



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



GARY AND MARYANN PRUDEN

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DAUPHIN COUNTY
CONSERVATION DISTRICT, and
MERRILL MILLER, Permittee
and J.D. ECKMAN, INC., Co-Permittee**

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EHB Docket No. 2024-023-BP

Issued: May 19, 2025

**OPINION AND ORDER ON APPELLANTS’
MOTION FOR SUMMARY JUDGMENT**

By Paul J. Bruder, Jr. Judge

Synopsis

The Environmental Hearing Board (“Board”) denies Appellants Gary and MaryAnn Pruden’s (collectively referred to as “Appellants”) Motion for Summary Judgment. Appellants’ motion is based on objections which, based on the information before us, cannot reasonably be said to be within the genre of the issues raised in the notice of appeal documents. A motion to amend with supporting documentation will need to be filed if Appellants wish to pursue these arguments at a hearing.

OPINION

Introduction

This third-party appeal centers around a National Pollutant Discharge Elimination System Permit, No PAC220415 (“Permit”), issued to Merrill Miller and J.D. Eckman, Inc. On March 16, 2025, Appellants filed a Motion for Summary Judgment arguing: (1) the Permit was issued in violation of 25 Pa. Code § 102.8 because the project did not qualify as a “site restoration project,”

and (2) the Permit was issued in violation of Article 1, Section 27 of the Pennsylvania Constitution. (See Appellants’ Summ. J. Brief at 7-15). The Department/Conservation District filed their Joint Response on April 15, 2025. Permittee Merrill Miller (“Permittee”) and Co-Permittee/Intervenor J.D. Eckman, Inc. (“Intervenor”) filed their individual Responses on April 16, 2025. Appellants’ Reply Brief was due May 1, 2025, but no reply was filed. This matter is ready for review and disposition.

Background

On November 1, 2023, Permittee Merrill Miller and Intervenor J.D. Eckman, Inc. submitted a “PAG-02 National Pollutant Discharge Elimination System (“NPDES”) General Permit for Discharge of Stormwater Associated with Construction Activities Notice of Intent” proposing new coverage for discharge of stormwater associated with earth disturbance activities at a clean fill site, located at 23 Kellocks Run Road, South Hanover, Dauphin County (“Site”). (See DEP Ex. 2). On November 27, 2024, the Department, through the Conservation District, approved the request for coverage under the PAG-02 NPDES Permit for the proposed project.¹

On February 9, 2024, Appellants filed a Notice of Appeal (“NOA”) with the Board. On February 12, 2024, Appellants filed an Addendum to their Notice of Appeal (“Addendum”). On March 1, 2024, Appellants filed an Amendment to their Notice of Appeal (“Amendment”). Collectively, we will refer to these documents as the “Appeal Documents.”

On March 16, 2025, following the close of discovery, Appellants filed a Motion for Summary Judgment (“Motion”) arguing that there are no genuine issues of material fact that the

¹ Although the subject Permit expired December 7, 2024, a renewal Notice of Intent for a major modification to the NPDES Permit has since been filed with the Conservation District. This remains pending with the Conservation District as they conduct their technical review prior to making a determination. (See J.D. Eckman’s Brief in Resp. to Summ J. at n. 1-2 & the Department’s Brief in Resp. to Summ. J. at n. 1).

Permit was improperly approved, and the Board should revoke the permit. Permittee and Intervenor objected to the Motion in part on the ground that the arguments advanced were not stated in the original appeal.

Standard of Review

Summary judgment is appropriate when the record - including pleadings, depositions, answers to interrogatories, and other related documents - shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Stedge v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is granted only in the clearest of cases, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Liberty Twp. v. DEP*, 2022 EHB 324, 326; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106.

Discussion

Appellants allege they are entitled to summary judgment because: (1) the Permit was issued in violation of 25 Pa. Code § 102.8, in that the project did not qualify as a “site restoration project,” as was identified on the permit documents, and (2) the Permit was issued in violation of Article 1, Section 27 of the Pennsylvania Constitution. (*See* Appellants’ Summ. J. Brief at 7-15). In response, Permittee and Intervenor assert that Appellants are not entitled to summary judgment because: (1) Appellants’ Amendment to the Notice of Appeal was filed outside the 20 day “amendment as of

right” period and the objections contained within should not be considered; (2) Appellants’ claims are raised for the first time in their Motion, and in effect waived, as they were never included in any of the Appeal Documents; and (3) Appellants’ arguments involve disputed questions of fact and law.

Timeliness of the March 1, 2024 Appeal Amendment

Pursuant to Pennsylvania code and Board regulations, a person aggrieved by an action of the Department must file its appeal with the Board within 30 days after receiving notice of the action. 25 Pa. Code § 1021.52(a)(2). The thirty-day period begins to run after publication in the Pennsylvania Bulletin, or if no publication occurs, then after actual notice is provided to the aggrieved party. *Id.* at § 1021.52(a)(2)(i-ii). An appeal may then be amended “as-of-right” within 20 days after the initial filing. 25 Pa. Code § 1021.53(a). After the 20-day grace period ends, the Board, upon motion, may grant leave to further amend the appeal if no undue prejudice will result to the opposing parties. *Id.* at § 1021.53(b).

The decision of whether to allow a party to amend its appeal after the 20-day grace period has expired rests firmly within the Board’s discretion and involves an analysis into whether the opposing parties will suffer undue prejudice. *Dengal v. DEP*, 2024 EHB 466, 469 (citing *Tapler v. DEP*, 2006 EHB 463, 465). The right to amend one’s appeal is viewed liberally by the Board in efforts “to secure determination of cases on their merits.” *Williams v. DEP*, 2020 EHB 277, 281 (citing *Chester Water Authority v. DEP*, 2016 EHB 358, 362).

The instant case is unique in that Appellants from the outset have discussed the issues they incurred with receiving proper notice of the Permit and why their appeal documents may be late. Appellants’ original NOA was timely hand delivered to the Board on February 9, 2024. In their initial filing, Appellants state that they received no notice from the Department, but they received

letters regarding the Site and Permit activity on December 19, 2023 from JD Eckman² and a Certified Letter dated January 25, 2024 from the Township of South Hanover.³ Appellants' NOA outlines specific objections on how the Permit's issuance violated proper public notice requirements and how the only notice they were able to find after conducting research into the issue was a "FINAL ACTIONS TAKEN FOR NPDES PERMITS AND WQM PERMITS" in the Pennsylvania Bulletin on January 13, 2024.

On February 12, 2024, three days after the filing of the original NOA, Appellants' Addendum was timely received by the Board via facsimile. Again, Appellants provided an explanation as to why their appeal may be viewed as tardy, and state objections regarding lack of proper public notice.⁴

On March 1, 2024, Appellants' Appeal Amendment was filed with the Board.⁵ The Amendment was filed one day after the 20-day "appeal by right" period concluded. Appellants

² The letter stated "[w]e hereby notify you of the approved Dauphin County NPDES permit for land disturbance and placement of fill material at the following location: Merrill 'Bud' Miller's Residence 23 Kellocks Run Road Hummelstown PA 17036." (See December 19, 2023 South Hanover Township letter attached to Appellants' February 9, 2024 NOA).

³ The Township letter stated that a request was submitted to the Township's Board of Supervisors by JD Eckman, Inc. regarding a construction project wherein construction vehicles, including dump trucks bringing hundreds of loads of fill, would travel on Kellock's Run Road for a 4.5 year period from the date of approval. Specifically, the letter stated: "Because this request may affect property owners/residents of Kellock Run Road, the Board of Supervisors wants to be assured that proper notification with specific detail is given to all those in the affected area. The Board of Supervisors would appreciate hearing from you before it considers the project. . . . We would welcome all feedback by February 5, 2024." (See January 25, 2024 South Hanover Township letter attached to Appellants' February 9, 2024 NOA).

⁴ Appellants state: "[w]e appreciate your acceptance of this addendum via mail, as it pertains to the lack of proper public notices related to the issuance of this permit which has seriously impacted our ability to respond within the 30 day timeframe of the Final Notice of permit." (See Appellants' February 12, 2024 Addendum).

⁵ In their Amendment, Appellants assert three specific objections: "(1) The Permittee and site are not eligible for coverage under the General permit; (2) Permittee has been dumping unregulated fill at the site since at least 2010. Earlier estimates indicated the dumping began in 2021 [sic]; and (3) PAG-02 Application signed by Permittee, Merrill D. Miller Jr. contains material misrepresentations." (See Appellants' March 1, 2024 Addendum).

state that the reasoning for the late filing of their Amendment was due to their Right-to-Know Request documents not being timely received by the state. They requested that the objections contained within still be considered by the Board.

The Board does its best to grant leniency to *pro se* appellants, trying to navigate a complex procedural minefield, while understanding that they are nonetheless subject to the same rules of practice and procedure as those that do have legal counsel. *354 Broadway, LLC v. DEP*, EHB Docket No. 2024-139-B, slip. op. at 13-14 (Opinion and Order March 18, 2025) (Clark, J., concurring) (quoting *Perrin v. DEP*, 2008 EHB 78, 82 (“Although we often have said that *pro se* parties will be given no special consideration, as we in fact did earlier in this very Opinion, in many (if not most or all cases) this simply is not true.”)). This premise aligns with the Board’s precedence in ensuring that *pro se* appellants are not unduly disadvantaged from having a hearing on the merits by failing to comply with complex environmental regulations and/or procedural requirements.

In exercising the Board’s discretion, we take into consideration the procedural history of this case coupled with the fact that the Prudens are *pro se*. We do not believe there is any undue prejudice at this time in considering Appellants’ March 1, 2024 Amendment. Appellants established Board jurisdiction in this case by timely filing their initial NOA and Addendum. The period of time prescribed for the filing of a document (other than the jurisdictional deadline for filing an appeal) may be extended by the Board for good cause upon motion. 25 Pa. Code § 1021.12(a).

Although we understand that Appellants failed to file a formal motion for leave with affidavits, we acknowledge that Appellants’ Amendment did specifically request the information be considered, despite its tardiness. Specifically, the Amendment language states: “[w]e are

requesting that information contained in, and findings related to, the above be allowed under the Appeal.” (See March 1, 2024 Amendment). At no point in time after the filing of the Amendment did any opposing counsel file a motion to dismiss or a motion to strike Appellants’ Amendment, despite Appellants acknowledging in all three of their Appeal Documents that timeliness might be in question.

Additionally, Appellants’ Amendment was filed toward the beginning of this appeal,⁶ a mere two weeks after the parties’ attorneys entered their appearances, before the mandated 60-day settlement conference, and as far as we can tell, before any discovery was undertaken. The Department, Permittee, and Intervenor had ample time to conduct written discovery or depositions on any information contained within the Appeal Amendment or any of the Appeal Documents. It is also noteworthy to mention that on February 16, 2024, Chief Judge and Board Chairperson Steven C. Beckman provided written notice to the Pennsylvania Bulletin, pursuant to 25 Pa. Code § 92a.88, that it must publish notice of the appeal and petitions to intervene may be filed with the Board. Indeed, at the time Appellants filed their Amendment, there was still an opportunity for other parties to intervene in the lawsuit.

For these reasons, the Board finds there is no undue prejudice to opposing parties, and the March 1, 2024 Amendment, and the arguments contained within, are part of the Appeal.

Waiver of claims set forth in the Motion for Summary Judgment

The Board will now consider the issue of waiver. Intervenor and Permittee allege that

⁶ According to the timeline provided by the Appellants, they had thirty days from written notice of the Permit in the Pennsylvania Bulletin to file an Appeal, which would have made that deadline February 12, 2024 at the earliest. 25 Pa. Code § 1021.52(b). Appellants then would have had another 20 days to amend their appeal, making the amendment “as-of right” period end March 4, 2024. If taken from the date the Appellants received actual notice of the permit, on January 25, 2024, the Appellants would have had until February 26, 2024 to file their initial notice of appeal and then until March 18, 2024 to amend as of right.

Appellants' arguments: (1) that the project did not qualify as a "site restoration project" (2) and the Permit violates Article 1, Section 27 of the Pennsylvania Constitution, exceeded the scope of issues preserved in the Appeal Documents.

Under 25 Pa. Code § 1021.51, a notice of appeal to the Board must set forth separate specific objections – either factual or legal - to the action of the Department for which review is being sought. 25 Pa. Code § 1021.51(e). While it is true that allegations not raised in a notice of appeal are generally waived, the Board has consistently held that notices of appeal are to be read broadly, and we will be reluctant to find waiver so long as an objection falls within the "genre of the issue" contained in the notice of appeal. *See Bennner Twp. Water Authority v. DEP*, 2019 EHB 594, 637; *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 206-08; *New Hanover Twp. v. DEP*, 2011 EHB 645, 671; *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 65-66, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002); *Jefferson Cnty. Bd. of Comm'rs v. DEP*, 1996 EHB 997, 1004-05. *See also Croner, Inc. v. DER*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

As Judge Labuskes stated in *Rhodes v. DEP*:

It is a longstanding rule that allegations not raised in the notice of appeal are waived. [citations omitted] However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. [citations omitted].

New Hanover Twp. v. DEP, 2011 EHB 645, 671 (quoting *Rhodes, et al. v. DEP*, 2009 EHB 325, 327)).

Appellants argue in their Motion that the Permit was improperly issued for a "site restoration project" due to various activities occurring at the Site and the impervious surface present; thus, they argue, the Department failed to require the mandated PCSM information

pursuant to 25 Pa. Code. § 102.8(g) & (n) necessary to issue the Permit for a “site restoration project.” (*See* Appellants’ Summ. J. Brief at 8-11). Appellants further assert that the Department violated Article 1, Section 27 of the Pennsylvania Constitution because it did not obtain all the necessary information mandated by 25 Pa. Code § 102.8(g) and (n) before issuing the Permit. (*See* Appellants’ Summ. J. Brief at 12-13).

Permittee and Intervenor contend in response that Appellants’ arguments introduce novel legal theories and factual assertions not contained within the Appeal Documents. (*See* J.D. Eckman Brief in Resp. to Summ. J. at 4 & Merrill Miller Brief in Resp. to Summ. J. at 5).

In reviewing the three Appeal Documents filed, Appellants list a variety of objections, including:

- 1) The submission of and issuance of NPDES permit violated Act 14 public notice requirements. Notice was not provided as required under the PAG 02 NOI;
- 2) No public notice of permit applications and draft permits was provided violating § 92a.82;
- 3) The submission and issuance of the NPDES permit violated public notice requirements under Federal and State guidelines, including Pa Code § 102.5;
- 4) General Permit (PAG 02) does not cover earth disturbance activities that have the potential for hazardous or toxic discharges, including: C&D and residential waste burning at the site; dumping unclean fill at the site;⁷
- 5) Permittee has been dumping unregulated fill at the site since at least 2010. Earlier estimates indicated the dumping began in 2021;
- 6) The Permittee and site are not eligible for coverage under the General permit;
- 7) Not all permittees signed the Application or Notice of Intent; and
- 8) PAG-02 Application signed by Permittee, Merrill D. Miller Jr., contains material

⁷ Appellants’ NOA further details that they believe the earth disturbance activities at the Site have the potential for hazardous or toxic discharges, including the dumping, burning, and disposal of waste (including construction and demolition) and unclean/unregulated fill, hazardous and toxic waste ashes, and the contamination of water sources.

misrepresentations.

(See Notice of Appeal, Addendum to Notice of Appeal, and Amendment to Notice of Appeal).

Upon review of the Appeal Documents and Appellants' Motion, we agree with Permittee and Intervenor in that it *facially* appears Appellants' "site restoration project" and Article 1, Section 27 claims are not specifically raised in the Appeal Documents. However, given that discovery has been completed and no party has made any reference whatsoever to whether the issues of "site restoration project" or Article 1, Section 27 were identified or explored during the discovery process, at this time we cannot fairly say that those issues are not within the genre of issues included in the Appeal Documents or otherwise not properly before the Board.

We find this case to be similar to *Chester Water Authority*, 2016 EHB 280 and *Joshi v. DEP*, 2018 EHB 771. In *Chester Water Authority*, Chester Water Authority filed a motion for summary judgment arguing that Permittee Old Dominion's permit should have been initially denied, and presumably revoked, because Old Dominion was not able to comply with the permit requirements. *Chester Water Authority*, 2016 EHB 280, 284. In response, Permittee Old Dominion and the Department stated that this argument was not properly before the Board because Chester Water Authority did not include the issue in its notice of appeal. *Id.* They specifically argued that: "Chester Water did not identify the issue *in discovery* or otherwise and that, in fact, the argument appears for the very first time in Chester Water's motion for summary judgment. They add that Chester Water has not moved to amend its appeal to add to this issue." *Id.* (emphasis ours). The Board found that *facially* this argument was not included in the notice of appeal, and if Chester Water wanted to pursue the argument, it needed to file a motion to amend its appeal. *Id.* 285-87.

After the motion for summary judgment was denied for including arguments beyond the scope of its notice of appeal, Chester Water Authority filed a motion to amend. *Chester Water*

Authority v. DEP, 2016 EHB 358, 359. Old Dominion and the Department fought the amendment arguing they would be prejudiced by this late amendment. *Id.* at 360. The Board held that the Department and Old Dominion were not unduly prejudiced by appellant's motion because the issues in question were an iteration of legal issues that had been in dispute since the inception of the appeal, the topics had already been the subject of discovery, and there was no surprise to the opposing parties. *Id.* at 361, 364.

Similarly, in *Joshi v. DEP*, Appellant Joshi filed an untimely motion for summary judgment arguing issues of public notice. *Joshi v. DEP*, 2018 EHB 771. The Board found that Joshi had asserted arguments in his motion for summary judgment that were not encompassed within the genre of the objections listed in his original notice of appeal documents. *Id.* at 774. Therefore, he needed to file a motion to amend to include his new public notice argument. *Id.* at 775.

Joshi filed a motion to amend his appeal to include the new notice issues presented in his motion for summary judgment. *Joshi v. DEP*, 2018 EHB 787. Upon review of what was produced and discussed in discovery, the Board concluded that the new arguments asserted by appellant were never revealed in discovery and relied upon an entirely new set of facts not addressed in the lawsuit. *Id.* at 792-94. Thus, the opposing parties would be prejudiced by allowing the amendment, and the motion to amend was denied. *Id.* at 795.

As in *Chester Water Authority* and *Joshi*, in order for the Board to determine if Appellants' "site restoration project" and/or Article 1, Section 27 claims are within the genre of issues raised in the appeal documents, we would need information as to whether these claims were developed in discovery under Appellants' catch-all objection ("The Permittee and site are not eligible for coverage under the General permit.") or any other objections listed. Appellants would need to file

a motion to amend and provide support for the idea that DEP, Permittee, and Intervenor were well aware of these claims as a result of questioning during discovery, and therefore, no undue prejudice or surprise is present. *See Chester Water Authority*, 2016 EHB 280, 285 (arguments regarding what has been uncovered in discovery “relate to whether an amendment to the notice of appeal should be allowed, not whether a party may simply raise an issue for the first time in a motion for summary judgment.”); *Dengal v. DEP*, 2024 EHB 466; *Joshi v. DEP*, 2018 EHB 771, 774 (finding a motion for “summary judgment may not be used as a substitute for a motion for leave to amend a notice of appeal.”)

Appellants are free to file a motion to amend their notice of appeal, which if filed, must include specific objections to what claims they are setting forth. The motion would need to include citations to regulations being challenged, such as 25 Pa. Code § 102.8(g) and (n), and Article 1, Section 27. Although Appellants’ original NOA outlines in paragraph form their environmental concerns with illegal dumping, burning of hazardous waste, air quality concerns, and contamination of water quality, their motion to amend would need to include factual or legal objections as to how the Department’s actions or inactions violated Article 1, Section 27, led to or may lead to environmental degradation, or failed to uphold its trustee duties.

In addition, any motion to amend and any responses thereto would need to include written discovery that has taken place or any deposition transcripts that would support the idea that these issues were identified during discovery. At this point in time, the Board has no information on what was asked of any party during discovery. We would expect that thorough questioning of the Appellants during discovery would have led to the identification of these specific issues. As such, an analysis of the discovery or lack of discovery in this matter will be necessary to determine whether allowing these claims will prejudice opposing parties. *See Center for Coalfield Justice v.*

DEP, 2019 EHB 523, 627-528 (discussing motion to strike undisclosed Article 1, Section 27 claim); *Chester Water Authority*, 2016 EHB 280, 285-86; *Dengal v. DEP*, 2024 EHB 466; *Joshi v. DEP*, 2018 EHB 771, 774.

For the reasons stated above, the Board will not address the merits of Appellants' claims as we cannot say they are properly before the Board.⁸ Appellants may file a motion to amend their appeal if they wish to pursue these arguments.

Accordingly, we issue the following order.

⁸ Although we do not analyze the merits of the issues fully here, based on the information before us in this Motion for Summary Judgment, summary judgment would not be proper as there are genuine issues of material fact that must be resolved at a merits hearing. Summary judgment is only appropriate for issues free from doubt. *Williams v. DEP*, 2019 EHB 764, 774.



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EHB Docket No. 2024-023-BP

ORDER

AND NOW, this 19th day of May, 2025, it is hereby **ordered** that Appellants' Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Paul J. Bruder, Jr.
PAUL J. BRUDER, JR.
Judge

DATED: May 19, 2025

c: DEP, General Law Division:
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