleum product in the eastern 1,000 gallon tank; and 13 gallons of kerosene in the 2,000 gallon tank. (T. 33-34; Department Ex. 17)

37. Mr. Overdorff has no reason to believe that Mr. Carey's tanks were not pumped empty (one inch or less of product) in November 2001. (T. 51)

38. Mr. Overdorff tested the tanks three times in the three years leading up to the hearing, from approximately April 2016 to April 2019. (T. 85, 100) During those inspections, the amount of product in the tanks has remained approximately the same. (T. 90, 100)

39. There is no electronic means of determining whether there has been any leakage associated with the underground storage tanks on the property. (T. 36)

40. The only method of determining leakage is to monitor the volume of liquid material in the tanks. However, the volume can vary over time with expansion and contraction that occurs with the various seasons; the volume can also vary due to the evaporation of water. (T. 37)

41. The tank measurements do not indicate that the tanks are leaking. (T. 100)

42. The Department has not made a determination that the tanks are leaking. (T. 99)

43. Mr. Carey is 74 years old. (J.S. 10)

44. His first job was in a coal mine, where he began working when he was approximately 14 or 15 years old. (T. 104)

45. He worked for GTE for 21 years, after which he began his own company. (T. 105)

46. Mr. Carey also did construction work for the government in Puerto Rico beginning in the 1970s. (T. 105)

47. His health issues include the following: COPD, emphysema, asthma, black lung and obstructive sleep apnea. (T. 124)

48. Mr. Carey served 14 years in federal prison and was released on March 26, 2019. (J.S. 9; T. 124) At the time of the hearing, Mr. Carey had been out of prison for approximately five weeks. (T. 127)

49. Mr. Carey has a bank account consisting of $25.00. The funds were given to him by his daughter so that he could open an account which allowed direct deposit of his Social Security. (T. 126)

50. Mr. Carey became eligible to receive Social Security effective May 22, 2019. He did not receive Social Security while in federal prison. (T. 126)

51. Mr. Carey testified that he plans to take care of the tanks but needs approximately one year to do so. (T. 127-28)

DISCUSSION

In this appeal of an Administrative Order issued by the Department, the Department has the burden of proving by a preponderance of the evidence that its order was lawful and a reasonable exercise of its discretion and is supported by the evidence presented. 25 Pa. Code § 1021.122(b)(4); *Liddick v. DEP*, 2018 EHB 207, 215; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153-54. The Board reviews Department actions *de novo* and is able to consider evidence that was not presented to the Department when it made the decision that is the subject of the appeal. *Robinson Coal*, 2015 EHB at 153-54; *O'Reilly v. DEP*, 2001 EHB 19, 32. *See Gerhart v. DEP*, EHB Docket No. 2017-013-L (Adjudication issued September 25, 2019) ("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.") (citing *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.)

Where the Department's action is discretionary, we may exercise our discretion in modifying the Department's action based on the record before us. *Pequea Township v. Herr*, 716 A.2d 678, 686; *Lyons v. DEP*, 2011 EHB 169, 186-87 (citing *Pequea Township*, and quoting *Leatherwood v. Department of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003)). As explained by the Commonwealth Court in *Pequea Township*:

> When an appeal is taken from DER[4] to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a

[4] DER is the predecessor to the Department of Environmental Protection.

> mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.

716 A.2d at 686.

There is no dispute that the Department has the authority to issue orders to ensure compliance with the Storage Tank Act and to implement regulations for the proper operation and closure of tanks, including the collection of fees. 35 P.S. §§ 6021.501 and 6021.1309. Section 245.451 of the storage tank regulations specifies that storage tanks may be placed in temporary out-of-service status for a limited period of one year or three years depending on performance standards, after which they must be permanently closed or put back into service. 25 Pa. Code § 245.451(h). In the case at hand, the tanks were placed into temporary out-of-service status in 2001 but have not been permanently closed. Registration fees and USTIF fees were last paid on the tanks in 2001.

Mr. Carey does not dispute that he is the owner of the tanks and that he is responsible for them. Rather, he asks the Board to take into consideration his recent release from prison and his limited financial resources in establishing a timeframe for him to comply with the Department's order. He also asserts that he is not responsible for any past due USTIF or registration fees. We examine each of these arguments below.

Permanent Closure or Removal of the Tanks

Mr. Carey asks the Board to allow him a period of one year in which to permanently close the underground storage tanks or take other action to address them. In support of his request, he asserts that the tanks are in good condition and under warranty and, based on the Department's own investigation, show no signs of leakage or environmental harm. He points out

that the Department exercised its discretion to take no action on the tanks from 2001 until 2015. Additionally, the record demonstrates that from approximately 2005 to March 26, 2019 Mr. Carey was incarcerated and had limited ability, including limited financial ability, to close the tanks. (F.F. 48-49.) For its part, the Department argues that the tanks present a danger to public health, safety and welfare and a threat to the environment, and it acted within its authority to order their permanent closure.

We find that the Department acted within its authority to order permanent closure of the tanks. Section 245.451 of the storage tank regulations specifies that storage tanks may be placed in temporary out-of-service status for no more than three years, after which they must be either put back into service or permanently closed. 25 Pa. Code § 245.451(h). Therefore, we uphold that portion of the Department's Administrative Order directing Mr. Carey to take steps to permanently close the tanks.

The only question before us on this matter is the timing of when Mr. Carey must comply with the Department's order. The Department presented no evidence at trial that the tanks pose any threat of harm to the public or the environment in their current state.[5] In fact, the Department presented no expert testimony on this subject. The Department acknowledged in its August 4, 2014 letter that the tanks were pumped to within one inch of product, which is the definition of "empty" pursuant to the Department's regulations. From 2005 until August 4, 2014 there is no record of any written communication from the Department to Mr. Carey regarding the tanks. The Department has been aware of the temporary out-of-service status of the tanks since 2001 and did not take enforcement action seeking closure of the tanks until 2015. When asked

[5] Department witness Douglas Overdorff raised the possibility that someone could drop a match into the tank but testified that during his nearly 36-year tenure at the Department, he was not aware of this occurring. (T. 88-89)

why the Department elected to order closure of the tanks in 2015, Mr. Overdorff was unable to provide a clear answer.

The record also reflects that prior to Mr. Carey's incarceration, he made efforts to work with the Department to ensure compliance with the storage tank regulations. In 2002, subsequent to placing the tanks in temporary out of service status, he pumped the tanks to within an inch of product as required by the Department's regulations. (F.F. 11-12.) In 2003 he appears to have addressed violations brought to his attention by the Department and received a letter dated April 11, 2003 from Gerald F. McKernan in the Department's Storage Tank Cleanup Environmental Section stating that "the list of violations has been brought into compliance." (F.F. 13.) On February 10, 2005, the Department approved a Remedial Action Completion Report submitted for Carey's Country Store. (F.F. 14.) By letter dated August 4, 2014, Ted E. Loy, Environmental Program Manager for the Department's Environmental Cleanup and Brownfields Program, acknowledged that Department inspections had verified that the tanks are empty (pumped to less than one inch of product). (F.F. 15; Appellant Ex. N.) Mr. Overdorff testified that the Department has tested the tanks three times from approximately April 2016 to April 2019 and the amount of product has remained the same. None of the tanks contain more than one inch of product. (T. 29-35.) There is no indication that the tanks are leaking, and the Department presented no evidence to demonstrate that the tanks are likely to leak or pose any threat to health or the environment in their current state. The Department presented no evidence leading us to believe that the tanks pose an immediate threat.

Based on the Department's own determination that the tanks meet the regulatory definition of empty and the lack of any evidence that the tanks are leaking or pose an environmental threat or danger to public health, safety or welfare, we find that Mr. Carey's

request for additional time in which to permanently close the tanks or otherwise address them in a manner that is satisfactory to the Department is reasonable.[6]

USTIF Fees

The Underground Storage Tank Indemnity Fund (USTIF) is an industry-wide insurance fund for underground storage tanks established pursuant to Section 704 of the Storage Tank Act. 35 P.S. § 6021.704(a). The statute creates a board to regulate the fund and to establish fees to be paid by owners or operators of underground storage tanks as deemed appropriate. *Id.* at § 1021.705(d)(1). The board consists of 14 members, including six members with expertise in the management of underground storage tanks who are appointed by the Governor from a list of nominees provided by various trade groups. *Id.* Payment into USTIF is mandatory unless a tank has been determined to be exempt by the Environmental Quality Board. 25 Pa. Code § 245.704(a). The fund is administered by the Pennsylvania Department of Insurance. (F.F. 20.)

It is the Department's contention that Mr. Carey owes $3,372.16 in past due USTIF fees. There is no dispute that Mr. Carey has not paid into USTIF since 2001. However, it is Mr. Carey's argument that any USTIF fees that may be owed are not owed to the Department of Environmental Protection, but to the Pennsylvania Insurance Department which is not a party to this action. Therefore, he argues this is not the appropriate action for collection of any such fees.

We disagree. USTIF was established by the Storage Tank Act, and pursuant to Section 1309 of the Act, the Department has the authority to "issue such orders as are necessary to aid in the enforcement of the provisions of this act." Even if the fund itself is administered by the Department of Insurance, it is the Department of Environmental Protection that is charged with

[6] The Department's order requires Mr. Carey to permanently close the tanks. In his brief, Mr. Carey also discusses the possibility of selling the property. We leave it to the parties to decide whether to pursue a possible resolution of this matter in a manner that does not involve closure of the tanks.

enforcing it and the regulations governing the payment of fees into the fund. Where an owner or operator fails to pay his or her USTIF fees, the Department has the authority to order compliance. The purpose served by USTIF is an important one. As stated in the enabling language:

> Moneys in the fund are hereby appropriated to the [USTIF] board for the purpose of making payments to owners, operators and certified tank installers of underground storage tanks who incur liability for taking corrective action or for bodily injury or property damage caused by a sudden or nonsudden release from underground storage tanks and for making loans to owners as authorized by this act. The fund shall be the sole source of payments under this act, and the Commonwealth shall have no liability beyond the amount of the fund. Every owner and certified tank installer of an underground storage tank shall demonstrate financial responsibility by participating in the Underground Storage Tank Indemnification Fund.

35 P.S. 6021.704(a)(1). In adopting this provision the legislators intended to ensure that anyone seeking to own, operate or install an underground storage tank should be able to fulfill his or her financial responsibilities. The fund also ensures that anyone who suffers bodily harm or property damage due to a release from an underground storage tank is adequately compensated. By electing to take on the responsibility of an underground storage tank, the tank owner agrees to pay into this fund. While we sympathize with Mr. Carey's financial condition, we nonetheless find that an owner may not shirk his responsibility for payment into the USTIF fund.

Therefore, we uphold that portion of the Department's order directing the payment of back USTIF fees.

Registration Fees

Section 502(a) of the Storage Tank Act establishes an annual fee of $50 for each underground storage tank. *Id*. at § 6021.502(a). Mr. Carey has three physical underground storage tanks, two of which have two chambers that are regulated separately by the Department,

for a total of five regulated tanks. Registration fees have not been paid on the tanks for approximately 17 years following their placement into temporary out-of-service status. The Department contends that Mr. Carey owes $3,250 in past due registration fees.

Mr. Carey argues that the only documentary evidence regarding registration fees provided by the Department at the hearing consists of a printout from the Department's computer data system indicating that the Department had written off the registration fees. (Department Ex. 26.) The notation in the comment section of the printout reads, "write off/coll. effort exhaust 3 11-10." When asked about the "write off" notation on the printout, Mr. Overdorff stated that he did not prepare the document and did not know what it meant, but he acknowledged that it could be construed as "forgiving payment of something that is due for services and/or some type of yearly fee." (T. 82.) He further acknowledged that "[a]n agency may have the regulatory discretion to take that into consideration" but testified that he had never seen the Department "entirely wipe a clean slate." (T. 82-83.) Based on this printout from the Department's records, however, it appears that the Department took steps to write off the amount owed by Mr. Carey for past due registration fees, or at least considered it to be an option. The record further indicates that from 2001 to August 4, 2014 the Department did not try to collect registration fees (or USTIF fees) on the tanks. No explanation was provided for why the Department subsequently decided to pursue the fees in 2014. Mr. Carey argues that because the Department did not rebut the apparent conclusion that the amount owed for the registration fees had been written off, and because the only witness presented by the Department could not explain it, he should not be held responsible for the fees.

There is no dispute that registration fees have not been paid on the tanks since 2001. We could easily conclude that Mr. Carey is liable for the past due registration fees from 2002 to the

date of the Department's order. However, based on the record presented at the hearing, it appears that the Department may have elected to write off the amount owed by Mr. Carey for past registration fees. The Department's only witness at the hearing could neither confirm nor deny whether the Department had elected to forego the previously owed fees. That, combined with the fact that the Department did not pursue collection of the registration fees for nearly 13 years, suggests to us that the Department's decision to pursue collection of the entire amount of the fees at this time was not a reasonable exercise of its discretion. Given the unique circumstances of this case, we feel that a reduction in the amount of registration fees for which Mr. Carey is liable is warranted. See *Diehl v. DEP*, 2018 EHB 18, 27 (The Board may substitute its discretion when it finds that the Department's action is unreasonable); *Shenango, Inc. v. DEP*, 2006 EHB 783, 796 (We examine the Department's exercise of discretion on a case-by-case basis in deciding whether it has acted reasonably.) Since the Department's letter of August 4, 2014 clearly put Mr. Carey on notice that he owed registration fees for his tanks, we find that it is appropriate to order the payment of registration fees from August 4, 2014 to the date of the Department's Order in this matter, March 2, 2015. We, therefore, reduce the amount sought by the Department by $3,000, representing the past due fees for years 2002 through 2013.

CONCLUSIONS OF LAW

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

2. Pursuant to 25 Pa. Code § 1021.122(b)(4), the Department has the burden of proof in the appeal of a Department order.

3. The Department must show by a preponderance of the evidence that it acted lawfully and within a reasonable exercise of its discretion when it issued the order that is the subject of

the appeal and that the order is supported by the evidence in the record. *Liddick*, 2018 EHB at 227; *Robinson Coal*, 2015 EHB at 153.

4. The Appellant bears the burden of proving any affirmative defenses to the Department's order. *Liddick*, 2018 EHB at 227; *Robinson Coal*, 2015 EHB at 154.

5. The Board's review of Department actions is *de novo*, meaning that the Board decides the case anew on the record developed before it. *Liddick*, 2018 EHB at 227; *O'Reilly*, 2001 EHB at 32.

6. The Department has the authority to require the permanent closure of Mr. Carey's underground storage tanks pursuant to Section 107(f) of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.107(f).

7. The Department has the authority to require the payment of fees into USTIF pursuant to 25 Pa. Code § 245.704(a).

8. The Board exercises its discretion in this matter to provide Mr. Carey with a period of one-year from the date of this Adjudication to comply with the Department's Administrative Order requiring permanent closure of the underground storage tanks.

9. The Board exercises its discretion in this matter to reduce the amount of registration fees owed by Mr. Carey by $3,000. Therefore, Mr. Carey owes $250 in registration fees.

10. The Board retains jurisdiction over this matter.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN FLOYD CAREY, SR.	:	
	:	
v.	:	**EHB Docket No. 2015-036-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 2nd day of December, 2019, it is ordered as follows:

1. The appeal of John Floyd Carey, Sr. is upheld in part and denied in part as set forth in this Adjudication.
2. Mr. Carey has a period of one-year from the date of this Adjudication to comply with that portion of the Department's Administrative Order requiring permanent closure of the underground storage tanks at issue in this appeal. In the alternative, the Department may approve the sale of the tanks by Mr. Carey or otherwise come to a resolution of this matter with Mr. Carey.
3. Mr. Carey is directed to pay $3,372.16 into USTIF on or before one-year from the date of this Adjudication.
4. Mr. Carey is directed to pay $250 in registration fees to the Department on or before one-year from the date of this Adjudication.
5. The Environmental Hearing Board retains jurisdiction over this matter.

ENVIRONMENTAL HEARING BOARD

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

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 2, 2019

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

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

For Appellant:
James Corbelli, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
v.	:	**EHB Docket No. 2019-068-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UNIVERSITY AREA JOINT AUTHORITY, Permittee	:	**Issued: December 10, 2019**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board denies a permittee's motion to dismiss, premised on administrative finality, of an appeal of an NPDES permit. An appeal based on the Department's existing use determination for a stream made as part of an NPDES permit renewal, as required by Pennsylvania's water quality standards program, is not a collateral attack on an earlier existing use determination for the same stream. Therefore, the appeal is not barred by administrative finality.

O P I N I O N

Pennsylvania Fish and Boat Commission ("the Commission") filed this appeal from the Pennsylvania Department of Environmental Protection's ("the Department's") renewal of NPDES Permit No. PA0234028 to Permittee University Area Joint Authority ("the Authority"). The Authority operates a water treatment plant for a treatment facility in College Township, Centre County. The permit authorizes the Authority to discharge treated effluent into the waters of the Commonwealth at a stream known as Slab Cabin Run. The Commission contends that the

Department made an incorrect existing use determination for Slab Cabin Run when renewing the Authority's permit in 2019. The Commission agues that the renewed permit erroneously refers to Slab Cabin Run as a Cold Water Fishes Stream (CWF) when it should be a High Quality Cold Water Fishes Stream (HQ-CWF). Therefore, the Commission contends that the Authority's permit is not adequately protective of Slab Cabin Run.

Currently before the Board is a motion to dismiss filed by the Authority. The Authority argues that the Commission's appeal is barred by administrative finality because the Authority had an earlier opportunity to appeal the Department's existing use determination for Slab Cabin Run and opted not to do so. In reviewing a motion to dismiss, the Board must consider the Authority's motion in the light most favorable to the non-moving party, accepting the non-moving party's version of factual events as true. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48. The Board will only grant the motion if the Authority is clearly entitled to judgment as a matter of law. *Winner v. DEP*, 2014 EHB 135, 136-37.

Ruling on the Authority's motion requires a brief primer on Pennsylvania's EPA-approved water quality standards program, which "provides that instream water uses and the level of quality necessary to protect those uses shall be maintained and protected." *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772 (citing 25 Pa. Code § 93.4a). Water use types recognized under Pennsylvania's water quality standards program are found in Sections 93.4(a) and 93.3 of the Department's regulations. "Section 93.4(a) sets forth statewide water use types related to aquatic life, water supplies, and recreation. Section 93.3 sets forth protected water use types, which include all of the uses contained in Section 93.4(a), as well as additional aquatic uses such as cold water fishes (CWF) and trout stocking (TSF), and the special protection uses of [High Quality] HQ and [Exceptional Value] EV waters." *Monroe Cnty. Clean Streams*

Coal. v. DEP, 2018 EHB 798, 801. As noted above, the Commission argues in its appeal that Slab Cabin Run is an HQ-CWF water. Section 93.4b defines HQ waters as waters containing either: (1) chemical or toxicological information indicative of an HQ water or (2) biological information indicative of a high-quality water. 25 Pa. Code § 93.4b(a). Relevant to this appeal, one specific biological indicator of a high-quality water is whether "the surface water has been designated a Class A wild trout stream by the Fish and boat Commission following public notice and comment." 25 Pa. Code § 93.4b(a)(2)(ii).

Pennsylvania's water quality standards program provides two separate means for identifying and protecting water uses such as an HQ-CWF – existing uses and designated uses. As we discussed in *Monroe County Clean Streams Coalition v. DEP*:

> Pennsylvania's program is concerned with maintaining and protecting (1) existing uses and (2) designated uses. 25 Pa. Code §§ 93.4a(b), 93.9(a), 96.3(a). Existing uses are defined as "[t]hose 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. Designated uses are defined as "[t]hose uses specified in §§ 93.4(a) and 93.9a – 93.9z for each water body or segment whether or not they are being attained…*Designated* uses of streams are promulgated by formal rulemaking by the Environmental Quality Board and are listed as regulations in the *Pennsylvania Code*. *See* 25 Pa. Code §§ 93.9a – 93.9z. The process for classifying the *existing* uses of streams, however, is much different. That process is set forth at 25 Pa. Code § 93.4c(a).

2018 EHB 798, 800-01. The process for classifying existing uses, located in 25 Pa. Code § 93.4c(a), mandates that the Department make "a final determination of existing use protection for the surface water as part of the final permit or approval action." 25 Pa. Code § 93.4c(a)(1)(iv). Thus, while the Department must protect a stream use *designated* by the EQB, the Department must also identify and adequately protect *existing* stream uses during every final permit or approval action, notwithstanding that stream's designated use. At the time the Department issues a final permit, "[a]ny person adversely affected by the permit can then attempt

to show that the Department's [existing] use determination was flawed, but only in the context of an appeal from the permit." *Monroe Cnty. Clean Streams*, 2018 EHB at 802 (citing 25 Pa. Code § 93.4c(a)(1)(iv)).

With this background in mind, we turn to the history of NPDES Permit No. 0234028 ("the Permit"). In 2012, the Department issued the Permit, which authorized discharges from the Authority's wastewater treatment plant into Slab Cabin Run. The Commission states that in the 2012 Permit the Department correctly determined Slab Cabin Run's existing use as a CWF. The Permit was appealed by the Authority in 2012, (EHB Docket No. 2012-131-L), but the Department's existing use determination was not at issue in that appeal. As a result of the appeal, the Department issued an amendment to the Permit that was consistent with the settlement negotiations conducted by the parties, which did not involve the Department's 2012 existing use determination. The amendment was issued in 2014 and it did not change the expiration date of the 2012 Permit. Meanwhile, between the initial issuance and the amendment of the Permit, the Commission added Slab Cabin Run to its list of Class A Trout Streams and published notice of that listing in the *Pennsylvania Bulletin* on May 4, 2013 (43 Pa. B. 2529). The Commission argues now in its notice of appeal that its Class A Wild Trout designation means Slab Cabin Run qualifies as a HQ-CWF Stream under the regulations, 25 Pa. Code § 93.4b(a)(2)(ii). However, Slab Cabin Run's HQ use was not reflected in the 2014 Amended Permit, nor is it reflected in the renewal under appeal here.

The Authority argues that the Commission's appeal is barred by administrative finality because it had an opportunity to appeal the Department's existing use determination for Slab Cabin Run in 2014 and failed to do so, precluding the Commission from raising their argument now. The Commission, in turn, argues that its appeal is not barred by administrative finality

because, if it appealed the 2014 Amended Permit, its appeal would have been confined to the terms that had been amended. Therefore, the Commission says it would have been prohibited from raising an issue with the Department's existing use determination, since it was not at issue in the permit amendment. The Department has filed a "Memorandum of Law Regarding Permittee's Motion to Dismiss" to clarify its position with respect to the Department's stream designation process, but it does not seem to take an explicit position on the administrative finality issue.

Administrative finality generally requires that a party appeal a Department action close to the time it actually occurs, and not at a significantly later point in time. A party's failure to raise issues related to a Department action on appeal when they are able to do so often precludes the party from raising those issues in the future. *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (1975), *aff'd*, 375 A.2d 320 (1977); *see also Sierra Club v. DEP*, 2017 EHB 685, 688. The doctrine imposes this constraint to prevent an appeal from being used as a vehicle "for reviewing or collaterally attacking" the appropriateness of an earlier Department action. *Love v. DEP*, 2010 EHB 523, 525. The ability to use appeals in this manner would "postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law" by continually leaving Department actions open to attack. *Wheeling-Pittsburgh Steel Corp.*, 348 A.2d at 767.

Given that the central function of administrative finality is to prevent previous Department actions from collateral attack, it is "critically important to determine precisely what action is being appealed." *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134. This requires the Board to parse through the legal issues raised in an appeal and ensure they are actually implicated in the Department action being challenged. As the Board discussed in *Wheatland:*

> Only issues that relate to *that action* [currently on appeal] may be raised. An appellant may not use the occasion of an action that takes the form of a change,

> renewal, or update to challenge whether the original permit should have been issued in the first place. Similarly, the appellant may not use the occasion of the most recent change to challenge changes that were finalized in earlier modifications. The appellant is limited to challenging whether the current change is appropriate. That challenge will turn on the factors relevant to the current change, which may or may not resemble factors that were considered when the original action was taken.

Id. In *Wheatland*, an effluent limit for iron in an NPDES permit renewal was challenged by the permittee. Prior to the renewal, the permit was transferred from one permittee to another with no change in the limit. The Department argued that the iron limit was not an appealable issue because it was established in the original NPDES permit and went uncontested when the permit was amended to transfer it to the new permittee. The Board disagreed, finding that the only issues implicated by the permit amendment were those related to a transfer of ownership, and therefore only issues related to transfer of ownership could have been raised in an appeal of the amendment. In contrast, during the permit renewal the Department reviewed the permit terms, and the Board held that the effluent limit for iron was appealable at that time.

As a general rule, permit renewals are less likely to implicate administrative finality issues. In *Tinicum Township v. DEP*, where an appellant challenged the renewal of an NPDES permit authorizing the discharge of quarry water, the Board noted that "the scope of the pertinent inquiry for a legislatively mandated permit renewal is broader than the scope of the inquiry for, say, a permit modification." *Tinicum Twp. v. DEP*, 2002 EHB 822, 835-36. This broad mandate requires the Department, when renewing a permit, to "ensure that a continuation of the permitted activity is appropriate based upon up-to-date information" as opposed to re-examining the "historical initiation of the activity in question." *Id.* at 835. In *Wheatland*, where the Board discusses the *Tinicum* decision, the Board noted that the determinative issue at the time of a permit reissuance or renewal is "not whether the permit was appropriate in the first place; it was

whether it should have continued in place for another five years…challenges related to the former [are] barred; challenges related to the latter [are] held to be properly the subject of Departmental consideration and Board review." *Wheatland*, 2004 EHB at 135-36. *See also Solebury School v. DEP*, 2014 EHB 482, 527 (noting that administrative finality was never intended to insulate permits from review and could not bar an appeal concerning whether a permitted activity should continue in light of current information).

In the instant case, the Commission is appealing the Department's 2019 renewal of the Permit, arguing that the Department made an incorrect existing use determination, as evidenced by permit conditions that the Commission says are insufficient to protect an HQ-CWF stream. The Commission notes that it designated Slab Cabin Run as a Class A Wild Trout Stream, and argues this was enough for the Department to determine Slab Cabin Run's existing use to be a HQ-CWF under 25 Pa. Code § 93.4b. We do not view the Commission's appeal as a collateral attack on a prior Department action. The Department is obligated during a permit renewal to review a permit to ensure it is appropriate based on up to date information, *Tinicum Township*, 2002 EHB at 835-36, which would include information regarding the quality and use of a receiving stream in an NPDES permit.

Additionally, the Department is required to make "an existing use determination for surface water as part of the final permit or approval action." 25 Pa. Code § 93.4c(a)(1)(iv). In making that determination, the Department is charged with evaluating a wide swath of information, "including data gathered at the Department's own initiative, data contained in a petition to change a designated use submitted to the EQB…, or data considered in the context of a Department permit approval action…" 25 Pa. Code § 93.4c(a)(1)(i). The public is also encouraged to submit information on existing use protection to the Department during the permit

review process. *Id*. at 93.4c(a)(1)(iii). Therefore, the Department was required to make an existing use determination when it renewed the Permit in 2019, regardless of what prior existing use determination it may have made in 2014. The Department appears to agree in its memorandum of law, stating "the regulations require the Department to make an existing use determination for Slab Cabin Run during each final permit or approval action." (DEP Memo. at 3-4. The Authority provides us with no reason why we, or the Department, should ignore the Commission's existing use information on Slab Cabin Run simply because it dates back to 2013, particularly when the Department makes a new existing use determination in the context of every permit renewal. To hold otherwise would risk insulating the Authority's permit from review, contrary to the intent of administrative finality. *Solebury School*, 2014 EHB at 527.

The Authority frames the Commission's appeal as an attack on an existing use determination made in 2014, but nowhere in its appeal does the Commission concern itself with the Department's 2014 existing use determination. Instead, the Commission's appeal properly focuses on the Department's permit renewal in 2019 and avoids taking issue with any "historical initiation of the activity in question." *Tinicum Twp.*, 2002 EHB at 835.

The Authority's motion is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
v.	:	**EHB Docket No. 2019-068-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UNIVERSITY AREA JOINT AUTHORITY, Permittee	:	

O R D E R

AND NOW, this 10th day of December, 2019, it is hereby ordered that the Authority's Motion to Dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: December 10, 2019

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2019-056-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 10, 2019**
	:	

OPINION AND ORDER ON
PETITION TO INTERVENE

By Michelle A. Coleman, Judge

Synopsis

The Board grants a Commonwealth agency's petition to intervene in an appeal of the Department's issuance of an NPDES permit to appellant. The Board finds that the intervenor has a substantial, direct, and immediate interest in the outcome of the appeal.

O P I N I O N

On June 22, 2019, University Area Joint Authority ("the Authority") filed a Notice of Appeal of the Department of Environmental Protection's ("the Department's") renewal of NPDES Permit No. PA 0234028. The permit authorizes the Authority to discharge a limited amount of treated sewage per day into Slab Cabin Run, a cold-water fish stream containing wild trout, located in College Township, Centre County. Among other things, the Authority contends the permit significantly reduces the amount of discharge from the previous permit, increases the required nitrogen monitoring to two times per week, and prohibits a change in stream temperature of more than 2 degrees within the hour of discharge flow. The Authority argues that such specifications and restrictions provided by the permit are arbitrary and capricious, or otherwise inconsistent with applicable law.

On October 4, 2019, the Pennsylvania Fish and Boat Commission ("the Commission") filed a petition to intervene in the appeal. The Authority opposes the petition. The Department has not weighed in.

The Commission is the principal agency responsible for the propagation, protection, and management of fish in waters of the Commonwealth. 30 Pa.C.S §§ 2101 and 2102. The Commission argues that as the primary Commonwealth agency charged with protecting, conserving, and enhancing the aquatic resources of Pennsylvania, it should be permitted to intervene so that it can ensure that appropriate methods and measurements are used to monitor the flow and temperature characteristics of Slab Cabin Run. The Commission seeks to present evidence regarding ideal habitat conditions for maintaining wild trout in Slab Cabin Run and water quality considerations to maintain a healthy trout habitat. The Commission is concerned that the Authority's discharges may degrade Slab Cabin Run's aquatic resources.

The Authority contends that the Commission has failed to provide sufficient factual averments and legal assertions in support of its petition to intervene. Further, the Authority asserts that the Commission has failed to demonstrate it has a greater interest than that of the general public in this matter and argues that the Commission is not entitled to intervene merely because it is an agency of the Commonwealth. The Authority would have the Board conclude that the Commission failed to demonstrate that it has a substantial, direct, and immediate interest in the appeal.

Section 4 of the Environmental Hearing Board Act provides that "[a]ny interested party may intervene in any matter pending before the Board." 35 P.S. § 7514(e). *See also* 25 Pa. Code § 1021.81 (person may petition to intervene in any matter prior to the initial presentation of evidence). Because the right to intervene in a pending appeal should be comparable to the right

to file an appeal in the first instance, we have held that an intervenor must have standing. *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434. A person or entity has standing if that person has a substantial, direct, and immediate interest in the outcome of the appeal. *Lawson v. DEP*, 2017 EHB 968, 970; *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Wilson, supra*, 2014 EHB at 2. In order for an interest to be considered "substantial" it must be greater than the abstract interest of all citizens in having others comply with the law. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). "Direct" and "immediate" mean that there must be a sufficiently close causal connection between the person's interest and the actual or potential harm associated with the challenged action. *Id*. In other words, the intervenor's interest must not be remote. *Id*. at 286; *Borough of Glendon v. Dep't of Envtl. Prot*., 603 A.2d 226, 231 (Pa. Cmwlth. 1992). When standing is challenged in an answer to a petition to intervene, we accept as true all verified facts set forth in the petition and all inferences fairly deducible from those facts and decide whether the averments nevertheless fail to establish a basis for standing as a matter of law. *Lawson, supra*, 2017 EHB at 970 (citing *Logan v. DEP*, 2016 EHB 531, 533).

Both parties cite *Hanson Aggregates PMA, Inc., v. DEP*, 2006 EHB 711, in support of their positions. The Authority argues that in *Hanson*, the Board granted the Commission's petition to intervene primarily based on evidence that the Commission had been an active party and independent voice in the regulatory matters surrounding the case. Additionally, the Authority points out that the Commission may not intervene simply because it is an agency of the Commonwealth. We agree with the assertion that the Commission is not entitled to automatically intervene in cases by sole virtue of being a Commonwealth agency. We also agree that in *Hanson*, the fact that the Commission participated in the review process of the permits at

issue supported our decision to grant intervention. However, the Authority has overlooked our prime reason for allowing the Commission to intervene in that case – the Commission's statutory duties and responsibilities regarding Pennsylvania's fish populations were of the foremost importance.

Consistent with our past decision, we hold that the Commission has a substantial, direct and immediate interest in this matter. Given that the Commission has jurisdiction over the protection, preservation, and management of fish and fish habitat in the waters of the Commonwealth, and that the issuance of the permit allows the Authority to engage in an activity that directly impacts those resources for which the Commission is responsible, we see no reason to conclude any differently than we did in *Hanson.* The fact that the Commission did not provide factual support that it participated in the review process of the Authority's permit does not, in our opinion, diminish its interest.

Finally, the Authority points out that the Commission has filed its own third-party appeal of the Department's issuance of the NPDES permit, and the Authority has moved to dismiss that appeal. If the appeal is dismissed, the Authority asserts that the Commission will have used its petition to intervene as a backdoor attempt to challenge the NPDES permit. Since the motion to dismiss the Commission's appeal has been denied in an Opinion and Order issued on the same day as this Opinion, we need not address this argument. *See Pa. Fish and Boat Comm'n v. DEP*, EHB Docket No. 2019-068-C (Opinion and Order on Motion to Dismiss issued December 10, 2019).

Accordingly, we grant the Commission's Petition to Intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2019-056-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 10th day of December, 2019, it is hereby ordered that Pennsylvania Fish and Boat Commission's Petition to Intervene in this matter is **granted**. Petitioner Pennsylvania Fish and Boat Commission is hereby granted the right to intervene and present evidence on all issues and claims raised within Appellant's Notice of Appeal. Henceforth the caption shall read:

UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2019-056-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: December 10, 2019

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

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For Intervenor:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2019-121-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 16, 2019**

OPINION AND ORDER ON DEPARTMEMT'S
MOTION TO DENY PETITION FOR SUPERSEDEAS WITHOUT HEARING

By Steven C. Beckman, Judge

Synopsis

The Board grants the Department's Motion to Deny Petition for Supersedeas Without Hearing pursuant to 25 Pa Code 1021.62(c) where Mr. Spencer has failed to state grounds sufficient for the granting of a supersedeas. Mr. Spencer has not shown that he has a strong likelihood of success on the merits or that he will suffer irreparable harm as a result of the Department's Order.

O P I N I O N

Background

On October 31, 2019, Randy J. Spencer filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's ("the Department's") September 30, 2019, Administrative Order ("the Order") finding him in violation of the Dam Safety Act (32 P.S. §693.6(a)) and requiring him to remove vehicles and other items within the floodway on his property located in Cranberry Township, Venango County. On December 4, 2019, Mr. Spencer filed a Petition for Supersedeas with the Board ("the Petition"). In the Petition, Mr. Spencer states that, on November 20, 2019, the Department filed a Petition to Enforce the Order with the

Commonwealth Court. Mr. Spencer also notes in his Petition that he is engaged in litigation with Cranberry Township in the Venango County Court of Common Pleas[1] as well as with the Pennsylvania Department of Transportation regarding the removal of the vehicles from his property. In his Petition, Mr. Spencer asserts that he lacks the resources to litigate the multiple actions he is currently facing, and that the Board should grant supersedeas since all of the pending litigation seek the exact same relief, the removal of the vehicles from his property which he agrees he should do. (See Petition, Paragraphs 6-8; 10-12).

The Board issued an Order permitting the Department to file a response to the Petition and scheduling a conference call with the parties on December 9, 2019. On December 6, 2019, the Department filed its Response to Mr. Spencer's Petition. The Board held a conference call with the parties on the morning of December 9th to address the Petition and the Department's Response. Just prior to the start of the call, the Department filed a Motion to Deny Petition for Supersedeas Without Hearing ("Motion"), which is the subject of this Opinion and Order. Counsel for Mr. Spencer had not had a full opportunity to review the Motion prior to the call so the Board provided an opportunity to file a response to the Motion on or before December 12, 2019. Mr. Spencer did not file a response to the Department's Motion.[2] Following the conference call, the Board also issued an order scheduling a hearing on the Petition commencing on December 19, 2019. We are ready to rule on the Department's Motion.

[1] The action in Venango County Court resulted in Findings and an Order entered by Judge H. William White on November 13, 2019. A copy of the Findings and Order were attached to the Petition as Exhibit 1.

[2] After the drafting of this Opinion and Order but prior to issuance, the Board received a response to the Motion from Mr. Spencer filed on December 16, 2019. The response was untimely and the Board did not consider it in its decision.

Standard

The Department's Motion relies on 25 Pa. Code § 1021.62(c). Under this Board Rule, the Board may deny a petition for supersedeas upon motion without a hearing for lack of particularity in the facts pleaded, lack of particularity in the legal authority cited as the basis for the grant of the supersedeas, an inadequately explained failure to support the petition with affidavits, or a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.62(c)(1) – (4); *Doughtery v. DEP*, 2014 EHB 9, at 12; *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 372; *Timber River Dev. Corp. v. DEP*, 2008 EHB 635; *Dickinson Twp. v. DEP*, 2002 EHB 267. A supersedeas is an extraordinary remedy and will only be granted upon a clear demonstration of need. *Teska and Mannarino v. DEP and EQT Production Co.*, 2017 EHB 541, 543; *Weaver v. DEP*. 2013 EHB 486. The petitioner bears the burden to prove the necessity for a supersedeas. *Id*; *Tinicum Twp. v. DEP*, 2008 EHB 123. In ruling on a petition for supersedeas, the Board considers the following factors: 1) irreparable harm to the petitioner; 2) the likelihood of the petitioner prevailing on the merits; and 3) the likelihood of injury to the public or other parties. 35 P.S.§ 7514(d)(1); 25 Pa.Code § 1021.63.

In order for the Board to grant a supersedeas, a successful petitioner generally must make a credible showing on each of the three regulatory factors, with a strong showing of a likelihood of success on the merits. *Hudson v. DEP*, 2015 EHB 719, 726 (citing *Mountain Watershed Ass'n v. DEP*, 2011 EHB 689, 690-91; *Neubert v. DEP*, 2005 EHB 598, 601; *Lower Providence Twp. v. DER*, 1986 EHB 395, 397). If the petitioner fails to carry its burden on any one of the regulatory factors, the Board need not consider the remaining requirements for supersedeas relief. *M.C. Resource Development v. DEP*, 2015 EHB 261, 265 (citing *Dickinson Twp. v. DEP*, 2002 EHB 267, 268; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369). In order to be successful, the petitioner's chance of success on the merits must be more than speculative; however, it need not

establish the claim absolutely. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829, 831-32.

Discussion

In its Motion, the Department argues, among other things, that the Board should deny the Petition without a hearing because Mr. Spencer failed to state grounds sufficient for the granting of a supersedeas.[3] We agree. The Petition failed to set forth sufficient grounds for granting a supersedeas. Even if we accept all of the facts and arguments set forth by Mr. Spencer in his Petition, we find that he has failed to demonstrate that he has a substantial likelihood of success on the merits of his appeal or that he would suffer irreparable harm as a result of the Department's Order.

Likelihood of Success on the Merits

In requesting a supersedeas from the Board, Mr. Spencer has the burden of convincing the Board that he is likely to be successful in demonstrating that the Department's Order compelling him to remove his vehicles from the property was unreasonable or contrary to law. Mr. Spencer offered no meaningful argument to that effect in his Petition and has therefore failed to state sufficient grounds for us to conclude that he will meet his burden. The extent of Mr. Spencer's argument is a bald assertion that he "is likely to prevail on the merits in that [the Department] has presented no evidence of harm caused directly or solely by Appellant's conduct…" (Petition, Paragraph 14). This statement is not persuasive and misstates which party has the burden in the underlying appeal.

[3] Because we find that Mr. Spencer failed to state sufficient grounds for granting a supersedeas, we do not address the other arguments set forth in the Department's Motion.

Further, Mr. Spencer has not attempted to demonstrate that he is not in violation of the Dam Safety Act or Clean Streams Law or related regulations. In fact, in his Petition, Mr. Spencer does not directly dispute his violations, but appears to only take issue with the Department's requirement that he move the vehicles within 30 days. It seems Mr. Spencer would have us conclude the 30-day timeline is unreasonable based on his belief that it is unlikely a significant rain event will occur, thereby eliminating the risk of any environmental harm within that timeframe. This is clearly speculative, and we do not find this argument persuasive. In the Findings of Fact by the Court of Common Pleas of Venango County, Judge White wrote that "[Mr. Spencer] also told us that he is at his own pace moving the trailers from the location to another location." (Petition Exhibit 1 at page 3). Mr. Spencer has not indicated any good reason why he cannot remove the vehicles in the timely manner set forth by the Department. It appears that Mr. Spencer merely does not want to act expediently and prefers to, as indicated by Judge White, "move at his own pace." (Petition Exhibit 1 at page 3). Mr. Spencer's arguments regarding the requirement to remove the vehicles in a timely manner are an insufficient basis for us to find that he is likely to prevail on the merits of his underlying appeal.

Irreparable Harm

Because Mr. Spencer failed to state sufficient grounds to convince us of his likelihood of success on the merits, we are not obligated to consider the remaining requirements for supersedeas relief. *Teska and Mannarino v. DEP*, 2016 EHB at 547. However, we will briefly discuss the factor of irreparable harm as it applies to this case. Mr. Spencer also failed to state sufficient grounds to persuade us that the Department's Order would cause him irreparable harm. In addressing the requirements for a supersedeas in the Petition, he states that the Department will not suffer irreparable harm if the Board grants the Petition. (Petition, Paragraph 14). We

note for the record that the consideration of irreparable harm under our rules governing supersedeas petitions addresses the harm to the petitioner not the party opposing the petition.

While it is not entirely clear from the Petition, there appear to be two harms asserted by Mr. Spencer. First, he cites the burden and costs of the ongoing multiple litigations involving the removal of the vehicles. We do not believe that these burdens or costs constitute an irreparable harm. He offers no evidence of the costs and it is not clear to us that these litigation costs or the burden of addressing his violations in multiple forums constitute irreparable harm, particularly given his agreement that he should remove the vehicles. The costs and burden of the litigation would be simple to alleviate by doing what he has already agreed he should do and remove the vehicles. The second harm raised by Mr. Spencer is his apparent concern that if he fails to remove the vehicles in a timely manner, the Department will remove the vehicles, thereby depriving him of his personal property without due process. He states, without offering any support, that the vehicles have substantial value and that their removal by the Department would deprive him of over $100,000 of value in his personal property. This alleged harm is both speculative and not irreparable. There is nothing on the face of the Department's Order indicating that it intends to confiscate Mr. Spencer's property or otherwise deprive him of it. Even in the event that the Department reaches the point that it, rather than Mr. Spencer, removes the vehicles, any resulting harm to Mr. Spencer would be financial in nature and able to be compensated by money and thus, would not constitute irreparable harm in the context of our considerations of a supersedeas petition.

In conclusion**,** Mr. Spencer failed to state grounds sufficient for the granting of a supersedeas in the Petition and, therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2019-121-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 16th day of December, 2019, upon review and consideration of Randy J. Spencer's Petition for Supersedeas, the Department's Motion to Deny the Petition for Supersedeas Without a Hearing, and a conference call with the parties, it is hereby ordered that the Department's Motion to Deny the Petition for Supersedeas is **granted.** The hearing on the Petition for Supersedeas scheduled to commence on Thursday, December 19, 2019 is canceled.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: December 16, 2019

c: **DEP, General Law Division:**
Attention: Maria Tolentino

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

For Appellant
Timothy McNair, Esquire
(via electronic filing system)

Court Reporters:
Adelman Reporters, LLC
(via electronic mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LYNDA WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 2018-067-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ESTATE OF HARRY SIMON, Permittee	:	**Issued: December 30, 2019**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO STRIKE OR FILE SUR-REPLY

By Michelle A. Coleman, Judge

Synopsis

The Board denies competing motions for summary judgment filed by the Appellant and the Permittee, as well as a motion to strike or file sur-reply filed by the Department. The Appellant's Motion for Summary Judgment is denied because genuine issues of material fact concerning the project site and nearby waters must be resolved. In considering the Appellant's Motion for Summary Judgment, the Board separately addresses an issue raised by the Department of the Board's jurisdiction to hear this appeal. Also, with respect to the Appellant's motion, the Board addresses and denies a Motion to Strike Appellant's Reply Brief in which the Department contends the Appellant improperly raised new arguments not contained in its summary judgment motion. Finally, the Permittee's motion based on Appellant's lack of standing is denied because the Appellant has adequately demonstrated standing.

O P I N I O N

On June 13, 2018, the Department of Environmental Protection ("Department") issued NPDES Stormwater Construction permit, PAD 150046, to the Estate of Harry Simon ("Permittee") to discharge stormwater and conduct earth disturbance activities at 1364 Grove Road in West Whiteland Township, Chester County. The permit authorizes stormwater discharges associated with construction activities and was sought in connection with a project to subdivide three residential lots into eight residential lots, build an access road, and maintain open space, as well as to construct associated utilities and stormwater management structures. Part of this construction will also entail rerouting a driveway. In connection with the driveway construction, trees will be cleared, and an embankment will be graded to improve the line of sight for drivers accessing the driveway into the development from a main road, Grove Road. This construction will abut a wetland. There will also be a need for utility line extensions from Grove Road into the property.

The Appellant, Lynda Williams, who lives approximately half a mile away from the construction and frequently drives along Grove Road, filed an appeal on July 16, 2018 stating her concerns about PAD 150046, specifically its potential impact on wetlands surrounding the construction. In her appeal, the Appellant attached a letter from the Department responding to public comments the Appellant had previously made concerning the Permittee's construction and advising the Appellant of her right to appeal to the Board if she was aggrieved by the Department's issuance of PAD 150046 to the Permittee. The Board previously denied a motion to dismiss filed by the Department concerning the Board's jurisdiction to hear Appellant's appeal. In that motion, the Department argued that the Appellant was effectively appealing the letter she had received from the Department, as opposed to the issuance of PAD 150046, and the

Board did not have jurisdiction to hear an appeal concerning this letter. The Board denied that motion, noting that the Board would "need to bend over backwards to reach the Department's interpretation that [the Appellant] is appealing the statements contained in the letter and not the permit issued to the [the Permittee]." *Williams v. DEP*, 2018 EHB 856, 859-860.

Currently before the Board are two summary judgment motions, one from the Appellant and one from the Permittee. The Appellant moves for summary judgment because she believes the location of the Permittee's construction is within 150 feet of a body of water subject to a riparian forest buffer protection in Chapter 102 of the Department's regulations, and therefore the Permittee was required to submit a riparian forest buffer management plan to the Department before the Department issued the permit. The Permittee responds to the Appellant's motion on the merits, arguing no body of water covered under Chapter 102 is present within 150 feet of its construction. Additionally, the Department, in response to the Appellant's motion, re-raises its jurisdictional argument from its previous motion to dismiss. The Permittee moves for summary judgment because it believes that the Appellant lives far enough away from the construction that she does not have standing to appeal its NPDES permit. The Appellant, in turn, argues that factors other than the distance of her residence, such as aesthetic appreciation and flooding concerns, give her standing in this matter. The Department has also filed a motion to strike the Appellant's reply or, in the alternative, file a sur-reply. The Department argues in its motion that the Appellant has impermissibly raised new arguments in her reply brief, in violation of this Board's rules.

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of

law. *See* 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-08. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. Issues that involve mixed questions of fact and law are best decided at a full hearing and are generally not fit for summary judgment. *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

I. Appellant's Motion for Summary Judgment and Department's Related Motion to Strike or File Sur-Reply

A. A Riparian Forest Buffer Management Plan

When the Permittee applied for its NPDES permit, it was required to respond to the following question on its permit application:

> Does the project discharge to a river, stream, creek, lake, pond or reservoir with a designated use of high quality or exceptional value? If so, is earth disturbance occurring within 150 feet of the river, stream, creek, lake pond or reservoir?

In response, the Permittee checked "No" and added "Yes to the first question, no to the second question." The Permittee skipped follow-up questions related to riparian buffers, including one pertaining to a riparian forest buffer management plan for the construction work.

No party contests the fact that the Permittee did not develop a riparian forest buffer management plan in connection with the NPDES permit issued by the Department. The parties' dispute revolves around whether a riparian forest buffer plan is required in the first place. 25 Pa. Code § 102.14(a) restricts a permittee's ability to conduct earth disturbance activities near bodies of water within Exceptional Value or High Quality watersheds, unless the activity falls within certain categorical exclusions, *see* 25 Pa. Code § 102.14(d). For Exceptional Value or High

Quality watersheds attaining their designated use, generally no earth disturbance may occur "within 150 feet of a perennial or intermittent river, stream, or creek, or lake, pond or reservoir." 25 Pa. Code § 102.14(a)(1). For Exceptional Value or High Quality watersheds that are *not* attaining their designated use, a permittee may conduct earth disturbance activities where a "project site contains, is along or within 150 feet of a perennial or intermittent river, stream, or creek, lake, pond or reservoir" if the permittee does one of three activities to maintain a riparian buffer along an affected water: (1) protects an existing riparian forest buffer, (2) converts an existing riparian buffer to a riparian forest buffer, or (3) establishes a new riparian forest buffer. 25 Pa. Code § 102.14(a)(2). A plan that addresses how earth disturbance near an affected area will comply with one of these three criteria is what the parties refer to as a riparian forest buffer management plan and is required by 25 Pa. Code § 102.14(b)(3). A riparian forest buffer management plan must contain, at a minimum: (1) a planting plan for newly established forest, (2) a maintenance schedule and procedures for newly planted or converted forest, and (3) an inspection schedule to ensure long-term maintenance. 25 Pa. Code § 102.14(b)(4).

All parties agree that the earth disturbance associated with Permittee's construction will occur within the Broad Run Watershed, a High Quality watershed that is not attaining its designated use, and therefore 25 Pa. Code § 102.14(a)(2) applies. All parties also agree that any earth disturbance within 150 feet of an affected water requires a riparian forest buffer management plan unless an exception applies. The crux of the parties' disagreement is what waters qualify for riparian forest buffer protection, and whether to measure the 150-foot distance from the actual earth disturbance or from the larger "project site.". The Appellant mentions four different waters in her briefs that she suggests triggers the need for a riparian forest buffer management plan. The Board will address these four waters as three separate points: first, a pond

and stream located on the Permittee's property next to the proposed earth disturbance activity; second, wetlands that abut the earth disturbance activity; and third, a perennial stream located off the property, across Grove Road.

First, the Appellant references a pond and a stream. The Permittee's subdivision and driveway construction activities will result in approximately six acres of earth disturbance on the roughly 14-acre estate property. The Appellant claims there is both a pond and a stream on the eastern portion of the property, located next to where the proposed driveway will connect with Grove Road. The Appellant argues that a riparian forest buffer management plan is required for the pond and stream both because they are located on the estate property and because they are within 150 feet of where the earth disturbance activity on the property will take place.

The Permittee, in contrast, denies the very existence of either a pond or a stream. The Permittee relies on the same exhibit used by the Appellant of a portion of a title plan sheet for the property (Appellant Ex. 5) and notes that there is no reference to any pond. The Permittee then says that what the Appellant calls a stream is actually a fully enclosed water pipe which drains water to a PennDOT Storm Sewer System. This feature is somewhat confusingly labeled on the plan sheet as "waters of the U.S. through pipe."

The Department, in its brief, agrees with the Permittee's characterization of the site and presents affidavits from the Department employees stating that the only non-wetland aquatic resource abutting the proposed earth disturbance is piped water, as suggested by the Permittee. The Department says that one of its aquatic biologists, Donald Knorr, inspected the site and reviewed the wetland delineation prepared by the Permittee and determined that the aquatic resource the Appellant calls a pond is properly categorized as a palustrine emergent wetland. (Department Ex. G.) When the parties are unable to agree on the basic features on the property,

and without a clear understanding on our end, it is a strong signal that summary judgment is inappropriate. Even the Appellant, in her reply brief supporting her own motion, concedes that the arguments raised by the Department and the Permittee preclude summary judgment on the issue of these two water sources. This is an issue where a hearing to develop facts through testimony would provide a great deal of clarity on the pond/wetland and stream/drainpipe.

In contrast to the alleged pond and stream, the Permittee does not dispute the existence of wetlands within 150 feet of proposed earth disturbance activity. Instead, the Permittee argues that Chapter 102 does not require a riparian forest buffer management plan for construction occurring within 150 feet of a wetland. The Permittee points to the language of Section 102.14(a) which explicitly mentions "a perennial or intermittent river, stream, or creek, or lake, pond or reservoir" but fails to include "wetlands." The Department concurs with the Permittee, and points to comment and response documents prepared by the Department when Chapter 102 was adopted, which state: "the riparian buffer provisions specify a subset of surface waters, specifically excluding wetlands, seeps, and springs." (Department Ex. E). The comments also state: "there is no buffer requirement for wetlands within this rulemaking." (*Id.*) The Appellant, in contrast, offers no reason for why the Board should read-in "wetland" as part of the covered aquatic resources in Section 102.14(a). Therefore, the Board finds no reason to grant the Appellant's Motion for Summary Judgment on this issue.

B. Department's Motion to Strike or File Sur-Reply

The Appellant argues, for the first time in her reply brief supporting her motion for summary judgment, that a fourth body of water requires this Board to rule in her favor, a perennial stream on the other side of Grove Road. The Department, nearly a month after the reply brief was filed, has moved to strike this portion of the reply, or alternatively requests leave

to file a sur-reply. Before turning to the merits of the Appellant's argument, we will first decide whether it was appropriate for the Appellant to raise this argument in her reply brief.

A reply brief is the last filing a party is allowed under the Board's rules governing summary judgment. 25 Pa. Code § 1021.94a(k). The reply brief is intended as the "last word" and, because of this, the Board rarely permits sur-replies and will instead strike a party's reply brief if it introduces "the sort of entirely new argument that would ordinarily call for reply." *Rhodes v. DEP*, 2009 EHB 504, 505. To help parties resist the temptation to unduly extend argument in a reply brief, the Board's rules also require that affidavits or other documents relied on for a dispositive motion be filed at the time of that motion, or the documents will not be considered. 25 Pa. Code § 1021.94(d); *see also Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 753 n.4.

The Appellant's reply brief applies her riparian buffer argument to the perennial stream across the road from the estate property, which was mentioned for the first time by the Department in its response to Appellant's motion. The Board fails to see how this is an entirely new argument that would ordinarily call for an additional reply. The riparian buffer argument has been a central theme of the Appellant's motion from the start. Additionally, as the Appellant notes, the first mention of the perennial stream is in the Department's response, not the Appellant's reply. Appellant attaches three exhibits to supplement her reply, which the Department contends is impermissible new information in support of the Appellant's motion. The Department does not specify which document it feels contains new information, but it clearly cannot be the Appellant's affidavit, which was attached to the Appellant's Motion for Summary Judgment. To the extent that the Department objects to the second document, the Board notes that Appellant is merely re-attaching the Department's Exhibit B from its Response,

and including a "zoomed-out" version of that exhibit for context. As for the third document, Exhibit 14, the Appellant attached this document solely in response to the Department's new argument concerning an exception to the riparian buffer requirement for roadwork on Grove Road. The Board does not construe the Appellant attaching these three documents to her reply as an attempt to sneak in additional documents in support of her original motion. Ruling for the Department and striking the Appellant's reply or allowing a sur-reply would effectively give the last word on the perennial stream riparian buffer dispute to the Department, contrary to the Board's rules on summary judgment motion practice.

The Department also asserts in its motion is that the Appellant's arguments are beyond the scope of her notice of appeal. The Department notes that the notice of appeal focuses solely on wetlands and wetland impacts, and does not mention riparian buffers, making the Appellant's reply brief an untimely amendment to her notice of appeal. Since we do not detect an entirely new issue in the reply brief, we do not understand why the Department is raising this argument now in its motion to strike. It appears to us that the entire riparian buffer issue might be beyond the scope of the Appellant's notice of appeal, but that was just as true on the day the Appellant filed her motion for summary judgment. The Department was free to raise this argument in its response to the Appellant's motion, and the Board could have considered it at that point in time. *See Chester Water Auth. v. DEP*, 2016 EHB 280, 284-86. Instead, the Department chose not to do so. While the Department's argument may well be a valid one, the time to raise it in the context of summary judgment has passed.

Having declined to strike the Appellant's reply brief, we can move on to whether summary judgment is appropriate. The Appellant, referring to the Department's response brief, notes that a stream across Grove Road meets the definition of a "perennial stream" and would

therefore be subject to the riparian forest buffer requirement. The Department agrees that it is a perennial stream, but argues that the only earth disturbance activity within 150 feet of that stream is the extension of utility lines on Grove Road, an activity it argues is beyond the scope of the Permittee's NPDES Permit, and is nevertheless excepted from riparian buffer requirements as road maintenance under 25 Pa. Code § 102.14(d)(i)(v), and allowed when authorized by the Department under 25 Pa. Code § 102.14(f)(2)(i).

The Appellant argues the Department is incorrect, and that it is the "project site," and not just the earth disturbance, which triggers the riparian buffer requirement under 25 Pa. Code § 102.14(a)(2). The Appellant notes that the riparian buffer requirement is triggered when "the ***project site*** contains, is along or within 150 feet of a perennial river, stream…" 25 Pa. Code § 102.14(a)(2) (emphasis added). The Appellant then references the definition of "project site" in 25 Pa. Code § 102.1, in the Definitions section of Chapter 102, which reads as follows:

> *Project site*--The entire area of activity, development, lease or sale including:
> (i) The area of an earth disturbance activity.
> (ii) The area planned for an earth disturbance activity.
> (iii) Other areas which are not subject to an earth disturbance activity.

Applying this definition of "project site," the Appellant suggests the proper reading of the regulations is that the entire property, not just the portion where earth disturbance activities are occurring, should be considered the "project site" for purposes of calculating the 150-foot distance from the perennial stream on the other side of Grove Road. According to the Appellant, the small south-eastern tip of the Permittee's property falls within 150 feet of the perennial stream, and therefore, a portion of the project site falls within 150 feet of the perennial stream and triggers the riparian forest buffer provisions.

The Board finds the issue of what constitutes the "project site" to be an issue unfit for summary judgment because it is a mixed question of law and fact. *Ctr. for Coalfield Justice*,

2016 EHB at 347. Summary judgment is only fit for issues free from doubt and the Board finds no clear answer to the question of what should be considered a "project site" by looking at the definition alone. The extent of the project site in this matter will likely require consideration of both the legal definition of "project site" and factual evidence from a hearing providing more context for that definition. Among other things, it is not clear how far the proposed earth disturbance is from the portion of the Permittee's property the Appellant claims is within 150 feet of the perennial stream.

C. Board's Jurisdiction to Hear Appeal

The Department, in opposition to Appellant's motion,[1] once again raises the issue from its earlier motion to dismiss that the Board lacks jurisdiction to hear this appeal because the Appellant attached a letter from the Department to her notice of appeal, as opposed to a copy of the permit. As noted above, the Board denied the Department's motion, holding that the Appellant had appealed the issuance of the NPDES permit and not the Department's letter, and that the Appellant had done everything required of her under 25 Pa. Code § 1021.51, the Board's rule for commencing an appeal. *Williams v. DEP*, 2018 EHB 856. The Department says we "did not enter judgment in Appellant's favor" and "Appellant did not (and still has not) asked for judgment on this issue." (Department Memo at 7.) The Department then cites two cases on entering summary judgment against a moving party for reasons that are unclear. While the Board did not, and indeed could not, somehow issue a ruling affirmatively in favor of the Appellant in the process of denying the Department's Motion to Dismiss, the Board stated quite clearly that the Department's motion was denied because the law favored the Appellant and the motion was

[1] The Department has not filed its own motion for Summary Judgment, so this issue is discussed in the context of whether to grant or deny the Appellant's Motion.

spurious. (We are curious as to what motion the Department thinks the Appellant could file to "ask for judgment" on whether she appealed an action subject to our jurisdiction.)

While the Department is entitled to revisit issues on summary judgment that they have raised in a motion to dismiss, the Board struggles to see why the Department has decided to re-raise this particular issue. As this Board has noted in the past, one of the main differences between ruling on a motion for summary judgment and a motion to dismiss is how the Board treats factual assertions by the parties. In a motion to dismiss, the Board assumes the non-moving party's version of events as true and decides issues of law in the light most favorable to the non-moving party. In a motion for summary judgment, the Board first examines the record to ensure there are no genuine issues of material facts, and then decides issues of law in the light most favorable to the non-moving party. *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54-55. Additionally, a motion to dismiss is primarily restricted to facts contained within the appeal, although additional facts outside those stated in an appeal may be considered when the Board's jurisdiction is at issue. *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409 (quoting *Florence Twp. v. DEP*, 1996 EHB 282). A summary judgment motion, in contrast, can include facts from pleadings, depositions, answers to interrogatories and other related documents. 25 Pa. Code § 1021.94a.

With this in mind, the Board would think that a party would opt to re-raise an issue on summary judgment if new facts have come to light through discovery. This scenario is not present here. The only thing new the Department points to this time around is a snippet of deposition testimony where the Appellant tells counsel for the Permittee nothing more than she received the Department letter and thought, "I'll go ahead and express my concerns in the appeal," (Department Ex. A), and an affidavit from a Department program manager telling us he

did not send a copy of the permit to her and concluding that she could not have appealed the permit, (Department Ex. F). The Board fails to see any meaningful distinction between the facts we assumed as true when ruling on this issue in a motion to dismiss and the "facts" the Department has set forth in its response to the Appellant's Summary Judgment Motion. Appellant's motion is denied solely due to the reasons detailed in Sections I.A. and I.B. of this Opinion and not due to the Department's jurisdictional argument.

II. Permittee's Motion for Summary Judgment

The Permittee argues that the Appellant does not have standing to pursue her appeal. When an Appellant is on notice that her standing is at issue, and then that standing is challenged in a motion for summary judgment filed after the close of discovery, the appellant must be able to point to evidence demonstrating the basis for her standing. *Food & Water Watch v. DEP*, EHB Docket No. 2018-108-L (Opinion issued August 9, 2019). Appellants are not required to prove their case on the merits in order to have standing to appeal. *Delaware Riverkeeper v. DEP*, 2004 EHB 599. However, appellants "must show that they have more than subjective apprehensions." *Premier Tech Aqua v. DEP*, 2017 EHB 111, 127. The Appellant has done so here.

An individual has standing if they have a substantial, direct, and immediate interest in the outcome of the appeal. *Robinson Twp.,* 83 A.3d 901, 917 (Pa. 2013). An interest is substantial as long as it surpasses the common interest of all in procuring obedience to the law. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). In other words, there must be "some discernable adverse effect" to an interest other than that in ensuring compliance with the law. *Drummond v. DEP*, 2002 EHB 413, 423 (quoting *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975)). An interest is direct where there is a causal connection between the matter complained of and the harm alleged. *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa.

2009). Last, an interest is immediate where the causal connection is sufficiently close so as not to be remote or speculative. *Id.*

In the context of third-party appeals from the issuance of permits, this Board has held that individuals have standing if they (1) use the area potentially affected by the permitted activity (i.e. their interest is substantial), and (2) there is an objectively reasonable threat that the permitted activity may affect that use (i.e. their interest is direct and immediate). *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 753; *Citizen Advocates United to Safeguard the Environment, Inc. ("CAUSE") v. DEP*, 2007 EHB 632, 673.

The Board defines "use" broadly and has long held that aesthetic appreciation is a legitimate ground for standing. *CAUSE*, 2007 EHB at 673 ("A realistic potential of harm to a person's aesthetic appreciation of an environmental resource is enough to establish a right to appeal."). *See also Consol Pa. Coal Co., LLC v. DEP*, 2011 EHB 251, 253 (acknowledging "under repeated Board precedent," that recreational and aesthetic interests can establish standing). Aesthetic appreciation does not require any ownership of, or direct proximity to, the affected area to result in standing. In *Orix-Woodmont*, for example, the Board found that neighbors who lived near, and drove by, the site of a development had standing to challenge a permit issued by the Department because the neighbors "fish in [the area], take walks and observe nature and wildlife at the site, and generally enjoy the aesthetic qualities of the area." *Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 85-86.

The Appellant has adequately demonstrated an aesthetic appreciation of the project area. The Appellant lives approximately one-half mile away from the property and drives by the property almost every day. The Appellant enjoys viewing the wetlands and ponds during her daily commute as well as the "tall pine trees on the top of a berm between Grove Road and the

wetlands" because they "bring nature into an otherwise urban setting." (Appellant Ex. 12). The Appellant notes, and the Permittee does not contest, that the earth disturbance activities in connection with this project will require a portion of the Grove Road berm to be excavated to create an additional line of site for cars exiting the development onto Grove Road. While the Permittee argues that the Appellant cannot view the wetlands from her house, *Orix-Woodmont* makes clear that the Appellant is not required to do so to establish standing. The Permittee contests the impact this excavation will have on the wetland itself, an argument related to the merits of the appeal. While the Permittee may well wish to raise this issue at a hearing, the argument goes above and beyond what is required of the Appellant to demonstrate standing. *Delaware Riverkeeper v. DEP*, 2004 EHB 599. To demonstrate standing, it is enough that the excavation will take place in such a manner that may affect the Appellant's aesthetic interests in the area.

In addition to her aesthetic interests, the Appellant defends her standing by raising concerns of flooding. Flooding to property or to a road that the Appellant uses, as a result of the Department issuing this permit, would clearly present a substantial, direct, and immediate risk of harm to the Appellant. Here, Appellant's expert has averred that there is a risk that the construction by the Permittee may increase flooding on Grove Road. Viewed in the light most favorable to Appellant, the non-moving party on this issue, Appellant's concerns rise above mere subjective apprehension and are sufficient to defeat the Permittee's Motion for Summary judgment.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 30th day of December, 2019, upon consideration of Permittee's Motion for Summary Judgment, Appellant's Motion for Summary Judgment, and the Department's Motion to Strike or File Sur-Reply, as well as all responses and replies, it is hereby ordered that all Motions are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

DATED: December 30, 2019

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Esquire
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