



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



CITIZENS FOR PENNSYLVANIA’S	:	
FUTURE, MAYA K. VAN ROSSUM, THE	:	
DELAWARE RIVERKEEPER AND	:	
DELAWARE RIVERKEEPER NETWORK	:	
	:	
v.	:	EHB Docket No. 2023-026-L
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TRANSCONTINENTAL	:	Issued: May 16, 2025
GAS PIPE LINE COMPANY, LLC, Permittee	:	

ADJUDICATION

By Bernard A. Labuskes, Jr., Board Member and Judge

Synopsis

The Board dismisses an appeal of two water obstruction and encroachment permits and one erosion and sediment control permit for a natural gas pipeline project where the appellants have not produced evidence showing that the permits and associated plans fail to adequately protect and restore any impacted resources, or that there is any specific harm to any of the streams or wetlands affected by the project. The appellants have not shown that it was unreasonable for the Department to not require the permittee to obtain baseline water quality data for every affected water resource before construction work began.

FINDINGS OF FACT

1. Appellant Citizens for Pennsylvania’s Future (“PennFuture”) is a Pennsylvania nonprofit environmental advocacy organization with offices in Harrisburg, Philadelphia, Pittsburgh, Erie, and East Stroudsburg, Pennsylvania. (T. 31-32.)¹

¹ Citations to the record cited as: Parties’ Stipulation No. (“Stip. __.”); Transcript of Testimony Page No. (“T. __.”); Carolyn Lange Deposition Transcript Page No. (“L.T. __.”); Dr. Alexander Jackson Deposition

2. Appellant Delaware Riverkeeper Network (the “Riverkeeper Network”) is a nonprofit organization established in 1988 to protect, preserve, and enhance the Delaware River, its tributaries, and habitats. (T. 48-50.)

3. Appellant Maya van Rossum, the Delaware Riverkeeper, is the Executive Director of the Riverkeeper Network. (T. 48-50.)

4. The Commonwealth of Pennsylvania, Department of Environmental Protection (the “Department”) is the executive branch agency responsible for administering the environmental protection laws of the Commonwealth, including 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; and their implementing regulations.

5. The permittee is Transcontinental Gas Pipe Line Co. (“Transco”), a subsidiary of The Williams Companies, Inc. (T. 664.)

6. Transco’s Regional Energy Access Expansion Project (the “Project”) is an expansion and increase in capacity of an existing interstate natural gas transmission system that consists of mainline construction, ancillary components, temporary access roads, permanent access roads, and contractor yards in Pennsylvania, New Jersey, and Maryland. (Stip. 1; T. 667, 684-85.)

7. In Pennsylvania, construction of the Project included constructing two new pipeline segments, among other facilities. In Luzerne County, the Project included construction of 22.3 miles of a 30-inch diameter pipeline, which is referred to as the “Regional Energy Lateral.” In

Transcript Page No. (“J.T. __.”) Parties’ Joint Exhibit No. (“Jt. Ex. __.”); Appellants’ Exhibit No. (“App. Ex. __.”); Department Exhibit No. (“DEP Ex. __.”); and Transco Exhibit No. (“Tr. Ex. __.”).

Monroe County, the Project included construction of 13.8 miles of 42-inch diameter pipeline, which is referred to as the “Effort Loop.” (Stip. 2; T. 337, 685; DEP Ex. 1.)

8. Approximately 78-percent of the Project is collocated with existing pipelines constructed in the 1950s, 1960s, and 1980s, and overlapping with existing utility rights-of-way. In Luzerne County, the Regional Energy Lateral is 59-percent collocated with Transco’s existing Leidy A Line. In Monroe County, the Effort Loop is 100-percent collocated with Transco’s Leidy Line. (Stip. 3, 4; T. 514, 636, 866-68, 926-27, 1188; Jt. Ex. 7, 8, 11.)

Standing

9. PennFuture has a local mission in the Northeast region to protect the headwaters of the Delaware River with a particular focus on protecting and conserving Exceptional Value (“EV”) and High Quality (“HQ”) streams, which are concentrated in the Poconos region. (T. 32.)

10. PennFuture employs a civic engagement organizer based in Luzerne County who also does work in Monroe and Pike Counties. (T. 33.)

11. PennFuture started the “Our Pocono Waters” campaign in 2018, bringing together businesses, organizations, and local officials to educate the region on the importance of EV streams. It estimates engaging more than 3,500 people as part of this campaign. (T. 34.)

12. PennFuture has done stream mapping, held many events, and monitored projects adjacent to or on EV streams in the region to ensure that those streams are being protected. (T. 34.)

13. PennFuture has submitted public comments on Transco’s Project at least four different times since 2020, including comments to the Department on the applications for Transco’s Chapter 102 and Chapter 105 permits. (T. 38, 45-46; Jt. Ex. 2, 3.)

14. PennFuture has also engaged its membership about the Project to update its members on the development of the Project and to inform them about opportunities to comment. (T. 38.)

15. As of September 2024, PennFuture had around 830 members, including members in Monroe County and Luzerne County. (T. 35-36, 42.)

16. Carolyn Lange has been a continuous member of PennFuture since 2018 and is a monthly donor. She is also a monthly donating member of the Riverkeeper Network. (T. 37; L.T. 50-52, 54, 59.)

17. Ms. Lange lives in Saylorsburg, Ross Township, Monroe County, and has lived there since 1987. She lives a couple miles from Transco's construction. (L.T. 21-22, 30.)

18. Ms. Lange uses McMichael Creek for recreational purposes, like hiking, birding, and sometimes fishing, and she uses Pohopoco Creek for kayaking as well as hiking and birding in the area. (L.T. 35-38.)

19. Transco's Project crosses unnamed tributaries to both Pohopoco Creek and McMichael Creek. (Jt. Ex. 37; DEP Ex. 27w.)

20. Pohopoco Creek is an area of concern for Ms. Lange because the pipeline crosses it and she believes there will be inherent disturbances to the resource from the crossing. (L.T. 31-32.) She is concerned about tree cutting, stream crossings, silt pollution, macroinvertebrate disturbances, trout fishery habitat disturbance, thermal degradation, habitat fragmentation, and preserving water quality. (L.T. 20-21, 44-46, 76-77, 79.)

21. Ms. Lange likes to recreate in Chestnuthill Park and the West End Regional Park, which she and her husband use for hiking, birding, exercising, and enjoying nature, and have enjoyed for many years. (L.T. 39-41.)

22. Transco's Project crosses through the Chestnuthill Park and passes within a tenth of a mile of the West End Regional Park. (Jt. Ex. 26, 37.)

23. Ms. Lange has avoided going to the West End Regional Park because she did not want to observe Transco's construction. She and her husband have generally avoided areas where Transco's construction was happening because it was emotionally trying for them. (L.T. 42-43, 103-04.)

24. The Riverkeeper Network does educational work teaching people about the Delaware River watershed and its tributaries, the values of the environment, and any existing threats to the watershed. It has also done education work and programs about special protection waters, including the importance of HQ and EV streams and wetlands in the northern part of the Delaware River. (T. 50-51, 61-62, 64-65.)

25. The Riverkeeper Network has a scientific monitoring program with staff scientists and volunteers performing data collection, collecting water samples, documenting aquatic life, and taking pictures and videos. (T. 51-52.)

26. The Riverkeeper Network has been active in the Our Pocono Waters campaign with PennFuture. (T. 63-64.)

27. The Riverkeeper Network has also been involved in matters concerning threats of harm to the waterways in Northeastern Pennsylvania in Monroe County and in the Delaware River watershed portions of Luzerne County and Northampton County addressing warehouse and pipeline projects. (T. 64.)

28. The Riverkeeper Network has drafted testimony with organizational partners concerning Transco's Project, created educational programming for its members and the

community to help them understand the Project, and distributed alerts to encourage its members and the community to participate in the permitting process. (T. 66-67.)

29. The Riverkeeper Network also testified at public hearings and submitted comments to the Department on the applications for the permits under appeal. (T. 83; Jt. Ex. 2, 3.)

30. Transco and the Riverkeeper Network had a meeting together before the permit applications were filed where Transco sought the Riverkeeper Network's input on the Project. (T. 71-72, 89, 668.)

31. The Riverkeeper Network was also involved in the proceedings before the Federal Energy Regulatory Commission (FERC) regarding the Project. (T. 67-68.)

32. Dr. Alexander Jackson has been a donating member of the Riverkeeper Network since around 2023, but previously volunteered with the organization to help with monitoring events in the area from around 2021. (T. 59; J.T. 52-53, 104.)

33. Dr. Jackson has lived in Blakeslee, PA in Tunkhannock Township, Monroe County since 2015, about 1,300 feet from the right-of-way or edge of disturbance for Transco's pipeline work. (J.T. 15, 17.)

34. Dr. Jackson could not access the trails near his house where he hikes and walks his dog during most of 2023 because he would have had to cross the pipeline right-of-way to access the trails and it was not possible with Transco's construction work. (J.T. 23-26.)

35. Dr. Jackson fishes in the area of the confluence of Poplar Run and Pohopoco Creek in Monroe County. (J.T. 86.)

36. He testified about a sediment pollution event in Poplar Run upstream of where he fishes, which he believed was from Transco's construction, and which caused him concern. (J.T. 43-47.)

37. Wetlands in the McMichael Creek watershed and in the Tunkhannock watershed that Dr. Jackson visits and uses for recreation were impacted by the Project. (J.T. 87.) The wetland in the Tunkhannock watershed had black gum trees that Dr. Jackson enjoyed; the wetland was impacted by the Project and is not there anymore. (J.T. 87-88.)

38. Dr. Jackson also keeps bees. Transco's Project affected what he estimated to be a 30-acre swath of goldenrod when Transco cleared the right-of-way that the bees would use for nectar and pollen, and he has had to supplement their food with cane sugar to keep the bees alive. (J.T. 32-37.)

39. Dr. Jackson also uses Bear Creek and Shades Creek in Luzerne County for recreational purposes. (J.T. 107-08.)

40. Portions of Transco's Project are located within the Shades Creek and Bear Creek watersheds and the Project affects Bear Creek and its unnamed tributary and Shades Creek and eight of its unnamed tributaries. (Jt. Ex. 35 (at 12-13); DEP Ex. 26w.)

Transco's Project

41. On March 26, 2021, Transco filed an application with FERC pursuant to Sections 7(b) and 7(c) of the Natural Gas Act, 15 U.S.C. § 717f, and Part 157 of FERC's regulations, 18 C.F.R. Part 157, requesting authorization to construct and operate the Project. (Stip. 5.)

42. On April 9, 2021, FERC determined that an Environmental Impact Statement ("EIS") should be prepared for the Project. (Stip. 7; T. 685.)

43. FERC issued a Certificate Order on January 11, 2023, *Transcon. Gas Pipeline Co., LLC*, 182 FERC 61,006 (2023), which authorized Transco to construct and operate the Project as described and conditioned in the Certificate Order. (Stip. 12, 13; Tr. Ex. 1.)

44. The recommended environmental conditions in the Final EIS were included as conditions in Appendix B of the Certificate Order. (Stip. 14.)

45. As a condition of the Certificate Order, Transco was required to obtain certain federal authorizations for the Project. (Stip. 15.)

46. One of the required federal authorizations for the Project in Pennsylvania was a Water Quality Certification under Section 401 of the Clean Water Act (“Section 401 Water Quality Certification”), 33 U.S.C. § 1341, which is issued by the Department. (Stip. 16; T. 683.)

47. Transco submitted an application to the Department for a Section 401 Water Quality Certification on March 31, 2021 and subsequently responded to a January 7, 2022 technical deficiency letter from the Department by submitting a revised application on March 2, 2022. (Stip. 17.)

48. The Department issued the Section 401 Water Quality Certification to Transco on March 30, 2022. 52 Pa.B. 2287 (Apr. 16, 2022). (Stip. 18.)

49. The Section 401 Water Quality Certification requires Transco to obtain an Erosion and Sediment Control Permit under 25 Pa. Code Chapter 102, and Water Obstruction and Encroachment Permits under 25 Pa. Code Chapter 105. (Stip. 19; T. 683, 689.)

50. Transco submitted applications for an Erosion and Sediment Control Permit and Water Obstruction and Encroachment Permits in connection with the Project to the Department on April 9, 2021. (Stip. 20.)

51. On February 3, 2023, the Department issued Erosion and Sediment Control Permit No. ESG830021002-00 (the “Chapter 102 permit”) and Water Obstruction and Encroachment Permit Nos. E4083221-006 and E4583221-002 (the “Chapter 105 permits”) to Transco for the Project. Separate Chapter 105 permits were issued for Luzerne County and Monroe County. The

Chapter 102 permit and Chapter 105 permits are collectively referred to as the “permits.” (Stip. 23; Jt. Ex. 31, 32a, 32b.)

52. Utility line stream crossings are typically regulated by a general permit, but Transco’s Project required individual permits because it proposed to cross EV wetlands and streams, which the Department reviews with additional scrutiny. (T. 1114-15, 1133-35.)

53. On March 23, 2023, FERC issued a Notice to Proceed authorizing Transco to commence construction of all components of the Project in Pennsylvania, New Jersey, and Maryland. *See* FERC Notice to Proceed (Mar. 23, 2023), FERC Document Accession Number 20230323-3094. (Stip. 27; Tr. Ex. 5.)

54. Transco completed pipeline construction in October 2023. (Stip. 28, 29.)

55. Following the completion of work on certain compressor stations and metering and regulating stations, Transco received approval from FERC on July 26, 2024 to place the Project into full service. Transco commenced full Project service on August 1, 2024, meaning gas is flowing through the pipelines. (Stip. 30, 31; T. 676-77, 679-82, 690; Tr. Ex. 7.)

56. In Pennsylvania, Transco’s Project disturbed 262.2 acres of land in Monroe County and 405 acres in Luzerne County. (Jt. Ex. 8, 10.)

57. A total of 108 wetland complexes are traversed by the Project in Luzerne County, with 42 of them being EV wetland complexes, and 18 wetland complexes are traversed by the Project in Monroe County, with 16 of them being EV. (Jt. Ex. 35, 37.)

58. The Project crosses 19 named and classified streams along with many of their unnamed tributaries in Luzerne County for a total of 76 stream and floodway crossings. The Project crosses six named and classified streams along with several of their unnamed tributaries in

Monroe County for a total of ten stream and floodway crossings. (Jt. Ex. 32a, 32b, 35, 37; DEP Ex. 26w, 27w.)

59. Thirty-eight of the streams and unnamed tributaries crossed by the Project in Luzerne County and ten of the streams and unnamed tributaries crossed in Monroe County are special protection waters. (Jt. Ex. 32a, 32b, 35, 37.)

60. Special protection waters, such as HQ and EV streams and wetlands, are afforded greater protection from degradation under Pennsylvania Law. (T. 434-36.) *See generally* 25 Pa. Code Chapter 93.

61. Among the special protection waters crossed by the Project in Monroe County is Poplar Run, an EV stream. (T. 342, 580; Jt. Ex. 32b.)

62. Transco developed the erosion and sediment control (“E&S”) and post construction stormwater management (“PCSM”) plans for the Project by utilizing the Department’s Erosion and Sediment Pollution Control Program Manual and its PA Stormwater Best Management Practices Manual, as well as the antidegradation best available combination of technologies (“ABACT”) best management practices (“BMPs”) listed in the Department’s guidance documents identified in the regulations at 25 Pa. Code §§ 102.4(b)(6)(iii) and 102.8(h)(3). (T. 819-23; Jt. Ex. 4, 8, 10, 11, 12; Tr. Ex. 17.)

63. The Department approved Transco’s use of ABACT BMPs, having determined that they either individually or collectively managed the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year / 24-hour storm during earth disturbance activities. (T. 340-49, 1054-56, 1088-90; Jt. Ex. 33.)

64. The entire Project was treated as if it were in a special protection watershed even where it was not, so Transco used ABACT BMPs across the entire length of pipeline construction. (T. 341-44, 823-24.)

65. In addition to utilizing ABACT BMPs, in accordance with the Chapter 102 permit, Transco used decompaction of the soil during restoration of the right-of-way to “meadow in good condition” in order to promote infiltration within the temporary and permanent rights-of-way. (T. 345-46; Jt. Ex. 31 (Part C, V.G and V.I).)

66. “Meadow in good condition” is a type of vegetative restoration that has a goal of resulting in little to no increase in the rate and volume of stormwater runoff coming from a site. (T. 346, 407-08.)

67. 99.44% of Project impacts will be restored to meadow in good condition through soil decompaction and the use of a meadow seed mix. (T. 345-54, 409-10, 416-18; Jt. Ex. 33.)

68. Contractors laying the pipeline remove and segregate the topsoil during construction and then put it back on top of the subsoil. The area is scarified during restoration to ensure proper seed germination and vegetative growth. The affected area is covered with meadow seed mix to allow for regrowth of plants aboveground with specific root structures to provide stormwater management and function. (T. 407-09, 416-19.)

69. The BMPs required for the Project, such as the use of timber mats underneath heavy construction equipment, protect soils for restoration purposes by preventing compaction or liquefaction of soils. (T. 809-10, 1236-37.)

70. The remaining 0.56% of the Project area consists of impervious surfaces, such as pipeline infrastructure (pipeline machinery, mainline valves, regulator stations), and will be mitigated through the use of PCSM BMPs (infiltration berms, level spreaders, subsurface

infiltration beds) to help infiltrate and slow down the rate and volume of stormwater coming off of those areas. (T. 347-49; Jt. Ex. 33.)

71. Transco's permit applications included detailed descriptions and technical plan drawings of each site-specific BMP, including calculations and narratives prepared by licensed professionals that articulate how those BMPs will work to keep the stormwater on the site to mimic the pre-construction natural management of stormwater. (T. 286-90, 300, 389-90.)

72. There is no credible evidence that Transco's E&S and PCSM controls were not adequately designed and, therefore, should not have been permitted. (*See* T. 342-45, 513, 615-19, 629-30, 823-24; Jt. Ex. 33; Tr. Ex. 28a.)

73. Transco's Chapter 102 permit application and companion plans addressed potential thermal impacts to water bodies affected by the Project from the removal of mature trees and canopy at stream and wetland crossings. (T. 831-36, 838-39; Jt. Ex. 8, 33.)

74. The measures to minimize thermal impacts include the preservation of tree canopy cover to the maximum extent practicable, and, consistent with the riparian buffer requirements, the replanting of riparian buffers five feet from the pipeline centerline. (T. 794-97, 1160; Jt. Ex. 7, 27, 47.)

75. Transco's permit application included riparian reforestation plans describing how Transco would replant trees along the riparian buffers. (T. 607, 794-97, 1160; Jt. Ex. 27.)

76. The Project involves about 19 acres of total riparian buffer replanting in Luzerne and Monroe Counties. (T. 1160.)

77. The Department evaluated the potential impacts to water temperature from the Project and determined that the proposed changes in vegetation and loss of canopy cover associated with the Project would not have a major change in the water temperature. (T. 1158-60.)

78. Thermal impacts to streams are not anticipated for this Project due to the reduction in size of the resource crossing, the riparian replanting, and because most streams in Pennsylvania are groundwater-fed. (T. 831-36, 838-40, 1158-61, 1247-48.)

79. Transco made “neck-downs” to reduce the size of the construction right-of-way to 50 feet at stream and wetland crossings to minimize the area of disturbance and avoid and reduce impacts. (T. 447-48, 607, 989-91, 1175-76; Jt. Ex. 7, 23; DEP Ex. 26w, 27w.)

80. These reductions to the workspace are considered the maximum reductions for the safe operation and passage of equipment and personnel while minimizing the length of time required to cross the streams and wetlands. (T. 962-64, 991.)

81. The Aquatic Resource Impact Tables (“ARIT”) prepared by Transco and submitted to the Department identify each surface water (i.e., wetlands and streams) impacted by the Project, the latitude and longitude of the resource, the Chapter 93 designation for the resource, the work proposed within the resource, whether the work relates to a temporary or permanent impact, and the exact square footage of the impact dimensions. (T. 1136-40, 1175-76; DEP Ex. 26w, 27w.)

82. Transco submitted watercourse data forms that identified the characteristics of each watercourse affected by the Project, including the flow type, stream depth, substrate type, water clarity, slope, the types of riparian vegetation and aquatic organisms present (including the presence of macroinvertebrates), and the geometry of the stream, among other characteristics. (T. 620-22; Jt. Ex. 14-18, 25.)

83. The Environmental Assessment also contained a module that identified and described the potential project impacts and how those impacts would be minimized, including the minimization of effects on fish and other aquatic biota. (Jt. Ex. 19, 26.)

84. As part of its data collection, Transco did not do any pre- or post-construction sampling or analysis to determine water quality or temperature in any of the streams affected by the Project. Transco did not collect pre- or post-construction information regarding aquatic life or populations of benthic macroinvertebrates in affected waters. Transco did not conduct pebble counts or grain-size measurements or detailed analyses of streambed characteristics. (T. 227-28, 289, 548, 1065-66, 1068-69, 1286.)

85. The Department determined that additional testing, including pre- or post-construction sampling, macroinvertebrate studies, fish studies, and water quality studies, is not needed for the Project because of the type of impacts, the proposed construction activities, the proposed minimization practices, and the provisions of the Chapter 102 permit. (T. 1155-58, 1174-77.)

86. In making this determination, the Department considered the relatively small and quick nature of the stream crossings and the common methods of utility crossings of streams and wetlands being employed by Transco. (T. 1154-55, 1176-80, 1219-20, 1273-74.)

87. The primary construction methods utilized for the Project are considered standard industry practices and are common in all types of utility line projects, including not only natural gas transmission lines, but also sanitary sewer lines, stormwater control lines, drinking water lines, and electric and fiber optic lines. (T. 1154-55, 1178-80.)

88. The way in which the Department regulates crossings for Transco's pipeline Project is the same as the way in which the Department regulates crossings for activities associated with these other types of linear projects. (T. 1179-80, 1281-82.)

89. The Department considers utility line crossings to be low risk based upon decades of experience regulating them. (T. 1219-21, 1231, 1258-59, 1273-74.)

90. In-stream sampling was also not required because all stream crossings for the Project were done “in the dry.” “In the dry” crossings utilize a pump or flume to divert the water around the workspace so there is no water flowing through the workspace while the excavator operates. While the water is diverted, the pipeline is installed and the soils are removed and put back in more or less the same contours of the stream. After the completion of construction activities, the workspace is stabilized and the pump or flume is removed to allow water to flow again. (T. 1154-57.)

91. According to the Department, working “in the dry” means that there will be no major change to the shape of the stream after pipeline installation and there will be no extra sediment. (T. 1155.)

92. An “in the dry” crossing for pipeline construction generally takes 24 to 48 hours depending on the size of the stream. Construction across streams and wetlands should be done as quickly as possible to reduce the risk of a storm event and to restore the water resource as soon as possible. (T. 236, 996, 1011, 1157, 1174.)

93. None of the crossings for the Project were constructed “in the wet,” which may include having an excavator dig in the stream while water is flowing around. For a project proposing “in the wet” construction, an applicant may be required to conduct macroinvertebrate and sediment testing. (T. 1155-57, 1193.)

94. The Department has determined that the requirement to include macroinvertebrate assessments in the environmental assessments for all stream enclosures and stream realignments is not appropriate, particularly for stream systems with low to minimal macroinvertebrate populations, and the Department in its discretion determines whether those assessments are needed on a case-by-case basis. (T. 1227-30, 1264-68.)

95. In contrast to utility line crossings, the Department does require in-stream sampling, monitoring, and additional analysis for other permitted activities, such as dredging, bridge culvert projects, stream channel realignments, dam removals, brownfield sites, mining, and others. (T. 1221-27.)

96. The permits and Transco's approved plans require Transco to stabilize and restore pipeline crossings upon the completion of work by stockpiling native streambed material and using a minimum of six inches of native streambed material prior to restoring stream flow. Restored streambed elevation cannot exceed the pre-existing streambed elevation. (T. 288-89, 418, 468, 622-23, 990, 1235-36; Jt. Ex. 9, 31, 32a (Special Condition V), 32b (Special Condition U).)

97. Transco's stream construction plans require the stream banks and streambed to be restored to pre-construction contours. (T. 287-88, 392, 1155; Jt. Ex. 19, 26.)

98. The permits contain pre- and post-construction monitoring conditions to ensure that BMPs are properly installed and functioning, and that restoration of affected resources is achieved. (T. 226-27, 292-93, 372-73; Jt. Ex. 31, 32a, 32b.)

99. The Chapter 102 permit requires a licensed professional to be present onsite during all critical stages of the implementation of Transco's PCSM plan, including the installation of structurally engineered BMPs. (Jt. Ex. 31 (Part A, III.D; Part C, V.C).)

100. Once post-construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process in Chapter 102, 25 Pa. Code § 102.7, to ensure that the BMPs have been constructed in accordance with the plans and are functioning as intended. (T. 351, 1036-37.)

101. Until a notice of termination is accepted by the Department, the Chapter 102 permit requires Transco to visually inspect the Project site weekly, at minimum, to ensure that BMPs are

properly constructed and maintained to effectively minimize pollution to waters of the Commonwealth. Each inspection must include an evaluation of the BMPs to determine whether they are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed. (Jt. Ex. 31 (Part A, III.C).)

102. Transco must also prepare a long-term operation and maintenance schedule addressing the repair, replacement, or other routine maintenance of the BMPs to ensure proper function and operation. (Jt. Ex. 31 (Part A, III.C).)

103. Transco is required to “prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions,” and to submit that documentation to the Department within 90 days of completing the work under each Chapter 105 permit. (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).)

104. There are site specific plans, including designs, photos, and other documentation that the Department can review to ensure that a stream channel or wetland is restored and remains stable post-construction. (T. 226-27, 287-90.)

105. After construction, Transco is required to supply post-construction and monitoring reports for restored resources for five years, which include post-construction monitoring of stream hydrology and of tree and shrub plantings in wetlands. (T. 224-28, 412-14; Jt. Ex. 32a (Special Conditions X, Y, Z), 32b (Special Conditions W, X, Y).)

106. The Chapter 105 permits require Transco to monitor for secondary impacts to hydrology, which includes the submission of reports that “contain information describing the presence or absence of hydrology at the time of inspection, a narrative comparison to hydrology

present in the watercourse during pre-permitting field investigation(s), and photographs of the watercourse.” (Jt. Ex. 32a (Special Condition Z.1), 32b (Special Condition Y.1).)

107. Under the Chapter 105 permits, Transco is required to provide post-construction monitoring reports for restored resources for a minimum of five years, with two reports filed in each of the first two years and annual reports filed in the following three years. The Department can request additional monitoring if parameters are not met. (T. 371-73; Jt. Ex. 32a (Special Conditions Y, Z, CC, DD), 32b (Special Conditions X, Y, BB, CC).)

108. The purpose of these reports, among other things, is to ensure that affected resources are being properly restored, to demonstrate that the existing wetlands onsite are maintaining pre-construction wetland conditions and delineated acreages, to ensure that vegetative replanting is successful, to make sure hydric soils are present, and to ensure any excess fill has been removed from the resources. (T. 372-73, 844-49; DEP Ex. 15d.)

109. The monitoring reports do not require metrics on the affected wetland such as water quality parameters, functions, hydrology, or the ecosystem. (T. 227-28, 292-93.)

110. Transco’s adaptive management plans specify that, if its work fails to meet restoration or other requirements, e.g. if there are issues with replanting survival, Transco must propose a plan to the Department to ensure compliance with those requirements, such as planting additional vegetation or enhancing soil conditions. (T. 403-04, 625, 802-05.)

111. The Department’s in-the-field observations on this Project, including an inspection of EV stream Poplar Run, reflect that streams have recovered or are recovering in accordance with the terms of the permits. (T. 1166-68.)

112. The Department determined that there would be no adverse impacts to EV wetlands and no significant adverse impacts to other wetlands if the Project is implemented as designed in

the Chapter 105 permits and plans and Transco follows all permit conditions. In making this determination, the Department considered the effect on each wetland complex as opposed to individual wetland within the complex. (T. 1151-53; Jt. Ex. 35, 37.)

113. There is no complete or permanent loss or fill of any wetlands associated with the Project. While the habitat function of some portions of wetlands will change, there is no loss of hydrology or biogeochemical processes. All wetland areas will be restored to wetland areas. (T. 184, 192-93, 237-38, 782-83, 1163-65.)

114. Some sections of the Project converted Palustrine Forested (PFO) and Palustrine Scrub Shrub (PSS) wetlands into Palustrine Emergent (PEM) or PSS wetlands in areas immediately above the pipeline within the right-of-way. (T. 1147-48.)

115. This is a permanent functional conversion of wetlands from a change in the type of vegetation growing in the wetland, i.e. a change from a forested function to a meadow function. (T. 245, 784-75, 1148-50, 1180-82.)

116. The permanent functional conversion of the wetlands is due to vegetative maintenance in the right-of-way that is designed to ensure that tree roots do not damage or corrode the pipeline. (T. 1009, 1180-82.)

117. The permits allow for the cutting of woody material within the 30-foot-wide corridor of the right-of-way on a routine basis, but only a ten-foot-wide swath within that corridor (five feet on each side of the pipeline) will be subject to mowing. (T. 237-38, 246, 364, 787, 814-15, 935; Jt. Ex. 35, 37.)

118. Certain sections of the right-of-way will be mowed as infrequently as once every three years. Wetlands within those sections will reach different functional status intermediately

because of the change in vegetation. A mowed area that reaches PSS status intermediately means shrub species and vegetated cover will appear. (T. 244-46, 814-15; Jt. Ex. 35.)

119. The Department considered the conversion of PFO and PSS wetlands to PEM and PSS wetlands to be a permanent indirect impact. (T. 213-16, 1147-51, 1177.)

120. Permanent indirect impacts include the placing of the pipeline under a stream because it is permanent but it does not change the stream grade or substrate, or the maintaining of vegetation in the right-of-way because it only changes one function of the wetland (vegetation). A permanent direct impact would be a loss or fill of wetlands, e.g. paving over wetlands. (T. 783, 806-07, 1177.)

121. In the Department's view, the conversion of one function of a portion of a wetland does not amount to wetland fill or loss. The Department considers loss to be when the wetland no longer exists. (T. 195-96.)

122. For Luzerne County, 0.24 acres of PSS wetlands are permanently converted to PEM wetlands, 0.54 acres of PFO wetlands are permanently converted to PEM wetlands, and 0.78 acres of PFO wetlands are converted to PSS wetlands as a result of the required mowing to maintain the pipeline right-of-way. (T. 1148; Jt. Ex. 35.)

123. For Monroe County, 0.04 acres of PSS wetlands are permanently converted to PEM wetlands, 0.15 acres of PFO wetlands are permanently converted to PEM wetlands, and 0.10 acres of PFO wetlands are converted to PSS wetlands due to of the required mowing to maintain the pipeline right-of-way. (T. 1149; Jt. Ex. 37.)

124. A total of 1.56 acres of EV wetlands across both counties are converted from PFO or PSS wetlands to PEM or PSS wetlands. (Jt. Ex. 35, 37.)

125. The Department determined that no adverse impacts to any wetland's functions and values were anticipated from the Project. (T. 1152; Jt. Ex. 35, 37.)

126. The Department determined that the function and value of the existing wetlands are not unique to the area, nor will the Project impair the wetland systems from providing their functions and values once restoration is complete. (T. 1287; Jt. Ex. 35, 37.)

127. The Department requires mitigation not just for complete and direct losses of wetlands, but also for the conversion of wetland functions. Transco's mitigation plans require compensatory mitigation for the permanent and temporal functional conversion of wetland cover types due to mowing. (T. 782-90, 1265-67; Jt. Ex. 20, 27, 35, 37.)

128. Mitigation for any permanent conversion of wetlands is being done in excess of the minimum one-to-one ratio required by the regulations, with the mitigation ratio for EV wetlands at 2.5 to 1. (T. 1149-50; Jt. Ex. 35, 37.)

129. Offsite mitigation for the functional conversion of wetlands involves identifying existing offsite wetlands in an emergent state and selecting them for planting with trees and shrubs. (T. 785-86.)

130. The replacement ratios used for the Project factor in the time it takes for trees or shrubs to grow, which is why the ratio is higher than one-to-one. (T. 1287-88.)

131. The Department accounted for the nature of the resource and its special protection status when setting wetland replacement ratios and increased the ratios so that they were higher than is normally required. (T. 1288, 1294.)

132. Apart from the right-of-way directly over the pipeline, the permits require Transco to restore many areas to preconstruction conditions. (Jt. Ex. 31, 32a, 32b, 35, 37.)

133. Under the Chapter 105 Permits, after the completion of earthmoving activities, Transco “shall restore all disturbed wetland areas to original contours and replant with indigenous wetland vegetation in accordance with the restoration plans as presented in the permit application.” (Jt. Ex. 32a (Special Condition S), 32b (Special Condition R).)

134. The Chapter 105 Permits require that “[a]ll Palustrine Scrub-Shrub (PSS) and Palustrine Forested (PFO) wetlands within the temporary right-of-way (ROW) shall be replanted with woody species that are similar to those species present in the wetland prior to the permittee conducting construction activities.” (Jt. Ex. 32a (Special Condition W), 32b (Special Condition V).)

135. The Chapter 105 Permits require Transco to “ensure at least an eighty-five percent (85%) survival rate of wetland plantings during the five (5) year monitoring period. Additional wetland plantings and/or reports in subsequent years beyond the initial five (5) years may be required if an eighty five percent (85%) survivability of planted species is not achieved.” (Jt. Ex. 32a (Special Condition X), 32b (Special Condition W).)

136. The Department and Transco considered the cumulative impacts of the Project to stream and wetland resources in relation to other projects, including the previously installed collocated pipelines. (T. 863-69, 1162-66, 1193-94.)

DISCUSSION

Citizens for Pennsylvania’s Future (“PennFuture”), the Delaware Riverkeeper Network (the “Riverkeeper Network”), and Maya van Rossum, the Delaware Riverkeeper (collectively the “Appellants”) have filed an appeal of the Department of Environmental Protection’s (the “Department’s”) issuance of Erosion and Sediment Control Permit No. ESG830021002-00 and Water Obstruction and Encroachment Permit Nos. E4083221-006 and E4583221-002 to

Transcontinental Gas Pipe Line Company, LLC (“Transco”) for work associated with Transco’s Regional Energy Access Expansion Project in Luzerne and Monroe Counties (the “Project”). The Erosion and Sediment Control Permit is known as a Chapter 102 permit under Title 25 of Pennsylvania’s regulations, 25 Pa. Code Chapter 102, and the Water Obstruction and Encroachment Permits are known as Chapter 105 permits, 25 Pa. Code Chapter 105. Separate Chapter 105 permits were issued for Luzerne and Monroe Counties.

Transco’s Project is an expansion and increase in capacity of an existing interstate natural gas transmission system that spans Pennsylvania, New Jersey, and Maryland. In Pennsylvania, construction of the Project included constructing two new pipeline segments, one in Luzerne County and one in Monroe County. In Luzerne County, the Project included construction of 22.3 miles of a 30-inch diameter pipeline for what Transco calls the “Regional Energy Lateral.” In Monroe County, the Project included construction of 13.8 miles of 42-inch diameter pipeline for what Transco calls the “Effort Loop.” Approximately 78-percent of the Project is collocated with existing pipelines and it overlaps with existing utility rights-of-way. In Monroe County, the Effort Loop is 100-percent collocated with Transco’s Leidy Line. In Luzerne County, the Regional Energy Lateral is 59-percent collocated with Transco’s existing Leidy A Line.

Transco’s Project disturbed 262.2 acres of land in Monroe County and 405 acres in Luzerne County. The Project crossed numerous streams and wetland complexes in those counties, with some of the streams and wetlands being classified as High Quality or Exceptional Value waters of the Commonwealth, and thus subject to the Commonwealth’s antidegradation program.

On March 23, 2023, the Federal Energy Regulatory Commission (FERC) issued a Notice to Proceed authorizing Transco to commence construction of all components of the Project in Pennsylvania, New Jersey, and Maryland. Transco completed pipeline construction in October

2023. Transco received approval from FERC on July 26, 2024 to place the Project into full service and subsequently commenced full Project service on August 1, 2024, meaning gas has been flowing through the pipelines since that time.

Standard of Review

The Board reviews Department actions *de novo*, meaning the Board “decide[s] the case anew on the record developed before” it. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318 (citing *Dirian v. DEP*, 2013 EHB 224, 232; *O’Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep’t of Env’tl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975)). In a third-party appeal such as this one, the Appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The Appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department’s obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff’d*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156. *See also Lyons v. DEP*, 2011 EHB 169, 178 (appellant of Chapter 105 permit must show “no reasonable basis” for Department’s action) (citing 25 Pa. Code § 105.21(e)).

By their own admission, the Appellants have not shown that there has been any actual environmental harm or degradation as a result of Transco’s Project. They do not even allege that any particular harm was likely to occur at any particular location given the permits. Instead, they mostly argue in general terms that the Department’s improper, inadequate, incomplete review failed to ensure that no harm could come from the Project. As we have said many times before, it is possible for a third-party appellant who bears the burden of proof to prevail in an appeal with such a case, but it can be difficult. *Stocker v. DEP*, 2022 EHB 425, 453 (“an appellant who rests

on the fact of an inadequate investigation or analysis alone often does so at its peril.”) (quoting *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484); *Kiskadden v. DEP*, 2015 EHB 377, 410 (“Our function in this proceeding is not to critique the Department’s procedures generally or as employed in this case. While an inadequate investigatory process may be evidence of a potentially dispositive finding, it is not dispositive in and of itself.”) (quoting *O’Reilly, supra*, 2001 EHB at 45).

A case built upon speculation, possibilities, and little actual investigation on the part of the appellants themselves has limited chances of success. We made this clear in *Shuey v. DEP*, 2005 EHB 657:

Where the appellants argue that the granting of a permit will destroy or pollute a valuable natural resource it is not enough to meet their burden to simply focus on the value of the natural resource. The natural resource’s value is usually acknowledged by all parties involved, including the Department whose primary function it is to protect the environment. They must come forward with evidence, usually in the form of expert testimony, to prove their claims....An appellant cannot simply come forth with a laundry list of potential problems and then rest its case. It must prove by a preponderance of the evidence that these problems have occurred or are likely to occur.

Id. at 711-12. *See also Stedje v. DEP*, 2015 EHB 577, 612. Here, for the reasons discussed below, the Appellants have failed to meet their burden of proof.

Standing

Before getting to the merits of this appeal, we will address the preliminary issue of standing. Transco, but not the Department, argues that both PennFuture and the Riverkeeper Network lack standing in some way. Transco contends that PennFuture does not have standing to challenge any of the permits under appeal, and that the Riverkeeper Network does not have standing to challenge the Luzerne County Chapter 105 permit. The issue of standing first came up during the filing of the parties’ pre-hearing memoranda in the lead up to the merits hearing. The Appellants’ pre-hearing memorandum, which was filed first, contained no mention of their

standing. However, Transco's pre-hearing memorandum contained a section asserting that PennFuture and the Riverkeeper Network did not have standing in this appeal, raising the issue for the first time. The Appellants then filed a motion to amend their pre-hearing memorandum to address their standing in this litigation. They said that they omitted any mention of standing in their pre-hearing memorandum because Transco and the Department had not brought up the issue of standing at any time prior. The Appellants sought to amend their pre-hearing memorandum to include a new section on standing as well as five additional witnesses who would testify for purposes of standing. The Department and Transco filed responses in opposition to the motion, arguing that they would be prejudiced by the amendment because they would be deprived of the opportunity to depose the new witnesses ahead of their testimony to explore their interests.

We issued an Order granting the motion to amend and allowing the Appellants to call Matthew Stepp and Maya van Rossum, who had already been named in Transco's pre-hearing memorandum, as witnesses as part of their cases-in-chief during the merits hearing. In the Order we stated that, following the conclusion of the merits hearing, the record would be left open and discovery would be reopened for 30 days to allow the Department and Transco to take discovery regarding the issue of standing from the organizational members the Appellants identified in their motion to amend. We also permitted the Appellants to reopen their cases-in-chief to provide hearing testimony on the issue of standing from those organizational members, subject to cross-examination from the Department and Transco, and we scheduled an additional day of hearing in November 2024.²

At the conclusion of the merits hearing, the parties indicated that they would inform the Board about the depositions and if the depositions could be used in lieu of another day of hearing

² In our Order we also denied the Appellants' request that we bifurcate this matter and decide the issue of standing separately from the merits before receiving testimony from any other witnesses.

testimony. The parties thereafter filed a letter stating that the depositions of the standing witnesses had been completed and that the parties agreed to use the deposition transcripts instead of reconvening in November for additional hearing testimony. The deposition transcripts for Carolyn Lange and Dr. Alexander Jackson were filed on November 4, 2024 for inclusion in the record. We issued an Order on the same day accepting the transcripts, closing the record, and setting the post-hearing briefing schedule.

In its post-hearing brief, Transco continues to object to our Order allowing the Appellants to amend their pre-hearing memorandum and reopening discovery, saying it provides an incentive to parties to “abuse the discovery process” and “withhold evidence until the eve of trial without penalty.” (Transco Brief at 58.) We fully stand by our decision allowing the Appellants to amend their pre-hearing memorandum to address their standing in this appeal, and to reopen discovery for the purpose of Transco taking the depositions of the newly identified witnesses. Reopening discovery curtailed the prejudice to the Department and Transco and is consistent with the Board’s preference to resolve cases on the merits and not through procedural maneuvering. *See Goheen v. DEP*, 2003 EHB 92, 97 (“We must remain ever mindful that the Board’s primary responsibility is to decide cases on the merits.”). *Cf. PQ Corp. v. DEP*, 2017 EHB 870, 876 n.4 (“the Board’s preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected”) (quoting *Neville Chem. Co. v. DEP*, 2003 EHB 530, 532).

Transco also preserves its earlier argument that the Appellants are “bound by” the testimony Matthew Stepp and Maya van Rossum, as organizational designees, gave during depositions regarding the effect of Transco’s project on specific members of the two organizations. Fundamentally, this is a discovery dispute, and at this point we have little interest in devoting time

to resolving a discovery dispute a year and a half after discovery has been completed. Transco could have raised this issue in discovery via e.g. a motion to compel, but for whatever reason, it chose not to. Its main gripe appears to be that Mr. Stepp and Ms. Van Rossum were not better prepared for their depositions, and yet Transco did nothing about it until filing its pre-hearing memorandum three weeks before the start of the merits hearing. At this stage in the proceedings we are much more interested in deciding the issue of standing on its own merits and not based on some drawn-out discovery grievance.

Even so, Transco's argument is without merit. Transco does not explain what it means by saying the Appellant organizations are "bound by" the deposition testimony. It offers no support for a contention, if that is what it is, that the organizations could not name additional witnesses at the hearing solely because they were not identified by the organizations' designees at their depositions. Even if the designees had testified at the depositions, "We have no members adversely affected," that would not have precluded them from testifying at the hearing that they did have such members, let alone precluded other members from testifying themselves. They obviously could have been impeached by their prior deposition testimony, Pa.R.Civ.P. 4020(a)(2), but it does not follow that they could not testify at all. Instead, any witness testifying at a hearing can be impeached by prior allegedly inconsistent deposition testimony, Pa.R.Civ.P. 4020(a)(1), but that does not preclude the witness from testifying at the hearing.

In *Pennsylvania Trout v. DEP*, 2003 EHB 622, we considered a permittee's motion for summary judgment arguing that the organizational appellants did not have standing to challenge a Chapter 105 permit. The permittee asserted that, during depositions of the organizations' representatives, the representatives did not identify any member with a sufficient interest to establish standing. In response to the motion, the appellants submitted affidavits from three

members attesting to their interest in the area affected by the development. We rejected the permittee's argument and denied the motion. We held that the affidavits were sufficient to overcome the motion for summary judgment and the issue of standing would be determined conclusively following the hearing on the merits. We thereafter allowed the standing witnesses to testify at the hearing, and found that the appellants demonstrated standing. *Pa. Trout v. DEP*, 2004 EHB 310, 354-59, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004).

In any event, being unable or unprepared to identify specific members and describe how they stand to be affected is not the same as saying there are no members adversely affected and then later claiming the opposite. The fact that Transco was unsatisfied with the deposition answers of Matthew Stepp and Maya van Rossum is as much a comment on the lawyers' questioning as it is on the deponents' answers. There is no real conflict in the deposition testimony of Mr. Stepp and Ms. van Rossum and the clarification they and the Appellants later provided.

Transco's argument with respect to the Riverkeeper Network is even weaker. During her deposition, Maya van Rossum identified "Mr. Jackson" as a Riverkeeper Network member affected by the Project. Through questioning of Ms. van Rossum on cross-examination at the merits hearing, Transco confirmed that during Ms. van Rossum's deposition she could not describe with particularity exactly how Dr. Alexander Jackson was impacted by the Project, and whether he was impacted by the Project generally or impacted by the permits themselves. (T. 77-80.) That Transco points to this as "binding testimony" to somehow argue that the Riverkeeper Network cannot utilize Dr. Jackson as a standing witness borders on complete nonsense. There is no evidence that Transco ever followed up with any questions seeking any more information about Dr. Jackson after Ms. van Rossum's deposition. Transco could have sought to depose Dr. Jackson

ahead of the hearing, but it apparently never did. It could have served interrogatories, but it never did. Transco's feigned surprise at the Riverkeeper Network's standing witness is not credible.

To that end, Transco relies on Rule 4007.4 of the Pennsylvania Rules of Civil Procedure to argue that the Appellants were under a duty to seasonably supplement their deposition testimony to identify persons having knowledge of discoverable matters. Pa.R.Civ.P. 4007.4(1). However, the Explanatory Note to the Rule provides some guidance on the procedure for one party securing the supplementation of deposition testimony from another party, and it places much of the onus on the party seeking the information:

First, it is quite common, when an oral deposition is complete, for the inquirer to request, and obtain, an agreement from the opponent or from an expert witness to supplement the response within the scope of the Rule. This also can be accomplished by appropriate closing questions in interrogatories.

Second, the inquirer, if such an agreement is refused, may move the court to enter an appropriate order.

Third, the inquirer may, at any time, force a review of prior responses by filing supplementary interrogatories or noticing a supplementary oral examination to discover whether the respondent has become aware of any information which requires an amendment of any prior response.

Pa.R.Civ.P. 4007.4 (Explanatory Comment). It does not appear that Transco did any of these things or ever followed up on the depositions in any way to get more information about any members affected by the Project. There is no indication that Rule 4007.4 does not apply to the deposition of a designee taken under Rule 4007.1(e).

Transco says it "had a right to rely on the Appellants' *discovery responses* and deposition testimony" (emphasis added), but it is unclear whether Transco ever served any discovery requests on the Appellants that would have generated a discovery response. Transco has never pointed to any interrogatory it served, let alone one requesting the identity of the Appellants' witnesses or anything about standing. Transco in its opposition to the Appellants' motion to amend cited discovery requests served by the Department and responses served on the Department, but never

any of its own. It appears that Transco's entire discovery in this case, at least with respect to standing, consisted of a couple organizational designee depositions. It strains credulity for Transco to so vociferously complain about the Appellants' conduct in discovery when Transco hardly conducted any discovery itself.

Turning our focus away from stale discovery disputes and toward the actual standing issue, remarkably, no party addresses whether Maya van Rossum, the Delaware Riverkeeper, who is also a named party to this appeal, has standing. Any challenge to her standing to appeal all three permits at issue in this matter has been waived. 25 Pa. Code § 1021.131(c) (issues not argued in a post-hearing brief may be waived); *Morrison v. DEP*, 2021 EHB 211, 221 (finding waiver where objections not addressed in post-hearing brief); *Stedje, supra*, 2015 EHB at 594 ("if an appellant's standing is never challenged, it does not need to be proven"). Accordingly, it would seem that we can end this discussion here. Any further discussion of standing is almost superfluous since there is no barrier to reaching the merits of this appeal, regardless of whether PennFuture or the Riverkeeper Network have standing. Nevertheless, in the interest of a complete record, we will address their standing.

Transco argues in its post-hearing brief that neither PennFuture nor the Riverkeeper Network possess standing in their own right as organizations, that PennFuture does not have standing as a representative of any of its members, and that, while the Riverkeeper Network has standing on behalf of its members to challenge the Monroe County Chapter 105 permit and the Chapter 102 permit, it does not have representational standing to challenge the Luzerne County Chapter 105 permit. If a standing challenge has been properly raised in a pre-hearing memorandum, pursued at the hearing, and preserved in a post-hearing brief, an appellant must show that it demonstrated by a preponderance of the evidence at the hearing on the merits that it

has standing. *Montgomery Twp. Friends of Family Farms v. DEP*, 2024 EHB 716, 726-31; *Williams v. DEP*, 2021 EHB 232, 244; *Stedje*, 2015 EHB at 594; *Giordano v. DEP*, 2000 EHB 1184, 1187.

We recently summarized the general standard for standing in Board matters in *Dengel v. DEP*, 2024 EHB 605:

In order to have standing to appeal an administrative decision, persons must have a direct interest in the subject matter of the case. *Mountain Watershed Assn. v. DEP*, [2024 EHB 476, 479], citing *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). See also, *Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Id.* (citing *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024)). In order for a person to have a direct interest, their material interests must be discrete to them or a limited class of persons from more diffuse interests common among the citizenry. *Muth*, 315 A.3d at 196 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007))....

In third-party permit appeals, as is the case here, the Board has held that a party can meet the requisite interest for standing based on where they reside and/or where they recreate. *Food and Water Watch v. DEP*, 2020 EHB at 247. An appellant has standing when [] they come forward with specific facts to credibly aver that they use the affected area and that there is a realistic potential that their use and enjoyment of the area will be adversely affected by the permitted activity. *Muth v. DEP, et al.*, 2022 EHB 411, 415 (citing *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643).

Id. at 615-16.

An organizational party before the Board can generally have standing as a third-party appellant in two ways—as the organization itself, or as a representative of one or more of its members. *Lawson v. DEP*, 2018 EHB 265, 267; *Citizens for Pa.'s Future v. DEP*, 2015 EHB 750, 751; *Pa. Trout, supra*, 2004 EHB at 355. For an organization to have standing in its own right, we have found standing where the organization's work, interests, and/or mission are sufficiently

close to the subject matter of the appeal, such as if the organization’s mission and/or work includes the protection or improvement of the environment in the area affected by the Department’s action. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648. For representational standing, “[a]n organization has standing if at least one individual associated with the group has standing.” *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)). See also *Pa. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012) (“an association, as a representative of its members, has standing to bring a cause of action even in the absence of injury to itself if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the challenged action and the members of the association have an interest in the litigation that is substantial, direct, and immediate.”).

Beginning with the standing of PennFuture and the Riverkeeper Network in their own right as organizations, Transco argues PennFuture lacks standing as an organization because its interest in the Project is no different than the abstract interest that all citizens have in ensuring compliance with the law. Transco also challenges the standing of the Riverkeeper Network as an organization, but only with respect to the Luzerne County Chapter 105 permit. Transco argues that the Riverkeeper Network has not shown any evidence of it being adversely affected by the Luzerne County permit apart from its general organizational purpose of protecting waters in Pennsylvania.

Transco says that, just because the protection of the environment may be part of an organization’s mission, it does not necessarily mean that the organization has standing. Instead, Transco says, an organization must actually be aggrieved in some way. In support of its argument, Transco relies on certain cases from the Commonwealth Court. Transco quotes the Commonwealth Court in *Americans for Fair Treatment, Inc. v. Philadelphia Federation of*

Teachers, Local 3, 150 A.3d 528 (Pa. Cmwlth. 2016) as saying that “the fact that the challenged action implicates the organization’s mission or purpose is not sufficient to establish standing.” *Id.* at 534. Transco also points to *Armstead v. Zoning Board of Adjustment of City of Philadelphia*, 115 A.3d 390 (Pa. Cmwlth. 2015), which Transco says found that an organization lacked standing because the organization had not been involved in any negotiations, made significant investments, or pointed to any other evidence to show that its interest extended beyond its organizational purpose.

However, the caselaw from the Commonwealth Court is not as unequivocal as Transco makes it out to be. For instance, *Americans for Fair Treatment* contains no discussion of organizational standing in its own right apart from the quoted sentence. The Oklahoma nonprofit corporation at issue did not appear to argue that it had standing as an organization itself to challenge a provision of a collective bargaining agreement between the Philadelphia Teachers Union and the Philadelphia School District. Instead, the Commonwealth Court determined that the organization did not have standing because it did not identify any members adversely affected by the challenged action. *Id.*, 150 A.3d at 535-38.

In *Dowds v. Zoning Bd. of Adjustment*, 242 A.3d 683 (Pa. Cmwlth. 2020), a case not cited by Transco, the Commonwealth Court, reviewing cases, found that an association or organization can have standing in its own right in part if that organization has participated in hearings or expressed concerns before e.g. a zoning board or at public meetings before a historical commission. *Id.* at 692-95 (discussing *Society Hill Civic Ass’n v. Phila. Bd. of License & Inspection Review*, 905 A.2d 579 (Pa. Cmwlth. 2006), and *Goodchild*, 2020 Pa. Commw. Unpub. LEXIS 232, No. 562 C.D. 2019 (Pa. Cmwlth. May 4, 2020)). The Court in *In re Friends of Marconi Plaza & Rich Cedrone*, 287 A.3d 965, 975 (Pa. Cmwlth. 2022) subsequently construed

Dowds as establishing the following factors for determining organizational standing in a land use appeal: “(1) being a recognized community organization, (2) expressing concerns at meetings before the Historical Commission, and (3) participating in negotiations with the permit applicant.” Although these cases dealt with standing in different administrative proceedings, we find the factors to be instructive.

PennFuture is a recognized statewide environmental advocacy organization that has one of its five Pennsylvania offices in East Stroudsburg, Monroe County, in the Poconos region, and it previously had an office in Wilkes-Barre, Luzerne County. (T. 31-33.) PennFuture employs a civic engagement organizer based in Luzerne County who also does work in Monroe and Pike Counties. PennFuture has an overall mission “to fight for an equitable just state economy through clean air, clean water, and climate change solutions utilizing legal advocacy, policy engagement, and empowering Pennsylvanians.” (T. 31.) The organization also has a local mission in the Northeast region to protect the headwaters of the Delaware River with a particular focus on protecting and conserving Exceptional Value and High Quality streams, which are highly concentrated in the Poconos region. (T. 32.) In 2018, PennFuture started the “Our Pocono Waters” campaign, where PennFuture brought together businesses, organizations, and local officials to educate the region on the importance of Exceptional Value streams to the local economy. PennFuture estimates that it has engaged over 3,500 people as part of this campaign. (T. 34.) PennFuture has also performed an economic development study that it says showed Exceptional Value streams have supported three billion dollars in economic growth for the region. PennFuture has done stream mapping, held many events, and monitored projects adjacent to or on Exceptional Value streams in the region to ensure that those streams are being protected.

Specific to the Transco Project, PennFuture has submitted public comments at least four different times since 2020, including 15 pages of comments to the Department in October 2021 on the applications for the permits under appeal here, along with the Riverkeeper Network and another organization. (T. 38, 45-46; Jt. Ex. 2, 3.) PennFuture has also engaged its membership about the Transco Project to update its members on the development of the Project and to inform them about opportunities to comment if they wished. (T. 38.)

The Riverkeeper Network has a mission “to champion the rights of our communities to a Delaware River and tributary streams that are free flowing, clean, healthy, and abundant with the diversity of life.” (T. 49-50.) The Riverkeeper Network has been active in the Our Pocono Waters campaign along with PennFuture. The Riverkeeper Network has done educational programming about the importance of High Quality and Exceptional Value streams and wetlands in the northern part of the Delaware River watershed because of the relation of the streams to the health of the main stem of the Delaware River. (T. 64-65.) It has also been involved in matters concerning threats of harm to the waterways in Northeastern Pennsylvania in Monroe County and in the Delaware River watershed portions of Luzerne County and Northampton County addressing warehouse and pipeline projects. (T. 64.) It has conducted stream monitoring in special protection water areas. (T. 62-63.)

Regarding the Transco Project, the Riverkeeper Network initially researched what was proposed for the Project and how the Project could impact the tributary streams and watershed for the Riverkeeper Network’s community. It then crafted written testimony with organizational partners, created educational programming for its members and the community to help them understand the implications of the Project, and distributed action alerts to encourage its members and the community to participate and get engaged in the permitting process. (T. 66-67.) The

Riverkeeper Network also testified at public hearings. It submitted comments to the Department on the applications for the permits under appeal. (T. 83; Jt. Ex. 2, 3.) The Riverkeeper Network was also involved in the proceedings before FERC regarding the Project, filing a motion to intervene, commenting on the draft Environmental Impact Statement, and contesting FERC's issuance of the certificate for the Project. (T. 67-68.) Perhaps most notably, Transco and the Riverkeeper Network were engaged before the permit applications were filed and had a meeting together where Transco sought the Riverkeeper Network's input on the Project. (T. 71-72, 89, 668.)

In *Friends of Lackawanna*, *supra*, 2017 EHB 1123, we found that a third-party appellant organization had standing in its own right because its work and mission included protecting the environment near the landfill facility subject to the appeal. We noted that the organization was involved in public hearings on the landfill, including borough council meetings and zoning proceedings. The organization also submitted comments to the Department on the permitting action that was under appeal, expressing concerns about the possible impact to the environment and local community. *Id.* at 1151. In *Petrus Holdings*, *supra*, 2022 EHB 284, we granted a petition to intervene and determined that the petitioner organization had standing in its own right in an appeal of a denial of an application to revise a township's Act 537 plan. The organization focused its work in the county where the proposed project was located and spent time sampling and monitoring an Exceptional Value stream that would have received a discharge from the project. The organization also submitted comments on the application for the Act 537 plan revision. We found that there was a "clear nexus" between the organization's mission and work in the area and the action under appeal. *Id.* at 288.

The work that PennFuture and the Riverkeeper Network have engaged in here is very similar to the work that the organizations in *Friends of Lackawanna* and *Petrus Holdings* pursued. They do work in the areas near the project, engage the community, hold events, develop educational materials, perform mapping and monitoring, and have commented on and been involved in the permits at issue in the appeal. Although one might draw a contrast between the more locally focused organizations in *Friends of Lackawanna* and *Petrus Holdings* and the statewide or watershed-focused organizations here, this alone does not automatically disqualify PennFuture and the Riverkeeper Network from possessing standing in their own right. Transco's Project itself is not confined to a specific site or a particular discharge point. The Project involves two pipelines that run through two different counties over 36 combined miles. By its nature it affects a far greater geographic area than many other types of projects. It is possible that an organization could have a specific interest in a specific stream crossing of a pipeline project that would provide standing to that organization, but that does not mean that an organization with a more diffuse interest in an area where a pipeline project crosses numerous streams and wetlands lacks the particularity of interest that is required for organizational standing. It is enough that the Appellant organizations here do significant work in Monroe and Luzerne counties and in the High Quality and Exceptional Value waters and local watersheds that stand to be affected by Transco's project. See *Friends of Marconi Plaza, supra*, 287 A.3d at 977 (the Commonwealth Court rejected a requirement for a granular level of interest in an action: "We reject the City's argument that the association's interest must be pinpointed to a single feature of the park, *i.e.*, the statue itself; Friends of Marconi Plaza's involvement in the preservation and beautification of the park includes the statues located therein.").

We also note that, like in the Commonwealth Court cases of *Dowds* and *Friends of Marconi Plaza*, PennFuture and the Riverkeeper Network were also involved in public hearings and the public comment process for the permits. While submitting comments to the Department on a project may not always be sufficient to establishing standing for an organization or an individual, the submission of comments coupled with PennFuture and the Riverkeeper Network's other involvement in the Project area are sufficient to establish standing as an organization. *Compare PennEnvironment v. DEP*, 2020 EHB 350, 354-56 (finding that Section 10.2 of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4010.2, provides standing in an EHB appeal to any person who participates in the public comment process for a plan approval or permit).

Accordingly, given the work and localized missions and campaigns that the Appellant organizations have engaged in over the past several years, both generally as it concerns special protection waters in the headwaters of the Delaware River, and specifically with respect to Transco's Project, we have no hesitation concluding that PennFuture and the Riverkeeper Network each have standing as an organization in their own right. They have invested time and energy in preserving the water quality of special protection waters that serve as the headwaters for the Delaware River, and they have an objectively reasonable belief that the permits under appeal authorize activities that could impact the water quality of the resources affected and crossed by Transco's pipeline Project. Even by Transco's own standard, PennFuture and the Riverkeeper Network have clearly made investments in the Delaware River headwaters region, have been involved in negotiations about the Project, and have shown an interest in this matter that extends beyond merely their organizational purposes. (*See* Transco Brief at 63.) They have shown an organizational interest in the Project and in the permits under appeal sufficient to support standing.

Even though we find that PennFuture and the Riverkeeper Network have standing in their own right, we will briefly address Transco's arguments against the standing of the Appellants as representatives of their members. Initially, we point out that Transco bases this attack on the *depositions* it took of the Appellants' members after the conclusion of the initial dates of the merits hearing. The Appellants had no obligation to develop the direct testimony of the witnesses at those depositions. Instead, we scheduled an additional day for the merits hearing. Transco and the other parties had the opportunity to question the standing witnesses during that additional day of merits testimony, but they elected to use the deposition transcripts instead.

Transco argues that PennFuture does not have standing because its identified member, Carolyn Lange, could not describe how the resources she uses were impacted by Transco's construction work after the fact. Transco says Ms. Lange "admitted that the Project has not affected her use and enjoyment of any of the resources at issue." (Transco Brief at 55.) Transco does not seem to dispute that Ms. Lange uses resources that were affected by the Project; it seems to only argue that Ms. Lange must, for purposes of standing, have been actually harmed by the Project after it was completed while the appeal was pending.

The problem with Transco's argument is that it contorts the standing inquiry into a merits inquiry. Indeed, Transco has it backwards. The question for standing is not whether the Project in hindsight *has* harmed Ms. Lange; it is whether she had a reasonable concern at the time of permit issuance that it *would* harm her. Whether Transco's Project has impacted a resource and whether a person has objectively reasonable concerns about a project for purposes of standing are two different things. Transco does not offer any caselaw that says a backward-looking standing inquiry is appropriate. Instead, as we said in *Valley Creek Coalition v. DEP*, 1999 EHB 935:

The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to file an appeal from an action of the Department; it does not

evaluate whether or not a particular claim has merit.... We may ultimately find that the Department had no obligation to consider post-construction discharges, and deny the Appellant's request for relief, but that does not negatively impact its ability to seek relief in the first instance. Even if an appellant's position substantively lacks merit, it may nevertheless procedurally seek resolution of its appeal.

Id. at 944 (internal citations omitted). *See also Pa. Waste Indus. Ass'n v. DEP*, 2016 EHB 590, 603 ("Appellants are not required to prove their case on the merits in order to have a right to appeal, but they must show that they have more than subjective apprehensions.").

We have no difficulty concluding that Ms. Lange has an interest that is sufficient to support the standing of PennFuture in this matter. Ms. Lange testified that she uses McMichael Creek for recreational purposes like hiking, birding, and sometimes fishing. (L.T. 37-38.) She also uses Pohopoco Creek for kayaking as well as hiking and birding in the area. (L.T. 35-36.) The Department's Record of Decision and Transco's Aquatic Resource Impact Table show that Transco's Project crosses unnamed tributaries to both Pohopoco Creek and McMichael Creek. (Jt. Ex. 37; DEP Ex. 27w.) Ms. Lange testified that Pohopoco Creek is an area of concern for her because the pipeline crosses it and she believes there will be inherent disturbances to the resource from the crossing. (L.T. 31-32.) She is concerned about tree cutting, stream crossings, silt pollution even with the use of BMPs, macroinvertebrate disturbances, trout fishery habitat disturbance, thermal degradation, habitat fragmentation, and preserving water quality. (L.T. 20-21, 44-46, 76-77, 79.)

Ms. Lange also testified about the parks she likes to recreate in, including Chestnuthill Park and West End Regional Park, which she and her husband use for hiking, birding, exercise, and enjoying nature. (L.T. 39-41.) She stated that she and her husband have enjoyed those places immensely over the years. (T. 40.) Transco's permit application and the Department's Record of Decision show that the Project crosses through Chestnuthill Park and passes within a tenth of a

mile of the West End Regional Park. (Jt. Ex. 26, 37.) Notably, and contrary to all of Transco's assertions, Ms. Lange testified that she avoided going to the West End Regional Park because she did not want to observe the construction going on, and that she and her husband have generally avoided areas where Transco's construction was happening because it was emotionally trying for them. (L.T. 42-43, 103-04.) In short, Ms. Lange clearly uses the resources affected by Transco's Project, she had an objectively reasonable concern that the resources would be adversely affected by Transco's construction, and she even avoided visiting certain resources during construction.³ *Dengel, supra*, 2024 EHB at 615-16.

Transco concedes that the Riverkeeper Network has representational standing to challenge the Monroe County Chapter 105 permit and the Chapter 102 permit. (Transco Brief at 67.) However, Transco maintains that the Riverkeeper Network does not have representational standing to challenge the Luzerne County Chapter 105 permit. Transco has not explained why we should parse out a project into its individual components for purposes of a standing analysis. First, the Chapter 102 permit covers both Monroe and Luzerne Counties. Much of Transco's construction work is covered by both the Chapter 102 and the Chapter 105 permits. The Project could not go forward without Transco first possessing both types of permits. The Department evaluated the permits as part of a single project. The Appellants have appealed and litigated the permits together. Many of the parties' arguments in this appeal are not county-specific. If a person has an interest in a specific stream crossed by a project that gives rise to standing, that person is not prevented

³ Even if Ms. Lange had not avoided visiting some of the resources during Transco's construction, we would still conclude that she has standing. Just because Ms. Lange, by chance, did not recreate in or around e.g. Pohopoco Creek or McMichael Creek when Transco was constructing its pipeline through those streams does not mean she does not harbor an objectively reasonable belief that her use of those resources could have been impacted for purposes of standing.

from challenging the entire project or the entire permit authorizing the project. Standing is not so compartmentalized.

In any event, Transco's argument still fails. Transco says the Riverkeeper Network's only identified member who testified as being adversely affected by the Project, Dr. Alexander Jackson, testified exclusively to impacts on resources in Monroe County and none in Luzerne County.⁴ Concerningly, Transco's assertion is simply untrue. While Dr. Jackson testified in detail about his use of resources in Monroe County, such as fishing in Poplar Run and Pohopoco Creek, enjoying wetlands in the Tunkhannock Creek and McMichael Creek watersheds, and hiking on trails where his access was blocked due to Transco's construction, he also identified Bear Creek and Shades Creek as resources he has used for recreational purposes, which are in Luzerne County. (J.T. 107-08.) The Environmental Record of Decision for Luzerne County states that the Luzerne County portion of the Project is located within the Shades Creek and Bear Creek watersheds, among others. (Jt. Ex. 35 (at 12).) Among the streams the Record of Decision identifies as being impacted by the Project, it lists Bear Creek and its unnamed tributary, and Shades Creek and its eight unnamed tributaries. (*Id.* at 13.) The Record of Decision also says a portion of Bear Creek and an unnamed tributary to Shades Creek will have floodway impacts. (*Id.*) Bear Creek, Shades Creek, and unnamed tributaries to each of them are listed in Transco's Aquatic Resource Impact Table for Luzerne County. (DEP Ex. 26w.) Like with Ms. Lange, Dr. Jackson has identified areas he uses that had a realistic potential to be adversely affected by Transco's activities such that he has standing on behalf of the Riverkeeper Network.

⁴ During the deposition of Carolyn Lange, in response to a question from Transco's counsel asking if Ms. Lange is also a member of the Riverkeeper Network, she testified that she is and makes monthly donations to the organization. (L.T. 59.)

Finally, assuming for purposes of argument only that either PennFuture or the Riverkeeper Network did not have standing, it is not clear what Transco would have us do if, for instance, one party had standing to challenge the Luzerne County Chapter 105 permit but the other did not. Transco does not offer any insight into what relief it would want. It does not say we should do something as nonsensical as striking from the record all questioning from one Appellant's counsel at the merits hearing that related to a certain permit. *See Montgomery Twp. Friends of Family Farms v. DEP, supra*, 2024 EHB at 733 ("The Appellant does not support its request with any authority for why we would strike all of the exhibits Herbruck's introduced at the merits hearing, disregard the testimony of its witnesses, or strike any questioning from Herbruck's counsel from the transcript. This appeal would obviously not go away if Herbruck's were dismissed as a party."). And to bring this discussion full circle, no one has challenged the standing of Maya van Rossum.

Motion for Nonsuit

Transco and the Department ask us to grant the oral motion to dismiss they made at the hearing at the conclusion of the Appellants' cases-in-chief. The presiding judge informed the parties at that time that the hearing would need to be recessed in order to address the motion. He said the Board would take the motion under advisement subject to briefing if the parties wished to pursue it. Counsel for Transco then stated "[w]e understand that it is on the record, and we are happy to move forward on our case." (T. 662.) Both Transco and the Department then put on their cases-in-chief. The Appellants respond that the motion has now been waived because Transco and the Department decided to put on their cases-in-chief and enter evidence into the record.

The motion is effectively a motion for a nonsuit, and the parties argue it as such in their briefs. We do not need to decide whether or not a motion for nonsuit can still be pursued after the moving party has put on its entire case-in-chief, because even assuming the motion is still

actionable, it is groundless and must be denied on its merits. A motion for nonsuit can only be successful before the Board if a party with the burden of proof fails to present almost *any* evidence in support of its case. *DEP v. Schultz*, 2015 EHB 1, 4; *Fox v. DEP*, 2011 EHB 320, 324-25; *Clabatz v. DEP*, 2006 EHB 263, 265; *Decker v. DEP*, 2002 EHB 610, 614. A motion for a nonsuit is not to be used for arguing the relative merits of the parties' arguments. Transco claims the Appellants did not produce any evidence of likely degradation and inadequate restoration, which are their main concerns in this case, but that is simply not true. Among other things, they presented the expert opinions of Paul Cooper and James Schmid, Ph.D. exactly to that effect. (*See, e.g.*, T. 431-33, 545-48.) Both Transco and the Department attack the qualifications and credibility of the Appellants' experts and their opinions, but a motion for nonsuit is not suited for that purpose absent extraordinary deficiencies not present here.

Transco says that it is entitled to a nonsuit because there is no regulation requiring in-stream sampling. However, the fact that there is no regulation that expressly requires in-stream sampling does not foreclose, for example, the Appellants' claim that the Department, despite having the authority to do so, acted unreasonably in not requiring it. Transco says the Appellants put on no evidence that the Department failed to comply with regulatory standards. (DEP Brief at 81.) Again, this is not true. The Appellants presented admissible evidence including expert testimony that the Department failed to ensure that the regulatory requirement that water quality be maintained as required by 25 Pa. Code § 93.4a was satisfied. The Department says that it is entitled to a nonsuit because "[t]he relief Appellants seek was not entirely clear at the close of their case." (DEP Brief at 81.) Again, this is simply not true, but in any event, the criticism seems out of place in the context of a motion for nonsuit.

In-Stream Water Quality Sampling

The Appellants' main argument is that the Department did not ensure that Transco would comply with the antidegradation requirement that the water quality of special protection waters must be maintained and protected. The issue comes down to whether the Best Management Practices (BMPs) and restoration requirements in Transco's permits were adequately designed to ensure that the water quality of special protection waters of the Commonwealth affected by the Project would not be degraded. The Appellants' primary complaint, repeated and rephrased many times throughout their briefs, is that, in addition to ensuring that the BMPs were properly engineered, the permits should have included a requirement for pre- and post-construction in-stream water quality sampling to ensure that the BMPs were properly designed and the water resources would not be degraded: the Department should not simply have assumed the controls would work. In their words, "Trust but verify." (App. Brief at 1.) Similarly, they argue in the same vein that there should have been better pre- and post-construction data gathering mandated in the permits with respect to site restoration. They argue that one cannot determine whether water quality and other site conditions have been returned to baseline if one does not know what baseline was. As a remedy, they ask us to remand the permits for further study because "it is not too late to learn the status of the water resources now." (App. Brief at 69.)

It is true that the Department did not in fact include a permit condition requiring pre- and post-construction in-stream water quality sampling for the Project. Like everything else the Department does, we review that aspect of the permits to assess whether it was lawful, reasonable, and supported by the facts. *Gerhart v. DEP*, 2019 EHB 534, 546-47. We will also consider whether the remedy proposed by the Appellants is justified.

The decision not to include the in-stream sampling was not unlawful. There is no express requirement to conduct such sampling in the regulations that apply to the Project.⁵ Nor do we believe any such requirement is implicitly mandated for every construction project that drains to special protection waters.

No person is permitted to degrade the waters of the Commonwealth. 35 P.S. §§ 691.401 and 691.611; *DEP v. EQT Production Co.*, 2017 EHB 439, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018); *Oley Twp. v. DEP*, 1996 EHB 1098, 1117. Exactly what constitutes degradation of the waters of the Commonwealth is set forth in 25 Pa. Code § 93.4a, which reads as follows:

§ 93.4a. Antidegradation.

- (a) *Scope.* This section applies to surface waters of this Commonwealth.
- (b) *Existing use protection for surface waters.* Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
- (c) *Protection for High Quality Waters*—The water quality of High Quality Waters shall be maintained and protected, except as provided in § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements).
- (d) *Protection for Exceptional Value Waters*—The water quality of Exceptional Value Waters shall be maintained and protected.

25 Pa. Code § 93.4a. For *all* waters of the Commonwealth, permits must ensure that the level of water quality necessary to protect the existing and designated uses of the waters is maintained and protected. *Id.*; *Liberty Twp. v. DEP*, 2024 EHB 790, 807. For High Quality waters, in addition to protecting existing and designated *uses*, permits must ensure that the existing water quality of the

⁵ The regulation at 25 Pa. Code § 102.11(c) incorporates the federal effluent limitations for the “Construction and Development Point Source Category” found at 40 C.F.R. Part 450, which is a turbidity requirement that applies to NDPES Permits for Stormwater Discharges Associated with Construction Activities if the permittee utilizes construction dewatering activities and such dewatering activities discharge the water from those activities to sensitive waters (sediment impaired or designated high quality waters). This monitoring requirement is in the nature of a “numeric” effluent limit and requires effluent sampling. It does not require sampling of the receiving water. Dewatering BMPs were utilized during construction for the Project but were not authorized to discharge directly to surface waters.

waters is also maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. 25 Pa. Code §§ 93.4a(c) and 93.4c(b)(1)(iii). For Exceptional Value waters, the water quality of the waters must be maintained and protected, period. 25 Pa. Code § 93.4a(d).

The regulations set up an algorithm for implementing the antidegradation requirements. For High Quality and Exceptional Value waters (a.k.a. special protection waters), the regulations for point sources provide:

(b) *Protection of High Quality and Exceptional Value Waters.*

(1) *Point source discharges.* The following applies to point source discharges to High Quality or Exceptional Value Waters.

(i) *Nondischarge alternatives/use of best technologies.*

(A) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.

(B) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters, except as provided in subparagraph (iii).

25 Pa. Code § 93.4c(b)(1)(i). Thus, for discharges to special protection waters, a permit applicant must use an environmentally sound and cost-effective nondischarge alternative if one is available. If one is not available, a person proposing a discharge must do two things: (1) it must use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater technologies, which is also known as ABACT; and (2) the person must demonstrate that the discharge will maintain and protect the existing quality of the receiving waters. *Id.* Using

ABACT does not necessarily guarantee that the existing quality of the receiving waters will be protected. Otherwise, there would be no need for Section 93.4c(b)(1)(i)(B). ABACT is a technology-based standard. The technology-based standard of ABACT in Section 93.4c(b)(1)(i)(A) does not supplant the water quality-based standard in Section 93.4c(b)(1)(i)(B). *See generally Liberty Twp.*, 2024 EHB at 807 (NPDES permits must comply with both technology-based effluent limits and water quality-based effluent limits) (citing 25 Pa. Code §§ 93.4a, 96.4(b); 40 C.F.R. 125.1-125.3 (incorporated by 25 Pa. Code § 92a.3)). Therefore, regardless of ABACT being employed, the water quality of High Quality waters must be maintained unless a detailed Social and Economic Justification (SEJ) is allowed, and the water quality of Exceptional Value waters must be maintained. The step-by-step analysis set forth in 25 Pa. Code § 93.4c applies to earth disturbance activities covered by a Chapter 102 permit. 25 Pa. Code §§ 102.4(b)(6) and 102.8(h).

In the context of erosion and sedimentation and post-construction stormwater control for earth disturbance projects covered by a Chapter 102 permit, the regulations define nondischarge alternative and ABACT as follows:

Nondischarge alternative—Environmentally sound and cost-effective BMPs that individually or collectively eliminate the net change in stormwater volume, rate and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities **to maintain and protect the existing quality of the receiving surface waters of this Commonwealth.**

ABACT—Antidegradation best available combination of technologies—Environmentally sound and cost effective treatment, land disposal, pollution prevention and stormwater reuse BMPs that individually or collectively manage the difference in the net change in stormwater volume, rate, and quality for storm events up to and including the 2-year/24-hour storm when compared to the stormwater rate, volume and quality prior to the earth disturbance activities **to maintain and protect the existing quality of the receiving surface waters of this Commonwealth.**

25 Pa. Code § 102.1 (emphasis added). These regulations conflate the technology-based and water quality-based concepts in a somewhat circular fashion, such that control measures cannot constitute a nondischarge alternative or ABACT unless they “maintain and protect the existing water quality of the receiving surface waters of this Commonwealth.” *Id.* However, importantly, regardless of the technology employed, it is clear that the existing water quality of the special protection receiving waters must be maintained and protected (excluding the SEJ for High Quality waters). 25 Pa. Code § 93.4a.

There is no dispute, and we agree, that the Department has the authority to require in-stream water quality sampling in appropriate cases, and it has done so in other situations. (Findings of Fact No. 93, 94, 95.) However, the Appellants are wrong to insist that any of the regulations discussed above legally mandate such sampling for every project impacting special protection waters. Rather, whether to require it in any given case is a matter within the Department’s reasoned discretion using its best professional judgment. The Department’s decision to not require Transco to take pre- and post-construction in-stream water quality samples must be fact-based and reasonable. It must turn on the facts related to each permit under appeal. In order to prevail, the Appellants needed to show that the Department’s decision was not reasonable or fact-based. They failed to do so.

The Appellants say the Department in approving BMPs relied too heavily on its Stormwater Best Management Practices Manual and Erosion and Sediment Pollution Control Manual. They say the Department simply assumes the measures described in those manuals will work. As this Board has repeatedly held throughout various regulatory revisions, and as we reaffirm today, simply following narrative *technology* requirements set forth in a manual is not *necessarily* a complete substitute for ensuring that *water quality* requirements are met. *Borough of*

Stockertown v. DEP, 2016 EHB 456, 468-69; *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 563-65; *Blue Mountain Preservation Ass'n v. DEP*, 2006 EHB 589, 609-13. However, by the same token, there is nothing inherently wrong with relying on the manuals, among other things, when deciding whether in-stream sampling is necessary in a particular case.

Still, the Board is more concerned with the result than the process that the Department used to get to that result. *Friends of Lackawanna*, 2017 EHB at 1156; *O'Reilly*, 2001 EHB at 51. The Appellants repeatedly criticize the Department for its use of forms and checklists, but this Board checks to see if the Department got to the right result using appropriate analyses, not how the Department used forms and checklists to manage and standardize the process. We must determine whether the Department correctly concluded that the applicant's proposed control measures are adequately designed to ensure that water quality in the special protection waters would be protected. The fact that the Department relied upon its manuals in making that decision is, in and of itself, neither definitive, irrebuttable proof that a control measure is adequately designed nor definitive, irrebuttable proof that a control measure is inadequately designed. Consistency or inconsistency with approved designs in a manual is certainly relevant, but it is not necessarily conclusive. The regulations do not say otherwise.⁶

Reliance on approved BMPs coupled with adequate site investigation will undoubtedly be sufficient in the vast majority of cases. Yet, the Appellants were nevertheless free to show that the Department approved an inadequate design in this case, or that water quality sampling should have been required based on site-specific considerations. They failed to do so. We have no evidence that any of Transco's BMPs were inadequately designed or that there was any particular reason why water quality sampling should have been required. The Appellants did not even try to

⁶ There is a regulatory presumption that a forested riparian buffer meeting certain criteria will maintain water quality, 25 Pa. Code § 102.14(e)(1), but even that presumption can be overcome with specific proof.

make such a showing. The closest they came to making a particular showing was directing our attention to a significant sedimentation event that occurred at the crossing of Poplar Run, an Exceptional Value stream. However, the fact that this event occurred does not prove that the Department erred by approving the control measures at that location. No engineer testified that the event occurred *because* the control measures were inadequately designed. There is no direct evidence that measures were in fact inadequately designed. For example, Transco might have improperly installed or maintained the measures (there is no proof of that), but that does not mean the measures were inadequately designed and the permit was therefore issued in error.

The design of control measures is largely an engineering function, yet the Appellants did not present any expert engineering testimony. Instead, they presented the testimony of two ecologists, neither of whom was qualified to opine on the design of BMPs. Paul Cooper is a limnologist or freshwater ecologist. (App. Ex. 48.) He is neither an engineer nor an expert in stormwater management. (T. 527-28.) He was not offered as an expert on BMPs. He did very little review of the relevant files. He seemed less than adequately familiar with the Transco E&S and PCSM plans that he was purporting to criticize. (T. 617-19, 629-30, 637-38.) He never prepared such a plan himself. He performed no engineering calculations. (T. 615-17.) He was unfamiliar with various parts of the regulatory programs. Surprisingly, he never reviewed the Records of Decision for the permits. (T. 647-48.) He did not visit the site. He testified largely in generalities and vague possibilities.

His testimony boiled down to its essence was that there can be “a host of potential problems” with a pipeline project. (T. 568.)⁷ This is the sort of testimony that we have repeatedly held adds very little value. *See, e.g., Stocker, supra*, 2022 EHB at 444 (“It is on [the appellant] to

⁷ For example, Mr. Cooper warned of thermal impacts from pipeline projects, but the Appellants fail to explain how any of Transco’s BMPs could have been better designed to avoid any such impacts.

show based on evidence adduced at the hearing that the plan cannot be implemented, not to claim that there is no assurance that the plan can be implemented.”); *Stedje*, 2015 EHB at 612 (discussing “the laundry list of potential but unsubstantiated problems that also will not support a correction on our part”). The fact that there *might* be “problems” is why environmental permits are required. Importantly, Mr. Cooper conceded that he was not in the position to say one way or the other whether Transco’s BMPs were adequately designed. (T. 615.) Nothing in Mr. Cooper’s testimony persuades us that the Department decision not to require in-stream water quality sampling for the Project was unreasonable.

The Appellants’ other expert, James Schmid, Ph.D., is an expert in wetland ecology and environmental assessment. (App. Ex. 47.) He is not an engineer, and not an expert in stormwater controls. (T. 426-27, 429.) Unfortunately, although we have the highest regard for Dr. Schmid, his testimony in this case was not particularly helpful. Dr. Schmid never visited any sites on the Project or did any field work, a cardinal flaw for the type of opinions he was offering. (T. 488-93.) He conducted very limited file reviews. He presented no data to support his opinions. He often spoke in terms of theory, policy, generalities, and speculative possibilities, rarely providing any specifics. He conceded that he had a “fairly limited opportunity for review.” (T. 500.) He tended to point out isolated errors he uncovered in the massive permit application record and complain about a lack of professionalism, yet the errors if they exist at all were not shown to be of any real consequence. (E.g. T. 441-42.) Dr. Schmid also did not testify directly in support of the Appellants’ theory that in-stream water quality sampling should have been required.

In contrast to Mr. Cooper’s testimony in support of a requirement for in-stream sampling, the Department’s experts, David Goerman and Katie Seymore, credibly explained why pre- and post-construction in-stream sampling was not reasonable for this Project. The utility line crossings

at issue here, because they are of short duration, have limited extent relative to the overall size of the resources being impacted, and must be conducted “in the dry,” are considered low risk projects. (T. 1154-57, 1174-80, 1219-21, 1231, 1258-59, 1273-74, 1283-84; Jt. Ex. 35, 37.)

Other witnesses explained that construction of the pipeline calls for the digging of a trench within the pre-existing pipeline right-of-way, laying and construction of the pipe itself, replacing fill and dirt once the pipe is laid, and reseeding and soil management to promote regrowth and revegetation of that area afterwards. (T. 285-89, 395, 418-19.) Construction here used the same construction methods used in all types of utility line projects, including natural gas transmission lines, gathering lines, distribution lines, sanitary sewer lines, drinking water lines, and electric and fiber optic lines. (T. 1178-80.) The majority of the crossings were designed and constructed using “in the dry” construction. (T. 1154-57.) This construction method utilizes a pump around or a flume to divert the water around the workspace so there is no water flowing through the workspace while the excavator operates. While the water is diverted around the workspace, the pipeline is installed and the soils are put back to the same contours of the stream. After the completion of construction activities, the workspace is stabilized and the pump around or flume is removed to allow water to flow again. Working “in the dry” means that there will be no major change to the shape of the stream after pipeline installation and that there will be no extra sediment. (T. 1154-55.)

Transco constructed resource crossings using minimization practices. Construction activities for each resource crossing generally took 24 to 48 hours depending on the size of the stream. (T. 1157, 1174.) The resource crossings are supposed to be as quick as possible to reduce the risk of a storm event and to restore the resource as soon as possible. Transco “neck-downed” and narrowed the right-of way when constructing the resource crossings to minimize impacts.

Furthermore, Transco's permits do in fact require a great deal of information regarding pre- and post-construction site conditions, 25 Pa. Code §§ 102.4(b)(1)-(9), 102.6(a)(2), 102.8(f)(1)-(15), 102.8(g)(1)-(6), 102.8(h), and 102.14, which provides further support for our conclusion that the Department acted reasonably in not requiring in-stream water quality sampling. Transco's applications needed to include detailed descriptions and technical plan drawings of each site-specific BMP, including calculations and narratives prepared by licensed professionals that articulate how those selected BMPs will work to keep the stormwater on the site to mimic the pre-construction natural management of stormwater. (T. 286-90, 300, 389-90.)

Transco submitted site-specific data regarding watercourses that identified the characteristics of each watercourse affected by the Project, including the flow type, stream depth, substrate type, water clarity, slope, the types of riparian vegetation and aquatic organisms present (including the presence of macroinvertebrates), and the geometry of the stream, among other characteristics. (T. 286-90, 389-90, 620-22; Jt. Ex. 14-18, 25, 33, 35, 37.) The Environmental Assessment also contains a module that identifies and describes the potential Project impacts and how those impacts will be minimized, including the minimization of effects on fish and other aquatic biota. (Jt. Ex. 19, 26.) Further, the Chapter 105 permits require Transco to "prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions." (Jt. Ex. 32a, 32b.) The Chapter 105 permits also require Transco to monitor for secondary impacts to hydrology, which includes the submission of monitoring reports that "contain information describing the presence or absence of hydrology at the time of inspection, a narrative comparison to hydrology present in the watercourse during pre-permitting field investigation(s), and photographs of the watercourse." (*Id.*)

With respect to post-construction sampling, there are already regulatory requirements and permit conditions mandating pre-construction meetings, inspections (weekly and after every stormwater event) throughout the duration of construction to confirm the proper installation and functioning of the BMPs, licensed professional oversight of critical stages of construction, and documentation of the required monitoring. (Jt. Ex. 31.) 25 Pa. Code §§ 102.4(b)(5)(x), 102.4(b)(8), 102.8(j)-(m) and 102.14(g)-(h). Once post construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process. 25 Pa. Code § 102.7. Further, there are requirements related to certifications from licensed professionals that the post-construction/restoration BMPs were installed in accordance with the approved plans, as well as operation and maintenance requirements that continue in perpetuity. 25 Pa. Code §§ 102.8(f), (j), (k), (l), (m), and 102.14(g).

The Appellants have not shown that there would be any significant additional benefit or value added from in-stream sampling. They say the costs would not be unduly burdensome, but the Department accurately counters that the Project involved numerous crossings. Requiring the sort of sampling advocated by the Appellants would add substantial time and cost to the application process.

The Appellants do not tell us what sort of in-stream sampling they believe would have sufficed. It is said that one never steps into the same stream twice. They are dynamic systems that are constantly changing. Do the Appellants believe there should be at least four quarters of pre- and post-construction samples to give a meaningful picture of seasonal changes in flow and benthic communities? What would they sample for? The primary pollutant of concern during construction is sediment, whereas post-construction controls are as much concerned with rate and volume of flow. Where and how would the sampling be performed? For example, how one would sample

for “thermal impacts” as advocated by the Appellants has not been explained. In-stream water quality sampling of sedimentation would seem to raise a number of questions that the Appellants do not answer.

The Appellants very much in passing argue that the numeric criteria of Chapter 93 apply to stormwater management. (App. Brief at 44-46.) They then go on to say that, because the numeric criteria apply, *in-stream* sampling should be required. This is a *non sequitur*. The connection between the two points is neither obvious nor explained.

The Appellants argue that the need to maintain and protect the existing water quality of the waters under the antidegradation regulations must include protecting the “ecology” of the waters. (App. Brief at 41-42, 51, 56.) There is no support in the law for such a broad, vague reading of the antidegradation regulations. The Appellants refer us to various regulations that set water quality criteria based in part on protection of the aquatic community, *e.g.* 25 Pa. Code §§ 93.4b, 93.7, but that hardly supports a claim that permittees must not only protect the water quality of the receiving stream, they must also protect the “ecology” of the stream in order to comply with Chapter 93. There are provisions in Chapter 105 regarding ecology, which we discuss below, but those are separate and apart from the obligation to refrain from degrading water quality set forth in Chapter 93.

The Appellants on occasion contend more generally that the Department failed to include or implement “Chapter 93 water quality or antidegradation requirements.” (*See e.g.*, App. Reply Brief at 11.) Other than in-stream sampling, they do not tell us the “requirements” that they are referring to that they believe should have been included in the permits. They seem to accept that no sampling of the discharges themselves were required. As previously noted, they have not shown that any BMPs were inadequately designed to ensure the protection of water quality. The

Appellants were free to, but failed to, show us that there were any other aspects of the permits that fell short of protecting water quality.

The Appellants repeat their objection that in-stream pre- and post-construction water quality sampling should have been required for Transco's 105 permits as well as the 102 permit. We reject that objection for the same reasons we just discussed. Although authorized and appropriate in some cases, the Appellants failed to show that such in-stream water quality sampling was necessary or appropriate in this case as a condition of Transco's Chapter 105 permits.

For all of these reasons we conclude that the Department's decision not to require pre- and post-construction in-stream sampling for the Project was lawful and reasonable. There is no credible evidence that in-stream water quality sampling was necessary or appropriate in this case to ensure that the water quality of the affected waters of the Commonwealth would be maintained and protected. Even if we assume *arguendo* that the Department erred in this regard, we would not be inclined to grant the relief requested by the Appellants, namely, a remand for "further study." Pipeline construction was completed in October 2023. The pipeline has been in full service since August 2024. We are told that there is no outstanding federal litigation that imperils full operation going forward. The "Appellants are not asking the Board to order the pipeline removed or relocated." (App. Brief at 68.)⁸ The Appellants acknowledge that it is now too late to take any pre-construction samples or to further evaluate pre-construction site conditions. Any measures related to E&S controls during construction are obviously moot. The Appellants do not explain how remanding the permit to require an assessment of "the status of these water resources now," (App. Brief at 69), could possibly translate into any specific measures to be taken regarding any BMP because the BMP was improperly designed and should not have been permitted. They

⁸ The Appellants' concession that they are not asking for a pipeline relocation renders moot their argument that Transco's alternatives analysis regarding pipeline location was inadequate.

do not explain how the results could show that degradation has occurred, and if so, how it relates to an improper BMP design. This is not an enforcement case; it is an appeal to determine whether permits were issued in error.

The Appellants could have but did not seek a supersedeas. Some of that may be explained by the protracted jurisdictional wrangling that took place.⁹ But be that as it may, the fact of the matter is that the scope of practical relief that we could have offered has been narrowed down considerably, which when coupled with the Appellants' limited proposed remedy, may explain why many of the Appellants' arguments come across as attacks on the Department's programs in general as opposed to attacks on Transco's permits for this Project.

Restoration

The Appellants also challenge Transco's Chapter 105 permits. 25 Pa. Code Chapter 105 primarily relates to work done *in* the water resources as opposed to in the upland areas, with the latter being primarily regulated under Chapter 102. The Chapter 105 regulatory framework allows impacts, including permanent impacts to water resources, subject to the review process and permitting standards, which require avoidance, minimization, and mitigation. 25 Pa. Code §§ 105.11 – 105.20a. There are myriad requirements relating to the review process and permitting standards, but the guiding principle is the Department must ensure that all permits contain

⁹ See EHB Docket No. 2023-026-L, Docket Entries #7-9 (Transco's Motion to Stay Proceedings (seeking a stay based on Transco's initiation of federal litigation arguing that the United States Court of Appeals for the Third Circuit and not this Board had jurisdiction over this appeal), Appellants' Response in Opposition Thereto, and Order Denying Motion to Stay); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 97642 (M.D. Pa. June 5, 2023) (denying Transco's motion for preliminary injunction to enjoin the Board from proceeding with the Appellants' appeal on the basis of jurisdiction), *aff'd*, 108 F.4th 144 (3d Cir. 2024), *pet. for reh'g en banc denied*, 110 F.4th 612 (3d Cir. Aug. 8, 2024); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 233735 (M.D. Pa. Dec. 22, 2023) (granting Appellants' motion to dismiss Transco's complaint), *aff'd*, 2024 U.S. App. LEXIS 27958 (3d Cir. Nov. 4, 2024).

conditions and requirements that are protective of the public health and safety as well as the environment. 25 Pa. Code §§ 105.14, 105.15, 105.16, 105.18a, 105.21.

For Exceptional Value wetlands, a permit may not be issued unless it is shown that the encroachment will not have an “adverse impact” on the wetland. 25 Pa. Code § 105.18a(a)(1). The regulations also provide that the cumulative effect of the project and other projects may not result in “impairment” of the resource. 25 Pa. Code § 105.18a(a)(6). Meanwhile, another subsection speaks in terms of not causing or contributing to pollution or a “diminution of resources sufficient to interfere with their uses.” 25 Pa. Code § 105.18a(a)(5). The regulation at 25 Pa. Code § 96.3(g) provides: “Functions and values of wetlands shall be protected pursuant to Chapters 93 and 105 (relating to water quality standards; and dam safety and waterway management).” 25 Pa. Code § 105.14(b)(11) requires the Department to review a Chapter 105 permit for “consistency” with state antidegradation requirements. In *Pine Creek Valley Watershed Ass’n v. DEP*, 2011 EHB 761, 772, we reconciled these standards somewhat by saying “[f]or EV wetlands, the Department reviews a project to ensure that there will be no adverse impact to the functions and values of the wetlands.” The permitting standards for “other wetlands,” i.e. non-Exceptional Value wetlands, track these various terms, but prohibit a “*major* impairment” or a “*significant* adverse impact.” 25 Pa. Code § 105.18a(b)(1) and (6) (emphasis added). All of these imprecise terms obviously leave a great deal of room for the exercise of reasonable discretion.

Avoidance, minimization, and mitigation are the operative principles. Impacts should be avoided if possible. Avoidance includes an alternatives analysis. The Appellants cling, just barely, to their criticism of Transco’s alternatives analysis, suggesting that some wetlands might have been avoided with a different pipeline route. (App. Brief at 49 n.5.) They also concede, however,

that they are not asking us to relocate the pipeline now. Therefore, any opinion we would offer at this point would be purely academic and we will not address that issue further.

Minimization can relate to short-term and long-term impacts. With respect to short-term minimization, the Appellants complain that the disruption caused by Transco's construction activities during construction failed to minimize the impact of the Project. They complain that the permitted activities include bringing in earth-moving equipment, clearing forested wetlands, digging a ten-foot deep trench, laying a 30 or 42-inch wide pipe, and backfilling soils, stopping and diverting streams for a period of time, and the "total removal of everything in the right of way." (App. Reply Brief at 6.)

There is no relief we can offer at this point regarding the Appellants' complaint of inadequate attention to detail during construction. Construction is completed. Nevertheless, we reject the Appellants' accusation that the Department failed to properly minimize the impact of construction activities during construction. We touched on the numerous permit requirements relating to the minimization of impacts above. All impacts, temporary or otherwise, were identified and accounted for. The Aquatic Resource Impact Tables, often referred to as the acronym "ARIT," (T. 1136), describe all impacts from the Project. (*See* DEP Ex. 26w, 27w.) The Aquatic Resource Impact Tables identify each and every surface water (e.g., wetlands and streams) impacted by the Project, the latitude and longitude of the resource, the Chapter 93 designation for the resource, the work proposed within the resource, whether the work relates to a temporary or permanent impact, and the exact square footage of the impact dimensions. (T. 1136-38; DEP Ex. 26w, 27w.) The Department's Records of Decision also speak in significant detail regarding the impacts that are temporary or permanent, and how those impacts will be mitigated. (Jt. Ex. 35, 37.)

This directly refutes the Appellants' claim that Transco's permit application "vastly undercounts" the construction zone. (App. Brief at 55.)

To repeat, the actual construction of the "in the dry" stream crossings for this Project are quick and created the minimum disruption possible associated with trenching. (T. 1154-57, 1174; Jt. Ex. 32a (Special Conditions L.1, T, U, NN, OO, PP), 32b (Special Conditions K.1, S, T, MM, NN, OO).) The Appellants were free to show that the Department acted unreasonably by approving the permits without adequate protections during construction, but they have not explained what more could or should have been done.

Turning to mitigation, mitigation is defined as follows:

- (i) An action undertaken to accomplish one or more of the following:
 - (A) Avoid and minimize impacts by limiting the degree or magnitude of the action and its implementation.
 - (B) Rectify the impact by repairing, rehabilitating or **restoring** the impacted environment.
 - (C) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.
- (ii) If the impact cannot be eliminated by following clauses (A)—(C), compensate for the impact by replacing the environment impacted by the project or by providing substitute resources or environments.

25 Pa. Code § 105.1 (emphasis added). Mitigation includes restoration. Complete and timely restoration equates to complete mitigation, which does not excuse appropriate minimization of impacts during construction, but it does mean that there will be, by definition, no adverse impact precluding the issuance of a permit within the meaning of the regulatory prohibition against adverse impacts. If a resource has been restored within a reasonable period of time, there has been no adverse impact within the meaning of the regulations. Otherwise stated, truly temporary impacts will generally not constitute adverse impacts within the meaning of the regulations. On

the other hand, absent restoration, the impact is permanent. If the Department in the exercise of its reasoned discretion is willing to tolerate a permanent impact, there must be compensation.

In *Center for Coalfield Justice v. DEP*, 2017 EHB 799, *appeal discontinued*, No. 1290 C.D. 2017, we held in the mining context that limited and temporary disruption of a stream's uses clearly can be anticipated as part of the Department's overall permitting scheme. We acknowledged that "limited" and "temporary" are imprecise terms, which means there must be an examination of the unique facts of each case to see whether the impacts result in impermissible impairment. Consideration of the mitigation measures proposed is an integral part of this examination. *Id.*, 2017 EHB at 845-54.

Restoration is not defined in the Chapter 105 regulations, but with respect to streams, we recently held that, when an encroachment is changed or removed, the goal is to return the impacted watercourse to natural conditions, i.e. the natural regimen and ecology that existed prior to the encroachment, to the extent possible. *Del. Riverkeeper v. DEP*, 2024 EHB 549, 574 (citing 25 Pa. Code §§ 105.2(4), 105.14(b), 105.16(d), 105.161(a)(3)). The idea is to return the resource back to its natural functioning ecosystem. 25 Pa. Code § 105.14. (*See* T. 1231-38.) If that is not possible, social and economic balancing will be required. 25 Pa. Code § 105.16. Restoration does not require the resource to be returned to an exact mirror image of its pre-construction appearance. The pebbles in the stream may not be in exactly the same place, and every plant in the post-construction wetland may not copy every individual plant pre-construction. Soil horizons cannot be restored with perfect exactitude over every inch of the project. The standard of success for wetlands is enough of a return to the natural regime that existed pre-construction that the wetland's functions and values are reestablished and revived. 25 Pa. Code § 105.14(b)(13); *Pine Creek Valley Watershed Ass'n*, 2011 EHB at 772. Mitigation is not just required for complete losses of

wetlands; it is also required for altered wetland functions and values. If pre-construction functions and values cannot be restored within a reasonable time or ever, compensation is required, even if the wetland itself remains. (T. 160-61, 372-73, 1217-18, 1267, 1286-88.) 25 Pa. Code §§ 105.1 (definition of mitigation), 105.18a(a)(7), 105.18a(b)(7), 105.20a.

With respect to restoration, the Appellants first posit the same argument regarding restoration that they made regarding water quality, namely, that there was not enough pre-construction data to properly assess whether the resources have been restored to their original condition. For example, Transco did not do pebble counts or grain-size measurements in the streams, inventory every single plant in the wetlands, or perform more detailed macroinvertebrate studies. Mr. Cooper, utilizing an example from the permit application, testified that

there is a description of some of the major taxon present but it doesn't utilize more advanced metrics that would be used to describe those [benthic] communities, which is often the basis for determining existing uses at a site. Same with stream substrate characteristics. It does list the major types. It doesn't provide proportions, which would be valuable for showing stability and the crossing...once that material was replaced into the system. There is no description of [stream] hydraulics in that area. So much of the basic information is there. I think additional information would be important for characterizing the site, assisting in design for restoration, and for monitoring the restoration.

(T. 551-52.) Unfortunately for the Appellants, there is nothing we can do about the cited lack of baseline data now. Even if we could, we detect no error here.

There is no end to the study that is possible, but at some point reasonable heads must prevail. The Department actually mandated a wealth of pre-construction information to measure against post-construction conditions. At the risk of repetition, the permit application included four modules with several parts, including a part for resource identification and characterization and for identifying and describing potential impacts. (T. 1144-45; Jt. Ex. 13-30; DEP Ex. 26y, 27y.) Transco was required to prepare and maintain a detailed record of pre-construction and post-

construction conditions of each stream and wetland crossing, including but not limited to, photographs. (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).) The in-stream information included substrate data. (T. 620-23; Jt. Ex. 25.) Transco's application included a detailed analysis of the functions and values provided by each wetland along the project route. (T. 785-93, 842-43; Jt. Ex. 14-19, 25, 26, 27.) The approved mitigation plan ensures that those functions and values are maintained. (Jt. Ex. 19, 20, 26, 27.)

We do not credit Mr. Cooper's testimony that more baseline data was required for this Project. His testimony was repeatedly based on possibilities and consequences that might have occurred but might not be accurately measured. (*See, e.g.*, T. 570, 575-78.) He of course had no data of his own. He also seemed to be opining under the mistaken understanding that post-construction conditions must be an exact replica or carbon copy of pre-construction conditions. Such a standard is impractical, unnecessary, and unreasonable. Rather, the permit must ensure a return of the streams to their natural regime, and return wetlands so that they serve their pre-construction functions and values. With this standard in mind, the data requirements advocated by Mr. Cooper seem excessive, a search for knowledge for knowledge's sake alone, without adding any practical value.

Regardless of pre-construction conditions, Transco's permits contain extensive restoration requirements designed to ensure that regulatory standards would be met and long-term impacts are eliminated or minimized. The Project did not propose any permanent loss of wetlands. (T. 782-83, 1164.) All wetlands are restored to wetlands. For all the Appellants' objections, the reality is that the permanent impacts to wetlands on this Project relate to nothing more than a change in vegetation. "[T]he wetland is still there, it is just that the vegetation has changed a little bit." (T. 352. *See also* T. 784, 1163, 1181-82.) Transco's permit applications properly accounted for this

change in vegetation by ensuring that any functions and values associated with the change in vegetation were addressed. (T. 782-85.) 25 Pa. Code § 105.20a.

Transco's and the Department's witnesses explained why this functional conversion would not result in any adverse impact. (T. 815-16, 859-60, 898, 1152-53, 1193-94.) Appellants offered no contrary evidence. Dr. Schmid, the Appellants' expert witness pertaining to wetlands, acknowledged that he was not expressing an opinion as to whether the Project might have an adverse impact on wetlands. (T. 500-01, 513.)

Transco's stream construction plans require the stream banks and streambed to be restored to pre-construction contours. (T. 287-88, 1155; Jt. Ex. 19 (Section S3.G), 26 (Section S3.G).) The pipeline crossings must be restored and properly stabilized upon completion of the work, and restored streams must use a minimum of six inches of native stream bed material, which has been stockpiled. (T. 288-89, 418, 468, 622-23, 990, 1235-36.) Further, the restored streambed elevation cannot exceed the pre-existing streambed elevation. (Jt. Ex. 32a (Special Condition V), 32b (Special Condition U).) There was a reforestation plan identifying where to replant trees. (T. 625-26.) Wetlands are to be restored using native wetland seed mix. (T. 793-95; Jt. Ex. 27.)

Transco's Environmental Assessment addresses how pre-construction hydrology and drainage patterns of wetlands would be restored. (Jt. Ex. 19, 26 (Sections S3.D.2(i) and S3.G.1).) Transco's applications included adaptive management plans. These plans specified that if work fails to meet restoration or other requirements, Transco was required to propose a plan to the Department to ensure compliance with those requirements. (T. 403-04, 625, 802-05.)

Some of the other permit conditions regarding restoration that are present in both the Luzerne County Chapter 105 Permit and the Monroe County Chapter 105 Permit are:

- "Upon completion of final earthmoving activities, the permittee shall restore all disturbed wetland areas to original contours and replant with indigenous wetland

vegetation in accordance with the restoration plans as presented in the permit application.” (Jt. Ex. 32a (Special Condition S), 32b (Special Condition R).)

- “All Palustrine Scrub-Shrub (PSS) and Palustrine Forested (PFO) wetlands within the temporary right-of-way (ROW) shall be replanted with woody species that are similar to those species present in the wetland prior to the permittee conducting construction activities.” (Jt. Ex. 32a (Special Condition W), 32b (Special Condition V).)
- “The Permittee shall ensure at least an eighty-five percent (85%) survival rate of wetland plantings during the five (5) year monitoring period. Additional wetland plantings and/or reports in subsequent years beyond the initial five (5) years may be required if an eighty five percent (85%) survivability of planted species is not achieved.” (Jt. Ex. 32a (Special Condition X), 32b (Special Condition W).)
- Transco is required to “prepare and maintain a detailed record of pre-construction and post-construction conditions of each stream and wetland crossing, which shall include sufficient photographs to compare pre-construction and post-construction conditions.” (Jt. Ex. 32a (Special Condition N), 32b (Special Condition M).)

The Appellants have not provided any convincing evidence that these conditions are inadequate to ensure the effective restoration of the affected resources.

The Appellants ask us to remand the permits so that they can be revised to require more monitoring. To a large extent this request overlaps with their request for post-construction sampling of water quality and streambed materials. They add that the permits only require reports and photographs twice a year for the first two calendar years and once a year for three years after that, which they say is not enough. (App. Brief at 22; App. Reply Brief at 5.) They say there should be more to evaluate whether restoration has been successful and whether an impact is “truly temporary,” but they do not tell us how long or at what frequency the monitoring reports should continue.

We do not see a need to remand the permits for more monitoring. The Department acted reasonably in requiring the amount that it has. Once post-construction and/or restoration BMPs are installed, inspections are a requirement of the notice of termination process in Chapter 102. (T. 351, 1036-37.) 25 Pa. Code § 102.7. Further, there are requirements related to certifications from

licensed professionals that the post-construction/restoration BMPs were installed in accordance with the approved plans, as well as operation and maintenance requirements that continue in perpetuity. (T. 1038-39; Jt. Ex. 31.) 25 Pa. Code §§ 102.8(f), (j), (l), (m), and 102.14(g). Transco is required to observe wetlands, take photos, and monitor for a set of parameters, including percent survival of aquatic species and plant species. (T. 226-27, 1035-36; Jt. Ex. 32a, 32b.) It must monitor for secondary impacts to hydrology. (Jt. Ex. 32a, 32b.) Off-site and on-site mitigation activities are also monitored and reported on for five years. (*Id.*) The Department can request additional monitoring if parameters are not met. (*Id.*)

The Appellants next argue that the Department should better define “temporary” in terms of impacts to resources; it should include a specific deadline in the permits for when restoration must be complete. They complain that what the Department considers a “temporary impact” is based on a permittee’s expectation of achieving restoration, and that can last until the expiration of the permits, which can be continuously renewed. (T. 293-94.) There is no enforceable time constraint, they say; as a result, impacts could *de facto* become permanent without any of the accompanying regulatory obligations for mitigation that should come into play for permanent impacts.

The Appellants say the Department may not disregard the “durational extent” of the impacts. We certainly agree. However, there is no evidence that the Department did that. To the contrary, the record is replete with evidence that Transco must obtain full restoration within a reasonable period of time, and extensive monitoring is required to ensure that happens. We decline to draw a red line between what may be a temporary impact and a permanent one. Tellingly, the Appellants do not suggest one. What constitutes timely restoration of a resource will vary in each case, and it will turn on the facts. *Cf. Ctr. for Coalfield Justice, supra.*

The Appellants next say that some of the impacts that the Department has labeled as temporary are in fact permanent. Because impacted resources will never be restored, there was inadequate compensation required for the Project, they claim. The problem that pervades throughout the Appellants' case and appears once again in this context is they do not give us specific examples. They do not point to any specific location where the Department treated what should have been a permanent impact as temporary. This case is to be contrasted with *Gerhart, supra*, 2019 EHB 534. In that case, two landowners appealed the Chapter 102 and 105 permits authorizing the construction and installation of a natural gas liquids pipeline that traversed the landowners' property. The landowners focused on specific streams and wetlands on their property that would be crossed by the pipeline and produced evidence showing that one of the wetlands classified as having emergent vegetation and to be restored as such, was actually a forested wetland and needed to be restored accordingly pursuant to the pipeline company's restoration and replanting plans. Here, we have nothing approaching that level of specificity.

We reject Dr. Schmid's opinion that deforestation of a forested wetland is never temporary, which is more a personal opinion of semantics than science. (T. 454-55.) Dr. Schmid's personal opinion does not support a remand of Transco's permits for any additional compensatory measures. Similarly, the fact that wetland recovery in general takes longer than Dr. Schmid would personally like does not compel us to change anything in the permits. Dr. Schmid has not explained how Transco could have accelerated the process to his satisfaction, even if that were the pertinent inquiry.

In any event, the Department does consider the time it takes to reestablish the same type of vegetation when deciding how much compensation is required. Section 105.18a requires replacement of affected wetlands, and Section 105.20a provides the wetlands replacement criteria.

The Chapter 105 replacement ratios take into account how long it takes for trees or shrubs to grow, so that is often why permits require a higher than one-to-one ratio of mitigation wetlands. The Department takes the type of the resource into account. (T. 1287-88.) In this case, for the crossings of Palustrine Forested (PFO) and Palustrine Scrub Shrub (PSS) wetlands where vegetative conditions will be converted to Palustrine Emergent (PEM) vegetative conditions, the Department determined that the functional conversion impacts will be mitigated for, as described in Transco's Mitigation Plan. For the PFO and PSS wetlands not in the right-of-way, these areas will be replanted and allowed to revert back to PFO conditions following construction, and off-site mitigation will also compensate for the temporal loss of their functions and values.

The sections of the Project that were proposed to convert PFO/PSS wetlands to PEM wetlands are limited to the section immediately above the pipeline right-of-way because mowing (as infrequently as every three years) is required to ensure pipeline integrity and safety from the threat of tree roots. (T. 1147-48.) The permanent functional conversion here of PFO/PSS wetlands to PEM constitutes permanent indirect impacts because one function, the vegetation, will change. (T. 1147-51.) These permanent functional conversions are in a narrow path on either side of the pipeline and are a small portion of the larger resources (T. 1150-51.) As documented in the Records of Decision, the total amount of permanent functional conversion for the Project is less than two acres. (Jt. Ex. 35, 37.) The mitigation ratio for EV wetlands in this permit was 2.5 to 1, much more than the regulatory minimum. (T. 1150; Jt. Ex. 35, 37.) The permanent functional conversion of 1.56 acres of EV wetlands (of 1.86 acres of total wetlands converted) over both counties from PFO/PSS wetlands to PEM or PSS wetlands will be mitigated for offsite. (Jt. Ex. 35, 37.)

Lastly, the Appellants complain that Transco and the Department did not adequately consider the *cumulative* impact of the Project, as required by, *e.g.*, 25 Pa. Code §§ 105.14(b)(14), 105.18a. The Appellants are referring to the otherwise favorable fact that most of the Project collocated the new pipelines with preexisting pipelines. However, the record clearly belies the allegation. (T. 863-69, 1162-66, 1193-94.) The Appellants have not shown how any alleged shortfall might have changed the result or would justify any remand.

Environmental Rights Amendment

The Appellants argue that the Department failed to fulfill its duties and responsibilities under Article I, Section 27 of the Pennsylvania Constitution, sometimes referred to as the Environmental Rights Amendment (ERA). The ERA provides:

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

PA. CONST. art I, § 27. The first step in our constitutional analysis is to determine whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next, we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Stocker*, 2022 EHB at 445.

The Department's "duties under Article I, Section 27 are not necessarily coextensive with or limited to ensuring compliance with applicable statutes and regulations...." *Del. Riverkeeper Network v. DEP*, 2022 EHB 103, 139-40 (citing *Friends of Lackawanna*, 2017 EHB at 1161). See also *Ctr. for Coalfield Justice*, 2017 EHB at 860. However, as a practical matter, an appellant

challenging a Department action that is otherwise compliant with the applicable statutes and regulations needs to explain what more the Department should have done to fulfill its responsibilities under the ERA. It will generally not be enough to merely restate the other arguments in the case relating to regulatory violations and reframe them as constitutional violations. *Liberty Twp. v. DEP*, 2024 EHB 36, 140; *Del. Riverkeeper Network*, *supra*.

The ERA requires the Department to fully consider the environmental effects of its action, but that duty will often be described in the regulations. The ERA precludes actions that result in an unreasonable degradation, diminution, depletion, or deterioration of the environment, but what is reasonable or unreasonable will often be established and delineated by regulation. There may be some daylight between full compliance with the applicable regulatory programs and acting with prudence, loyalty, and impartiality, but a successful appellant will need to explain.

The Appellants argue that the Constitution required the collection of more information about the baseline water quality in affected streams even though the regulations did not expressly require it. They similarly argue that the Department was required by the Constitution to collect more data about pre-construction site conditions than that which is required under the regulations. They say the Department had the authority to require such information from Transco but fell short of its constitutional duties by failing to exercise that authority in this case.

We are not convinced that the ERA is an appropriate vehicle for challenging the Department's actions at such a granular level. Even if it is, the Appellants have not convinced us that the Department's failure to require more pre-construction investigation created an unacceptable risk that anybody's constitutional right to clean air, pure water, or the preservation of the natural, scenic, historic, or esthetic values of the environment would be jeopardized. Failure to collect more data did not prevent the Department from being able to predict with a reasonable

amount of information and study that issuance of the permits would not result in unreasonable degradation. Nor in our judgment was requiring more data necessary for the Department to fulfill its trustee duties given the reams of data already required regarding the appropriately minimized, short-term construction in the water resources. The same is true with respect to the Appellants' claim that more post-construction monitoring than that required by the Department was constitutionally mandated. The amount of post-construction reporting in this case is sufficient to show that water quality has been maintained and pre-construction conditions have been restored.

This case stands in stark contrast to the situation in *New Hanover Township v. DEP*, 2020 EHB 124, *aff'd*, 316 A.3d 668 (Pa. Cmwlth. 2024). In that case, we found that the Department had violated its constitutional duties by failing to meaningfully account for the serious and demonstrated threat that groundwater pumping at a proposed quarry would spread contaminated groundwater from a nearby hazardous site and even pull it into the quarry itself. The Department gave no thought to what would happen when that occurred. This was a major failing in the Department's duty to consider the potentially grave consequences of its action. We did not in that case get into the particulars of whether there was enough sampling.

Finally, the Appellants argue that planting new saplings for restoration of a mature forested wetland can never be justified by the fact that only "future generations" will benefit from fully grown trees. The sacrifice of the "current generation" is too great; "the Commonwealth cannot allow for the present-day degradation of the public natural resources based on a promise that the degradation will be remedied in time for future generations' enjoyment." (App. Brief at 68.)

The Appellants' argument is essentially the same as saying there should never be any development in forested wetlands that requires tree cutting. The ERA was not intended to derail all development. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 954 (Pa. 2013). A complete

constitutional analysis needs to recognize and balance that the development at issue, in this case new pipelines, has social utility and leads to an increase in the general welfare, convenience, and prosperity of the people. *Id.*; *Ctr. for Coalfield Justice*, 2017 EHB at 860.

Furthermore, we reject the value judgment that perhaps underlies the Appellants' argument that any one kind of wetland is inherently more valuable than another. It is true that different types of wetlands provide different functions and values, and functions and values must be matched and restored, but that restoration is exactly what is required in Transco's permits. In fact, the wetland replacement ratios used for the Project factor in the time it takes for trees to grow, which is why certain ratios are higher than one to one. (T. 1288; Jt. Ex. 35 (at 6 (using ratios of 1.5, 2, and 2.5 for permanent impacts to forested wetlands)), 37 (at 5 (same))).)

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. § 693.24(a); 35 P.S. § 691.7; 35 P.S. § 7514; *Cole v. Pa. Dep't of Env't Prot.*, 329 A.3d 1228 (Pa. 2025); *Transcon. Gas Pipe Line Co., LLC v. Pa. Env't Hearing Bd.*, 2023 U.S. Dist. LEXIS 97642 (M.D. Pa. June 5, 2023), *aff'd*, 108 F.4th 144 (3d Cir. 2024), *pet. for reh'g en banc denied*, 110 F.4th 612 (3d Cir. Aug. 8, 2024).

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Env'tl Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. In third-party appeals, the appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364; *Jake v. DEP*, 2014 EHB 38, 47.

4. The Appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

5. 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 Env't Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018); *Kiskadden v. Dep't of Env't Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016).

6. The Board reviews the Department's final action, not the Department's review process leading up to a final action. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156; *Snyder v. DEP*, 2016 EHB 705, 706.

7. Issues not argued in a party's post-hearing brief may be waived. 25 Pa. Code § 1021.131(c); *Morrison v. DEP*, 2021 EHB 211, 221.

8. Transco and the Department waived the ability to challenge the standing of Maya van Rossum, the Delaware Riverkeeper, in this appeal. 25 Pa. Code § 1021.131(c); *Morrison v. DEP*, 2021 EHB 211, 221; *Stedje v. DEP*, 2015 EHB 577, 594.

9. If a standing challenge has been properly raised in a pre-hearing memorandum, pursued at the hearing, and preserved in a post-hearing brief, an appellant must show that it demonstrated by a preponderance of the evidence at the hearing on the merits that it has standing. *Montgomery Twp. Friends of Family Farms v. DEP*, 2024 EHB 716, 726-31; *Williams v. DEP*, 2021 EHB 232, 244; *Stedje v. DEP*, 2015 EHB 577, 594; *Giordano v. DEP*, 2000 EHB 1184, 1187.

10. The purpose of standing is to determine whether an appellant is the appropriate party to file an appeal from an action of the Department; it does not evaluate whether or not a particular claim has merit. *Pa. Waste Indus. Ass'n v. DEP*, 2016 EHB 590, 603; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944.

11. An organization has standing in its own right when the organization's work, interests, and/or mission are sufficiently close to the subject matter of the appeal. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648.

12. An organization has representational standing if at least one individual associated with the group has standing. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152 (citing *Funk v. Wolf*, 144 A.3d 228, 245-46 (Pa. Cmwlth. 2016)); *Pa. Med. Soc'y v. Dep't of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012).

13. PennFuture and the Delaware Riverkeeper Network have standing as organizations in their own right in this appeal. *Petrus Holdings, Inc. v. DEP*, 2022 EHB 284, 286-87; *Friends of Lackawanna v. DEP*, 2016 EHB 641, 648; *In re Friends of Marconi Plaza & Rich Cedrone*, 287 A.3d 965, 975 (Pa. Cmwlth. 2022); *Dowds v. Zoning Bd. of Adjustment*, 242 A.3d 683 (Pa. Cmwlth. 2020).

14. PennFuture and the Delaware Riverkeeper Network have standing as representatives of their members. *Dengel v. DEP*, 2024 EHB 605, 615-16; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1152.

15. Transco and the Department's motion for a nonsuit is denied. *Fox v. DEP*, 2011 EHB 320, 324-25; *Clabbatz v. DEP*, 2006 EHB 263, 265.

16. Permits must ensure that the level of water quality necessary to protect the existing and designated uses of the waters of the Commonwealth is maintained and protected. 25 Pa. Code

§ 93.4a.; *Liberty Twp. v. DEP*, 2024 EHB 790, 807; *Pine Creek Valley Watershed Ass'n v. DEP*, 2011 EHB 761, 772.

17. For High Quality waters, permits must ensure that the existing water quality of the waters is also maintained and protected, unless the Department finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. 25 Pa. Code §§ 93.4a(c) and 93.4c(b)(1)(iii).

18. For Exceptional Value waters, the water quality of the waters must be maintained and protected. 25 Pa. Code § 93.4a(d).

19. The Appellants have not shown that Transco's permits, along with its plans and BMPS, do not adequately protect the existing and designated uses and water quality of the waters of the Commonwealth.

20. The Appellants have not shown that it was necessary for Transco to conduct pre- and post-construction in-stream water quality sampling for each stream and wetland affected by the Project.

21. The Appellants have not shown that the Department acted contrary to its trustee duties and obligations under Article I, Section 27 of the Pennsylvania Constitution in issuing the permit. PA. CONST. art. 1, § 27; *Stocker v. DEP*, 2022 EHB 425, 445.

22. The Appellants have not met their burden of proof on their claims in this appeal. 25 Pa. Code § 1021.122(c)(2).



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



**CITIZENS FOR PENNSYLVANIA’S
FUTURE, MAYA K. VAN ROSSUM, THE
DELAWARE RIVERKEEPER AND
DELAWARE RIVERKEEPER NETWORK**

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and TRANSCONTINENTAL
GAS PIPE LINE COMPANY, LLC, Permittee**

:
:
:
:
:
:
:
:
:
:
:
:

EHB Docket No. 2023-026-L

ORDER

AND NOW, this 16th day of May, 2025, it is hereby ordered that the Appellants’ appeal is
dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman

**STEVEN C. BECKMAN
Chief Judge and Chairperson**

s/ Bernard A. Labuskes, Jr.

**BERNARD A. LABUSKES, JR.
Board Member and Judge**

s/ Sarah L. Clark

**SARAH L. CLARK
Board Member and Judge**

s/ MaryAnne Wesdock

**MARYANNE WESDOCK
Board Member and Judge**

s/ Paul J. Bruder, Jr.

PAUL J. BRUDER, JR.
Board Member and Judge

DATED: May 16, 2025

c: DEP, General Law Division:

Attention: Maria Tolentino

(via electronic mail)

For the Commonwealth of PA, DEP:

Lance H. Zeyher, Esquire

Sean L. Robbins, Esquire

Margaret O. Murphy, Esquire

Robert A. Reiley, Esquire

Elizabeth A. Davis, Esquire

(via electronic filing system)

For Appellant, Citizens for Pennsylvania's Future:

Jessica R. O'Neill, Esquire

Emma H. Bast, Esquire

(via electronic filing system)

**For Appellants, Maya K. van Rossum, the Delaware Riverkeeper,
and Delaware Riverkeeper Network:**

Kacy C. Manahan, Esquire

Devon E. Guyer, Esquire

(via electronic filing system)

For Permittee:

Andrew T. Bockis, Esquire

John R. Dixon, Esquire

Elizabeth U. Witmer, Esquire

Pamela S. Goodwin, Esquire

Sean T. O'Neill, Esquire

(via electronic filing system)