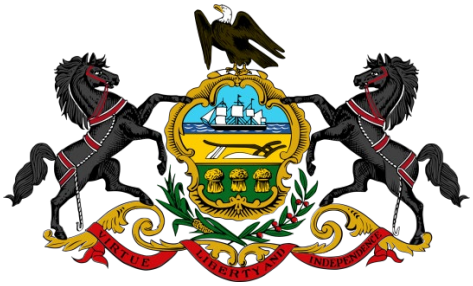
Environmental Hearing Board

Adjudications and Opinions



2023

COMMONWEALTH OF PENNSYLVANIA
Steven C. Beckman, Chief Judge and Chairperson

2023

JUDGES OF THE

ENVIRONMENTAL HEARING BOARD

Chief Judge and Chairperson*	Steven C. Beckman
Judge	Michelle A. Coleman (retired July 2023)
Judge	Bernard A. Labuskes, Jr.
Judge	Sarah L. Clark
Judge	MaryAnne Wesdock
Secretary	Christine A. Walker

*Chief Judge and Chairman Thomas W. Renwand retired February 2023

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2023 EHB 1

FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2023.

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

OPINIONS

Case	Page
Amerikohl Mining Inc	348
Beech Mountain Lakes Association, Inc.	221
Clean Air Council	203
Clean Air Council, Citizens for Pennsylvania's Future, and Center for Biological Diversity	23
Clean Air Council, The Delaware Riverkeeper Network, and Mountain Watershed Association, Inc	257
Delaware Riverkeeper Network and Maya Van Rossum, in her capacity as the Delaware Riverkeeper	1
Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya Van Rossum and Steven Gidumal and Virtus Capital Advisors, LLC	271
DEP v. Randy J. Spencer	338
Stephen and Ellen Gerhart	245
Gary Graham, Executor of the Estate of Robert B. Graham	30
Craig High	331
Brian Latkanich	299
Liberty Township and CEASRA (Appellants' Joint Motion in Limine Directed at Tri-County Landfill)	57
Liberty Township and CEASRA (Motion for Leave to File *Amicus Curiae* Brief)	326
Liberty Township and CEASRA (Motion for Site View)	185
Liberty Township and CEASRA (Motions to Recuse/Disqualify/Reassign Board Member)	62
Liberty Township and CEASRA (Petition for Supersedeas)	170
Liberty Township and CEASRA (Petition to Reopen the Record)	317
Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Preclude Appellants from Calling Tri-County's Experts as Witnesses and/or Introducing Their	

Expert Reports in Their Case-in Chief) 92

Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Preclude Evidence and Argument on Potential Discharges of Leachate)..... 71

Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Preclude Evidence and Arguments that Require Expert Testimony) 87

Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Preclude Issues Resolved on Summary Judgment) 43

Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Preclude Testimony and Evidence Regarding Violations Pre-Dating Those Addressed by 25 PA. Code 271.125)..... 50

Liberty Township and CEASRA (Tri-County Landfill's Motion in Limine to Strike and Preclude Testimony on Portions of Appellants' Exhibit 60 and Any Expert Testimony of Stephen Shields) 80

Liberty Township and CEASRA (Opinion in Support of Order on Application for Temporary Supersedeas)..... 108

Liberty Township and CEASRA, Inc. (Petition for Supersedeas)..... 158

Liberty Township and CEASRA, Inc. (Opinion in Support of Order on Application for Temporary Supersedeas)..... 117

Edna Ongaco 239

Salvatore Pileggi (Motion for Summary Judgment)..... 288

Salvatore Pileggi (Motion to Compel)..... 179

Sam and Cathy Popovich 35

Protect PT (Motion for Leave to Amend Notice of Appeal) 15

Protect PT (Permittee's Motion for Partial Dismissal)..... 191

Douglas Scott and Linda Marie Scott 138

Sierra Club and PennEnvironment..... 97

DEP v. Randy J. Spencer 338

Brian Telegraphis..... 146

US Trinity Services, LLC, d/b/a Trinity Energy Services 128

2023 EHB DECISIONS SUBJECT MATTER INDEX

Abuse of discretion – 348

Administrative order (see Compliance order) – 288

Affidavits – 15, 35, 108, 117, 158, 170, 331

Air Pollution Control Act, 35 P.S. § 4001 et seq. – 23, 299

Amendment of pleadings or notice of appeal – 15

Amicus curiae – 15, 326

Appealable action – 1, 203

Article 1, Section 27 of Pa. Constitution – 191, 299

Attorneys' Fees and Costs – 245, 257

Best management practices – 179

Bituminous Mine Subsidence and Land Conservation Act (aka Subsidence Act), 52 P.S. § 1406.1 et seq. – 146

Bonds – 97, 348

Burden of proof – 92, 158, 170, 179, 221, 288

Civil penalties – 128, 338

Clean Streams Law, 35 P.S. § 691.1 et seq. – 245, 338

Coal and Gas Resource Coordination Act, 58 P.S. §§ 501-518 – 138

Compel, motion to – 23, 30, 179, 257

Compliance order/Administrative order – 331

Consent Order & Agreement/Consent Order & Adjudication – 97

Continuance and extensions – 271

Dam Safety and Encroachments Act, 32 P.S. § 693.1 et seq. – 331, 338

Default judgment – 338

Depositions – 257

Discovery – 23, 179, 191, 257

Dismiss, motion to – 35, 138, 191, 203, 239, 299

Dismissal of appeal – 1, 203, 221, 239

Due process – 128

Environmental Hearing Board Act, 35 P.S. § 7511 et seq. – 158, 170, 191, 299

Environmental Hearing Board Practice and Procedure, 25 Pa. Code § 1021 et seq. – 158, 170, 191, 257, 299, 317, 338

Erosion and sedimentation – 179, 288, 331

Evidence – 43, 50, 57, 71, 80, 87, 92, 317, 331

Ex parte communications – 23

Exhibits – 87, 331

Experts – 71, 80, 87, 92, 271

Failure to comply with Board orders – 239, 338

Failure to comply with Board Rules – 239, 338

Hazardous Sites Cleanup Act, 35 P.S. § 6020.202 et seq. – 1, 299

Hearings – 338

Hearsay – 317

Interrogatories – 23, 57, 179

Intervention – 326

Judicial Code – 62

Judicial notice – 331

Jurisdiction – 1, 35, 191, 239, 299

Limine, motion in – 43, 50, 57, 71, 80, 87, 92

Limit issues, motion to (see Limine) – 43, 50, 57, 71, 80, 87, 92

Mootness – 138, 245

Notice - 1

Notice of appeal – 15

Notice of appeal, timeliness (see Timeliness) – 239

NPDES – 71, 117, 158, 179, 288

Oil and Gas Act, 58 Pa. C.S. § 3201 et seq. – 138, 299

Pennsylvania Bulletin - 1

Pennsylvania Rules of Civil Procedure – 71, 179, 257, 338

Pennsylvania Rules of Evidence – 80, 92, 317

Permits (specify which statute, if applicable) – 43, 71, 108, 138, 158, 170, 203, 221, 271

Dam Safety and Encroachments Act – 221,
Solid Waste Management Act – 71, 108, 170, 191, 203
Oil and Gas Act – 138, 191
Clean Streams Law – 158

Post hearing briefs – 331

Pre-hearing memoranda – 43, 50, 57, 80

Prejudice – 15, 43, 50, 57, 80, 191

Privilege – 179, 257

- Attorney client – 257
- Work product – 257

Production of documents – 23, 57, 179, 257

Proportionality – 23, 257

Prosecutorial discretion – 299

Recusal – 62

Relevancy – 71, 179

Remand – 245, 257

Reopen – 57, 271, 317, 331

- Discovery – 57,
- Record – 271, 317, 331

Representation – 30

Rule to show cause – 245

Sanctions – 57, 338

Site view – 185

Solid Waste Management Act, 35 P.S. § 6018.101 et seq. – 50, 71, 108, 128, 170, 203

- Municipal waste – 108
- Residual waste – 128, 170

Standard of review – 23, 35, 50, 97, 128, 146, 158, 170, 191, 203, 299

Statement of Decision - 1

Statutory construction (Statutory Construction Act, 1 Pa.C.S. § 1501 et seq.) – 1, 128, 348

Strike, motion to – 331

Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 et seq. – 239

Subpoena - 257

Summary judgment – 43, 97, 128, 146, 221, 288, 348

Supersedeas – 108, 117, 158, 170

Supplement the record, motion to – 271

Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 et seq. – 348

- Reclamation – 348

Temporary supersedeas – 108, 117, 158

Taking – 138, 299

Timeliness – 239, 326

Water supply – 299

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK and MAYA VAN ROSSUM, IN HER CAPACITY AS THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2022-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 6, 2023**

OPINION AND ORDER ON JURISDICTION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of a Statement of Decision issued pursuant to the Hazardous Sites Cleanup Act that selects a response action for the cleanup of a hazardous site where Section 508 of the Act restricts the timing of an appeal to after the Department has initiated an enforcement action or has sought civil penalties or to recover its response costs, or there is an action in contribution. None of the mandatory prerequisites to the Board's jurisdiction have been satisfied here.

O P I N I O N

The Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, (hereinafter collectively the "Riverkeeper"), have filed an appeal of the Department of Environmental Protection's (the "Department's") Statement of Decision regarding the cleanup of the Bishop Tube hazardous site located in East Whiteland Township, Chester County. We are told that the Bishop Tube site was used for the manufacturing of metal alloy tubes from the 1950s until

1999 under the operation of several different companies over the years. The Bishop Tube site is apparently contaminated with a host of what are considered hazardous substances in the Hazardous Sites Cleanup Act (HSCA), 35 P.S. §§ 6020.101 – 6020.1305, including but not limited to trichloroethene (TCE).

On September 25, 2021, the Department published notice in the *Pennsylvania Bulletin* of a proposed remedial response action plan to address contaminated soil, groundwater, surface water, and a residential drinking water supply at the Bishop Tube site. 51 Pa.B. 6212 (Sep. 25, 2021). Notice was also published in *The Daily Local News* newspaper. (DEP Ex. B.) The Department held a public hearing on the response plan on November 9, 2021, and held open a public comment period until January 2, 2022, which was later extended until January 31, 2022. In March 2022, after the close of public comments, a consultant, working on behalf of two companies that may have formerly operated at the site, apparently detected per- and polyfluoroalkyl substances (PFAS) in monitoring wells at the site.

The Statement of Decision (SOD) was issued on September 21, 2022. In the SOD, the Department selected a remedial response action to clean up the soil, groundwater, and surface water contamination at the site. The remediation for soils set forth in the SOD involves in situ chemical oxidation and chemical reduction along with soil mixing; for groundwater, in situ chemical oxidation or chemical reduction or bioremediation amendments; and for the residential water supply, a connection to public water. The SOD says some more sampling and analysis for PFAS will need to occur in soil and groundwater during the remedial design phase of the selected response action. The Department tells us that the implementation of the selected response action has not yet begun and that it is in discussions with responsible parties for future implementation

of the response action while two other responsible parties are in the design phase for a voluntary portion of the cleanup.

The Riverkeeper filed its notice of appeal on October 21, 2022. It asserts in its appeal that the Department committed procedural errors in assembling the administrative record that formed the basis for the SOD. The Riverkeeper says that, because the presence of PFAS was not discovered until after the close of the public comment period, the public was deprived of the ability to comment on a response action that would also be used to clean up PFAS. The Riverkeeper also asserts that the selected remedial response does not meet the maximum contaminant level (MCL) set for PFAS by the Pennsylvania Environmental Quality Board. Citing Section 508 of HSCA, 35 P.S. § 6020.508, the Riverkeeper acknowledges in its notice of appeal that a response action is not normally appealable until the Department seeks to enforce an order, collect a penalty, recover response costs, or there is an action in contribution. (Appeal at ¶ 48.) But the Riverkeeper contends that the administrative record is so deficient in terms of the PFAS contamination that it renders the SOD arbitrary and capricious and the SOD should be challenged now. The Riverkeeper asks for the SOD to be vacated and remanded back to the Department for the reopening of the administrative record. (Appeal at ¶ 53.)

Aware of the provisions in Section 508 of HSCA addressing our jurisdiction over appeals, in lieu of our standard Pre-Hearing Order No. 1 setting deadlines for discovery, we issued an Order requiring the Riverkeeper and the Department to file jurisdictional statements with accompanying memoranda of law. The Order permitted the parties to file simultaneous reply briefs in further support of their positions. On January 4, we received a joint motion for leave to file an amicus curiae brief from Whittaker Corporation and Johnson Matthey Inc., two companies that are alleged in the SOD as having once operated at the Bishop Tube site. The companies' joint motion averred

that they have been involved in the remedial investigation of the site since 2008 and that they are negotiating a consent decree that would in part fund the response action selected in the SOD. After reaching out to the parties and being informed that the Riverkeeper did not object to the filing of an amicus brief but did object to the request to file an amicus reply brief, we issued an Order accepting the attached amicus brief for consideration but denying the request to also file a reply brief. The matter has now been fully briefed.

The Riverkeeper advocates for our exercising jurisdiction over this appeal while the Department and amici oppose it. There is no dispute among the parties that the Department is engaged in the development of a response action, and that the SOD is the memorialization of the Department's statement of the basis and purpose of its decision made on the administrative record under Section 506(e) of HSCA, 35 P.S. § 6020.506(e). However, the parties disagree on whether or not the Board has jurisdiction at this juncture under Section 508, 35 P.S. § 6020.508, to hear the Riverkeeper's appeal. That section is titled Administrative and Judicial Review of Response Actions. It contains unique provisions governing the timing, scope, and standard of review of challenges to an administrative record developed for a response action, or a decision made on that administrative record like the SOD. Since Section 508 is integral to our discussion, we provide it in full:

> **(a) General Rule.**— Notwithstanding any other provision of law, the provisions of this section shall provide the exclusive method of challenging either the administrative record developed under section 506 or a decision of the department based upon the administrative record.
>
> **(b) Timing of Review.**— Neither the [Environmental Hearing] board nor a court shall have jurisdiction to review a response action taken by the department or ordered by the department under section 505 until the department files an action to enforce the order or to collect a penalty for violation of such order or to recover its response costs or in an action for contribution under section 705. In the case of an action to enforce an order of the department, the person receiving such order shall be entitled to challenge said order within 30 days from the date the department moves to enforce its order.

> **(c) Grounds.**— A challenge to the selection and adequacy of a remedial action shall be limited to the administrative record developed under section 506. In a challenge to liability for natural resource damages, civil penalties or the recovery of response costs, or where the assessment of civil penalties is challenged, the record shall be limited to the administrative record developed under section 506, except that it may be supplemented with additional evidence supporting or refuting the department's determination that a person is a responsible person under section 701 or the department's assessment of civil penalties. The party challenging the department's determination or assessment shall retain the burden of proving the department's determination or assessment was arbitrary and capricious.
>
> **(d) Procedural Errors.**— Procedural errors in the development of the administrative record shall not be a basis for challenging a response action unless the errors were so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made. The person asserting the significance of the procedural errors shall have the burden of proving that the action would have been significantly changed.
>
> **(e) Remand.**— When a response action is demonstrated to be arbitrary and capricious on the basis of the administrative record developed under section 506, or when a procedural error occurred in the development of the administrative record which (error) would have significantly changed the response action, the following apply:
>
> (1) When additional information could affect the outcome of the case, the matter shall be remanded to the department for reopening the administrative record.
>
> (2) When additional information could not affect the outcome of the case, the department's enforcement of its order or its recovery of response costs shall be limited only as to that portion of the response action found to be arbitrary and capricious or the result of a procedural error which would have significantly changed the action.

35 P.S. § 6020.508.

The Department and the amici argue that the Board does not have jurisdiction because none of the prerequisite triggers in Section 508(b) have occurred: the Department has not filed an action to enforce an order or to collect a penalty for a violation of that order or to recover its response costs, and there is no action in contribution under Section 705. They say that challenges to the adequacy of the administrative record like the one the Riverkeeper is making here are still subject

to the jurisdictional constraints of Section 508(b).[1] The Riverkeeper asserts that the Board has jurisdiction pursuant to Section 508(d) because Section 508(d) acts as an exception to the general jurisdictional bar in Section 508(b). The Riverkeeper also argues that the Board has jurisdiction by way of our general jurisdictional authorization under the Environmental Hearing Board Act, 35 P.S. §§ 7511 – 7516.[2] For the reasons that follow, we agree with the Department and the amici and dismiss this appeal due to a lack of jurisdiction.

The Riverkeeper seeks to isolate Section 508(d), but that provision can only be understood in the context of Section 508 as a whole. Section 508 is comprised of several interrelated subsections that govern and inform our jurisdiction in this case. "[T]he starting point for all statutory interpretation is the statutory language and the object of all interpretation and construction of statutes is to ascertain and effectuate the intent of the General Assembly." *Clearfield Cnty. v. DEP*, 2021 EHB 144, 156 (quoting *Limerick Partners I, LP v. DEP*, 2013 EHB 502, 510). Every statute is to be construed to give effect to all its provisions. 1 Pa.C.S. § 1921(a). In doing so, we construe these provisions in the context in which they appear and in reference to other pertinent provisions. *Mission Funding Alpha v. Cmwlth.*, 173 A.3d 748, 757 (Pa. 2017). *See also* 1 Pa.C.S. § 1932 (statutes or parts of statutes to be construed together in *pari materia*). An individual subsection of a statute can only be properly understood in relation to the other subsections that make up the section. *Consulting Eng'rs Council v. State Architects Licensure Bd.*, 560 A.2d 1375, 1377 (Pa. 1989).

---

[1] The Department also argues that only responsible persons, as defined in Section 701 of HSCA, 35 P.S. § 6020.701, can appeal a response action, provided that the other jurisdictional prerequisites have been met. The Department contends that, because the Riverkeeper is not a responsible person for the contamination at the site, its appeal automatically fails. We assume here for purposes of discussion only that the Riverkeeper could potentially appeal the SOD without being a responsible person for the Bishop Tube site.

[2] The Riverkeeper's briefing at times slips into a discussion on the merits of its complaints. (*See, e.g.*, Brief at 2-4, 7; Reply Brief at 6-7.) Obviously, any discussion of the merits at this juncture is woefully premature. We express no opinion on any of those points.

To put it simply, Section 508 is intended to prohibit pre-enforcement review of response actions. For an appropriate understanding of Section 508, it is necessary to understand this basic point and view the section holistically, with each subsection following in a logical progression—providing the exclusive method for challenges to response actions, restricting the timing of those challenges, laying out the standards for substantive and procedural challenges, and specifying the remedy if a challenge is successful. Section 508 begins with subsection (a) providing the general rule that, "**[n]otwithstanding any other provision of law**, the provisions of this section shall provide **the exclusive method** of challenging either the administrative record developed under section 506 or a decision of the department based upon the administrative record." 35 P.S. § 6020.508(a) (emphasis added). Accordingly, Section 508 sets itself up as the only way to challenge the SOD or administrative record here.

Section 508(b) then makes it clear that a response action selected by the Department cannot be challenged until the Department files an action (1) to enforce an order requiring someone to take a response action, or (2) to collect a penalty for violation of that order, or (3) to recover the costs the Department incurred in taking the response action itself, or (4) "in an action for contribution" under Section 705.[3] Subsection (b) unquestionably establishes that the timing of administrative or judicial review is limited by the occurrence of one of more of those events.

---

[3] Section 705 provides in part:

> **(a) General Rule.**— A person may seek contribution from a responsible person under section 701, during or following a civil action under section 507 or 1101. Claims for contribution shall be brought in accordance with this section and the Pennsylvania Rules of Civil Procedure. Nothing in this section shall diminish the right of a person to bring an action for contribution in the absence of a civil action under section 507 or 1101.
>
> **(b) Allocation.**—
> In a civil action in which a liable party seeks a contribution claim, the court, or the board in an action brought under section 507 or 1101, shall enter judgment allocating liability among the liable parties. Allocation shall not affect the parties' liability to the department. The burden is on each party to show how liability should be allocated. In determining

Subsection (c) sets forth the general rule that a party challenging the Department's response action must base that challenge on the administrative record developed under Section 506.[4] Subsection (d) then provides that, not only must challenges brought in the limited contexts listed in subsection (b) be based on the administrative record, but "[p]rocedural errors…shall not be a basis for challenging a response action" unless the procedural errors in the development of the administrative record rise to a level of being "so serious and related to matters of such central relevance to the response action that the action would have been significantly changed had the errors not been made." 35 P.S. § 6020.508(d). Finally, subsection (e) describes the very limited remedies for a successful substantive or procedural challenge.

Contrary to what the Riverkeeper argues, we see no statutory language to suggest that subsection (d) trumps subsection (b) regarding the timing of review, or anything else in Section 508 for that matter. There is nothing in subsection (b) that says it only applies to nonprocedural

---

> allocation under this section, the court or the board may use such equitable factors as it deems appropriate…

35 P.S. § 6020.705.

[4] Section 506 provides in part:

> **Contents.**— The administrative record upon which a response action is based shall consist of all of the following:
>
> (1) The notice issued under subsection (b).
> (2) Information, including, but not limited to, studies, inspection reports, sample results and permit files, which is known and reasonably available to the department and which relates to the release or threatened release and to the selection, design and adequacy of the response action.
> (3) Written comments submitted during the public comment period under subsection (c).
> (4) Transcripts of comments made at the public hearing held under subsection (d).
> (5) The department's statement of the basis and purpose for its decision, including findings of fact, an analysis of the alternatives considered and the reasons for selecting the proposed response action, and its response to significant comments made during the public comment period.
> (6) The docket maintained under subsection (f), listing the contents of the administrative record.

35 P.S. § 6020.506(a).

errors. There is nothing in subsection (d) that says the timing constraints in (b) do not apply to procedural errors. The only logical way to read subsections (b) and (d) together is that subsection (d) allows a party to lodge a procedural challenge to a response action only when one or more of the jurisdictional prerequisites of subsection (b) have already been met. Whether the Riverkeeper is arguing a procedural challenge that the administrative record is riddled with errors or a substantive challenge that the Department's selected response action is inadequate because of a failure to meaningfully account for the presence of PFAS at the Bishop Tube site, neither of these challenges is ripe for review at this point.

In *Barron v. DEP*, 2012 EHB 347, 352, we described the triggers in Section 508(b) as "mandatory prerequisites to this Board having jurisdiction to review the Department's response action." In that case, we considered an appeal of an order issued by the Department pursuant to Sections 512(a) and 1102 of HSCA, which ordered the appellants to refrain from using their property in a way that would interfere with the response action the Department had previously developed for the hazardous site upon which the appellants lived. The appeal of the order instead challenged the response action selected by the Department in a statement of decision that was issued more than a year earlier. We determined that the appellants could not use their appeal of an order issued under HSCA Sections 512 and 1102 to challenge a response action because "the Department ha[d] not filed an action to enforce an order that was issued under Section 505 or to collect a penalty for violation of such an order, or to recover its response costs, or an action for contribution." *Id.* In short, the Department had not taken any of the mandatory prerequisites under Section 508 for the Board to have jurisdiction to review a challenge to a response action.

Nor has the Department done any of those things here. It has not filed an action to enforce an order issued under Section 505; it has not filed an action to collect a penalty on violation of any

such order; it has not filed an action to recover its response costs; and there is no action in contribution under Section 705. None of the triggers in Section 508(b) have occurred. In fact, we are told that the implementation of the response action is still being worked out between the Department and responsible parties.

The Riverkeeper cannot find support for its position within the text of Section 508, or any other part of HSCA, so it turns to policy arguments. The Riverkeeper implores that, if we cannot review procedural errors now, an "inadequate response action" could slip through the cracks. Yet, it concedes that we cannot now review a response action for inadequacy on substantive grounds. This self-contradiction strikes us as logically unsound.

The Riverkeeper claims that the General Assembly could not have intended to postpone review of a response action until it is the subject of enforcement or cost recovery proceedings, which may never occur, thereby insulating the response action from review. But that is precisely what the General Assembly has done, not only regarding procedural errors, but regarding substantive errors as well. It would be rather odd to say the least if procedural errors were given special treatment over substantive errors.

In fact, one of HSCA's policy declarations plainly states that administrative and judicial review are to be held off until after the completion of a response action:

> **Traditional methods of administrative and judicial review have interfered with responses to the release of hazardous substances into the environment**. It is, therefore, necessary to provide a special procedure which will **postpone both administrative and judicial review until after the completion of the response action**.

35 P.S. § 6020.102(6) (emphasis added). The policy declaration suggests that HSCA aims to facilitate the cleanup of hazardous sites without undue interference. However, that is not to say that the public is excluded from the process; the public is provided with at least 90 days to comment

on a proposed response action and the Department must hold a mandatory public hearing. 35 P.S. § 6020.506(c) and (d). It simply means that, once a response action has been selected, its implementation is not to be held up pending the outcome of what could be years of litigation.

The Riverkeeper also argues that we have jurisdiction over its appeal pursuant to the general provision for our jurisdiction contained in the Environmental Hearing Board Act, providing the Board with "the power and duty to hold hearings and issue adjudications…on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). As is often stated, we review any final Department action affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. *Greyhound Aramingo Petroleum Co. v. DEP*, EHB Docket No. 2021-070-C, slip op. at 3 (Opinion and Order, Mar. 28, 2022); *HJL, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 352-53 (Pa. Cmwlth. 2008). However, unlike the bounds of our normal jurisdiction, "HSCA sets forth unique processes and procedures for not only developing and implementing response actions, but challenging those actions in court or before this Board as well." *Barron*, 2012 EHB 374, 351. As previously noted, Section 508 makes it abundantly clear that the provisions of that section lay out the "exclusive method" for challenging the administrative record "[n]otwithstanding any other provision of law," e.g., the Environmental Hearing Board Act. 35 P.S. § 6020.508(a).[5]

[5] Section 508 stands in contrast to other provisions in HSCA that defer to the Board's general jurisdiction. For instance, Section 503(f) addresses orders issued by the Department for access to a site for investigating a potential release of a hazardous substance. Unlike Section 508, Section 503(f) defers to the Board's general appeal framework established in the Environmental Hearing Board Act: "An order issued under this section may be appealed to the board under the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act." 35 P.S. § 6020.503(f)(1). Similarly, Section 1102 deals with enforcement orders issued by the Department for a response action, study, or access, or orders modifying, suspending, or ceasing a response action. These orders are also appealable under the normal procedures of the Environmental Hearing Board Act. 35 P.S. § 6020.1102(d).

According to the SOD, the development of a response action to clean up the Bishop Tube site has been underway since at least March 2000 when the Department issued a response justification document for the site, with some investigative work of the contamination going back to the 1970s and 1980s. (DEP Ex. A (at 12), E.) It has apparently taken more than 20 years to finalize that response action. Indeed, the Riverkeeper has been a vocal critic of the pace of the cleanup, going so far as to file a mandamus action against the Department in the Commonwealth Court in which the Riverkeeper has sought "to compel DEP to act after 'manifest neglect and dilatory conduct, over a period of [17] or more years, to clean up or cause the clean up of past and present hazardous releases at the Bishop Tube Hazardous Waste Site.'" *Del. Riverkeeper Network v. Pa. Dep't of Envtl. Prot.*, 525 M.D. 2017, 2021 Pa. Commw. Unpub. LEXIS 413 at *1, 263 A.3d 48 (Pa. Cmwlth. Aug. 3, 2021). How extraordinarily ironic that the Riverkeeper now says it is "[c]oncerned by the suddenly rushed nature of remediation." (Brief at 1.) The Riverkeeper now claims it wants the Department to reopen the administrative record, which can only further delay the response action to finally clean up the Bishop Tube site. However, consistent with the clear language of Section 508 of HSCA favoring the facilitation of cleanups over indefinite delay, we lack jurisdiction to hear the Riverkeeper's appeal.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK and MAYA VAN ROSSUM, IN HER CAPACITY AS THE DELAWARE RIVERKEEPER	:	
v.	:	**EHB Docket No. 2022-091-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 6th day of February, 2023, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: February 6, 2023

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

For the Commonwealth of PA, DEP:
Adam N. Bram, Esquire
(*via electronic filing system*)

For Appellants:
Daryl D. Grable, Esquire
Mark L. Freed, Esquire
(*via electronic filing system*)

For Amicus Curiae, Whittaker Corporation and Johnson Matthey Inc.:
Benjamin G. Stonelake Jr., Esquire
Francis X. Crowley, Esquire
Frank L. Tamulonis, Esquire
Cathleen M. Devlin, Esquire
Amy L. Donohue-Babiak, Esquire
(*via electronic mail*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2022-037-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	**Issued: February 13, 2023**

OPINION AND ORDER ON
MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

A Motion for Leave to Amend Notice of Appeal is denied where it contains no verification or affidavits as required by 25 Pa. Code § 1021.53(c). Moreover, the motion fails to demonstrate that the proposed amendments would not cause undue prejudice to the opposing parties at this late stage of the proceeding.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Protect PT on June 3, 2022. The appeal challenges three unconventional gas well permits issued to Olympus Energy, LLC (Olympus) by the Department of Environmental Protection (Department) in connection with the development of the Metis Well Site in Penn Township, Westmoreland County. According to the Notice of Appeal, Protect PT "is a grassroots nonprofit organization…formed in December 2014 to ensure [that] the safety, security and quality of life for

people in Penn Township, Trafford and surrounding areas were protected from unconventional natural gas development." (Notice of Appeal, para. 5.)

On March 28, 2022, the Board issued Pre-hearing Order No. 1 setting November 30, 2022 as the deadline for completion of discovery. At the request of the parties, the Board extended the discovery deadline to January 30, 2023 and the dispositive motion deadline to February 28, 2023. On January 11, 2023, Protect PT filed a Motion for Leave to Amend Notice of Appeal (Motion to Amend). Following the filing of the Motion, at the joint request of the parties, the Board stayed the end of discovery until either a ruling on the Motion to Amend or March 15, 2023, whichever occurred later. Both the Department and Olympus have filed responses opposing the Motion to Amend.

Standard of Review

Section 1021.53 of the Board's Rules of Practice and Procedure governs amendment of appeals. Appeals may be amended as of right within 20 days after the filing of the notice of appeal. 25 Pa. Code § 1021.53(a). Amendments after the 20-day period are governed by Section 1021.53(b) which provides as follows:

> (b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

25 Pa. Code § 1021.53(b). Motions for leave to amend must be "verified and supported by affidavits." *Id.* at § 1021.53(c).

The decision of whether to allow a party to amend its appeal after the period for amendment as-of-right has expired "rests firmly within the Board's discretion" and involves an assessment of whether the amendment will result in undue prejudice to the opposing parties. *Tapler v. DEP*,

2006 EHB 463, 465. In assessing whether the opposing parties will suffer undue prejudice, the Board considers such factors as the following:

1) the time when amendment is requested relative to other developments in the litigation, including but not limited to the hearing schedule;
2) the scope and size of the amendment;
3) whether the opposing party had actual notice of the issue, including whether it was raised in other filings;
4) the reason for the amendment; and
5) the extent to which the amendment diverges from the original appeal.

Borough of St. Clair v. DEP, 2013 EHB 171, 173 (citing *Rhodes v. DEP*, 2009 EHB 325, 328-29; *Upper Gwynedd Twp. v. DEP*, 2007 EHB 39, 42; *Angela Cres Trust v. DEP*, 2007 EHB 595, 601; *PennFuture v. DEP*, 2006 EHB 722, 726; *Tapler*, 2006 EHB at 465; and *Robachele v. DEP*, 2006 EHB 373, 379).

With these principles in mind, we evaluate Protect PT's Motion to Amend and the Department's and Olympus' responses.

Discussion

Protect PT seeks to amend its Notice of Appeal to add the following two paragraphs:

> 32. The Department is aware that hydraulic fracturing releases PFAS, PFOAS, and related chemicals into the environment and, therefore, the Department is permitting the release of PFAS, PFOAS, and related chemicals in issuing the Well Permits.[1]
>
> * * * *

[1] PFAS refers to per- and polyfluoroalkyl substances and is defined as a group of man-made chemicals that includes PFOA, PFOS, GenX and other chemicals. PFOA refers to perfluorooctanoic acid. U.S. EPA, "PFAS Explained," https://www.epa.gov/pfas/pfas-explained

> 35. Protect PT objects to the Department's approval of the Well Permits because the Well Permits allow the introduction of PFAS, PFOAS, and related chemicals into the environment through hydraulic fracturing, which do not break down and which are known to cause deleterious health effects, without properly limiting or regulating their use, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

(First Amended Notice of Appeal, para. 32 and 35.)

Protect PT contends that its requested amendments will result in no undue prejudice to either the Department or Olympus because 1) no hearing has yet been scheduled and 2) expert reports supporting the proposed amendments were provided to the opposing parties on December 27, 2022. It asserts that, rather than being prejudicial, the proposed amendments to the Notice of Appeal will benefit the parties because they "narrow and precisely define the issues already raised" and "clearly identify the legal and factual deficiencies of the Department's action." (Memorandum of Law in support of Motion to Amend, p. 6.)

The Department and Olympus oppose the motion on the basis that it is procedurally deficient because it is not verified or supported by affidavits. Additionally, the Department argues that the proposed amendments are unrelated to the other issues raised in the Notice of Appeal and would greatly expand the scope of the appeal at this late stage. Finally, Olympus argues that the appeal is moot because the wells have already been drilled and hydraulically fractured.[2]

We need not reach the question of whether the proposed amendments are moot. Protect PT's Motion to Amend is neither verified nor supported by affidavits as required by Section 1021.53(c) of the Board's rules. On that basis alone, the motion must be denied. As we held in *Harvilchuck v. DEP*, 2013 EHB 544, "[A] motion for leave to amend an appeal must be denied

[2] Olympus has separately filed a Motion to Dismiss the appeal based on its argument of mootness. Responses to that motion are due on March 28, 2023.

where 'it is not verified and supported by affidavits…Supporting affidavits are mandatory.'" *Id*. at 546 (quoting *Robachele*, 2006 EHB at 375 (citing *CNG Transmission Corp. v. DEP*, 1998 EHB 1, 3)).

Moreover, even if we were to overlook the procedural defects of the motion, we are unconvinced that Protect PT has demonstrated that its proposed amendments will not result in undue prejudice to the other parties. As we noted earlier, when assessing prejudice, we look to such factors as the timing of the requested amendment, the scope and size of the requested amendment and whether it diverges from the original appeal, whether the opposing party had notice of the subject matter of the proposed amendment, and the reason for the amendment. Considering those factors, we believe that the proposed amendments would be prejudicial to the Department and Olympus at this late stage of the proceeding.

In *Starr v. DEP*, 2002 EHB 799, the Board denied a motion to amend the appeal where discovery had been closed for one month, after having been extended, and amendment of the appeal would have required the reopening of discovery. Here, discovery had been set to close at the end of January and was stayed only after the filing of the Motion to Amend. Moreover, the amendments raise new factual and legal allegations unrelated to the objections already set forth in the Notice of Appeal. While the original Notice of Appeal references water contamination, the primary focus of Protect PT's objections is that the Department failed to properly consider Olympus' compliance history in granting the permits. As such, the proposed amendments would greatly expand the scope of the appeal by bringing in a new and unrelated scientific argument that was only brought to the attention of the Department and Olympus near the end of the discovery period. To allow these amendments at this stage of the litigation would require additional and likely lengthy discovery, which we believe would cause undue prejudice to the opposing parties.

See *Tapler*, 2006 EHB at 465 ("When assessing prejudice, we look at the substance of the proposed amendment and consider the extent to which it diverges from the original appeal.") As we stated in *Upper Gwynedd*:

> We previously have permitted amendments to the notice of appeal where it appeared that the requested amendments were related to an objection raised in the original notice of appeal and the parties would not suffer undue prejudice by allowance of the amendment. . .We have denied those requests where it was clear that permitting the amendments would prejudice the Department [or other opposing parties] by requiring significant discovery or by reason of the lateness of the request after the hearing had been scheduled.

2007 EHB at 42 (citing *Tapler, supra,* and *Achenbach v. DEP*, 2006 EHB 211).

Protect PT points out that a hearing has not yet been scheduled in this matter. While that is true, the discovery period was set to end on January 30, 2023 and the next step in this process is the filing of dispositive motions, if any, and the scheduling of a hearing. Allowing Protect PT to amend its appeal at this stage of the litigation to add a new scientific theory would require a significant extension of discovery and result in substantial delay in bringing this matter to a hearing.

Therefore, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2022-037-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY, LLC, Permittee	:	

O R D E R

AND NOW, this 13th day of February, 2023, it is hereby ordered that Protect PT's Motion for Leave to Amend Notice of Appeal is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairman

DATED: February 13, 2023

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

For the Commonwealth of PA, DEP:
Richard Watling, Esquire
Anna Zalewski, Esquire
(via electronic filing system)

For Appellant:
Tim Fitchett, Esquire
(via electronic filing system)

For Permittee:
Craig P. Wilson, Esquire
Anthony Holtzman, Esquire
Maureen O'Dea Brill, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND CENTER FOR BIOLOGICAL DIVERSITY	:	
v.	:	**EHB Docket No. 2021-055-L (Consolidated with 2022-101-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENOVO ENERGY, CENTER, LLC, Permittee	:	**Issued: March 22, 2023**

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to compel. Although the recipient of the discovery requests is incorrect in asserting that communications "not available to the Department" are not discoverable, the movant failed to address the recipient's other objections, at least one of which, unreasonable burden and proportionality, appears to have merit given the unique circumstances presented in this consolidated appeal.

O P I N I O N

The appeal docketed at EHB Docket No. 2021-055-L is an appeal filed by Clean Air Council, Citizens for Pennsylvania's Future, and Center for Biological Diversity (the "Appellants") challenging an air quality plan approval issued by the Department of Environmental Protection (the "Department") to Renovo Energy Center, LLC ("Renovo"). The plan approval allows the construction of a 1,240 megawatt two-unit dual-fueled electric power plant in the

Borough of Renovo, Clinton County, Pennsylvania. The appeal docketed at EHB Docket No. 2022-101-L is the same Appellants' appeal from the Department's extension of the expiration date of Renovo's plan approval, the plan approval that is the subject of EHB Docket No. 2021-055-L. Renovo says that the extension was necessary because construction of the facility has been delayed due to the appeal of the plan approval, which it says has interfered with its ability to obtain financing for the project. We consolidated the two appeals on February 14, 2023 without objection from the parties.

Appellants filed interrogatories and document requests in the appeal of the plan approval extension (2022-101-L). Renovo has objected to the discovery requests on several grounds. One of those grounds was that the discovery improperly sought Renovo's "internal discussions or discussions with third parties." Renovo says that such discussions are *ipso facto* irrelevant because they were "not available to the Department" when it made its decision to extend the plan approval expiration date.

The Appellants have filed a motion to compel Renovo to more fully respond to the discovery. They argue, correctly, that Renovo is not entitled to withhold information simply because it relates to discussions that were "not available" to the Department. As we have said many times, we do not conduct a record review that is limited to what the Department considered. Rather, the Board applies a *de novo* standard to determine whether the Departmental action in dispute is supported by the evidence and is otherwise a proper exercise of authority. *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Leatherwood, Inc. v. Dep't of Envtl. Prot.*, 819 A.2d 604 (Pa. Cmwlth. 2003); *Browning-Ferris Indus., Inc. v. Dep't of Envtl. Prot.*, 819 A.2d 148 (Pa. Cmwlth. 2003). When applying a *de novo* standard, the Board admits and considers evidence that was not before the Department when it made its initial decision, including evidence

developed since the filing of the appeal. *Kiskadden v. DEP*, 2015 EHB 377; *Chimel v. DEP*, 2014 EHB 957; *Solebury School v. DEP*, 2014 EHB 482; *R.R. Action & Advisory Comm. v. DEP*, 2009 EHB 472. "An appeal before the Board is not the functional equivalent of conducting a file review at a Department office and then making a decision. We are interested in relevant documents that exist beyond the confines of the Department's file." *Clean Air Council v. DEP*, 2016 EHB 567, 575 n.2.

Renovo's objection that every communication *ex parte* of the Department is necessarily irrelevant, and therefore, not discoverable is without merit. As part of our *de novo* review, we can and often do consider "internal discussions" and other discussions "not available to the Department" in our review. There is no automatic exclusion from discovery for such discussions. "[I]n order to be relevant, information sought in discovery must have a reasonable potential to shed light upon whether the Department's action was lawful, reasonable, supported by the facts and consistent with its constitutional responsibilities." *Logan v. DEP*, 2016 EHB 801, 805. There is no requirement that the information must have been "available to the Department" in order for the information to be discoverable. Renovo's objection to that effect is overruled. Internal discussions and discussions with third parties clearly can have a reasonable potential to shed light on whether the Department's action was appropriate.

However, the Appellants' motion to compel only addresses Renovo's "internal discussions" objection. The Appellants do not challenge Renovo's other objections to their discovery requests. For example, Renovo points out in its response to the motion to compel that it also objected to the discovery as unduly burdensome. (*See* Mot. Ex. B., General Objections No. 3, 5, 6.) That objection seems to have considerable merit.

Discovery before the Board is governed by a proportionality standard and discovery obligations must be consistent with the just, speedy and inexpensive determination and resolution of litigation disputes." *Clean Air Council, supra*, 2016 EHB at 571 (citing 2012 Explanatory Comment Prec. Rule 4009.1, Part B). The Board considers the following factors when evaluating whether a discovery request is proportional: (1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (2) The relevance of the information sought and its importance to the Board's adjudication in the given case; (3) The cost, burden, and delay that may be imposed on the parties to deal with the information; (4) The ease of producing the information and whether substantially similar information is available with less burden; and (5) Any other factors relevant under the circumstances. *Tri-Realty Co. v. DEP*, 2015 EHB 552, 556-57; 2012 Explanatory Comment Prec. Rule 4009.1, Part B. When there is no reasonable balance between the value of the discovery request and the burden to the responding party, the information requested will often be beyond the scope of discovery. *See New Hope Crushed Stone & Lime Co. v. DEP*, 2016 EHB 666, *recon. denied*, 2016 EHB 741; *Cabot Oil and Gas Corp. v. DEP*, 2016 EHB 20, 26-33; *Tri-Realty Co., supra*, 2015 EHB 552.

When considering the proportionality factors, the Appellants' discovery requests are not in line with the nature and scope of the appeal of the plan approval extension. It is important to understand that the appeal from the plan approval (EHB Docket No. 2021-055-L) was filed on May 26, 2021. The record shows that there has already been a great deal of discovery relating to this project over the last two years. Motions for summary judgment have already been filed and ruled upon. The matter is ripe for a hearing on the merits. We are sympathetic to Renovo's concern that the plan approval extension should not serve as a basis for delaying adjudication of the merits of the Department's decision to approve this project. Renovo tells us, and we have no

reason to doubt, that the only thing that the plan approval extension did is extend the expiration date. The Appellants made no attempt to explain in their motion to compel why further discovery ostensibly related to the plan approval extension is justified in these protracted proceedings. In any event, the Appellants only challenged Renovo's objection regarding internal discussions. They did not challenge Renovo's proportionality objection or otherwise explain why their discovery requests are worthy of an order to compel.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, CITIZENS FOR PENNSYLVANIA'S FUTURE, AND CENTER FOR BIOLOGICAL DIVERSITY	:	
v.	:	**EHB Docket No. 2021-055-L (Consolidated with 2022-101-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RENOVO ENERGY, CENTER, LLC, Permittee	:	

O R D E R

AND NOW, this 22nd day of March, 2023, it is hereby ordered that the Appellants' motion to compel is **denied.**

ENVIRONMENTAL HEARING BOARD

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

DATED: March 22, 2023

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

For the Commonwealth of PA, DEP:
Geoffrey J. Ayers, Esquire
Amanda Chaplin, Esquire
(*via electronic filing system*)

For Appellant, Clean Air Council:
Alexander G. Bomstein, Esquire
Kathryn Urbanowicz, Esquire
Joseph Minott, Esquire
Eleanor M. Breslin, Esquire
(*via electronic filing system*)

For Appellant, Citizens for Pennsylvania's Future:
Jessica R. O'Neill, Esquire
(*via electronic filing system*)

For Appellant, Center for Biological Diversity:
Robert Ukeiley, Esquire
(*via electronic filing system*)

For Permittee:
John P. Englert, Esquire
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
John R. Dixon, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY GRAHAM, EXECUTOR OF THE ESTATE OF ROBERT B. GRAHAM	:	
v.	:	**EHB Docket No. 2021-040-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 22, 2023**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO COMPEL APPELLANT TO OBTAIN COUNSEL OR ALTERNATIVELY TO DISMISS THE APPEAL FOR APPELLANT'S FAILURE TO OBTAIN COUNSEL

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants the Department's motion seeking to have the party in interest, the appellant estate, obtain counsel where the executor is acting on behalf of the appellant estate and not on behalf of his individual interest.

O P I N I O N

On February 7, 2023, the Department filed its Motion to Compel Appellant to Obtain Counsel or Alternatively to Dismiss the Appeal for Appellant's Failure to Obtain Counsel ("Motion"). Gary Graham ("Mr. Graham"), Executor of the Estate of Robert B. Graham, filed a Response thereto on February 23, 2023, and the Department filed its Reply to the Response on March 10, 2023. The Department argued in its Motion that the Appellant, the Estate of Robert B. Graham ("Estate"), is required under the Environmental Hearing Board's ("the Board's") rules of practice and procedure to be represented by counsel and could not continue to be represented on a pro se basis by the Estate's Executor, Mr. Graham. Mr. Graham argued in his response to the

Department's Motion that he was only representing himself and his interests.

Earlier in this proceeding, the Appellant was represented by Attorney Timothy Fitchett ("Mr. Fitchett") who entered his appearance on November 24, 2021. On November 20, 2022, Mr. Fitchett withdrew as counsel and the Estate, under the direction of the Executor, Mr. Graham, has been proceeding without counsel since that time. The Department's Motion challenges whether the Estate can continue to proceed without an attorney and asks us to compel the Estate to retain new counsel. Pursuant to Rule 1021.21(a) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.21(a), parties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint. The record in this case makes clear that the Appellant in this matter is the Estate of Robert B. Graham and not Mr. Graham in his individual capacity. The Department's original order was directed to Mr. Graham. In his initial Notice of Appeal, Mr. Graham objected to the Department's order on the basis that he was not the owner of the underground storage tanks ("USTs") and that the USTs were owned by the Estate. The Department ultimately rescinded its original order and issued a new order directed to the Estate through Mr. Graham as its Executor. Mr. Graham filed a document that the Board accepted as an appeal of the Department's second order. Mr. Graham's own initial objections to the Department's order naming him as the owner of the USTs, and the Department's subsequent order aimed at the Estate that named Mr. Graham only in his capacity as the Executor of the Appellant Estate, makes it clear to the Board that it is the Estate's interests that Mr. Graham represents rather than his own. When it is clear that a person is advancing the interests of an estate rather than their own, an attorney must represent the estate consistent with the requirements of 25 Pa. Code § 1021.21(a). *See, e.g., Paul Ritsick and Donna Dubick, Executor of the Estate of David G. Dubick v. DEP*, 2022 EHB 36

n.2 (*citing Bisher v. Lehigh Valley Health Network, Inc*., 265 A.3d 383, 390 (PA 2021)).

Therefore, we issue the following Order[1]:

[1] Our Opinion and Order does not address the Department's alternative request to dismiss the appeal at this time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY GRAHAM, EXECUTOR OF THE ESTATE OF ROBERT B. GRAHAM	:	
v.	:	**EHB Docket No. 2021-040-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 22nd day of March 2023, it is hereby ORDERED that the Appellant shall obtain counsel on or before **May 8, 2023**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: March 22, 2023

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

For the Commonwealth of PA, DEP:
Edward S. Stokan, Esquire
Tyra Oliver, Esquire
(via electronic filing system)

For Appellant, Estate of Robert B Graham:
Gary Graham, Executor
131 E 17th Ave.
Homestead, PA 15120
(via U.S. first class mail)

For Permittee:
Craig P. Wilson, Esquire
Anthony Holtzman, Esquire
Maureen O'Dea Brill, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAM AND CATHY POPOVICH	:	
	:	
v.	:	**EHB Docket No. 2021-082-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CRONER, INC., Permittee	:	**Issued: March 22, 2023**

OPINION AND ORDER ON PERMITTEE'S MOTION TO DISMISS CERTAIN OF APPELLANTS' OBJECTIONS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board dismisses certain objections in the appeal where the Appellants did not respond to a motion to dismiss filed by the Permittee and supported by the Department.

O P I N I O N

Background

This matter involves an appeal filed by Sam and Cathy Popovich, objecting to the Department of Environmental Protection's (Department) approval of a revision to Croner, Inc.'s (Croner) Coal Mining Activity Permit No. 56841605 (the permit). The permit pertains to Croner's Goodtown preparation plant located in Brothersvalley Township, Somerset County. The revision reduces the permit area from 13.5 acres to 6.4 acres. It also authorizes water treatment activities.

The Popoviches amended their appeal twice, most recently on January 3, 2023. The parties have undergone discovery and on October 28, 2022 both the Department and Croner deposed the Popoviches. On January 16, 2023, Croner filed a Motion to Dismiss Certain of Appellants' Objections, and on February 1, 2023 the Department filed a Memorandum of Law in support of

the Motion. Under the Board's rules, a response to the Motion and Memorandum of Law was due on March 3, 2023. 25 Pa. Code § 1021.94(c). The Popoviches filed no response.

Standard of Review

The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Hopkins v. DEP*, EHB Docket No. 2021-067-B, slip op. at 2 (Opinion and Order issued April 1, 2022); *Consol Pennsylvania Coal Co., LLC v. DEP*, 2015 EHB 48, 54; *Winner v. DEP*, 2014 EHB 135, 136-37. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township v. DEP*, 2008 EHB 563, 570.

Where a party fails to respond to a motion to dismiss, the Board may deem all properly pleaded facts admitted. *Peckham v. DEP*, 2011 EHB 696, 697; *Tanner v. DEP*, 2006 EHB 468, 469. Section 1021.94(f) of the Board's rules states as follows:

> When a dispositive motion is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response must set forth specific issues of fact or law showing there is a genuine issue for hearing. If the adverse party fails to adequately respond, the dispositive motion may be granted against the adverse party.

25 Pa. Code § 1021.94(f). Thus, a failure to respond to a motion to dismiss may result in the motion being granted. *Thomas v. DEP*, 2019 EHB 347.

Discussion

Croner and the Department ask the Board to dismiss 16 of the 24 objections set forth in paragraph 3 of the Popoviches' Second Amended Notice of Appeal. Those objections pertain to the following issues: haul road access to the permit area, an alleged contract for coal delivery, and allegations of improper disposal of solid waste.

Haul Road

The Popoviches contend that they are the owners of the land on which the haul road is situated and Croner does not have authorization to use it. This claim is addressed in Objections A, B, C, D, G, H, I, P, R and S of paragraph 3 of the Second Amended Notice of Appeal. Specifically, in Objection G, they cite Section 86.64 of the mining regulations which states that a permit application must contain a description of the documents upon which the applicant bases its legal right to enter and commence coal mining activities. 25 Pa. Code § 86.64(a).

According to Croner's uncontested Motion and the Department's uncontested Memorandum of Law, Croner possesses an irrevocable license to use the haul road pursuant to a ruling by the Somerset County Court of Common Pleas, No. 305 Civil 1990. According to documentation provided by Croner and the Department, in 1990 Croner commenced a civil action in Somerset County against Mr. Popovich's father and predecessor in title to the property, Frank Popovich. The Common Pleas Court entered a decree that enjoined Frank Popovich from interfering with Croner's use of the haul road and, in its Conclusions of Law, stated, "Croner holds an irrevocable license to use the haul road across the [Frank] Popovich property as a means of access to and from Croner, Inc.'s coal preparation and loading facilities on the Croner property." (Exhibit B to Croner's Motion, Conclusion of Law No. 2.)

The Popoviches have provided no documentation that the decree of the Somerset County Court of Common Pleas has been superseded or is no longer in effect. Moreover, during his deposition Appellant Sam Popovich confirmed that neither he nor his father had appealed the court's ruling and he acknowledged that he was aware of the language of the order. (Exhibit 1 to Department's Memorandum of Law, p. 67-69, 87.)

Based on the Popoviches' failure to respond to the Motion, we deem the facts set forth above to be true. 25 Pa. Code § 1021.94(f). Because we find that there are no facts in dispute and Croner has demonstrated that it is entitled to judgment as a matter of law on the issue of authorization to use the haul road, we grant the Motion as to Objections A, B, C, D, G, H, I, P, R and S.

Contract for Coal Delivery

Related to the haul road issue is the Popoviches' claim that Croner has breached an alleged oral contract to provide them with coal in exchange for use of the haul road. Objections D, E, G, H, I, P, R and S of the Second Amended Notice of Appeal pertain to this issue. According to a Complaint filed with the Somerset County Court of Common Pleas, the Popoviches assert the existence of an oral contract for annual delivery of coal by Croner in exchange for access to the haul road. (Exhibit C to Croner's Motion.) Objection E of the Notice of Appeal contends that Croner has failed to provide coal to the Popoviches since 2017.

Both Croner and the Department argue that this issue is not properly before the Board since the Board does not have jurisdiction to decide contract disputes between private parties. We agree. In *Pond Reclamation v. DEP*, 1997 EHB 468, 474, we held:

> [W]hile the Board may consider contractual matters in determining whether there has been compliance with the statutes and regulations, we may not adjudicate or enforce the contract rights of private parties vis-à-vis each other. *McKees Rocks Forging, Inc. v. DEP*, 1991 EHB 405, 409-10. The Board's jurisdiction does not extend to resolving disputes between private parties, but only to actions involving the Department. *Id.; Crawford v. DER*, 1994 EHB 912, 916-17.

To the extent the Popoviches are seeking to litigate the alleged breach of contract, the Board is not the proper forum. *Starr v. DEP*, 2002 EHB 799, 807.

To the extent the Popoviches are asserting that Croner's alleged breach of contract has left it without an access road to the permit site, we have already addressed Croner's authorization to use the haul road. As we stated above, the Somerset County Court of Common Pleas determined that Croner holds an "irrevocable license to use the haul road" across the Popovich property. The court's decision was not conditioned upon fulfillment of the alleged oral contract to deliver coal. Nor have the Popoviches come forth with any argument to the contrary. In fact, in his deposition Mr. Popovich acknowledged that the court's decision made no mention of coal delivery in exchange for use of the haul road. (Exhibit 1 to Department's Memorandum of Law, p. 70.)

Based on the Popoviches' failure to respond to the Motion, we deem the facts set forth above to be true. 25 Pa. Code § 1021.94(f). Because we find that there are no facts in dispute and Croner has demonstrated that it is entitled to judgment as a matter of law, we grant the Motion as to Objections D, E, G, H, I, P, R and S.

Disposal of Solid Waste

The Popoviches contend that the permit was issued in violation of various provisions of the environmental regulations[1] because "the permittee has previously buried houses, asbestos shingles and other waste materials in the previously [mined] coal pit area and the treatment plans do not take into account the illegally [sic] disposal of wastes." This claim is set forth in Objections T, U, V, W and X of paragraph 3 of the Second Amended Notice of Appeal.

Croner denies that any such activities took place on the permit site at issue in this appeal or that any solid waste violations occurred. In support of its Motion, it provides the affidavit of

[1] The Second Amended Notice of Appeal cites the following regulations: 25 Pa. Code § 105.17, "25 P[a.][C]ode 95," "25 P[a.] [C]ode 93 and 96," "25 P[a.] [C]ode 271" and "25 P[a.] [C]ode 287." Because there are no regulations corresponding to "93," "95," "96," "271" and "287" we believe those numbers correspond to chapters of 25 Pa. Code, not to individual sections of the regulations.

Robert Bottegal, Croner's Senior Vice President, who affirms that the facts set forth in the Motion and brief are true and correct. (Exhibit F to Croner's Motion.) As noted above, when a dispositive motion is made and supported, the adverse party may not simply rest upon the allegations set forth in its notice of appeal. Rather, it must come forward with specific issues of fact or law demonstrating that there is a genuine issue for hearing. 25 Pa. Code § 10212.94(f).

The Popoviches have failed to come forward with any information in support of their claim. As we have previously held, "'No response is clearly not an adequate response, and the Board may grant the motion 'if the adverse party fails to adequately respond.'" *Thomas*, 2019 EHB at 349 (quoting *RES Coal, LLC v. DEP*, 2017 EHB 1239, 1244.) Based on the Popoviches' failure to respond, we deem the facts set forth in Croner's Motion to be true. Because we find that there are no facts in dispute and Croner has demonstrated that it is entitled to judgment as a matter of law, we grant the Motion as to Objections T, U, V, W and X.

For the reasons set forth herein, we enter the following Order granting Croner's Motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAM AND CATHY POPOVICH	:	
	:	
v.	:	**EHB Docket No. 2021-082-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CRONER, INC., Permittee	:	

O R D E R

AND NOW, this 22nd day of March, 2023, it is ordered that Croner's Motion is granted and Objections A, B, C, D, E, G, H, I, P, R, S, T, U, V, W and X set forth in paragraph 3 of the Second Amended Notice of Appeal are dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: March 22, 2023

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

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

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

For Permittee:
Christopher Buell, Esquire
John Bonya, Esquire
Stanley P. DeGory, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 27, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO PRECLUDE ISSUES RESOLVED ON SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Permittee's Motion in Limine to Preclude Issues Resolved on Summary Judgment is granted in part. Where the Board has entered partial summary judgment against the Appellants and dismissed certain objections raised in their amended notice of appeal, the Appellants are precluded from presenting evidence in support of those objections at the hearing. The motion is denied with regard to various exhibits listed by the Appellants in their prehearing memorandum where it is not clear that the exhibits pertain solely to the objections that have been dismissed.

O P I N I O N

Background

This matter involves an appeal filed by Liberty Township and CEASRA[1] (the Appellants) challenging the Department of Environmental Protection's (Department) issuance of a major permit modification (the permit) to Tri-County Landfill (Tri-County). The permit authorizes Tri-

[1] CEASRA is a citizens group registered as Citizens Environmental Association of the Slippery Rock Area, Inc. *Liberty Township v. DEP*, EHB Docket No. 2021-007-R, slip op. at 1, n. 1 (Opinion and Order issued October 27, 2022).

County to operate a municipal waste landfill in Liberty Township and Pine Township, Mercer County within the boundary of an inactive landfill that was previously operated by Tri-County. A hearing in this matter is scheduled to begin April 5, 2023. The Appellants and Tri-County have filed several motions in limine. This Opinion addresses Tri-County's Motion in Limine to Preclude Issues Resolved on Summary Judgment (motion). The Department concurs and joins in the motion, while the Appellants oppose it.

Standard

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing. 25 Pa. Code § 1021.121; *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, slip op. at 2 (Opinion and Order issued April 18, 2022); *The Delaware Riverkeeper v. DEP*, 2016 EHB 159, 161; *Kiskadden v. DEP*, 2014 EHB 634, 635. The purpose of a motion in limine is to provide the trial court an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at trial. *Range, supra* at 3 (citing *Commonwealth of Pennsylvania v. Padilla*, 923 A.2d 1189, 1194 (Pa. Super. 2007), *appeal denied*, 934 A.2d 1277 (Pa. 2007)).

Discussion

On October 27, 2022, the Board issued an Opinion ruling on dispositive motions filed by the parties. The Board denied the Appellants' motion for summary judgment and granted in part the Department's and Tri-County's motions for partial summary judgment (the Summary Judgment Opinion). *Liberty Township v. DEP*, EHB Docket No. 2021-007-R (Opinion and Order issued October 27, 2022). In its motion in limine, Tri-County asserts that the Appellants have resurrected several issues in their prehearing memorandum that were disposed of by the Summary Judgment Opinion. Specifically, Tri-County objects to the Appellants' claims that the permit was

issued in violation of the following statutory and regulatory provisions: 35 P.S. § 691.5(b)(1) and § 691.402 (Clean Streams Law); 25 Pa. Code § 109 et seq. (Safe Drinking Water regulations); and 25 Pa. Code § 105.17(1)(iv) (Dam Safety and Water Management regulations).

35 P.S. §§ 691.5(b)(1) and 691.402

In the Summary Judgment Opinion, the Board entered judgment against the Appellants "as to Objections A and B of the Amended Notice of Appeal to the extent they allege violations of 35 P.S. § 691.5(b)(1) and 35 P.S. § 691.402." *Liberty Township, supra* at 12. In their response to Tri-County's motion, the Appellants acknowledge that these objections have been dismissed. Therefore, this portion of Tri-County's motion is granted and the Appellants are precluded from presenting evidence in support of their claim that issuance of the permit violates 35 P.S. §§ 691.5(b)(1) and 691.402.

However, Tri-County seems to be asking for a broader ruling that precludes the Appellants from presenting any evidence related to water quality issues. In its motion it lists 45 exhibits that it argues should be excluded based on the dismissal of the aforesaid objections. The exhibits appear to address matters of water quality, but other than listing the name of the exhibit Tri-County provides no explanation of how they pertain specifically to Appellants' dismissed claims.

The Board's summary judgment ruling was narrow. We dismissed the Appellants' objections regarding specific sections of the Clean Streams Law - 35 P.S. §§ 691.5(b)(1) and 691.402 - because the Appellants failed to respond to the Department's assertion that these particular provisions did not appear to be relevant or applicable. Section 5(b)(1) simply recites that the Department has the power and duty to promulgate regulations and issue orders to implement the provisions of the Clean Streams Law. Sections 402(a) and (b) state that the Department may require a permit for an activity that creates a danger of pollution to waters of the

Commonwealth. Section 402(c) deals with NPDES permits and options available to NPDES permit holders. None of those sections appeared to be relevant to the Appellants' claim that the permit was improperly issued, and the Appellants provided no argument or evidence to the contrary. Based on the Appellants' failure to respond to the Department's motion, we deemed the facts of the Department's motion to be true and granted summary judgment pursuant to 25 Pa. Code § 1021.94a(l).

Our Summary Judgment Opinion did not extend beyond a discussion of these narrow issues. Without further information as to how the exhibits listed in Tri-County's motion relate to the Appellants' objections regarding Sections 5(b)(1) and 402 of the Clean Streams Law, we have no grounds for precluding them at this time.

25 Pa. Code §§ 105.17(1) and 109.1

Tri-County also argues that the Appellants should be precluded from pursuing their claims that the permit violates 25 Pa. Code § 105.17(1) and 25 Pa. Code § 109.1.[2] Section 109.1 is the definitions section of the Department's Safe Drinking Water regulations and Section 105.17(1) contains a description of exceptional value wetlands within the Department's Dam Safety regulations. In our Summary Judgment Opinion, we dismissed these objections based on the Appellants' failure to respond to the Department's motion. *Liberty Township, supra* at 9-10. In their response to the motion in limine, the Appellants acknowledge that these objections were dismissed. Therefore, this portion of Tri-County's motion in limine is granted, and the Appellants

[2] The Appellants' amended notice of appeal cites "25 P.S. § 109.1" and various subsections of "25 P.S. § 105.17(1)." Their prehearing memorandum cites "25 P.S. 109 *et seq*." and "25 P.S. § 105.17(1)." Because there is no "25 P.S." corresponding to these sections, we believe the Appellants intended to reference 25 Pa. Code § 109.1 and 25 Pa. Code § 105.17(1). See *Liberty Township, supra* at 9.

are precluded from presenting evidence in support of their claims that the permit violates 25 Pa. Code § 105.17(1) and 25 Pa. Code § 109.1.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 27th day of March, 2023, it is ordered as follows:

1) Tri-County's motion is granted in part.

2) The Appellants are precluded from presenting evidence at the hearing in support of their claims that issuance of the permit violates 35 P.S. § 691.5(b)(1), 35 P.S. § 691.402, 25 Pa. Code § 105.17(1), and 25 Pa. Code § 109.1.

3) That portion of Tri-County's motion seeking to preclude exhibits listed in the Appellants' prehearing memorandum is denied.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 27, 2023

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

For the Commonwealth of PA, DEP:
Douglas G. Moorhead, Esquire
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Dearald Shuffstall, Esquire
(via electronic filing system)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(via electronic filing system

For Permittee:
Alan Miller, Esquire
Jake S. Oresick, Esquire
Brian Lipkin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 28, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO PRECLUDE TESTIMONY AND EVIDENCE REGARDING VIOLATIONS PRE-DATING THOSE ADDRESSED BY 25 PA. CODE § 271.125

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion in limine seeking to limit the consideration of a party's violation history at the hearing on the merits. Although the regulation at 25 Pa. Code § 271.125 provides that an applicant for a municipal solid waste management permit list violations from the previous ten years in its permit application, that regulation in no way prohibits either the Department or this Board from considering any violations that may precede the ten-year period. Such older violations are not necessarily irrelevant. The Solid Waste Management Act contains no temporal restriction on the consideration of a party's compliance.

O P I N I O N

Liberty Township and Citizens Environmental Association of Slippery Rock Area, Inc. ("CEASRA") (hereinafter collectively the "Appellants") have appealed the issuance of a major permit modification to Tri-County Landfill ("Tri-County") by the Department of Environmental Protection (the "Department"). The permit authorizes Tri-County to operate a municipal waste

landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990.

The hearing on the merits in this matter is scheduled to begin on April 5. In addition to various other pre-hearing motions, the Appellants have filed two motions in limine and Tri-County has filed eight motions in limine. The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. *See also* 25 Pa. Code § 1021.121 ("party may obtain a ruling on evidentiary issues by filing a motion in limine").

In this motion, Tri-County seeks to preclude the Appellants from offering any evidence or testimony regarding certain violations found by the Department that occurred more than ten years prior to the submission of Tri-County's most recent application for a landfill in December 2018. Tri-County identifies four exhibits attached to the Appellants' pre-hearing memorandum that apparently deal with the compliance history of Tri-County and its related entities: Appellants' Exhibits 10, 11, 28, and 182.[1]

Tri-County points to the regulation at 25 Pa. Code § 271.125, which addresses the compliance information to be contained in a permit application for a municipal waste facility. The regulation, among other things, requires a description of notices of violations, administrative orders, civil penalty assessments, bond forfeitures, consent orders or adjudications, and relevant court proceedings and criminal convictions involving the applicant and its related parties.[2] 25 Pa.

[1] This Opinion and Order only addresses Tri-County's argument that the exhibits must be excluded under 25 Pa. Code § 271.125.

[2] The regulations define a "related party" as:

> A person or municipality engaged in solid waste management that has a financial relationship to a permit applicant or operator. The term includes a partner, associate,

Code § 271.125(a). The regulation limits the time period for the compliance disclosure to a "10-year period prior to the date on which the application is filed." *Id.* Tri-County says that its application was submitted on December 17, 2018 and it contained all the compliance information required by the regulation going back ten years from that date. Tri-County asserts that anything pre-dating the 10-year lookback period is completely irrelevant to this appeal. In their response, the Appellants argue that nothing in this regulation precludes the Department from reviewing a party's compliance history beyond ten years. We agree.

Section 271.125 appears to be the regulatory provision that corresponds to the Department's obligation laid out in Section 503(c) of the Solid Waste Management Act. 35 P.S. § 6018.503(c). Section 503(c) provides the Department with the authority to deny a permit to any applicant if the Department finds that the applicant has failed or continues to fail to comply with the Solid Waste Management Act or any other environmental statutes or regulations, or the applicant has shown a lack of ability or intention to comply with the environmental statutes, regulations, or orders of the Department, as evidenced by past or continuing violations. *Id.* Section 503(d) provides a mandate that the Department must deny a permit to any applicant that has engaged in unlawful conduct as defined by the Act, or if its "partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent" has engaged in unlawful conduct, unless the permit application demonstrates to the satisfaction of the Department that the unlawful conduct has been corrected. 35 P.S. § 6018.503(d). Unlawful conduct is broadly defined in Section 610 of the Act. 35 P.S. § 6018.610.

> officer, parent corporation, subsidiary corporation, contractor, subcontractor, agent or principal shareholder of another person or municipality, or a person or municipality that owns land on which another person or municipality operates a municipal waste processing or disposal facility.

25 Pa. Code § 271.1.

The Solid Waste Management Act contains no restriction on the time period during which the Department may evaluate any past violations or unlawful conduct by an applicant. The regulation requires an applicant to supply with its application a detailed accounting of violations for the past ten years, presumably to aid the Department in its responsibilities under Section 503(c) and (d), but it in no way limits the Department's consideration of violations that precede the ten-year window. It does not prevent the Department from independently evaluating an applicant's compliance history for years that precede what an applicant includes in its application. The regulation does not constrain the Department's discretion in upholding its responsibilities under Section 503 of the Act. *Cf. Concerned Residents of Yough, Inc. v. Dep't of Envtl. Res.*, 639 A.2d 1265, 1271 (Pa. Cmwlth. 1994) (the phrase "to the satisfaction of the Department" in Section 503(d) affords the Department "great discretion" in its evaluation of compliance history).

Tri-County directs us to *Concerned Citizens of Earl Township v. DEP*, 1994 EHB 1525, 1619, where we held that Section 503 vested the Department with a "vital power" to screen out bad actors seeking a permit and that the importance of this power to secure environmental compliance "should not be underestimated." We also said in that case that Section 503 should not be abused and that the Department must exercise "sound discretion" in acting in accordance with Section 503. *Id.* This is all undoubtedly true, but we do not understand how any of that relates to the issue at hand. It is not out of the question that the exercise of sound discretion should or at least can include old violations in some cases.

Indeed, according to the Department's pre-hearing memorandum, in September 2013 the Department denied Tri-County's then-pending permit application in part "because Tri-County and other related waste companies under the same corporate ownership had a documented history of poor compliance with Department-administered law and regulations." (DEP PHM at ¶ 30.) The

Department later tells us in its pre-hearing memorandum that, "[s]ince the Department's 2013 denial of a previous version of the Permit, Vogel Holding Inc., Tri-County's parent company, has hired new employees and implemented periodic environmental audits that has resulted in greatly increased compliance for all companies owned by Vogel Holding Inc., including Tri-County." (DEP PHM at ¶ 44.) The use of the comparative phrase "greatly increased compliance" suggests that the Department itself considered older violations when it decided to reverse its earlier decision. We do not see this as a violation of either the statute or the regulation.

Of course, if the Department can consider older violations, so can this Board. As the Appellants correctly point out, considering a party's compliance history is well within the Board's prerogative as part of our *de novo* review. In the context of the compliance history review for an NPDES permit under Section 609 of the Clean Streams Law, 35 P.S. § 691.609, we have held that "the Department and this Board must consider the totality of the party's history, in combination with other possibly relevant factors, to assess whether the party's conduct shows that it 'cannot be trusted with a discharge permit.'" *O'Reilly v. DEP*, 2001 EHB 19, 44-45 (quoting *Belitskus v. DEP*, 1998 EHB 846, 867). The standard for the admissibility of evidence before this Board is relevancy. 25 Pa. Code § 1021.123(a). Older violations may be less relevant due to their age, but that is not to say they are always necessarily irrelevant. For example, the Department's decision to reverse its earlier decision in this case, which was based in part on compliance history, might make older violations more relevant than they otherwise might have been, but that remains to be seen. The point is, whether or not evidence regarding Tri-County's older compliance history proves to be consequential to this appeal is something to be decided after the hearing.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 28th day of March, 2023, it is hereby ordered that Tri-County Landfill's Motion in Limine to Preclude Testimony and Evidence Regarding Violations Pre-Dating Those Addressed by 25 Pa. Code § 271.125 is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 28, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Douglas G. Moorhead, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 30, 2023**

OPINION AND ORDER ON APPELLANTS' JOINT MOTION IN LIMINE DIRECTED AT TRI-COUNTY LANDFILL

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

Synopsis

The Board denies a motion in limine requesting that several proposed exhibits be excluded as a discovery sanction, largely because the exhibits were never actually requested in discovery. Also, at least some of the exhibits were in fact produced.

O P I N I O N

The Appellants, Liberty Township and CEASRA ("Appellants"), filed this appeal on January 27, 2021 from the Department of Environmental Protection's (the "Department's") issuance of a major permit modification to Tri-County Landfill ("Tri-County"). The Appellants have filed a joint motion in limine asking us to exclude at the hearing several exhibits that were included in Tri-County's pre-hearing memorandum, as well as any testimony related thereto, as a discovery sanction. Tri-County opposes the motion.

It is true that the Board under appropriate circumstances may exclude evidence as a discovery sanction. *Gintoff v. DEP*, 2017 EHB 147, 150; *Wetzel v. DEP*, 2016 EHB 230, 232. Such exclusions only tend to occur in clear cases and where the movant has suffered demonstrable

prejudice, *Stocki v. DEP*, 2019 EHB 410; *Environmental and Recycling Services, Inc. v. DEP*, 2001 EHB 824, but before we even get to that point we need to find that there has indeed been a discovery violation. Here, we do not see one.

Initially, we see from Tri-County's response to the motion and the exhibits thereto that some of the exhibits the Appellants represent were not produced were in fact produced. *See, e.g.*, Exhibits 69, 70. Secondly, the Appellants never served a request for production of documents on Tri-County. Tri-County obviously cannot be sanctioned for failing to produce documents that were never requested in the first place.

Of course, documents might sometimes need to be produced in response to interrogatories, but we have reviewed the interrogatories that the Appellants cite in their motion and they did not cover the documents in question. For example, the Appellants complain that Tri-County failed to produce certain documents relating to groundwater. They say the documents were requested in its Interrogatory 14, which reads as follows:

> State all *surface water studies* in which Tri-County, the Expert, Consultant, Engineer, or other party conducted on behalf of Tri-County in regards to the surface water and NPDES issues, within the permit boundary, receiving streams, unnamed tributaries, tributaries, intermittent waterways, bodies of water and any other surface waters that were studied or considered for study by Tri-County?

(Emphasis added.) Tri-County responds, accurately, that *groundwater* documents were not requested in the interrogatory, which expressly relates to "surface water studies" "conducted on behalf of Tri-County." None of the documents at issue fit this description.

Similarly, with respect to Tri-County exhibits regarding bird-strike hazards and the Grove City Airport listed in the Appellants' motion, our review of the Appellants' expert interrogatories reveals that they cannot be said to have requested the documents. It also appears that the

documents were at a minimum referenced in the bird-strike expert's reports, which was turned in a year ago in April 2022, which hardly supports the Appellants' claim that they would be "highly prejudiced" if the documents were admitted, and consequently a postponement of the hearing and re-opening of discovery is necessary.

The Appellants additionally complain that the proposed exhibits were not identified in connection with Tri-County's motion for summary judgment. We are not aware of any rule that requires the exclusion of exhibits at a hearing because they were not identified in connection with a summary judgment motion.

The Appellants lodge three other objections in their motion. First, they object to the use of proposed exhibits relating to hydrogeology work done by Horsley Witten Group. They rely on arguments included in a separate motion in limine. We too will address that issue in that context.

Second, the Appellants contend that Tri-County Exhibits 108, 109, 113, and 119-125 are irrelevant because they relate to Seneca Landfill. This irrelevancy objection is difficult to understand and would seem to be contrary to the Appellants' interests in light of the Appellants' contention that Tri-County's compliance history should preclude issuance of the permits. By listing the documents, Tri-County does not seem to dispute that operations at the Seneca Landfill are relevant regarding its compliance history. Third, the Appellants object that some of these documents are hearsay, but that objection is better addressed at the hearing depending upon the context and purpose for which the exhibits are offered.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 30th day of March, 2023, it is hereby ordered that the Appellants' joint motion in limine directed at Tri-County is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 30, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Douglas G. Moorhead, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 30, 2023**

OPINION AND ORDER ON MOTIONS TO RECUSE/DISQUALIFY/REASSIGN BOARD MEMBER

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

Synopsis

The Board denies a motion to recuse/disqualify a Board Member from presiding over or participating in the adjudication of the appeal because, among other things, the motion only alleges that the Board Member will be a witness in unrelated matters, and the Board Member made adverse rulings against one of the Appellants' attorneys and her clients in those unrelated matters. Involvement or actions in unrelated matters does not require recusal in this matter. There is no other indication that the Board Member will be incapable of acting with impartiality in this appeal.

O P I N I O N

This appeal involves the issuance of a major permit modification to Tri-County Landfill ("Tri-County") by the Department of Environmental Protection (the "Department"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty Township and Pine Township, Mercer County within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The appeal of the permit was filed on January 27, 2021by Liberty Township, William C. Pritchard and Lisa L. Pritchard, and Citizens Environmental Association of Slippery Rock Area, Inc. ("CEASRA"). There have been more than 160 docket entries since the

appeal was filed in January 2021. The filings reflect that there have been changes in the list of appellants over the course of the last two years, such that Liberty Township and CEASRA are the only two remaining appellants (hereinafter "Appellants"). This appeal was transferred to Board Member and Judge Bernard A. Labuskes, Jr. ("Board Member Labuskes") for primary handling on February 3, 2023. The hearing on the merits is set to begin on April 5 in Pittsburgh.

The Appellants have filed what they variously refer to as a motion to disqualify or a motion to recuse Board Member Labuskes from presiding over or participating in the adjudication of this appeal.[1] The Appellants base their motion solely on the Code of Judicial Conduct. It must be said at the outset, however, that the Code does not apply to the Environmental Hearing Board's Members and Judges. *See* Code of Judicial Conduct (Application, Paragraphs [1] and [2].) Nevertheless, the Board Members strive for the same level of impartiality as that which is expressed in the Code, so we will address the Appellants' concern notwithstanding the lack of any applicable legal support in their motion.

The Appellants argue in their motion that Board Member Labuskes made adverse rulings, including an award of attorneys' fees, against Lisa Johnson, Esq., one of the attorneys for the Appellants, and her clients in unrelated Board appeals. They note that some of those rulings are under appeal. They do not suggest that those unrelated appeals have any connection to this appeal. They also allege that there are confidential investigations ongoing relating to Attorney Johnson's and Board Member Labuskes's actions in those unrelated appeals. They further allege that Board Member Labuskes "will be called as a witness" in those unrelated appeals and investigations.

[1] On March 30, 2023 the Appellants also filed a motion for reassignment, asking that this appeal be reassigned again to another Board Member. We do not detect any substantive new averments in the motion for reassignment that have not already been raised in the motion to recuse/disqualify. We do not see any reason to await responses and further delay the issuance of this Opinion and Order in light of the motion for reassignment. Therefore, for the same reasons that the motion to recuse/disqualify Board Member Labuskes is denied, the motion for reassignment is also denied.

The Department opposes the motion. It argues that if adverse rulings were a legitimate cause for recusal, such as the rulings against Attorney Johnson and her clients, no judge would be able to continue to sit. It points out that there is no possibility of Board Member Labuskes being a witness in *this* appeal. It argues that the motion is time barred because it was not filed at the earliest possible moment. Finally, it argues that recusal now would result in an unreasonable and unnecessary delay of the hearing. Tri-County also opposes the motion. It also argues that adverse rulings are insufficient to establish bias, that the Board Member is not a witness in *this* appeal, and that the motion has come too late in the proceedings.

Like the Department and Tri-County, we are left to wonder why the motion for recusal was filed as late as it was. Granting the motion would certainly result in further delay of an appeal that has now been pending for more than two years.[2] Indeed, the permitting process for this project started in the 1990s. Upon the sudden retirement of Board Chairman Renwand, this appeal was assigned to Board Member Labuskes on February 3, 2023. The Appellants waited 41 days after the reassignment to file their motion. In the intervening period, counsel worked collaboratively with the Board's staff to amend the hearing schedule previously established by Chairman Renwand in order to accommodate preexisting schedule conflicts of Board Member Labuskes. Numerous other prehearing motions and responses have been filed. The Appellants did not raise a concern regarding recusal during any of those proceedings.

[2] This is confirmed by the Appellants' averments in their motion for reassignment that, if they do not prevail on their motion to recuse/disqualify, they intend to seek immediate appellate review. The Appellants say in their motion for reassignment that they have filed it four business days before the hearing is set to commence because they do not want to delay the hearing schedule. Even if this case were reassigned again now to another Board Member, those Board Members have their own schedules. Earlier this month, the staff of the Board worked collaboratively with all parties to come to mutual agreement on revising the hearing schedule to accommodate the reassignment to Board Member Labuskes while still respecting the general schedule established by Chairman Renwand. It is difficult to see how there could not be a delay in the hearing if this matter were reassigned to another Board Member on the eve of trial.

In analogous situations regarding the judiciary, the Supreme Court of Pennsylvania "requires a party seeking recusal or disqualification to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred." *League of Women Voters v. Cmwlth.*, 179 A.3d 1080, 1086 (Pa. 2018) (quoting *Lomas v. Kravitz*, 170 A.3d 380, 389 (Pa. 2017)); *In re Lokuta*, 11 A.3d 427, 437 (Pa. 2011); *Goodheart v. Casey*, 565 A.2d 757, 763 (Pa. 1989) (*citing Reilly by Reilly v. SEPTA*, 489 A.2d 1291, 1298 (Pa. 1985)); *City of Phila. v. Pien*, 224 A.3d 71, 86 (Pa. Cmwlth. 2019). The "earliest possible moment" occurs "when the party knows of the facts that form the basis for a motion to recuse." *League of Women Voters*, 179 A.3d at 1086 (quoting *Lomas*, 170 A.3d at 390). In *Lomas v. Kravitz*, the Supreme Court held that the appellants waived their right to seek recusal by waiting 39 days after learning of the potential bias to file their motion. 170 A.3d at 391. Here, the Appellants waited 41 days.

In this matter, the Appellants' counsel was aware of all of the purported factual bases for recusal on February 3, 2023, yet the Appellants waited nearly seven weeks after the reassignment to file their motion, with the hearing to begin on April 5, 2023. We cannot say that the motion is a "calculated attempt to delay the hearing" as alleged by Tri-County and the Department, but their point that delay would in fact inevitably ensue as a result of granting their motion is well taken. There are, however, more substantial reasons for denying the motion.

First, none of the rulings and activity cited by the Appellants as the basis for their concern were taken by Board Member Labuskes individually. *See, e.g.*, *Stanley v. DEP*, EHB Docket No. 2021-013-L (Opinion and Order on Motion for Sanctions in the Form of Legal Fees, June 7, 2022). All Board Members participated in and contributed to the proceedings in question, including the Opinions and Orders involved. Board Member Labuskes had primary drafting responsibility in the Board appeals, but all Board Members decided the issues following considerable deliberation.

No appeals or proceedings have involved Board Member Labuskes individually. Similarly, in their motion the Appellants allude to "confidential investigations" pertaining to these earlier proceedings. Although it would be inappropriate to get into the merits of any such investigations given confidentiality constraints, the Board is not aware of any investigations involving Board Member Labuskes individually as opposed to the entire Board acting under the direction of its Chairman. It is not clear why the Appellants have singled out Board Member Labuskes. It would obviously be impractical to recuse the entire Environmental Hearing Board.

On that note, the Adjudication of this appeal will require the participation of the full Board. It is not a given that Board Member Labuskes will be in the majority, or if he is, whether he will prepare the first draft of the Adjudication. It is not clear how or why the Appellants believe any alleged bias on the part of Board Member Labuskes would compromise the impartiality of the other Board Members. Further, the Board currently has one vacancy, and Board Chairperson Beckman is recused in this matter for entirely unrelated reasons. Recusal of Board Member Labuskes would leave only two Board Members to work on the case.

Secondly and critically, the Appellants' motion is based upon activity in entirely unrelated proceedings. There is no suggestion that Board Member Labuskes has any personal involvement in *this* appeal. There is no suggestion that he is likely to be called as a witness in *this* appeal. The principle that a judge should not preside over and be a witness in the very same proceeding simply does not apply here.[3]

Furthermore, even if the unrelated matters were relevant, we detect no evidence of bias or impartiality in the unrelated matters. More importantly, there are no grounds for believing that Board Member Labuskes harbors any bias or ill will against Liberty Township or CEASRA, let

[3] We would add that we have not been advised that Board Member and Judge Labuskes is in fact likely to be called as a witness in any unrelated matter.

alone their attorneys. As the Department and Tri-County correctly point out, adverse rulings in other cases do not form the basis for recusal. *Pien*, 224 A.3d at 86 (quoting *Cmwlth. v. Abu-Jamal*, 720 A.2d 79, 90 (Pa. 1998)); *Cmwlth. v. Birdsong*, 24 A.3d 319, 331 (Pa. 2011); *Slusaw v. Hoffman*, 861 A.2d 269, 274 (Pa. Super. 2004).

The Appellants without explanation allude to the Board's decision to strike some filings from the docket by the parties in the unrelated cases. The implication seems to be that the Board's docketing decisions in those cases are somehow evidence of bias, presumably against Attorney Johnson or her clients in those cases. We fail to see how. Every adverse Board decision does not automatically equate to or reflect bias against the party or their attorneys. In any event, the merits of the Board's decisions regarding the management of its docket in those unrelated cases have no conceivable carryover to the instant appeal, just as a discussion of the merits of the award of legal fees or other rulings in those cases has no place here. The appellants in some of the unrelated appeals to which the Appellants here refer have exercised their right to appeal the Board's decisions and the Board will abide by any appellate ruling that may follow as it does in any other case.

We cannot endorse the practice of an attorney who has been at the receiving end of adverse rulings or docketing management having the de facto ability to recuse the Board's limited staff in every future matter involving that attorney. It is quite significant that a close examination of the Appellants' motion reveals that none of the Appellants' arguments are actually specific to *this* appeal; they would apply to every future appeal before the Board, or at least those assigned to Board Member Labuskes for primary handling. Neither the Appellants nor their counsel have pointed to any authority establishing the right to ask for what is in effect a lifetime recusal in any

appeal involving a particular attorney because that attorney is unhappy with rulings or docket management in prior cases.

As analogous authority, we note the Supreme Court's admonition that recusal "is a matter of individual discretion or conscience and only the jurist being asked to recuse himself or herself may properly respond to such a request." *Cmwlth v. Jones*, 663 A.2d 142, 143 (Pa. 1995). *See also Ferino v. DEP*, 2001 EHB 531, 534. "There is a presumption that judges of this Commonwealth are honorable, fair and competent." *DeLuca v. Mountaintop Area Joint Sanitary Auth.*, 234 A.3d 886, 895 (Pa. Cmwlth. 2020) (quoting *Abu-Jamal*, 720 A.2d at 89). Board Member Labuskes would not have accepted the reassignment from Chairman Renwand to conduct the hearing had he felt that he could not preside over the hearing with the same impartiality and fairness required of him in any appeal.

Finally, the Appellants "bear[] the burden of producing evidence establishing a conflict of interest, bias, or unfairness necessitating recusal." *Ferino*, 2001 EHB at 534 (quoting *People United to Save Homes (PUSH) v. DEP*, 1997 EHB 643, 644). The Appellants have produced no credible evidence to substantiate their claims of bias or prejudice. They have fallen well short of meeting their required burden in this case. Where, as here, no legitimate basis for recusal has been shown, we have an affirmative duty not to skirt our own assignments and responsibilities. *Welch v. Board of Dirs. of Wildwood Golf Club*, 918 F. Supp. 134, 138 (W.D. Pa. 1996) ("Just as a judge must disqualify himself if the motion establishes a reasonable doubt as to the judge's impartiality, a judge has an equally affirmative duty to preside in the absence of such proof."); *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992) ("there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is"). Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 30th day of March, 2023, it is hereby ordered that the Appellants' motion for recusal/disqualification and their motion for reassignment are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Board Member and Judge

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

s/ Sarah L. Clark
SARAH L. CLARK
Board Member and Judge

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

DATED: March 30, 2023

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

For the Commonwealth of PA, DEP:
Douglas G. Moorhead, Esquire
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake S. Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 30, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO PRECLUDE EVIDENCE AND ARGUMENT ON POTENTIAL DISCHARGES OF LEACHATE

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

Synopsis

The Board denies a motion in limine seeking to preclude the appellants from offering any evidence or argument on potential discharges of leachate from the landfill. Although the appellants cannot attack the terms and conditions of the landfill's NPDES permit in this appeal of its solid waste management permit, leachate management is integral to the operation of the landfill and issues associated with leachate discharge are not wholly irrelevant to this appeal.

O P I N I O N

Liberty Township and Citizens Environmental Association of Slippery Rock Area, Inc. ("CEASRA") (hereinafter collectively the "Appellants") have appealed the issuance of a major permit modification to Tri-County Landfill ("Tri-County") by the Department of Environmental Protection (the "Department"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990.

The hearing on the merits in this matter is scheduled to begin on April 5. In advance of the hearing, the Appellants have filed two motions in limine and Tri-County has filed eight motions in limine. The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. *See also* 25 Pa. Code § 1021.121 ("party may obtain a ruling on evidentiary issues by filing a motion in limine").

In this motion, Tri-County seeks to prevent the Appellants from offering any evidence or testimony on the discharge of leachate generated by the landfill, which Tri-County maintains "is not relevant or ripe." Tri-County argues that the waste management permit under appeal explicitly does not authorize any leachate to be discharged to waters of the Commonwealth. Instead, Tri-County says that its permit application provides for leachate to be stored on site before being trucked to an off-site wastewater treatment facility. Tri-County also argues that one of the Appellants' experts, Dr. John Stolz, is not qualified to render an opinion on the discharge of leachate to surface waters, and that his report critiques an NPDES permit for the landfill, not the waste permit under appeal. Tri-County says in its motion, "When an NPDES permit is issued, a separate appeal could be filed to challenge its terms." (Mot. at ¶ 14.)

At the time Tri-County's motion was filed, an NPDES permit application was pending before the Department for the landfill's construction of a leachate treatment plant and an associated discharge of industrial waste to an unnamed tributary to Black Run. (*See* DEP PHM "Undisputed Facts" at ¶¶ 49, 54, 55.) In a somewhat interesting development, the Appellants tell us in their response that the Department issued the NPDES permit to Tri-County on March 10 and it will go into effect on April 1, 2023. The issuance of the NPDES permit is not really surprising. The

Department tells us in its pre-hearing memorandum that a draft NPDES permit was published in the *Pennsylvania Bulletin* in November 2020 and a public hearing was held on the permit in April 2021. (DEP PHM "Undisputed Facts" at ¶¶ 54, 55.) Tri-County's motion in limine treats it as an inevitability that the NPDES permit would be issued at some point. (Mot. at ¶ 14; Memo. at 3.) The Department even tells us in its pre-hearing memorandum that "Tri-County Landfill cannot construct or operate the Landfill without an NPDES permit." (DEP PHM "Undisputed Facts" at ¶ 59.)

Indeed, it appears that the now-issued NPDES permit for the discharge of leachate and the waste permit under appeal have always been at least somewhat tied together. Tri-County's waste permit states that it does not authorize the discharge of leachate, but conditions that prohibition on Tri-County obtaining an NPDES permit for the discharge:

> This permit does not authorize nor shall be construed to be an approval to discharge industrial waste including without limitation any leachate discharge from the permitted area to waters of the Commonwealth, **absent a permit from the Bureau of Water Quality Management pursuant to the Clean Streams Law**.

(General Permit Condition No. 4 (emphasis added).) The waste permit allows Tri-County to collect its leachate and transport it to off-site treatment plants that will handle the leachate, as Tri-County vigorously claims, but the permit suggests that the trucking of leachate will continue only as long as it takes for Tri-County to receive an NPDES permit:

> An agreement between the permittee and at least 2 permitted treatment plants capable of accepting and treating the volume of leachate generated by the landfill shall be maintained at all times, **unless the permittee receives approval by the Department for an NPDES discharge permit** or receives approval from both the Department and an off-site wastewater treatment plant for direct discharge. The Department shall be notified of any changes to the agreements between the landfill and the treatment plants accepting leachate.

(Operating Permit Condition No. 26 (emphasis added).)

The Department's review memo accompanying the issuance of the permit also speaks to the connection between the waste permit and the NPDES permit. In fact, the review memo indicates that the construction of a leachate treatment plant by Tri-County, and its resultant discharge, was always envisioned for the landfill:

> The leachate from the new waste disposal areas will be monitored and treated during disposal, further mitigating the potential environmental concerns for leachate from the relocated waste. Initial management of leachate will be addressed through trucking and disposal at permitted facilities. These facilities will require analysis of the leachate prior to acceptance to ensure proper treatment of the waste, regardless of the chemical makeup. Tri-County is also proposing construction of its own leachate treatment plant at the site.
> ….
> Tri-County has submitted an application for a National Pollution Discharge Elimination System ("NPDES") permit for an industrial waste discharge to an unnamed tributary to Black Run associated with anticipated construction of a leachate treatment plant at the site to treat leachate from the new waste disposal areas….Because leachate will be managed by trucking to a DEP-permitted facility for at least the first three years of operation and potentially longer, the construction of a treatment plant is not planned for several years. In addition, Tri-County may propose a future connection to a permitted, publicly owned treatment works. Accordingly, the DEP is not delaying the issuance of the Solid Waste Permit for the issuance of this NPDES permit.

(App. Ex. 5, DEP Review Memo at 4-5, 6.) The Department's public comment response document attached to that review memo suggests that the trucking of leachate has been conditioned on Tri-County not yet having an NDPES permit, and now that it does, the trucking of leachate is apparently expected to cease:

> Tri-County has applied for a NPDES permit application with the Clean Water Program. Tri-County Landfill has not received a NPDES permit at this time or supplied information regarding approval for direct discharge to a treatment plant. **Tri-County Landfill will only be permitted to truck leachate until approval is received for the other options** and information regarding those approvals is supplied to the Department.

(App. Ex. 5 at 49 (emphasis added).)

The waste and discharge permits appear to be inextricably linked, judging by the Department's own review documents. Accordingly, we reject Tri-County's arguments that issues of leachate discharge are completely irrelevant in this appeal. In fact, Tri-County's argument that the waste permit does not authorize leachate discharges may even be moot. The argument that the Appellants' wastewater objections "depend on a hypothetical risk of harm from an activity that the Permit does not authorize" now rings somewhat hollow. (TCL Memo. at 4.) The largely hypothetical if not somewhat fantastic notion that the landfill would operate indefinitely trucking leachate has now apparently evaporated.

If the issuance of an NPDES permit was a matter of conjecture or nothing more than a distant possibility, Tri-County's motion in limine might have had some merit. Clearly it never was, but beyond that, the Department has further complicated the resolution of the issues raised in the motion by choosing to issue the NPDES permit less than a month before the hearing on the merits on the solid waste permit. Indeed, it appears that the permit was issued on the same day that the motion in limine was filed. It may be that the landfill can or will be operated for some period of time without a direct discharge of leachate, but it does not follow that we should pretend that this project can or will operate indefinitely without a direct discharge. Therefore, we cannot accept Tri-County's invitation to close our eyes to any and all evidence regarding a leachate discharge.

With that being said, we are mindful that the focus of this appeal, and the merits hearing, is the Department action under appeal—the approval and issuance of Solid Waste Management Permit No. 101678. *See Winegardner v. DEP*, 2002 EHB 790, 793 ("Our role is necessarily circumscribed by the Departmental action that has been appealed….We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental

actions."). This is not an appeal of the NPDES permit. This appeal does not provide a mechanism for attacking the actual terms and conditions of the NPDES permit. This leaves us rather between a rock and a hard place. The best way to deal with this tension between ignoring all evidence regarding leachate discharge while not digging too deep into the weeds on the actual terms of the NPDES permit is to assess the admissibility of the evidence on a case-by-case basis. If certain portions of the hearing appear to veer too far into the territory of the NPDES permit, we are capable of dealing with it at that time.

The second part of Tri-County's motion lodges attacks on the qualifications of one of the Appellants' experts, Dr. Stolz, and his ability to opine on issues regarding radioactivity in the waste accepted into and the leachate generated by the landfill. Tri-County argues that Dr. Stolz should be precluded from testifying on the environmental impacts of leachate because he lacks relevant expertise. In Dr. Stolz's expert report, he states that his background is in microbiology and geobiology and he is a professor in the Department of Biological Sciences and the Director of the Center for Environmental Research and Education at Duquesne University. (App Ex. 72.) He says that his current research involves radioactivity in oil and gas brine and surface and groundwater quality. (*Id.*)

Rule 702 of the Pennsylvania Rules of Evidence governs the admissibility of expert testimony at a hearing. It provides the general standard by which a witness is qualified to render expert opinions:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
>
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (c) the expert's methodology is generally accepted in the relevant field.

Pa.R.E. 702. Based only on our brief review of Dr. Stolz's CV, he appears to have more knowledge than a layperson on potentially relevant topics. *See Fisher v. DEP*, 2010 EHB 46, 47-48. The primary purpose of expert testimony is to assist the trier of fact in understanding complicated issues. *Blythe Twp. v. DEP*, 2011 EHB 433, 437 (citing *Rhodes v. DEP*, 2009 EHB 237, 239). There is nothing blatantly incongruent with Dr. Stolz's expertise and his ability to offer some value on leachate issues and radioactivity, at least from what we can tell at this juncture.

Nevertheless, whether the Board ultimately finds Dr. Stolz qualified to render opinions on all the subjects on which he will testify, and the weight and credibility to lend to those opinions, are issues better left resolved at the hearing following an appropriate proffer and voir dire. As we said in *Friends of Lackawanna v. DEP*, 2016 EHB 815, 823, in the context of deciding another motion in limine seeking to exclude an expert's testimony:

> In Board cases, the way that we typically address a proposed expert's qualifications is to allow the witness's proponent to elicit testimony describing the witness's qualifications at the hearing and then offer him or her up as an expert in specifically stated areas. After offering the opposing parties an opportunity for voir dire and/or object[ion], we then rule on the ability of the individual to give expert opinion testimony. Although in a blatant case a motion in limine based on lack of qualification might be appropriate, this is clearly not such a case based on our review of [this expert's] report and resume.

To the extent Tri-County objects to Dr. Stolz's qualifications or believes that any of the Appellants' questions proffered to Dr. Stolz exceed the areas of his expertise, it is free to make specific objections as they arise at the hearing.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 30th day of March, 2023, it is hereby ordered that Tri-County Landfill's Motion in Limine to Preclude Evidence and Argument on Potential Discharges of Leachate is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 30, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Douglas G. Moorhead, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 30, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO STRIKE AND PRECLUDE TESTIMONY ON PORTIONS OF APPELLANTS' EXHIBIT 60 AND ANY EXPERT OPINION TESTIMONY OF STEPHEN SHIELDS

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

Synopsis

The Permittee's motion in limine is granted in part. Portions of Appellants' Exhibit 60 that depict scenes other than the landfill at issue in this appeal are stricken. Additionally, where a witness is listed as a fact witness, and not an expert, he may not provide expert opinion testimony.

O P I N I O N

This matter involves an appeal filed by Liberty Township and CEASRA (the "Appellants") challenging the Department of Environmental Protection's (the "Department's") issuance of a major permit modification to Tri-County Landfill ("Tri-County"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty Township and Pine Township, Mercer County within the boundary of an inactive landfill that was previously operated by Tri-County. A hearing in this matter is scheduled to begin on April 5, 2023. The Appellants and Tri-County have filed several motions in limine. This Opinion addresses Tri-County's Motion in Limine to Strike

and Preclude Testimony on Portions of Appellants' Exhibit 60 and Any Expert Opinion Testimony of Stephen Shields. The Appellants oppose the motion in part.

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing. 25 Pa. Code § 1021.121; *Range Resources – Appalachia, LLC v. DEP*, EHB Docket No. 2020-014-R, slip op. at 2 (Opinion and Order issued April 18, 2022); *The Delaware Riverkeeper v. DEP*, 2016 EHB 159, 161; *Kiskadden v. DEP*, 2014 EHB 634, 635. The purpose of a motion in limine is to provide the trial court an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at trial. *Range, supra* at 3 (citing *Commonwealth of Pennsylvania v. Padilla*, 923 A.2d 1189, 1194 (Pa. Super. 2007), *appeal denied*, 934 A.2d 1277 (Pa. 2007)).

Tri-County seeks to preclude expert testimony by Stephen Shields and to strike portions of Appellants' Exhibit 60, identified as "Video Prepared by Pilot Stephen Shields Flying Over Grove City Airport for Landing." (Appellants' Joint Index of Exhibits in Support of Their Joint Pre-Hearing Memorandum.) The exhibit consists of a link to a YouTube video with the following description provided by the Appellants: "Video clip shows pilot Stephen Shields flying over [Tri-County Landfill] as he descends in 50 seconds to runway at Grove City Airport. He discusses the danger of this descent." (Exhibit 60, Appellants' Joint Prehearing Memorandum.) Stephen Shields is apparently a pilot employed by Capital Edge Consulting/Capital Edge Aviation to fly a Cessna Citation jet since late March or early April of 2019. (Transcript of the Deposition of Stephen Shields at 24.) Mr. Shields is named in the Appellants' prehearing memorandum as a fact witness who will testify at the hearing. He is not listed as an expert witness.

Tri-County asserts that, contrary to the Appellants' description, only a portion of Exhibit 60 consists of video taken by Mr. Shields. According to Tri-County, the rest of the video contains

various scenes of other landfills, a plane landing at an unknown airport, birds flying near garbage, and a plane engine on fire, none of which were filmed by Mr. Shields. This is supported by Mr. Shields's deposition testimony, in which he acknowledged that the footage he shot had been spliced together with other imagery to create the entire video that is labeled Exhibit 60. (*Id.* at 61-62, 68.) He further testified that he was not familiar with the other scenes depicted in the full version of the video. (*Id*. at 68.) Tri-County argues that those portions of the video that do not depict its landfill or the surrounding area have no relevance to this appeal. It further argues that, even if the video were found to have some relevance, it is outweighed by the prejudicial effect it would have on Tri-County.

In their response to the motion, the Appellants state as follows: "Appellants apologize to the Board and the parties as the video was not assembled by Mr. Shields, and inadvertently mislabeled, but Mr. Shields will be able to testify at the hearing as to the portions of the video that pertain to him." (Appellants' Joint Response to Tri-County's Motion, para. 1.) In other words, there does not appear to be any disagreement on Tri-County's objection. Accordingly, to the extent that the Appellants intend to offer Exhibit 60 into evidence, the Board will consider only a redacted version of Exhibit 60 that contains no videos or scenes other than that recorded by Mr. Shields. To the extent that the Appellants intend to have the Board view Exhibit 60 during testimony by Mr. Shields, only those portions of Exhibit 60 that consist of Mr. Shields's visual footage may be presented during the hearing.

Tri-County argues that the voiceover provided by Mr. Shields in Appellants' Exhibit 60 "renders opinion on the alleged danger of the Tri-County Landfill to the Grove City Airport due to the risk of bird strike, and whether a bird presents a danger to aircraft engines." (Permittee's Memorandum of Law at 6.) It contends that any discussion of how the landfill will operate under

the permit and the relative risk of bird strikes and the dangers they may pose to aircraft impermissibly moves Mr. Shields's lay testimony into the realm of expert opinion. (*Id.*)

In response to Tri-County's motion, the Appellants reiterate that Mr. Shields will testify as a fact witness, rather than an expert. (Appellants' Joint Omnibus Memorandum of Law at 13.) However, the Appellants go on to state that Mr. Shields's testimony will include his "experiences as a pilot flying in and out of the Grove City Airport and *which will naturally include the possibilities of bird strikes.*" (*Id.*) (emphasis added.) Appellants argue that "The Board is sophisticated enough to make determinations of Mr. Shields'[s] non-expert fact testimony at the hearing and Mr. Shields'[s] testimony should not be precluded by virtue of a motion in limine. . ." (*Id.*) Since Mr. Shields will be testifying as a live witness, his voiceover on the video adds no value. Mr. Shields will be able to describe and discuss his footage and experiences at the hearing. Tri-County's motion is granted with respect to the voiceover on the video.

With respect to Mr. Shields's live testimony, we agree with the Appellants that Mr. Shields's testimony should not be precluded entirely. We also agree with Tri-County that his testimony must be limited to comport with the Pennsylvania Rules of Evidence regarding opinion testimony from a lay witness. Mr. Shields is listed as a fact witness in the Appellants' prehearing memorandum; he is not listed as an expert witness. (Appellants' Joint Pre-Hearing Memorandum at 80-81.) Thus, under the Pennsylvania Rules of Evidence, to the extent that Mr. Shields offers testimony in the form of an opinion, that testimony is limited to opinion that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Pa.R.E. 701. Therefore, Mr. Shields may testify to his personal experience flying in and out of the Grove City Airport. To the extent that he has personally

witnessed bird strikes, he may speak to his observations regarding those events as permitted by Rule 701(a)-(b) and to the extent otherwise relevant and admissible. What Mr. Shields may not do is offer opinion as to any causal relationship between the landfill as it would operate under the permit and bird strikes or other alleged dangers, as any such opinion must necessarily be based on "scientific, technical, or other specialized knowledge" requiring an expert rather than fact witness. Pa.R.E. 701(c).

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 30th day of March, 2023, it is hereby ordered that Tri-County's Motion in Limine to Strike and Preclude Testimony on Portions of Appellants' Exhibit 60 and Any Expert Opinion Testimony of Stephen Shields is **granted** as set forth in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 30, 2023

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

For the Commonwealth of PA, DEP:
Douglas G. Moorhead, Esquire

Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Dearald Shuffstall, Esquire
(via electronic filing system)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(via electronic filing system

For Permittee:
Alan Miller, Esquire
Jake S. Oresick, Esquire
Brian Lipkin, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: March 31, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO PRECLUDE EVIDENCE AND ARGUMENTS THAT REQUIRE EXPERT TESTIMONY

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

Synopsis

The Board denies a motion in limine seeking to preclude the appellants from offering 77 exhibits listed in their pre-hearing memorandum due to the appellants' lack of expert witnesses. Among other reasons, there is no time at this late stage in the proceedings to parse through the documents to assess whether each one is admissible on any grounds aside from the appellants' lack of experts.

O P I N I O N

Liberty Township and Citizens Environmental Association of Slippery Rock Area, Inc., ("CEASRA") (hereinafter collectively the "Appellants") have appealed the issuance of a major permit modification to Tri-County Landfill ("Tri-County") by the Department of Environmental Protection (the "Department"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990.

The hearing on the merits in this matter is scheduled to being on April 5. In advance of the hearing, the Appellants have filed two motions in limine and Tri-County has filed eight motions in limine. The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. *See also* Pa. Code § 1021.121 ("party may obtain a ruling on evidentiary issues by filing a motion in limine").

In this motion in limine, Tri-County argues that the Appellants will not be able to prove actual or potential harm to wetlands, endangered/threatened species, groundwater, or water supplies because they do not have any expert witnesses with the necessary expertise. It cites well-established case law to the effect that a showing of harm or potential harm to a resource from a permitted operation requires expert testimony. *Diehl v. DEP*, 2018 EHB 18, 25 (hydrogeology); *Protect PT v. DEP*, 2020 EHB 27, 30-31 (threatened/endangered species); *Luddick v. DEP*, 2018 EHB 207, 216 (wetlands). The Appellants oppose the motion.

It is true that the Appellants have only identified two expert witnesses: Dr. Russell DeFusco and Dr. John Stolz. These are the only two witnesses that will be permitted to offer expert opinions on behalf of the Appellants at the hearing. Dr. DeFusco will be permitted to testify on bird-strike type issues and Dr. Stolz has been offered as an expert on radioactivity type issues. Their expert reports and qualifications define the boundaries of their testimony. Neither expert has been offered as an expert on endangered or threatened species, wetlands, or hydrogeology.

The difficulty with Tri-County's motion in limine is that it attempts to translate these undisputed facts and well-established case law into a request that we exclude 77 exhibits listed in the Appellants' prehearing memorandum. This is simply too big an ask with only a couple of days

left before the hearing. Furthermore, parsing through all of the exhibits in the context of a motion in limine would require us to determine that there is no possible basis for admitting each exhibit given the lack of experts on endangered species, wetlands, and hydrogeology. Some of the exhibits when presented in context and with a proper foundation at the hearing might well prove to be admissible notwithstanding the Appellants' inability to prove harm or a potential for harm to endangered species, wetlands,[1] groundwater, hydrogeology, or water supplies through expert testimony.

For example, in opposition to the motion in limine, the Appellants argue that the exhibits could go to whether the Department conducted an adequate review regarding the environmental effects of its action as mandated by Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art. I, § 27, and the applicable statutes and regulations, including the harms/benefits analysis. Proving that there was an inadequate investigation is different than proving the potential for any actual harm. While the Appellants are precluded from proving the latter due to their lack of pertinent expert witnesses, they are not necessarily precluded from attempting to prove the former. Where the 77 exhibits fall in this analysis will need to be sorted at the hearing.

Accordingly, we issue the Order that follows.

[1] Excepting that the Appellants aver that Dr. Stolz may be able to prove harm to wetlands like any other waters of the Commonwealth. This effort will turn on Dr. Stolz's qualifications and testimony at the hearing, but it does not appear to be distinct to wetlands.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 31st day of March, 2023, it is hereby ordered that Tri-County's Motion in Limine to Preclude Evidence and Appellants' Arguments that Require Expert Testimony is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: March 31, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Douglas G. Moorhead, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: April 3, 2023**

OPINION AND ORDER ON TRI-COUNTY LANDFILL'S MOTION IN LIMINE TO PRECLUDE APPELLANTS FROM CALLING TRI-COUNTY'S EXPERTS AS WITNESSES AND/OR INTRODUCING THEIR EXPERT REPORTS IN THEIR CASE-IN-CHIEF

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

Synopsis

The Board grants a permittee's motion in limine seeking to preclude the appellants from calling the permittee's experts as part of the appellants' case-in-chief and to preclude the appellants from introducing the permittee's experts' reports as part of the appellants' case-in-chief.

O P I N I O N

Liberty Township and Citizens Environmental Association of Slippery Rock Area, Inc. ("CEASRA") (the "Appellants") have appealed the issuance of a major permit modification to Tri-County Landfill ("Tri-County") by the Department of Environmental Protection (the "Department"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The hearing on the merits in this matter is set to begin on April 5. In advance of the hearing, the parties have filed numerous motions in limine. The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial.

Penn Twp. Mun. Auth. v. DEP, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635. *See also* 25 Pa. Code § 1021.121 ("party may obtain a ruling on evidentiary issues by filing a motion in limine").

In this motion in limine, Tri-County seeks to prevent the Appellants from calling Tri-County's expert witnesses to testify as part of the Appellants' case-in-chief, and from using Tri-County's experts' reports during the Appellants' case-in-chief. Tri-County acknowledges that the Appellants are free to cross-examine any of Tri-County's experts that Tri-County calls to testify as part of Tri-County's case-in-chief, and that the Appellants may use the experts' CVs and expert reports during the cross-examination.

The Appellants in their response and accompanying memorandum of law have not addressed any of Tri-County's arguments. The only substantive answer in the Appellants' response and memorandum is that the Appellants only listed Tri-County's experts as witnesses "to ensure they can call as to cross in the event TCL [Tri-County] does not call such experts in their case-in-chief pursuant to the Pennsylvania Rules of Evidence." (App. Resp. at 5.) In the wherefore clause of their response, the Appellants ask that we grant in part and deny in part Tri-County's motion:

> Appellants respectfully requests [sic] that this Honorable Board grant in part this Motion in Limine to Preclude Appellants from calling Tri-County's experts in Appellants' case-in-chief or using or introducing Tri-County's expert reports or curriculum vitae as evidence in Appellants' case-in-chief and deny in part such that Appellants are not precluded from calling Tri-County's experts as to cross and introducing Tri-County's expert reports or curriculum vitae as evidence related to Appellants calling such experts as to cross.

(App. Resp. at 6.)

The Appellants cannot do what they are attempting to reserve the right to do in their response for procedural reasons. The Appellants bear the burdens of production and proof. 25 Pa.

Code § 1021.122(c). They are required to make a prima facie case by the close of their case-in-chief. 25 Pa. Code § 1021.117(b). The Appellants will not know whether Tri-County is going to call its experts until after the Appellants' case is closed. The Appellants do not have the right to wait and see if Tri-County calls the witnesses in Tri-County's case-in-chief and then call them later. If the Board allows any rebuttal at all, it is usually very limited. It would not encompass calling major new witnesses such as the opposing parties' experts. A party with the burden of production that does not call a witness in its case-in-chief must bear the risk that the witness will not testify. No party should ever count on being permitted to put on new testimony on rebuttal. In short, the Appellants' attempted reservation does not provide a basis for denying Tri-County's motion in limine.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 3rd day of April, 2023, it is hereby ordered that Tri-County Landfill's Motion in Limine to Preclude Appellants from Calling Tri-County's Experts as Witnesses and/or Introducing their Expert Reports in their Case-in-Chief is **granted**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 3, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Angela N. Erde, Esquire
Douglas G. Moorhead, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB AND PENNENVIRONMENT	:	
	:	
v.	:	**EHB Docket No. 2022-032-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PPG INDUSTRIES, INC., Permittee	:	**Issued: April 6, 2023**

OPINION AND ORDER ON SIERRA CLUB AND PENNENVIRONMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE DEPARTMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies a Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment. The case involves complex issues of fact and law that make it inappropriate for resolution on summary judgment.

O P I N I O N

Introduction

The Appellants in this matter, the Sierra Club and PennEnvironment ("Sierra Club"), filed a Notice of Appeal (NOA) with the Environmental Hearing Board ("Board") on May 10, 2022. In the NOA, Sierra Club sought review of the Department of Environmental Protection's ("DEP's" or the "Department's") approval of the financial assurance proposal submitted by PPG Industries, Inc. ("PPG") for the remedy at PPG's Ford City waste site ("PPG Waste Site"). Sierra Club's listed objection to the DEP's approval stated that the DEP's action was arbitrary, capricious and not in accordance with the DEP's legal obligations because the approval did not conform to the requirements of an amended consent order and agreement between the DEP and

PPG and did not ensure that the proposed remedy for addressing the PPG Waste Site would be maintained in perpetuity.

The case proceeded through discovery and the discovery deadline was extended once until December 30, 2022. About three weeks prior to the end of discovery, Sierra Club filed the pending Motion for Partial Summary Judgment ("Motion"). After a short extension of time to complete discovery and file responses, PPG filed its Response to Appellants' Motion for Partial Summary Judgment ("PPG's Response") along with its Brief and a response to the Appellants' Statement of Undisputed Material Facts on January 31, 2023. On the same day, the Department filed similar documents (DEP's Response, Brief and Response to Statement of Undisputed Material Facts) but importantly for this decision, the Department also included a Cross-Motion for Summary Judgment ("DEP Cross-Motion"). On February 28, 2023, Sierra Club filed a Reply Brief in support of its Motion and a Brief in Opposition to the DEP Cross-Motion along with a Response to the DEP's Cross-Motion[1] and a Response to DEP's Statement of Undisputed Material Facts. The Department did not file a reply to the Sierra Club's Response to the DEP's Cross-Motion. Now that deadline for filing dispositive motions and all related filings have passed, the Board is in the position to rule on the Motion and DEP Cross-Motion.

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 entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.1-1035.2; *Muth v. DEP and Eureka Resources, LLC*, 2022 EHB 337, 338-39, *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376; *Williams v. DEP*, 2019 EHB 764, 765-66. In

[1] Sierra Club entitled its documents as a response to the DEP's Cross-Motion for Partial Summary Judgment but we note for the record that the DEP never characterized its Cross-Motion as one for partial summary judgment and we do not read it as anything but a full summary judgment motion.

evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sunoco Pipeline, L.P. v. DEP*, 2021 43, 45; *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as whether genuine issues of material fact remain must be resolved against the moving party. *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587.

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. It is usually only granted in cases where a limited set of material facts are truly undisputed, and a clear and concise question of law is presented. *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 576. In cases involving complex issues of fact and law, the Board has found that summary judgment may be inappropriate and has held that such matters should be decided on a fully developed record at a merits hearing. *Three Rivers Waterkeeper v. DEP*, 2020 EHB 87, 89; *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

Discussion

On April 2, 2019, DEP and PPG executed a Consent Order and Agreement ("2019 COA") addressing the PPG Waste Site. (Sierra Club Statement of Undisputed Facts, Para 3). On November 4, 2020, an amendment to the 2019 COA was signed by PPG and DEP ("First Amendment"). Paragraph 13 of the First Amendment states as follows:

> "13. Within thirty (30) days of the execution of this First Amendment, PPG shall submit documentation for the provision of financial assurances to the Department in an amount sufficient to secure the implementation and post-closure care, including without limitation long-term monitoring, operation and maintenance and replacement costs necessary to effectuate and maintain the remedy required by the 2019 Consent Order and Agreement and this First Amendment, or a revision of the remedy should the original fail, in perpetuity. Said financial assurances shall consist of an irrevocable letter(s) of credit and a standby trust in favor of the Department that conforms to the requirements of 25 PA Code section 287, Subchapter E and/or letter of credit and standby trust provisions established by 40 CFR 264.143(d) and 264.145(d)."

The Department approved PPG's financial assurance submittals covering the PPG Waste Site required by the First Amendment in a letter dated April 7, 2022. The approval covered three letters of credit as follows: 1) Slurry Lagoon Area - $22,206,800; 2) SWDA and Annex - $1,946,616 and 3) Site-wide construction operation, maintenance and monitoring - $12,363,864. The amounts of the letters of credit appear to be based, at least in part, on the use of Department worksheets that provide for a minimum time period of 30 years when calculating monitoring costs. (DEP Brief, p.4).

Sierra Club's Motion is presented as a motion for partial summary judgement, but we had some difficulty sorting out the specific issue on which Sierra Club believes it is entitled to a partial summary judgment. Its filings set forth a large amount of background information on historical conditions at the PPG Waste Site and the lengthy efforts to address those conditions. Sierra Club argues that the undisputed facts demonstrate that the Department did not ensure that PPG supply financial assurances adequate to fund the remedy at the PPG Waste Site in perpetuity as required under the First Amendment, but instead only obtained assurances that will cover 30 years of operation. In its Motion, the Sierra Club states that "the Board should thus find, as a matter of law, that approving a financial assurance package that only covered 30 years of operation, rather than for operation in perpetuity, was unreasonable, inappropriate, and not in conformance with the Department's obligation under the law and must be set aside. Partial summary judgment is appropriate because there is no genuine issue of material fact as to this issue." (Motion, p.2). In its Brief, the Sierra Club states that "[A]ppellants now seek partial summary judgment on the Department's failure to ensure that PPG establish financial assurances sufficient to operate and maintain collection and treatment of PPG's contaminated wastewater discharge in perpetuity." (Brief, p.1). Further in the Brief, the issue is restated as "The

Department failed to ensure – indeed, it failed to even attempt to ensure- that the financial assurances were sufficient to assure the remedy in perpetuity as required by the Amended Consent Order. Because that decision by the Department was unreasonable, arbitrary, and not in conformance with the Department's obligations under the Clean Streams Law and the Pennsylvania Constitution, Appellants are entitled to partial summary judgment on that issue." (Brief. p.2). In a footnote appended to the last sentence just quoted, Sierra Club states "Appellants note that this motion seeks summary judgment on the Department's fundamental failure to even attempt to assure the remedy in perpetuity. This motion does not address the amount that is sufficient to satisfy that aim. The specifics of the amount will be addressed at the evidentiary hearing following the Board's decision on the fundamental issue presented by this motion." (Brief, p. 2, fn. 2). Finally in its proposed order attached to its Motion, Sierra Club requested that the Board grant its Motion and order that "the Department's April 7, 2022 approval of PPG Industries, Inc.'s financial assurance submission, as required by the November 4, 2020 amendment to the April 2, 2019 Consent Order and Agreement between PPG and the Department was unreasonable, inappropriate, and not in conformance with the Department's obligation under the law because it failed to ensure that the financial assurances were sufficient to secure the remedy in perpetuity." (Proposed Order, p.1). PPG in its Brief points out that while Sierra Club attempts to parse this case into an issue focused on the meaning of the term perpetuity, the real question as stated by Sierra Club in its Motion is whether the Department acted reasonably and in compliance with the law in approving the letters of credit. We agree that trying to apply a simplified linguistic analysis that relies on a finding that perpetuity is not 30 years and therefore, the Department's actions fall short of what was required, is not what Sierra Club appears to actually be seeking in its Motion and does nothing to advance our resolution of

this case. Nothing about the language used by Sierra Club in its filings suggest a partial summary judgment but instead appear to request a full summary judgment on the reasonableness and lawfulness of the Department's actions in approving the letters of credit and we will treat it as such.

In their Responses to the Motion, both the Department and PPG acknowledge that the process used to evaluate PPG's financial assurance submittals relied on a thirty-year timeframe. The Department argues that rather than entitle Sierra Club to a partial summary judgment, the Department's use of the thirty-year timeframe was entirely consistent with paragraph 13 of the First Amendment and it is the Department that is entitled to a summary judgment. The Department's argument arises from the second sentence in paragraph 13 of the First Amendment that provides that PPG's financial assurances shall conform to the requirements of 25 PA Code section 287, Subchapter E. The Department specifically point out that provisions in 25 PA Code section 287, Subchapter E require the use of a Department form and guidelines in calculating the amount required for the financial assurances. It says that the Bond Worksheets are the required form and incorporate the required guidelines including the thirty-year timeframe. Therefore, the Department claims that it has fully complied with the requirements of paragraph 13 of the First Amendment.

The Department also argues that Sierra Club misrepresents the review and approval process completed by the Department. Sierra Club argued that the Department's process for approving PPG's proposal was "wholly inadequate" and that the Department conducted no meaningful analysis of its own. (Brief, p.16). Among the issues it raises is that the Department did not take into account the need to eventually repair and/or replace parts of the remediation system at the PPG Waste Site. Sierra Club further argues that the Department is mistakenly

relying on the continued existence of PPG and its ability to fund additional future requirements when there is no assurance that PPG will be around in the future. The Department and PPG dispute this characterization of the process that lead to the Department's acceptance. The Department argues that "[t]he record shows that the Department and PPG engaged in an effort that spanned some two years, with the exchange of PPG submittals and Department review memoranda that were detailed and scrutinizing." (DEP Brief, p.5). The Department contends that because it has the regulatory authority to review and require adjustments to cost estimates and to increase the amount of the letters of credit if necessary, its approval decision was proper. PPG in turn contends that "an assessment of financial assurances requires more than taking an expected annual cost and then multiplying that number by a period of time […] is not what PPG or DEP did to calculate the amount of required financial assurances." (PPG Brief, p.8). At the least, these different representations of the Department's review process and how PPG and the Department came to the figures they ultimately did, raises both a legal issue as to the proper interpretation of the requirements of Paragraph 13 of the First Amendment and support a finding that there are material facts in dispute that are inappropriate to resolve in a motion for summary judgment.

In its Brief, PPG primarily focuses on what it asserts are disputed material facts. PPG notes that because the Motion was filed prior to the close of discovery, Sierra Club was not in the position to consider the expert report from PPG's expert. According to PPG, its expert, Raymond Bummer, opines that the letters of credit are more than adequate to provide the required financial assurances in perpetuity. (PPG Brief, p.7). Sierra Club asserts that this information is irrelevant because its Motion is directed at the Department's decision and its pre-decision underlying analysis. (Reply Brief, p.19). It says that the Department was required to

engage in reasoned and appropriate decision-making and that the Department failed to do so. Sierra Club argues that in fact, Mr. Bummer agrees with the Sierra Club that the Department's decision making was flawed. (Reply Brief, p. 21). All of this discussion by PPG and Sierra Club only strengthen our conclusion that there are disputed material facts in this case.

Our review of this matter convinces us that this case is not appropriate for resolution through summary judgment. It involves complex issues of fact and law that would be better decided following a hearing and the development of a detailed record. Resolution of this appeal will require the Board to understand the scope and cost of the approved remedy for the PPG Waste Site along with the language of the governing agreement and the adequacy of the financial documents in place to ensure that the remedy can be constructed, operated and maintained in conformance with the agreement. At a minimum, the language of paragraph 13 of the First Agreement that is at the center of the issue presented by the summary judgment motions, is open to interpretation. Ultimately, the issue for the Board to decide is whether the Department's decision to approve the letters of credit was reasonable, appropriate and in compliance with its legal obligations. In order to do that we need to know whether the amounts of the letters of credit and any process for adjusting those amounts is adequate to meet the future requirements at the PPG Waste Site. Live testimony in a hearing is clearly the best way to ensure that the Board has what it needs to decide this appeal. We see no advantage to deciding any of the issues presented in the Motion and DEP Cross-Motion[2] at this time. Whether the amounts approved by the Department are adequate for the task is the central question and we look forward to hearing the parties' testimony on that issue.

[2] Sierra Club raised an argument that the Department's Cross-Motion was untimely, and we agree that the Cross-Motion was filed untimely, and this provides a further independent basis for denying the Cross-Motion.

Therefore, we order the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SIERRA CLUB AND PENNENVIRONMENT	:	
	:	
v.	:	**EHB Docket No. 2022-032-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PPG INDUSTRIES, INC., Permittee	:	

O R D E R

AND NOW, this 6th day of April, 2023, it is hereby ORDERED that the Appellants' motion for partial summary judgment and the Department's cross-motion for summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: April 6, 2023

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

For the Commonwealth of PA, DEP:
Tyra Oliver, Esquire
Edward S. Stokan, Esquire
(via electronic filing system)

For Appellants:
Tim Fitchett, Esquire
Carolyn Smith Pravlik, Esquire
Nicholas Soares, Esquire
(via electronic filing system)

For Permittee:
Christina Manfredi McKinley, Esquire
Richard S. Wiedman, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: April 17, 2023**

OPINION IN SUPPORT OF ORDER ON
APPLICATION FOR TEMPORARY SUPERSEDEAS

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

Synopsis

The Board denies an application for temporary supersedeas of a major modification of a solid waste management permit for the operation of a landfill. The Appellants have not shown through affidavits or otherwise that there is any threat of immediate and irreparable injury to the applicants or that there is a likelihood of injury to the public pending a hearing on the petition for supersedeas.

O P I N I O N

Liberty Township and CEASRA (the "Appellants") have filed a petition for supersedeas and application for temporary supersedeas in connection with their appeal of the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to Tri-County Landfill ("Tri-County"). The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The permit modification was issued in December 2020 and the Appellants filed their appeal in January 2021. The hearing on the merits

is already underway, having begun on April 5, 2023, and it is scheduled to continue through the end of April.

The Appellants' supersedeas filings came on Friday, March 31, 2023. Although the Appellants' petition for supersedeas and application for temporary supersedeas were not accompanied by affidavits when they were filed as required by 25 Pa. Code § 1021.62(a)(1), *see also* 25 Pa. Code § 1021.64(b) (application for temporary supersedeas shall be accompanied by petition for supersedeas that comports with Section 1021.62), the Appellants on April 4, 2023 filed an affidavit from Jane Cleary, and on April 7 they filed an affidavit from Robert Pebbles.[1] We held a conference call with the parties on the afternoon of Monday, April 3, 2023. Following the conference call, we ordered the Department and Tri-County to file responses to the application for temporary supersedeas by April 7. Both the Department and Tri-County filed responses in opposition to the application for a temporary supersedeas. On April 12, 2023, we issued an Order denying the application for temporary supersedeas. This Opinion is in support of that Order.

An application for temporary supersedeas is intended to provide an opportunity for emergency relief "when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas." 25 Pa. Code § 1021.64(a). Our rule on temporary supersedeas emphasizes the temporary nature of the relief by providing that a temporary supersedeas automatically expires in six business days unless otherwise ordered by the Board. 25 Pa. Code § 1021.64(f).

When deciding whether to grant or deny an application for temporary supersedeas, we consider the following factors:

[1] The affidavit from Jane Cleary does not identify who she is, but because she has already testified as a witness for the Appellants in the ongoing merits hearing we know that she is affiliated with CEASRA. The affidavit from Robert Pebbles also does not identify who he is, but we again know from the merits hearing that he is a Liberty Township supervisor.

> (1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.
>
> (2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.
>
> (3) The length of time required before the Board can hold a hearing on the petition for supersedeas.

25 Pa. Code § 1021.64(e).

It is important to note at the outset that the Board does not consider the merits of the appeal in the context of an application for a temporary supersedeas. *Beaver v. DEP*, 2002 EHB 574, 580 n.5 ("We note that while likelihood of success on the merits is a factor in determining whether to grant a supersedeas it is not a factor in determining whether to grant a temporary supersedeas."). A party seeking a temporary supersedeas has a high burden to show that a temporary supersedeas is justified. *Nicholas Meat, LLC v. DEP*, 2021 EHB 96, 97. For purposes of a temporary supersedeas, a party must show that they will suffer immediate and irreparable injury until the Board can hold a hearing on the petition for supersedeas, not irreparable injury until the Board resolves the appeal. *Ponderosa Fibres of Pa. P'ship v. DEP*, 1998 EHB 1004, 1007. "The purpose of a temporary supersedeas is to provide an avenue for immediate relief pending a hearing on a petition for supersedeas. It is only available for this limited window of time." *Clean Air Council v. DEP*, 2017 EHB 132, 142.

In order to grant an application for temporary supersedeas, there needs to be credible evidence of immediate and irreparable injury. *See Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 93 (denying application for temporary supersedeas where not enough evidence supporting injury); *A&M Composting, Inc. v. DEP*, 1997 EHB 965 (denying application for temporary supersedeas where application did not explain how party would be harmed during the time period until the Board could rule on the petition for supersedeas). We have held that general or speculative assertions of irreparable injury without greater specificity are insufficient to support

issuance of a supersedeas, *Mellinger v. DEP*, 2013 EHB 322, 328; *Al Hamilton Contracting Co. v. DER*, 1993 EHB 329, 331, and we see no reason why speculative assertions of injury should be sufficient for the issuance of a *temporary* supersedeas.

The sudden urgency prompting the Appellants' supersedeas filings in this appeal, which has been pending since January 2021, appears to stem from a letter dated March 30, 2023 sent from Tri-County to the Grove City Airport that says without elaboration: "In accordance with Condition 23, Section C of Solid Waste Permit No. 101678, Tri County Landfill, Inc. (TCL) is providing the Grove City Airport with notice of commencement of construction."[2] The Appellants do not provide any additional information with any degree of specificity through affidavits or otherwise on what this "construction" might be. They merely allude to some earthmoving at the site.

However, Tri-County in its response in opposition to the application for temporary supersedeas, which included affidavits, tells us that the work that has commenced and is ongoing at the site is the installation of erosion and sedimentation controls and earthmoving work for the construction of a sedimentation basin.[3] There is no indication that Tri-County has begun receiving new waste or relocating the historic waste at the site. There is no indication of any actual or imminent discharge to waters of the Commonwealth. Beyond the Appellants' unsupported speculation that bad things could happen, we see no evidence of any actual or realistic potential possibility of pollution pending our scheduling of a hearing on the petition for supersedeas, to the extent such a hearing is necessary given the ongoing merits hearing. It is perhaps ironic that the

[2] Notwithstanding the apparent urgency, the Appellants ask that we hold off holding a supersedeas hearing until no sooner than 30 days after the close of the ongoing merits hearing on the waste permit.

[3] The affidavits accompanying Tri-County's response are from David Smith, P.E., an engineer apparently familiar with the construction at the landfill, and Elizabeth Bertha, Environmental Health and Safety Director at Tri-County's parent company. Tri-County's representatives affirm that no waste is expected to be impacted on the site through at least January 31, 2024.

Appellants complain about the construction of a sedimentation basin since the very purpose of a sedimentation basin is to ensure that no uncontrolled pollution of the waters of the Commonwealth takes place. *See Blose v. DEP*, 1999 EHB 638, 640-41 (petition seeking supersedeas for construction of haul roads, sedimentation controls, and other pre-mining activities denied).

In both their petition for supersedeas and application for temporary supersedeas, the Appellants appear to have copied around 60 pages of material from their pre-hearing memorandum's statement of facts submitted in advance of the merits hearing. There is virtually nothing in the application addressing the criteria for a temporary supersedeas or explaining how the Appellants have met those criteria. The Appellants do not identify any specific immediate and irreparable injury they will suffer as a result of anything that is currently happening at the site. The Appellants have not laid out any concrete injury stemming from digging the sedimentation basin that they are suffering now and will continue to suffer until a hearing on the petition for supersedeas.

There is also nothing in the affidavits filed by the Appellants that explains what immediate and irreparable injury is occurring. Jane Cleary's affidavit only makes a vague claim of injury from earthmoving work:

> Earth moving can affect the hydrology of the area, which is already vulnerable based on the facts set forth in Exhibit 158, described below, and the NPDES Fact Sheet, Exhibit 33 to the Appellants' Pre-Hearing Memorandum, which lists the unnamed tributary to Black Run as "impaired" from unknown causes.

(Cleary Affidavit at ¶ 15.) Ms. Cleary has no pertinent expertise. The Appellants do not explain how or in what ways any earthmoving activities conducted by Tri-County are affecting the hydrology at the site or impacting an unnamed tributary to Black Run. There are no specific allegations of injury or quantification of impact to an unnamed tributary to Black Run, or explanation of a credible threat to any waters of the Commonwealth.

Instead of demonstrating that there is any threat of imminent injury to the Appellants or the public, the Appellants digress into a discussion of the merits. For example, they say that Tri-County "cannot be trusted to engage in activities under the Permit in accordance with applicable laws" due to their compliance history. They say that the landfill will violate Liberty Township's obligations under Article I, Section 27 of the Pennsylvania Constitution. They aver that Tri-County is required to obtain a building permit from the Township prior to constructing the landfill. The Appellants' application to some extent discusses irreparable harm per se, claiming that the Department did not act in accordance with applicable laws and regulations when it issued the waste permit to Tri-County. We question whether the temporary supersedeas mechanism was ever intended to address irreparable harm per se, but in any event, whether Tri-County has the necessary permits from the Township, the parties' respective responsibilities under the Pennsylvania Constitution, and whether there is harm per se, are things that are better addressed in the context of likelihood of success on the merits for a supersedeas as opposed to a temporary supersedeas.[4]

In determining whether to grant an application for a temporary supersedeas, we must also consider the length of time required before the Board can hold a hearing on the petition for supersedeas. The Appellants themselves have asked that we hold off scheduling a supersedeas hearing until at least 30 days after the conclusion of the ongoing merits hearing. That request belies any allegation of urgency. It also makes perfect sense given the ongoing hearing on the merits, which makes it impractical to schedule a hearing any sooner in any event.[5] Most

[4] It is interesting to note that the rules regarding temporary supersedeas speak in terms of *injury* rather than harm.

[5] A separate hearing on the supersedeas petition to, among other things, assess the likelihood of success on the merits may prove to be redundant in light of the completion of the merits hearing.

importantly, we do not discern even a suggestion of a threat of either immediate or irreparable injury to the applicants or the public even during the period in question.[6]

Accordingly, on April 12, 2023, we issued the Order that denied the application for a temporary supersedeas, a copy of which is attached.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 17, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

[6] Perhaps implicit in the Appellants' application is a concern that, once work starts at the landfill, it is harder to stop, but absent a supersedeas Tri-County proceeds at its own risk in moving forward with its work at the site.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 12th day of April, 2023, upon consideration of the Appellants' application for temporary supersedeas, and the responses of the Department and Tri-County Landfill in opposition thereto, it is hereby ordered that the application for temporary supersedeas is **denied**. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 12, 2023

c: For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA, INC.	:	
	:	
v.	:	**EHB Docket No. 2023-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: April 19, 2023**

OPINION IN SUPPORT OF ORDER ON
APPLICATION FOR TEMPORARY SUPERSEDEAS

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

Synopsis

The Board denies an application for a temporary supersedeas of an NPDES permit issued in conjunction with the operation of a landfill. The Appellants have not shown through affidavits or otherwise that there is any threat of immediate and irreparable injury to the applicants or that there is a likelihood of injury to the public pending a hearing on the petition for supersedeas.

O P I N I O N

Liberty Township and CEASRA, Inc. (the "Appellants") have appealed the Department of Environmental Protection's (the "Department's") issuance of NPDES Permit No. PA0263664 to Tri-County Landfill, Inc. ("Tri-County") authorizing discharges from Tri-County's landfill to unnamed tributaries to Black Run in Liberty Township, Mercer County. The NPDES permit authorizes three discharges, two of which involve the discharge of stormwater runoff from the construction of landfill cells and earthen berms, and the other a discharge of leachate from a future treatment plant. The Appellants previously appealed a major modification of Tri-County's solid waste management permit. The merits hearing on the waste permit is currently underway, having begun on April 5, 2023, and it is scheduled to continue through the end of April.

The NPDES permit was issued March 10, 2023, to become effective on April 1, 2023. The Appellants filed their appeal of the permit on Friday, March 31, 2023. On the same day, they filed a petition for supersedeas and an application for temporary supersedeas. Although the Appellants' petition for supersedeas and application for temporary supersedeas were not accompanied by affidavits when they were filed as required by 25 Pa. Code § 1021.62(a)(1), *see also* 25 Pa. Code § 1021.64(b) (application for temporary supersedeas shall be accompanied by petition for supersedeas that comports with Section 1021.62), the Appellants on April 4, 2023 filed an affidavit from Jane Cleary, and on April 7 they filed an affidavit from Robert Pebbles.[1] We held a conference call with the parties on the afternoon of Monday, April 3, 2023. Following the conference call, we ordered the Department and Tri-County to file responses to the application for temporary supersedeas by April 7. Both the Department and Tri-County filed responses in opposition to the application for a temporary supersedeas.

At the same time, the Appellants also filed a petition for supersedeas and an application for temporary supersedeas in their appeal of the waste permit. On April 12, 2023, we issued Orders denying the applications for temporary supersedeas in both the waste permit appeal and the NPDES permit appeal. On April 17, we issued an Opinion in support of our Order denying the Appellants' application for temporary supersedeas in the waste appeal, which explained that the Appellants did not show any evidence of immediate or irreparable injury as required for a temporary supersedeas. *See Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L (Opinion in Support of Order on Application for Temporary Supersedeas, Apr. 17, 2023). For this same

[1] Although the affidavits from Jane Cleary and Robert Pebbles do not identify who they are, we know from their testimony at the merits hearing on the waste permit that Jane Cleary is a member of CEASRA, Inc. and Robert Pebbles is a Liberty Township supervisor.

reason, we have denied the application for temporary supersedeas of the NPDES permit. This Opinion addresses the application for a temporary supersedeas of the NPDES permit.

An application for temporary supersedeas is intended to provide an opportunity for emergency relief "when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas." 25 Pa. Code § 1021.64(a). Our rule on temporary supersedeas emphasizes the temporary nature of the relief by providing that a temporary supersedeas automatically expires in six business days unless otherwise ordered by the Board. 25 Pa. Code § 1021.64(f).

When deciding whether to grant or deny an application for temporary supersedeas, we consider the following factors:

> (1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.
>
> (2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.
>
> (3) The length of time required before the Board can hold a hearing on the petition for supersedeas.

25 Pa. Code § 1021.64(e).

It is important to note at the outset that the Board does not consider the merits of the appeal in the context of an application for a temporary supersedeas. *Beaver v. DEP*, 2002 EHB 574, 580 n.5 ("We note that while likelihood of success on the merits is a factor in determining whether to grant a supersedeas it is not a factor in determining whether to grant a temporary supersedeas."). A party seeking a temporary supersedeas has a high burden to show that a temporary supersedeas is justified. *Nicholas Meat, LLC v. DEP*, 2021 EHB 96, 97. For purposes of a temporary supersedeas, a party must show that they will suffer immediate and irreparable injury until the Board can hold a hearing on the petition for supersedeas, not irreparable injury until the Board resolves the appeal. *Ponderosa Fibres of Pa. P'ship v. DEP*, 1998 EHB 1004, 1007. "The purpose

of a temporary supersedeas is to provide an avenue for immediate relief pending a hearing on a petition for supersedeas. It is only available for this limited window of time." *Clean Air Council v. DEP*, 2017 EHB 132, 142.

In order to grant an application for temporary supersedeas, there needs to be credible evidence of immediate and irreparable injury. *See Global Eco-Logical Servs., Inc. v. DEP*, 1999 EHB 93 (denying application for temporary supersedeas where not enough evidence supporting injury); *A&M Composting, Inc. v. DEP*, 1997 EHB 965 (denying application for temporary supersedeas where application did not explain how party would be harmed during the time period until the Board could rule on the petition for supersedeas). We have held that general or speculative assertions of irreparable injury without greater specificity are insufficient to support issuance of a supersedeas, *Mellinger v. DEP*, 2013 EHB 322, 328; *Al Hamilton Contracting Co. v. DER*, 1993 EHB 329, 331, and we see no reason why speculative assertions of injury should be sufficient for the issuance of a *temporary* supersedeas.

Once again, the Appellants have not demonstrated through their application or their affidavits any immediate and irreparable injury that justifies the extraordinary relief of the issuance of a temporary supersedeas. The Appellants assert that the NPDES permit does not demonstrate that there will not be any adverse impacts to the unnamed tributary to Black Run in terms of hydrology, water quality, and water pollution. But for purposes of a temporary supersedeas, the Appellants have it backwards. The onus is on the Appellants to show with credible evidence that there is a reasonable likelihood that there will be adverse impacts to the unnamed tributary to Black Run that constitute immediate and irreparable injury in the time period before a supersedeas hearing can be held. Broad and unsubstantiated claims that a permit is not adequately protective of the environment without demonstrating why are insufficient for a temporary supersedeas.

After their initial supersedeas filings but on the same day, the Appellants filed an additional exhibit to their application that is a letter dated March 30, 2023 sent from Tri-County to the Grove City Airport. The letter provides: "In accordance with Condition 23, Section C of Solid Waste Permit No. 101678, Tri County Landfill, Inc. (TCL) is providing the Grove City Airport with notice of commencement of construction." This same letter was also supplied with the Appellants' supersedeas filings in the waste permit appeal. However, as we explained in our Opinion denying the temporary supersedeas of the waste permit, *see* Slip Opinion at 4-5, the Appellants do not provide any additional information with any degree of specificity through affidavits or otherwise on what this "construction" might be or what immediate and irreparable injuries might follow.

Tri-County in its response in opposition to the application for temporary supersedeas, which included affidavits, tells us that the work that has commenced and is ongoing at the site is the installation of erosion and sedimentation controls and earthmoving work for the construction of a sedimentation basin that will help manage stormwater on the site.[2] Tri-County says the sedimentation basin is not expected to be completed until the end of June 2023 and there will be no discharge of stormwater from the basin under the NPDES permit until construction is finished. Tri-County also says the treatment plant that will have a discharge related to treated leachate and wastewater under the NPDES permit has not yet been built. Tri-County avers that it still needs to prepare and submit an application for a water quality management permit, and then be issued that permit by the Department, before the plant can be built. Tri-County estimates that any discharge from the treatment plant may be at least two years down the road.

[2] The affidavits accompanying Tri-County's response are from David Smith, P.E., an engineer apparently familiar with the construction at the landfill, and Elizabeth Bertha, Environmental Health and Safety Director at Tri-County's parent company. Tri-County's representatives affirm that no waste is expected to be impacted on the site through at least January 31, 2024.

The Appellants have not provided any evidence to question Tri-County's representations regarding the timeline of its work. There is no indication of any actual or imminent discharge to waters of the Commonwealth, including the unnamed tributary to Black Run, from either the sedimentation basin or the leachate treatment plant. There is also no support in the Appellants' temporary supersedeas application or affidavits for their claim that the landfill is currently polluting waters of the Commonwealth. Beyond the Appellants' unsupported speculation that bad things could or might be happening at the site, we see no evidence of any actual or realistic potential possibility of pollution pending our scheduling of a hearing on the petition for supersedeas.

One of the few other assertions of injury in the Appellants' application and affidavits is a claim that they have been harmed because they have had to prepare their appeal of the NPDES permit and supersedeas filings while also preparing for the merits hearing on the waste permit. This alleged injury is simply not grounds for a temporary supersedeas. For a temporary supersedeas in a third-party appeal of a permit, the focus generally should be on the immediate and irreparable injury to the environment and its use thereof by the applicant and the public, not on any administrative burden in preparing for a hearing in a related appeal.

The rest of the Appellants' contentions are for the most part all arguments on the merits of the issuance of the NPDES permit, not credible allegations of immediate and irreparable injury. This is exemplified by the fact that the Appellants have copied the objections from their notice of appeal into their application for temporary supersedeas, almost all of which are geared toward merits claims as opposed to any claims of ongoing immediate and irreparable harm from anything happening at the site. For instance, the Appellants contend the Department exceeded its authority in issuing the permit. They say that Tri-County will discharge to waters of the Commonwealth

that the Appellants claim are hydrologically connected to waters in West Virginia and Ohio. They argue that in issuing the permit the Department acted contrary to a 1991 memorandum of agreement, attached to their application, between the Department and the Environmental Protection Agency that appears to address the Department's role in administering the NPDES program in Pennsylvania. The Appellants do not fully explain this argument, but it is nonetheless an argument on the merits. The Appellants do not explain how this memorandum is relevant to any immediate and irreparable injury suffered by the Appellants and required for the issuance of a temporary supersedeas.

The Appellants argue that there is per se irreparable harm because the Department did not comply with the statutory and regulatory requirements in issuing the NPDES permit. They cite 25 Pa. Code § 105.21(a)(4), a regulation that appears to apply to dam safety and encroachments permits, not the NPDES permit at issue here, which says a proposed project must be consistent with the environmental rights and values secured by Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art. I, § 27, and with the duties of the Commonwealth as trustee to conserve and maintain the Commonwealth's public natural resources. As we held in our Opinion denying the temporary supersedeas of the waste permit, *see* Slip Opinion at 6, irreparable harm per se, and the Department's constitutional duties under the Environmental Rights Amendment, are issues better addressed in the context of likelihood of success on the merits for a supersedeas as opposed to a temporary supersedeas.

The Appellants also allege that the Department failed to give adequate public notice of the NPDES permit and that this is an irreparable injury because it interferes with the public's ability to identify and potentially appeal the permit. This argument is somewhat belied by the fact that the Appellants here evidently had notice of the NPDES permit and filed their appeal before the

permit became effective. Nevertheless, the adequacy of public notice is another merits question better suited to a hearing on the petition for supersedeas, not grounds for a temporary supersedeas. *See PRIZM Asset Mgmt. Co. v. DEP*, 2005 EHB 819 (granting in part petition for supersedeas and requiring Department to re-notice permit).

Finally, in determining whether to grant an application for a temporary supersedeas, we must also consider the length of time required before the Board can hold a hearing on the petition for supersedeas. As in their supersedeas filings in the waste appeal, the Appellants have asked that we hold off scheduling a supersedeas hearing until at least 30 days after the conclusion of the ongoing merits hearing in the waste appeal. That request undermines any allegation of urgency. It also makes perfect sense given the ongoing hearing on the merits for the waste permit, which makes it impractical to schedule a hearing any sooner in any event. Most importantly, we again do not discern even a suggestion of a threat of either immediate or irreparable injury to the applicants or the public even during the period in question.[3]

Accordingly, on April 12, 2023, we issued the Order that denied the application for a temporary supersedeas, a copy of which is attached.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 19, 2023

[3] Perhaps implicit in the Appellants' application is a concern that, once work starts at the landfill, it is harder to stop, but absent a supersedeas Tri-County proceeds at its own risk in moving forward with its work at the site.

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
(*via electronic mail*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA, INC.	:	
	:	
v.	:	**EHB Docket No. 2023-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 12th day of April, 2023, upon consideration of the Appellants' application for temporary supersedeas, and the responses of the Department and Tri-County Landfill in opposition thereto, it is hereby ordered that the application for temporary supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: April 12, 2023

c: **For the Commonwealth of PA, DEP:**
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
(*via electronic mail*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

US TRINITY SERVICES, LLC, d/b/a TRINITY ENERGY SERVICES	:	
v.	:	**EHB Docket No. 2022-017-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 1, 2023**

AMENDED OPINION AND ORDER ON US TRINITY SERVICES' MOTION FOR SUMMARY JUDGMENT AND DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board finds that spent horizontal directional drilling fluids resulting from the construction of a gas pipeline fall within the definition of "solid waste" in the Solid Waste Management Act. The Board also finds that the spent drilling fluids must be managed as residual waste pursuant to Section 78a.68a(k) of the oil and gas regulations. As to the question of whether spent drilling fluids and drill cuttings from pipeline construction fall within the definition of residual waste, we find that there are questions of law and fact that must be more fully developed and, therefore, summary judgment is not appropriate on this issue.

O P I N I O N

Background

This matter involves an appeal by US Trinity Services d/b/a Trinity Energy Services (Trinity), challenging a civil penalty assessment issued by the Department of Environmental Protection (Department). Trinity is an oil and gas pipeline contractor and was the prime contractor for Sunoco Pipeline, L.P in connection with the construction and installation of the Mariner East

2 (ME2) pipeline in Westmoreland, Cambria and Indiana Counties from approximately October 2015 to December 2020.[1] As part of its work on the ME2 pipeline, Trinity engaged in horizontal directional drilling, a technique that utilizes directional drilling fluid that acts as a lubricant and performs other functions. Use of this technique generates spent horizontal directional drilling fluids (spent drilling fluids) and drill cuttings that must be disposed of by the operator.

Trinity initially arranged to have its spent drilling fluids transported to a Department-authorized processing facility for solidification prior to disposal. However, beginning in July 2017 Trinity began to solidify the spent drilling fluids on its own without first seeking and acquiring Department authorization. Trinity utilized a site in Westmoreland County (designated as Site A) and a site in Cambria County (designated as Site B) to receive spent drilling fluids from pipeline installation activities and to solidify the material with Portland cement and mulch before arranging for its transport to a landfill for disposal. The Department did not authorize the use of Sites A and B for the purpose of solidifying the spent drilling fluids. Additionally, on September 27, 2017, Trinity transported and stored drill cuttings from the construction of the ME2 pipeline at a site in Indiana County (designated as Site C).

On February 18, 2022, the Department issued an Assessment of Civil Penalty (civil penalty assessment) in the amount of $50,000, alleging that Trinity transported spent drilling fluids to Sites A and B in Westmoreland and Cambria Counties and processed those materials in violation of the Solid Waste Management Act and the underlying regulations. The Department further alleged that Trinity failed to properly characterize the waste prior to its disposal and that it transported and stored drill cuttings at Site C in Indiana County in violation of the residual waste regulations.

[1] The facts set forth in the Background are taken from the parties' Statements of Undisputed Material Facts.

Trinity has moved for summary judgment and the Department has moved for partial summary judgment. Both parties have filed responses and replies. This matter is now ripe for disposition.

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. 25 Pa. Code § 1021.94a; Pa.R.C.P. No. 1035.1-1035.2; *Muth v. DEP*, 2022 EHB 337, 338-39; *Holbert v. DEP*, 2000 EHB 796, 807- 808. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the nonmoving party. *Muth, supra*; *Stedge v. DEP*, 2015 EHB 31, 33. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Discussion

The Department's civil penalty assessment alleges the following violations:

1) Trinity engaged in the unlawful processing of solid waste and operation of a solid waste transfer facility without a permit at Sites A and/or B. (Assessment of Civil Penalty, para. G-O.)
2) Trinity failed to properly characterize solidified drilling fluid waste as residual waste prior to its disposal. (Assessment of Civil Penalty, para. P-T.)
3) Trinity engaged in the unlawful storage and disposal of residual waste, in the form of drill cuttings, at Site C. (Assessment of Civil Penalty, para. U-X.)

Solid Waste

Although both parties' motions focus on the question of what constitutes residual waste, we believe it is important to look first at the broader question of what constitutes "solid waste." The Solid Waste Management Act, Act of 1980-97, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003 (SWMA) defines "solid waste" as "any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials." *Id.* at § 6018.103 (Definition of "solid waste.") Although the definition of "solid waste" excludes "drill cuttings," this exemption pertains only to drill cuttings generated during the drilling of an oil or gas well where the cuttings are disposed of at the well site. No such exemption applies to drill cuttings generated during pipeline construction. *Id*. at § 6018.103 (Definition of "solid waste" and "drill cuttings.") A plain reading of the statutory language leads us to conclude that spent drilling fluids and drill cuttings resulting from pipeline construction activities constitute "solid waste." Trinity acknowledges that the spent drilling fluids and drill cuttings from its operation were discarded materials that were sent to Sites A, B and C as a prelude to disposal. (Trinity's Statement of Undisputed Material Facts, para. 11, 13; Brief in Support of Trinity's Motion for Summary Judgment, p. 6.) There is no factual dispute that these materials are "waste."

The Department's motion focuses only on Trinity's activities with regard to the spent drilling fluids. There appears to be no factual dispute that Trinity engaged in the processing and transport of these waste materials. Trinity admits that it received spent drilling fluids from pipeline installation activities at Sites A and B, solidified these materials for disposal without prior authorization from the Department, and arranged for their transport to a landfill. (Trinity's Statement of Undisputed Material Facts, para. 10-14.) Pursuant to Section 610 of the SMWA, a permit is required for the processing and transport of solid waste. 35 P.S. § 6018.610(2) and (4).

Because we find that spent drilling fluids from pipeline construction are solid waste, Trinity's unpermitted activities with regard to these materials were a violation of the SWMA. Therefore, to the extent the Department bases its civil penalty assessment on the unpermitted processing and transport of solid waste by Trinity, we find that the Department is entitled to judgment on this issue.

Residual Waste

The term "solid waste" encompasses various categories of waste, including "residual waste." The Department's civil penalty assessment alleges that Trinity failed to properly characterize solidified spent drilling fluid as residual waste. It further alleges that Trinity engaged in the unlawful storage of residual waste by storing drill cuttings at Site C without authorization. For the reasons set forth below, we find that neither party has definitively answered the question of whether spent drilling fluid and drill cuttings constitute residual waste.

"Residual waste" is defined in the SWMA as the following:

> (i) Any garbage, refuse, other discarded material or other waste including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, mining and agricultural operations.
>
> (ii) Any sludge from an industrial, mining or agricultural water supply treatment facility, wastewater treatment facility or air pollution control facility, provided that it is not hazardous.

Id. at § 6018.103 (Definition of "residual waste.") The regulations define "residual waste" as follows:

> *Residual waste*—Garbage, refuse, other discarded material or other waste, including solid, liquid, semisolid or contained gaseous materials resulting from industrial, mining and agricultural operations and sludge from an industrial, mining or agricultural water supply treatment facility, wastewater treatment facility or air pollution control facility, if it is not hazardous. The term does not

> include coal refuse as defined in the Coal Refuse Disposal Control Act. The term does not include treatment sludges from coal mine drainage treatment plants, disposal of which is being carried on under and in compliance with a valid permit issued under the Clean Streams Law.

25 Pa. Code § 287.1. Trinity points out that neither definition includes spent drilling fluids or drill cuttings generated during pipeline construction. Trinity also directs us to the Department's website which includes a listing of examples of "residual waste." (Exhibit 5 to Trinity's Motion for Summary Judgment.) The rather extensive list does not include spent drilling fluids or drill cuttings as an example of residual waste.

Additionally, Trinity argues that these materials fail to meet the second prong of the definition of residual waste because they are not materials "resulting from an industrial, mining or agricultural operation." While it is clear that pipeline construction is not mining or an agricultural operation, the question then becomes is it an industrial operation? Although the SWMA does not define "industrial operation," it defines "industrial establishment" as "[a]ny establishment engaged in manufacturing or processing, including, but not limited to factories, foundries, mills, processing plants, refineries, mines and slaughterhouses." 35 P.S. § 6018.103 (Definition of "industrial establishment.") Trinity argues that pipeline construction is neither manufacturing nor processing and, therefore, cannot be classified as an industrial operation.

It is the Department's contention that both spent drilling fluids and drill cuttings are residual waste. However, its motion focuses solely on Trinity's activities with regard to spent drilling fluids. The Department argues that spent drilling fluids fall within the definition of residual waste, i.e., "discarded material or other waste…resulting from industrial…operations." 35 P.S. § 6018.103; 25 Pa. Code § 287.1. In support of its contention that Trinity's operation is "industrial," it includes photographs of Sites A and B where the processing of spent drilling fluids took place.

Without conceding its position that spent drilling fluids constitute "residual waste," the Department acknowledges that the SWMA's classification of waste, including residual waste, "lack[s] some precision." (Department's Brief in Support of its Motion for Partial Summary Judgment, p. 8.) Therefore, it argues, "regulations have been promulgated to more specifically define how various wastes are to be regulated." (*Id*.) Specifically, the Department directs us to Section 78a.68a(k) of the oil and gas regulations which governs horizontal directional drilling for oil and gas pipelines. It states as follows: "Horizontal directional drilling fluid returns and drilling fluid discharges shall be managed in accordance with Subpart D, Article IX (relating to residual waste management)." 25 Pa. Code § 78a.68a(k). There is no question that Section 78a.68a(k) clearly provides the Department with authority to require spent drilling fluids to be managed as residual waste. Therefore, to the extent that Trinity failed to manage its spent drilling fluids in compliance with Subpart D, Article IX (dealing with residual waste), the Department is entitled to summary judgment on this issue.

Trinity appears to concede this point. In its response brief, it states that if the Board concludes the spent drilling fluids were residual waste, then the Department is entitled to summary judgment, and "the same is true if the Board concludes that the spent horizontal directional drilling fluids were not residual waste but that 25 Pa. Code § 78a.68a(k) required that they be managed as such in this specific matter." (Trinity's Brief in Support of Response, p. 2.) However, Trinity argues that the Department should not be able to rely on 25 Pa. Code § 78a.68a(k) in this matter because the civil penalty assessment does not reference this section of the regulations. Trinity asserts that the Department's reliance on Section 78a.68a(k) violates its right to due process.

We disagree that Trinity's due process rights will be violated by the application of 25 Pa. Code § 78a.68a(k) to this matter. First, Trinity has provided no case law in support of its

proposition that the Department is precluded from relying on legal authority not set forth in its initial action. Second, we have held on numerous occasions that a party's right to due process is met by the opportunity to appeal a Department decision to the Board. *Kiskadden v. DEP*, 2015 EHB 377, 427-28; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 247; *Kiskadden v. DE*P, 2014 EHB 642, 643-44. As the Department points out, the Board satisfies due process by including findings in its adjudication. The Board's responsibility in this matter is to make a *de novo* determination of whether the Department had the authority to issue the civil penalty assessment and whether that assessment is supported by the law and the facts. *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32. We find no basis for excluding Section 78a.68a(k) in our consideration of this matter.

Because we find that 25 Pa. Code § 78a.68a(k) is applicable here, we need not reach the question of whether spent drilling fluids fall within the definition of residual waste. Regardless of how this type of waste is classified, there is no question that it must be managed as residual waste. We believe that a determination of whether spent drilling fluids are, in fact, residual waste involves questions of law and fact that need to be more fully developed. For instance, if spent drilling fluids are residual waste, we question why the Department promulgated a regulation saying they should be *managed* as a residual waste. Likewise, there are questions of law and fact regarding the issue of whether drill cuttings from pipeline construction fall into the classification of residual waste. These questions need to be more fully developed and are not appropriate for resolution in the context of the parties' summary judgment motions.

In accordance with our findings herein, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

US TRINITY SERVICES, LLC, d/b/a TRINITY ENERGY SERVICES	:	
v.	:	**EHB Docket No. 2022-017-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 1st day of May, 2023, it is hereby ordered as follows:

1) Trinity's Motion for Summary Judgment is denied.

2) The Department's Motion for Partial Summary is granted in part as follows:

   a) The spent drilling fluids at issue in this appeal are solid waste.

   b) Trinity engaged in the processing of solid waste and operation of solid waste transfer facilities at Sites A and B without authorization from the Department.

   c) Trinity failed to manage the spent drilling fluids at issue in this appeal in accordance with Subpart D, Article IX of the Department's regulations (dealing with residual waste management).

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: May 1, 2023

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

For the Commonwealth of PA, DEP:
John Herman, Esquire
Anna Zalewski, Esquire
(via electronic filing system)

For Appellant:
Martin R. Siegel, Esquire
Erica Townes, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLAS SCOTT and LINDA MARIE SCOTT	:	
v.	:	**EHB Docket No. 2022-075-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RICE DRILLING B, LLC, Permittee	:	**Issued: May 15, 2023**

OPINION AND ORDER ON
MOTION TO DISMISS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Permittee's motion to dismiss this appeal as moot is denied. Because the Appellants have raised a claim that the Department of Environmental Protection's issuance of permits for unconventional gas wells drilled on the Appellants' property constitutes a taking, this matter is not moot. The Board is the tribunal charged with adjudicating questions of whether a Department action has resulted in a taking.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Douglas Scott and Linda Marie Scott (the Scotts) challenging unconventional gas well permits issued to Rice Drilling B, LLC (Rice) by the Department of Environmental Protection (Department). According to the parties' filings, Rice applied for the unconventional gas well permits to drill wells known as Corsair 1H, 3H, 5H, 7H and 9H (the 2022 wells) located on property owned by the Scotts in Franklin Township, Greene County. The 2022 wells are located

on an existing well pad constructed in 2019 and in line with six producing Corsair wells drilled on the property in 2019.

According to documents provided with the Notice of Appeal, Rice and the Scotts entered into an agreement authorizing the drilling of wells on the Scotts' property. (Notice of Appeal, Attachment 1, Ex. F.) On or about April 11, 2022, Rice gave the Scotts notice of their permit applications to drill the 2022 wells. (Notice of Appeal, Attachment 1, para. 4.) On April 22, 2022, the Scotts requested that the Department deny the applications based on the following objections: 1) the Scotts owned multiple workable coal seams through which the wells would penetrate, 2) the 2022 wells were located within 500 feet of an operating gas well, and 3) Rice failed to obtain proper consent from the Scotts as required by Section 507 of the Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. 1069, *as amended*, 58 P.S. §§ 501-518 (Coordination Act). (Notice of Appeal, Attachment 1, para. 5 and Ex. B.)

On August 23, 2022, the Department issued the well permits, and the Scotts filed this appeal. The Scotts did not seek a supersedeas of the permit issuances.

The matter now before the Board is a motion to dismiss filed by Rice asserting that the matter is moot because the 2022 wells have been drilled and, therefore, there is no relief the Board can provide. The Department filed a memorandum of law in support of Rice's motion. The Scotts have filed a response opposing the motion, and Rice filed a reply. This matter is now ripe for disposition.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Muth v. DEP*, 2022 EHB 262, 264. A motion to dismiss may be granted only where the moving party is entitled to judgment as a matter of law. *Id*; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155 (citing *Burrows v. DEP*, 2009 EHB 20, 22); *Hopkins v. DEP*, 2022

EHB 103, 104. A motion to dismiss may only be granted when a matter is free from doubt. *Downingtown*, 2022 EHB at 155 (citing *Bartholomew v. DEP*, 2019 EHB 515, 517).

In its motion Rice argues that the Scotts' appeal should be dismissed on the basis of mootness. "Mootness is a prudential limitation related to justiciability, " and so is generally an issue that is properly resolved by a motion to dismiss. *M & M Stone Co. v. DEP*, 2009 EHB 495, 500. "A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Horsehead Resource Development Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd* 780 A.2d 856 (Pa. Cmwlth. 2001). There are exceptions to mootness, including where the action complained of is capable of repetition but likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision by the Board. *Consol Pennsylvania Coal Co. LLC v. DEP*, 2015 EHB 48, 56. The existence of any of these circumstances "may justify" the Board retaining jurisdiction of the matter. *Id.* (citing *Ehmann v. DEP*, 2008 EHB 386, 390.)

Discussion

Rice and the Department assert that the sole basis for the Scotts' claims is their contention that the coal seams underlying their property are workable and, therefore, they should have been afforded certain rights under the Coordination Act. The Coordination Act imposes certain requirements on gas wells that penetrate a workable coal seam. 58 P.S. § 503(a). In particular, Section 507 of the Coordination Act sets forth spacing requirements, and subsections (b) through (d) address circumstances where consent of the owner of the workable coal seam is required. *Id.* at § 507(b)-(d).

A "workable coal seam" is defined as follows:

> (1) A coal seam in fact being mined in the area in question under this act by underground methods.
>
> (2) A coal seam which, in the judgment of the Department of Environmental Protection, can reasonably be expected to be mined by underground methods.

Id. at § 502. The Department has developed a technical guidance document to assist in making a determination of what constitutes a "workable coal seam." (Notice of Appeal, Attachment 1, Exhibit C, p. 3.) In their Notice of Appeal and in their motion, the Scotts assert that the Department's determination that their coal seams were not "workable," and thus not subject to the protections of the Coordination Act, was arbitrary and capricious.

Rice and the Department argue that the Scotts' claims that they are entitled to protections under the Coordination Act are moot because the wells have been drilled and the surrounding coal has been sterilized. According to a declaration provided by Rice with its motion, Rice spud the 2022 wells on or about August 26, 2022 and completed drilling through the coal seams on the Scott's property between mid-September 2022 and mid-October 2022. (Rice's Memorandum of Law, Ex. 2, para. 4 and 6.) Rice and the Department assert that because the wells have been drilled there is no relief the Board can grant to the Scotts. They further argue that no exception to the mootness doctrine applies here.

The Scotts dispute that the appeal is moot. They argue that the issuance of the permits and the Department's determination that the coal seams are not workable presents a live dispute. In particular, they contend that if the Board finds that the coal seams through which the gas wells have been drilled are "workable" coal seams, that determination will impact Rice's operations and the Department's regulation of the wells going forward. They further argue that even if the Board determines that the claims are moot they nonetheless fall within the following exceptions to the mootness doctrine: 1) the Department's permitting process raises issues of public concern; 2) this

is a matter that is capable of repetition yet evading review as evidenced by the fact that the permit was issued on August 23, 2022 and the wells were spud just three days later on August 26, 2022; and 3) the Scotts will be deprived of a determination by the Board as to whether the Department erred in finding their coal seams unworkable. Additionally, the Scotts assert that even if we find that this matter is technically moot, "the Board has the authority upon its own measure of prudence to proceed." (Appellants' Memorandum of Law in Opposition, p. 12) (citing *Ehmann*, 2008 EHB at 388).

In its reply, Rice disputes that the Coordination Act imposes continuing obligations on it or the Department that prevent this matter from being moot. Rice contends that the Scotts are merely asking for an advisory opinion on how the Department should handle future permitting actions. As to the Scotts' claim of exceptions to the mootness doctrine, Rice argues that none of the stated exceptions apply. With regard to the public policy exception, Rice argues that the Department's decision in this matter was fact-based and unlikely to have far-reaching impact. As to the Scotts' claim that this issue is capable of repetition yet evading review, Rice points out that the Scotts could have sought a temporary supersedeas to prevent the drilling of the wells but chose not to do so. As to the Scotts' claim that they will suffer a detriment if they are unable to have their issues heard by the Board, Rice argues that the Scotts have failed to demonstrate how they will be affected. As Rice has continuously pointed out, the wells have been drilled and the coal seams are sterilized and that cannot be undone.

Based on our review of the Notice of Appeal and the parties' filings, we are not convinced that this appeal is moot. In their Notice of Appeal, the Scotts have asserted that the Department's issuance of the permits constitutes a taking. (Notice of Appeal, Attachment 1, para. 2 and 59.) As the Commonwealth Court has held, the Board has jurisdiction to determine whether a taking has

occurred in matters involving an action of the Department. *Beltrami Enterprises v. Department of Environmental Resources*, 632 A.2d 989 (Pa. Cmwlth. 1993), *petition for allowance of appeal denie*d, 645 A.2d 1318 (Pa. 1994).

However, Rice argues that to the extent the Scotts may seek damages for their alleged lost property interests, there is no relief that the Board can provide because the Board cannot award damages. (Rice Reply, p. 7) (citing *Tri-County Realty Co. v. DEP*, 2015 EHB 517, 529). While we agree with Rice that the Board cannot award damages in this matter, nonetheless "[i]t is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking." *Marshall v. DEP*, 2019 EHB 352, 354 (citing *Domiano v. Department of Environmental Protection*., 713 A.2d 713 (Pa. Cmwlth. 1998); *Davailus v. DEP*, 2003 EHB 101; *Sedat, Inc. v. DEP*, 2000 EHB 927). As the court held in *Beltrami*:

> It is irrelevant that the EHB does not have the power to award damages. Whether a court has been empowered to hear or adjudicate a controversy and whether a court has the power to grant the particular relief sought in a case are separate and distinct questions.

632 A.2d at 993. Following the Board's initial determination of whether a taking has occurred, "[t]he jurisdiction of the courts of common pleas under the Eminent Domain Code might then be invoked in order to determine the amount of damages, if any, that might have occurred as a result of the taking. . ." *Id. (*quoted in *Domiano,* 713 A.2d at 715).

Therefore, given that the Scotts have raised an objection in their Notice of Appeal asserting that the Department's action constituted a taking, we find that this matter is not moot, and we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DOUGLAS SCOTT and LINDA MARIE SCOTT	:	
	:	
v.	:	**EHB Docket No. 2022-075-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RICE DRILLING B, LLC, Permittee	:	

O R D E R

AND NOW, this 15th day of May, 2023, it is hereby ordered that Rice's motion to dismiss is **denied** for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: May 15, 2023

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

For the Commonwealth of PA, DEP:
Michael J. Heilman, Esquire
Forrest M. Smith, Esquire
Anna Zalewski, Esquire
(via electronic filing system)

For Appellant:
Joy Llaguno, Esquire
Philip Hook, Esquire
(via electronic filing system)

For Permittee:
Megan S. Haines, Esquire
Casey Snyder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2022-054-B**
	:	**(Consolidated with 2022-046-B)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WASHINGTON	:	**Issued: May 23, 2023**
COUNTY LAND RESOURCES INC.,	:	
Permittee	:	

OPINION AND ORDER ON APPELLANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND ON THE DEPARTMENT'S AND PERMITTEE'S MOTIONS FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies the Motions for Partial Summary Judgment filed by the Appellant and further denies the Department's and Permittee's Motions for Summary Judgment where there are disputed material facts of record concerning the nature of the underground hours worked and whether those operations conducted constituted underground mining operations in accordance with the regulatory definition resulting in no party having a clear case for summary judgment.

O P I N I O N

Background

Brian Telegraphis ("Mr. Telegraphis") owns and resides in his home located at 1570 Walters Street, Monongahela, PA 15063 ("the Dwelling"). The Dwelling is partially located above the Maple Creek Mine, an inactive bituminous coal mine. The Maple Creek Mine was operated by Maple Creek Mining, Inc. from 1995 to 2021, and is currently operated by its successor,

Washington County Land Resources, Inc ("Permittee"). The Department received a subsidence damage claim from Mr. Telegraphis on January 11, 2022 ("Claim"). On June 27, 2022, Mr. Telegraphis filed a Notice of Appeal with the Environmental Hearing Board ("the Board") alleging that the Department failed to issue a timely determination on his Claim. On July 28, 2022, the Department issued its determination after completing its investigation of Mr. Telegraphis' Claim and concluded that his Claim was not supported because the Dwelling was not covered under the provisions of the Bituminous Mine Subsidence & Land Conservation Act ("the Act").[1] Mr. Telegraphis filed his second Notice of Appeal on August 3, 2022, after the Department denied his Claim. The Board consolidated Mr. Telegraphis' two appeals on August 4, 2022, under Docket No. 2022-054-B.

On October 26, 2022, Mr. Telegraphis filed a Motion for Partial Summary Judgment and to Limit (Narrow) Issues and a Brief in Support thereto, and subsequently filed a Second Motion for Partial Summary Judgment and to Limit (Narrow) Issues on November 11, 2022 (collectively, the "Motions for Partial Summary Judgment").[2] The Department and the Permittee both filed their Responses to the Motions for Partial Summary Judgment on December 14, 2022, and contemporaneously filed their own respective Motions for Summary Judgment that same day. Mr. Telegraphis did not file a reply brief to either the Department's or the Permittee's Responses to his Motions for Partial Summary Judgment.

Mr. Telegraphis filed a Motion to Withdraw and/or Discontinue Two Issues Raised in Appeal ("Motion to Discontinue Issues") on December 20, 2022, that essentially requested the

[1] Mr. Telegraphis also filed a Mine Subsidence Insurance Fund Damage Claim Notice with the Department under his Mine Subsidence Insurance policy. The Mine Subsidence Insurance Fund supported Mr. Telegraphis' Mine Insurance claim and paid Mr. Telegraphis $400,000, the limit of his insurance policy.
[2] Prior to his Motions for Partial Summary Judgment, Mr. Telegraphis filed a Petition to Limit Issues on October 21, 2022. Mr. Telegraphis filed a Motion to Withdraw and/or Discontinue the Petition on January 4, 2023, which the Board granted.

Board to discontinue the two issues that he raised in his first Notice of Appeal. Neither the Department nor the Permittee opposed Mr. Telegraphis' request to withdraw the issues set forth in his Motion to Discontinue Issues. The Board granted the Motion to Discontinue Issues on January 5, 2023.

Mr. Telegraphis filed his Responses and Briefs in Opposition to both the Department's and Permittee's Motions for Summary Judgment on January 5, 2023, followed by Amendments to his Briefs. The Department and the Permittee submitted their Reply Briefs in Support of their respective Motions for Summary Judgment on January 20, 2023. All three of the parties have now moved for summary judgment on the issue of whether Mr. Telegraphis' Dwelling is covered under the Act. The Department and the Permittee assert that mining finished in May 2003 and Mr. Telegraphis' home was not built until October 2003, at the earliest. They argue that the only structures that qualify for relief from subsidence damage under the Act are those that were in place at the time that coal was being extracted from the mine. Mr. Telegraphis argues that the Act and the corresponding regulations impose no temporal limitation on when a dwelling must have been constructed in order to be eligible for relief, and that activity at the mine continued after his Dwelling was constructed.

Standard of Review

In order to prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact in dispute and that they are entitled to judgment as a matter of law on the basis of the record, including the pleadings, depositions, answers to interrogatories, and other related documents. Pa.R.Civ.P. 1035.1-1035.2; *Clearfield Cnty. v. DEP*, 2021 EHB 144, 146; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the

non-moving party. *Sunoco Pipeline, L.P. v. DEP*, 2021 EHB 43, 45; *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *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

The Bituminous Mine Subsidence & Land Conservation Act ("the Act") provides a legal mechanism for persons suffering subsidence damage to structures on their property as a result of "underground mining operations" to have that damage repaired by the coal mine operator or receive compensation from the operator for the damage. For "dwellings" like the Telegraphis home, the Act provides:

> Whenever **underground mining operations** conducted under this act cause damage to any of the following surface buildings overlying or in the proximity of the mine:
> ….
> (3) dwellings used for human habitation and permanently affixed appurtenant structures or improvements…
> …
> the operator of such coal mine shall repair such damage or compensate the owner of such building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable.

52 P.S. § 1406.5d(a) (emphasis added).[3] The corresponding regulation in Chapter 89 contains similar language:

[3] We have excluded from our quotation the remaining portion of 52 P.S. § 1406.5d(a)(3), which was superseded in 2004 by the federal Office of Surface Mining. *See* 30 CFR § 938.13 (superseding "[t]he

Repair of damage to structures.

(1) *Repair or compensation for damage to certain structures*. Whenever **underground mining operations** conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)—(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of § 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

….

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements.…

25 Pa. Code § 89.142a(f) (emphasis added).

The argument of the Department and the Permittee can be broken down into essentially two parts. First, they argue that the Act and the regulations require a structure to be "in place at the time of mining" to be eligible for a claim for subsidence damage. Next, they assert that "underground mining," or coal extraction, ended at the Maple Creek Mine on May 9, 2003 and the Dwelling was not built until October 2003 at the earliest. Therefore, they conclude, since the Dwelling was not "in place" until after "underground mining" concluded, the Dwelling is ineligible for coverage.

However, the Act and regulations clearly use the term "underground mining operations" rather than "underground mining" in discussing the causation of subsidence damages. The terms "underground mining" and "underground mining operations" are defined in the Chapter 89 regulations. Much like the Department and Permittee use the term in their filings, "underground mining" is narrowly defined as "[t]he extraction of coal in an underground mine." 25 Pa. Code § 89.5(a). "Underground mining operations," on the other hand, is defined more broadly and

---

portion of section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) of BMSLCA that states, 'in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application'). *See also* 69 FR 71553 (Dec. 9, 2004).

encompasses a more extensive range of activities beyond simply the extraction of coal: "Underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting." *Id.*

In his response to the Department's and Permittee's motions, Mr. Telegraphis points to Exhibit 11 attached to the affidavit of Michael Bodnar that was filed in support of the Department's motion for summary judgment. Exhibit 11 is a copy of a report from the Mine Safety and Health Administration that shows the coal production by year for the Maple Creek Mine. However, in addition to coal production, the report also lists the number of hours worked at the mine broken down into three categories: (1) underground; (2) surface at underground; and (3) office workers at mine site. The report shows that 94,230 hours were worked underground in 2004, and 17,101 hours were worked underground in 2005. Thus, more than 100,000 hours of work was conducted underground at the Maple Creek Mine in the two years after the Dwelling was constructed.[4]

No party fully explains the nature of the hours worked underground at the Maple Creek Mine in 2004 and 2005. The Department and Permittee tell us that it was not mining, i.e. coal extraction but nothing else. Mr. Telegraphis, for his part, seems to contend that the underground hours worked, as indicated by Exhibit 11, establishes that "mining" was taking place after his Dwelling was built. Neither statement by the parties is very helpful to the Board in resolving the multiple requests for summary judgment. While there is some evidence of record that coal extraction may have ceased in May 2003, that does not mean that "underground mining operations" relevant to Mr. Telegraphis' Claim were not taking place after that date. It seems

[4] We note that there exists some factual dispute as to the exact time that Mr. Telegraphis' Dwelling was constructed. The Department states in their undisputed material facts that the Dwelling was constructed no earlier than October 2003 which Mr. Telegraphis admits in his response thereto. However, the Permittee states that the Dwelling was constructed in 2004 and provides numerous citations to its deposition of Mr. Telegraphis in support of that assertion.

entirely possible that at least some of the 100,000+ hours of underground work listed in Exhibit 11 could fall under the definition of "underground mining operations" set forth in Chapter 89. We simply cannot say for sure one way or the other because we do not have any evidence, for example, from any employees at the mine who could attest to what was happening underground at the mine after the extraction of coal had ceased, or any more detailed records explaining how those hours were spent underground. Further, if we accept the Department's and the Permittee's assertion that coal extraction ended in May 2003, we have no records concerning underground mining operations in the remainder of 2003. Accordingly, even if we assume at this juncture that the Department and Permittee are correct in their position that a structure must be "in place" at a certain point relative to activities in the mine, those activities that can trigger liability for subsidence damage is broader than strictly "underground mining" and there are disputed issues of material fact regarding whether "underground mining operations" occurred after Mr. Telegraphis' Dwelling was constructed.

The Department argues that activities other than coal extraction are not relevant, but we disagree. The Department argues that other regulatory provisions, like the one requiring an operator to conduct a pre-mining survey, 25 Pa. Code § 89.142a(b)(1), and the one prohibiting underground mining near certain structures, 25 Pa. Code § 89.142a(c)(1), show that coal extraction "is the logical and most likely activity in an underground mine to cause subsidence damage and thus is the only relevant activity in a mine for determining whether a dwelling is in place at the time of mining." (Department's Reply Brief at 8.) However, simply because some regulatory provisions may focus on coal extraction, that does not necessarily support the position that an operator's liability is limited to only repairing or compensating a structure damaged by subsidence from coal extraction, as opposed to subsidence from other underground mining operations. For instance, a pre-mining survey might be relevant to relieving an operator from responsibility for

subsidence damage, but a landowner can still prevail in its claim if it shows "by a preponderance of evidence, that the damage resulted from the operator's **underground mining operations**." 25 Pa. Code § 89.144a(b) (emphasis added). Even if we assume that the Department is correct that coal extraction is the "most likely activity" to cause subsidence, the fact remains that the Act and regulations plainly allow for compensation for subsidence from underground mining operations that are not limited to coal extraction.

The Department nevertheless maintains that it has determined that the underground mining that eventually caused the subsidence that damaged Mr. Telegraphis' Dwelling occurred in 1999 and all other mining operations are irrelevant. It appears the Department bases its conclusion that the subsidence damage to Mr. Telegraphis' home was caused by mining that took place in 1999 because that was when underground mining nearest to the Dwelling occurred. The Department's position is that the only mining work that matters when deciding a subsidence claim is coal extraction, and, seems to further narrow its position by only considering the *nearest* mining as the relevant factor for purposes of causation, which ended prior to the Dwelling's construction. The problem with that position is that coal extraction, let alone "nearest coal extraction," is simply not what the statute and the regulations state. The operable question here concerns "underground mining operations." We think the question of causation of subsidence damage is a highly fact-intensive inquiry that is best left to a hearing on the merits, particularly after learning what, if any, "underground mining operations" actually occurred in the Maple Creek Mine following the end of coal extraction and where it occurred underground. In addition, we also look forward to testimony addressing the terms "underground mining" and "underground mining operations" and how the Department interprets those terms.

The arguments that Mr. Telegraphis sets forth in his Motions for Partial Summary Judgment are squarely counter to the Department's and Permittee's stance, arguing that the Act and the regulations do not require a structure to be "in place at the time of mining" to be eligible for a claim for subsidence damage. As stated above, we do not reach a decision as to the lawfulness of the Department's interpretation at this juncture. Mr. Telegraphis' Motions for Partial Summary Judgment are denied here for similar reasons that we deny the Department's and Permittee's Motions. While Mr. Telegraphis points out that underground work continued in 2004 and 2005, he proffers no evidence as to the nature of the underground work. The definition of "underground mining operations" includes specified types of work and Mr. Telegraphis has not made a factual showing, or shown as a matter of law, that the underground work that took place, as indicated by the report, constituted any of the particular types of underground work provided for in the definition. Moving forward, Mr. Telegraphis must develop testimony and produce records and evidence that shows that the underground work that was performed in the mine was within the scope of the definition "underground mining operations" and were the cause of the subsidence damage to his Dwelling if he is to prevail on his claim.

In sum, we cannot determine whether Mr. Telegraphis' Dwelling is eligible for coverage under the Act because the relevant term this Board must focus on per the statute and regulations is "underground mining operations." There is some evidence, as made clear by the Department's Exhibit 11, that underground mining operations may have taken place after coal extraction ceased and after the Dwelling was constructed. The definition of "underground mining operations" constitutes a list of certain activities, and we simply do not know whether any of these defined activities are what took place during the underground work evidenced by the Exhibit 11 report. We know there is some factual evidence that there was some underground work that took place

after Mr. Telegraphis' Dwelling was constructed but we have no evidence as to the nature of any of the underground work and whether that underground work involved any of the listed activities within the definition of underground mining operations. Based on the information before us, the possibility exists that underground mining operations took place after the construction of Mr. Telegraphis' Dwelling and those operations could have potentially caused the subsidence damage to the Dwelling. Even if we accept the Department's "in place" interpretation, that would require Mr. Telegraphis' Dwelling be in place during the underground mining operations that ultimately caused the subsidence, the possibility remains that the Dwelling is entitled to coverage under the Act and regulations because underground work continued after the Dwelling was constructed, and, at this point, we do not know the nature of that underground work or the exact cause of the subsidence damage.

We find that there are disputed material facts resulting principally from a lack of information in the record concerning the nature of underground work at the Maple Creek Mine in the time period after coal extraction reportedly ceased. As a result, this case does not qualify as the "clearest of cases" where one or more of the parties is entitled to the granting of a motion for summary judgment. We do not reach the question of interpretation of whether a structure needs to be "in place" at the time of underground mining operations for a claim for subsidence damage to be eligible for coverage under the Act and regulations.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN TELEGRAPHIS	:	
	:	
v.	:	**EHB Docket No. 2022-054-B**
	:	**(Consolidated with 2022-046-B)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON COUNTY LAND RESOURCES INC., Permittee	:	

O R D E R

AND NOW, this 23rd day of May, 2023, upon consideration of the parties' motions for summary judgment, and the responses thereto, it is hereby ORDERED as follows:

1. Mr. Telegraphis' Motions for Partial Summary Judgment are **denied**.
2. The Department's Motion for Summary Judgment is **denied**.
3. The Permittee's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: May 23, 2023

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

For the Commonwealth of PA:
Brian Greenert, Esquire
Michael Heilman Esquire
(*via electronic filing system*)

For Appellant:
Frank Magone, Esquire
(*via electronic filing system*)

For Permittee:
Jamie R. Hall, Esquire
Rodger L. Puz, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA, INC.	:	
	:	
v.	:	**EHB Docket No. 2023-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: June 13, 2023**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

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

Synopsis

The Board denies a petition for supersedeas of an NPDES permit issued in conjunction with the operation of a landfill because the Appellants have not shown that there is any evidence of irreparable harm that justifies the extraordinary relief of a supersedeas while the appeal proceeds on the merits. The Board denies the petition without a hearing because the Appellants have not stated grounds sufficient for granting a supersedeas in their petition or accompanying affidavits.

O P I N I O N

Liberty Township and CEASRA, Inc. (the "Appellants") have appealed the Department of Environmental Protection's (the "Department's") issuance of NPDES Permit No. PA0263664 to Tri-County Landfill, Inc. ("Tri-County") authorizing discharges from Tri-County's municipal waste landfill to unnamed tributaries to Black Run in Liberty Township, Mercer County. The landfill has been dormant for more than two decades and the NPDES permit is part of Tri-County's effort to reactivate the landfill. The NPDES permit authorizes three discharges, two of which involve the discharge of stormwater runoff from the construction of landfill cells and earthen berms, and the other a discharge of treated wastewater from a future leachate treatment plant.

The NPDES permit was issued March 10, 2023, to become effective on April 1, 2023. The Appellants filed their appeal of the permit on Friday, March 31, 2023. On the same day, they filed a petition for supersedeas and an application for temporary supersedeas. Although the Appellants' petition for supersedeas was not accompanied by affidavits when it was filed as required by 25 Pa. Code § 1021.62(a)(1), the Appellants on April 4, 2023 filed an affidavit from Jane Cleary, a member of CEASRA, Inc., and on April 7 they filed an affidavit from Robert Pebbles, a Liberty Township Supervisor.[1] Cover letters accompanying the affidavits stated that they were being filed in support of both the Appellants' petition for supersedeas and application for temporary supersedeas.

We held a conference call with the parties on Monday, April 3, 2023. Following the conference call, we ordered the Department and Tri-County to file responses to the application for temporary supersedeas by April 7 and responses to the petition for supersedeas by May 24, due to the parties' involvement in litigating the recent merits hearing on the Appellants' appeal of a major modification to Tri-County's waste management permit for the same landfill.[2] *See* EHB Docket No. 2021-007-L. On April 12, 2023, we issued an Order denying the Appellants' application for temporary supersedeas in the NPDES permit appeal. On April 19, we issued an Opinion in support of our Order denying the application for temporary supersedeas, which explained that the Appellants did not show through their affidavits or otherwise any evidence of immediate or irreparable injury as required for a temporary supersedeas. *Liberty Twp. v. DEP*, EHB Docket No. 2023-036-L (Opinion in Support of Order, Apr. 19, 2023). Both the Department and Tri-County

[1] Tri-County filed motions to strike each of these affidavits, which we denied with an Order on April 24, 2023.

[2] The Appellants also filed a petition for supersedeas and an application for temporary supersedeas in their appeal of the major permit modification at the same time that they filed their supersedeas papers in this appeal of the NPDES permit.

have now filed responses in opposition to the petition for supersedeas, asserting among other things that the Appellants have failed to show any irreparable harm. Tri-County asks in its response that we deny the petition without a hearing. For the reasons explained below, we agree with the Department and Tri-County and deny the Appellants' petition for supersedeas without a hearing.[3]

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The grant or denial of a supersedeas is guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered in ruling on a petition for supersedeas are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485.

In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three statutory and regulatory criteria. *VanDuzer v. DEP*, 2018 EHB 696, 699; *Weaver v. DEP*, 2013 EHB 486, 489; *Neubert v. DEP*, 2005 EHB 598, 601. In terms of irreparable harm, mere speculation that a petitioner will suffer irreparable harm is not enough for a supersedeas. *Guerin v. DEP*, 2014 EHB 18, 24 (citing *Pa. Fish and Boat Comm'n v. DEP*, 2004 EHB 473, 478-79). "General assertions of irreparable harm without greater specificity are not sufficient to establish irreparable harm." *Mellinger v. DEP*, 2013 EHB 322, 328. *See also Stevens v. DEP*, 2005 EHB 619, 625 (broad assertion of irreparable harm without any specificity not

[3] Although we are denying the petition for supersedeas without a hearing, it should be noted that we just completed the hearing on the merits of the Appellants' appeal of the major modification to Tri-County's solid waste permit, which spanned 12 days and gave us a very good idea of the nature of the project.

sufficient); *Borough of Roaring Spring v. DEP*, 2003 EHB 825, 835 n.20 (requiring a degree of definiteness for a showing of irreparable harm). Where a petitioner fails to satisfy any one of the supersedeas criteria, the Board is not obligated to consider the remaining criteria. *Spencer v. DEP*, 2019 EHB 756, 760 (citing *Teska v. DEP*, 2016 EHB 541, 547). *See also PBS Coals, Inc. v. DEP*, 2021 EHB 104, 107; *Oley Twp. v. DEP*, 1996 EHB 1359, 1369. In evaluating whether the criteria have been met, we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals*, 2021 EHB at 106 (citing *Del. Riverkeeper Network v. DEP*, 2016 EHB, 41, 43).

Our Rules allow us to deny a petition for supersedeas without a hearing if the petition is deficient for any of the following reasons:

> (1) Lack of particularity in the facts pleaded.
>
> (2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.
>
> (3) An inadequately explained failure to support factual allegations by affidavits.
>
> (4) A failure to state grounds sufficient for the granting of a supersedeas.

25 Pa. Code § 1021.62(c)(1)-(4). *See also Mellinger*, 2013 EHB 322; *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 732. Given the fact that a supersedeas is an extraordinary measure that is not to be taken lightly, we have held that it is critical for a petition for supersedeas to plead facts and law with particularity and to be supported by affidavits setting forth facts upon which the issuance of a supersedeas may depend. *Dougherty v. DEP*, 2014 EHB 9, 12 (citing 25 Pa. Code § 1021.62(a)). "The pleadings and affidavits must be such that, if the petitioner were able to prove the allegations set forth in its pleadings and affidavits at a hearing, and the Department and/or permittee did not put on a case, it would be apparent from the filings that the Board would be able, if it so chose, to issue a supersedeas." *Id.* at 12-13. In other words, the petitioner's papers must on their face set forth what is essentially a *prima facie* case for the issuance of a supersedeas.

VanDuzer, 2018 EHB at 700 (citing *Global Eco-Logical Servs. v. DEP*, 2000 EHB 829, 832; *A&M Composting v. DEP*, 1997 EHB 1093, 1098). Where a petition and its supporting documentation do not provide the Board with a basis for granting a supersedeas, it will be denied. *Mellinger, supra.*

Since a ruling on a petition for supersedeas is a limited decision addressing the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits, *Erie Coke Corp.*, 2019 EHB at 484, it is important to have a sense of what is happening at the site. The landfill is not currently in operation or accepting waste. However, we are told that preparation is underway for the landfill to begin operating again. An exhibit the Appellants filed in support of their petition is a letter dated March 30, 2023 from Tri-County to the Grove City Airport notifying the airport that Tri-County would be commencing construction at the landfill. In its response to the petition, Tri-County says that the ongoing work at the site involves the installation of erosion and sedimentation controls and earthmoving work for the construction of a sedimentation basin that will help manage stormwater on the site. Tri-County says the sedimentation basin is not expected to be completed until the end of June 2023 and there will be no discharge of stormwater from the basin under the NPDES permit until construction is finished.

Tri-County says that it will then proceed with constructing temporary diversions to direct stormwater into the sedimentation basin, and then construct a landfill berm and roadway to convey upgradient drainage to the basin. This work is expected to be completed by the end of February 2024. Tri-County will then perform work excavating, grading, and installing the liner for landfill Cell 1, which is expected to continue through September 2024. Tri-County avers that all of this earth disturbance work on the site is outside of the limits of the existing waste held at the landfill

from when the landfill was operated decades ago. Tri-County says that all of this work will occur before the landfill begins accepting any new waste for processing and disposal.

Any discharge from the yet-to-be-constructed leachate treatment plant appears to be even further off. Tri-County and the Department say that Tri-County still must obtain a water quality management permit for the construction of its treatment plant before any discharge of treated leachate can occur from that plant pursuant to the NPDES permit. Tri-County avers through the affidavits attached to its response that it will likely take more than two years for Tri-County to prepare and submit the application for the water quality management permit, to obtain that permit following the Department's review of the application, and to construct the treatment plant. We are told that, after the landfill begins accepting waste, Tri-County will truck any landfill leachate to another facility for treatment until the leachate treatment plant is in operation.

With this context in mind, the Appellants' petition must be denied without a hearing because together with its affidavits there is no credible showing of irreparable harm to the Appellants, the public, or the environment from any of Tri-County's activity, and the Appellants have fallen short of making out a *prima facie* case for the extraordinary relief of a supersedeas. Much of the material contained in the Appellants' petition for supersedeas is essentially the same as what was contained in their application for temporary supersedeas, which we found did not set forth any evidence of immediate and irreparable injury. The same is true here for irreparable harm. For instance, as in their application for temporary supersedeas, the Appellants claim that the landfill is currently polluting waters of the Commonwealth, including exceptional value wetlands, but again they provide no support to substantiate that claim in their petition or accompanying affidavits. Nor have the Appellants explained why granting a supersedeas of the NPDES permit would alleviate any alleged ongoing pollution.

In terms of the work currently happening at the site, the Appellants do not devote much time to addressing the sedimentation basin or the earthmoving work. The petition itself hardly touches on them at all. Both the Jane Cleary and Robert Pebbles affidavits (the bulk of which are identical to each other) contend that "earth moving can affect the hydrology of the area, which is already vulnerable…."[4] They point to exhibits filed in support of the Appellants' case in their appeal of the waste permit modification that identify an unnamed tributary to Black Run as being impaired from unknown causes. However, neither in their petition nor in their affidavits do the Appellants explain *how* Tri-County's earthmoving work could affect the area's hydrology and cause irreparable harm. Ms. Cleary and Mr. Pebbles do not identify any relevant expertise on hydrology that bears on their unsupported claims. The Appellants have not explained how there will be any irreparable harm from the construction and operation of the sedimentation basin on the site or from any of the other earthmoving work that is currently underway and will continue into next year.

Turning to the NPDES permit, the Appellants assert that the permit conditions do not demonstrate that there would be no adverse hydrologic impacts, water quality impacts, or water pollution to the unnamed tributary to Black Run, and all connected water sources from which people and wildlife drink. For purposes of obtaining a supersedeas, the Appellants must show us why the NPDES permit conditions are not sufficiently protective, and why there will be irreparable harm from operations conducted pursuant to that permit. To that end, the Appellants claim that the NPDES permit does not impose a limit on the volume of discharge to the unnamed tributary to Black Run, and that "there is no way of knowing" whether the stream can handle the discharge. They say that, if the stream does not have the appropriate capacity, there could be a disruption to

[4] The same affidavits were filed in support of the Appellants' petition for supersedeas in the waste permit appeal.

the watershed's hydrologic balance, which "could result" in erosion of the stream banks and potential flooding. The Appellants never show that there *will* be erosion or a hydrologic impact, or that there is a reasonable likelihood of those things happening. Instead, they rely merely on conjecture. Such assertions without evidence are precisely the sort of speculation that we have held to be insufficient to demonstrate irreparable harm for a supersedeas. *Guerin*, 2014 EHB at 24. The Appellants have not provided any evidence that the volume of any discharge will have a negative impact on the unnamed tributary to Black Run.

Copying the objections from their notice of appeal into their petition, the Appellants contend that the NPDES permit does not include testing for the parameters of bromide, strontium, and "all radionuclides in pollutant group 7" from both of the stormwater outfalls and the outfall from the leachate treatment plant. But apart from asserting that the landfill may accept some amount of oil and gas waste, which they suggest might contain such substances, the Appellants do not explain why such parameters are necessary or why the lack of such sampling parameters will result in irreparable harm. The Appellants claim that Tri-County will be discharging radioactive material, but there is simply no credible support for that claim in their papers. The Appellants' claims again amount to mere speculation.

The likelihood of even the prospect of irreparable harm is significantly less here where any discharge from the treatment plant is potentially years away following Tri-County obtaining the water quality management permit and constructing the plant. The Appellants contest this, saying that "[t]he Department and Tri-County may claim that no irreparable harms will occur as a result of the issuance of the NPDES Permit because Tri-County cannot treat or discharge leachate onsite without a Part II WQM permit to begin construction on a treatment facility, but this is not true." (Petition at ¶ 5.) But crucially, the Appellants never explain why that is not true. They do not

provide any support for their implication that there will be any discharge from the treatment plant without Tri-County first acquiring the water quality management permit. We presume that Tri-County will undertake all the necessary steps prerequisite to operating the treatment plant, including obtaining all necessary permits.

Finally, the Appellants assert that they have suffered irreparable harm because they had to prepare their notice of appeal of the NPDES permit while also preparing for the merits hearing on the solid waste management permit. As we said in our Opinion in support of our Order denying the application for temporary supersedeas, the administrative burden of preparing legal filings is not the type of irreparable harm that justifies the issuance of a supersedeas. *See also Spencer*, 2019 EHB at 761 (burden and costs of multiple litigation matters does not constitute an irreparable harm).

Simply put, the Appellants have not provided any justification for suspending the NPDES permit now while the case moves forward. The Appellants have not made a credible showing of irreparable harm from any discharge from the leachate treatment plant or sedimentation basin, from the construction of the sedimentation basin or the installation of any other erosion and sedimentation controls, or from any other activity conducted pursuant to the NPDES permit. The Appellants fail to allege with any degree of requisite specificity any credible harm at all, let alone irreparable harm that justifies a supersedeas while the appeal proceeds on the merits. "A supersedeas is an extraordinary remedy that places a heavy burden on the petitioners to make a clear showing of need." *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 764 (citing *Emerald Contura, LLC v. DEP*, 2017 EHB 670, 672-73). *See also Nicholas Meat, LLC v. DEP*, 2021 EHB 96, 100 (quoting *Erie Coke Corp. v. DEP*, 2019 EHB 481, 484) (supersedeas will not issue "absent a **clear demonstration of need**" (emphasis in original)). Without any evidence of irreparable

harm to the Appellants, the public, or the environment, there has been no appropriate showing of need here.[5]

The Appellants have not shown any irreparable harm to warrant the issuance of a supersedeas, so we do not need to consider the remaining criteria, such as likelihood of success on the merits or any irreparable harm to the other parties. *M.C. Res. Dev. Co. v. DEP*, 2015 EHB 261, 265; *Dickinson Twp. v. DEP*, 2002 EHB 267, 268. By failing to make a *prima facie* showing of irreparable harm in their papers, the Appellants have not stated grounds for the issuance of a supersedeas. Nor have they pled facts with any particularity that would support the extraordinary remedy of supersedeas relief. Therefore, we deny the petition for supersedeas without a hearing. 25 Pa. Code § 1021.62(c).

Accordingly, we issue the Order that follows.

[5] The Appellants also rely on a claim of irreparable harm *per se*, arguing that the Department lacked authority to issue the NPDES permit to Tri-County and that the Department failed "to properly apply applicable law." The Appellants make a vague reference to a 1991 memorandum of agreement between the Department and the Environmental Protection Agency, but they do not explain why this is relevant. Overall, the Appellants fail to substantiate any of these claims with an explanation of how the Department lacked the authority to issue the permit or acted unlawfully in issuing the permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA, INC.	:	
	:	
v.	:	**EHB Docket No. 2023-036-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 13th day of June, 2023, it is hereby ordered that the Appellants' petition for supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 13, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
(*via electronic mail*)

For Appellants:
Lisa Johnson, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: June 20, 2023**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

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

Synopsis

The Board denies a petition asking us to supersede a major modification of a solid waste management permit for the operation of a landfill. The Appellants have not shown that there is any threat of irreparable harm to the Appellants, the public, or the environment pending the Board's forthcoming Adjudication.

O P I N I O N

Liberty Township and CEASRA (the "Appellants") have filed a petition for supersedeas in connection with their appeal of the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to Tri-County Landfill's ("Tri-County's") solid waste management permit. The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The permit modification was issued in December 2020 and the Appellants filed their appeal in January 2021. The hearing on the merits has already

concluded, having begun on April 5, 2023 and lasting 12 days until April 21. The parties are currently in the midst of post-hearing briefing.

The Appellants filed their petition for supersedeas on Friday, March 31, 2023, three business days before the start of the hearing on the merits and more than two years after they filed their appeal. The petition for supersedeas was accompanied by an application for temporary supersedeas. Although the Appellants' petition was not supported by affidavits when it was filed as required by 25 Pa. Code § 1021.62(a)(1), the Appellants on April 4, 2023 filed an affidavit from Jane Cleary, a member of CEASRA, Inc., and on April 7 they filed an affidavit from Robert Pebbles, a Liberty Township Supervisor.[1] Cover letters accompanying the affidavits stated that they were being filed in support of both the Appellants' petition for supersedeas and application for temporary supersedeas.[2]

In the brief interlude between the filing of the petition for supersedeas and the start of the hearing on the merits, we conducted a conference call with the parties. Following the conference call, we ordered the Department and Tri-County to file responses to the application for temporary supersedeas by April 7. We requested responses to the petition for supersedeas by May 24, which is longer than usual for a supersedeas response due to the parties' involvement in litigating the hearing on the merits. On April 12, 2023, we issued an Order denying the Appellants' application for temporary supersedeas. On April 17, we issued an Opinion in support of our Order denying the application for temporary supersedeas, which explained that the Appellants did not show through their affidavits or otherwise any evidence of a threat of immediate or irreparable injury as

[1] Tri-County filed motions to strike each of these affidavits, which we denied with an Order on April 24, 2023.

[2] The Appellants also filed a petition for supersedeas and an application for temporary supersedeas in their appeal of an NPDES permit for discharges associated with the landfill. *See* EHB Docket No. 2023-036-L.

required for a temporary supersedeas. *Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L (Opinion in Support of Order, Apr. 17, 2023).

The Appellants have not amended or supplemented their petition for supersedeas following our ruling on their application for a temporary supersedeas. The Appellants also did not amend or supplement their petition during or after the hearing on the merits. Therefore, as of this writing, the Appellants' only support for their petition is contained in the petition itself and in the affidavits of Cleary and Pebbles. Both the Department and Tri-County have now filed responses in opposition to the petition for supersedeas.

The Environmental Hearing Board Act of 1988, 35 P.S. §§ 7511 – 7514, provides adversely affected parties with the right to file an appeal from a Department action. No appeal acts as an automatic supersedeas, but the Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). The grant or denial of a supersedeas is guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered in ruling on a petition for supersedeas are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Erie Coke Corp. v. DEP*, 2019 EHB 481, 485.

In order for the Board to grant a supersedeas, a petitioner generally must make a credible showing on each of the three statutory and regulatory criteria. *VanDuzer v. DEP*, 2018 EHB 696, 699; *Weaver v. DEP*, 2013 EHB 486, 489; *Neubert v. DEP*, 2005 EHB 598, 601. Where a petitioner fails to satisfy any one of the supersedeas criteria, the Board is not obligated to consider the remaining criteria. *Spencer v. DEP*, 2019 EHB 756, 760 (citing *Teska v. DEP*, 2016 EHB 541, 547). *See also PBS Coals, Inc. v. DEP*, 2021 EHB 104, 107; *Oley Twp. v. DEP*, 1996 EHB 1359,

1369. In evaluating whether the criteria have been met, we are mindful that "a supersedeas is an extraordinary remedy and will not be granted absent a clear demonstration of need." *PBS Coals*, 2021 EHB at 106 (citing *Del. Riverkeeper Network v. DEP*, 2016 EHB, 41, 43).

A petition for supersedeas must on its face together with supporting documents set forth what is essentially a *prima facie* case for the issuance of a supersedeas. *VanDuzer*, 2018 EHB at 700 (citing *Global Eco-Logical Servs. v. DEP*, 2000 EHB 829, 832; *A&M Composting v. DEP*, 1997 EHB 1093, 1098). *See also Mellinger v. DEP*, 2013 EHB 322; *Hopewell Twp. Bd. of Supervisors v. DEP*, 2011 EHB 732. Where a petition and its supporting documentation do not provide the Board with a basis for granting a supersedeas, it may be denied without a hearing. *Mellinger, supra. See generally* 25 Pa. Code § 1021.62(c)(1)-(4).

The Appellants have failed to satisfy that standard in this case. There is simply no credible support in the petition or the affidavits supporting the petition that there is any threat of irreparable harm to the Appellants, the public, or the environment pending our adjudication of the appeal on the merits. Initially, we have already concluded a lengthy hearing on the merits and post-hearing briefing is well underway. This is not the more typical case where a petition is filed early on in the proceeding and the hearing on the merits is not due to be held for many months or even years. The Appellants' petition was filed well over two years after they filed their notice of appeal and less than a week before the merits hearing began. "[A] Board ruling on a petition for supersedeas is a limited decision that addresses the status of the Department's action during the time interval between the filing of the appeal and the full Board's final ruling on the merits of the appeal." *Erie Coke*, 2019 EHB at 484. With post-hearing briefing already underway, we fully expect this appeal to be resolved one way or the other in the relatively short term, meaning the relevant time interval here is particularly short before the Board's final ruling on the merits.

Secondly, at the risk of repeating our discussion somewhat from our Opinion denying the application for a temporary supersedeas, nothing that is taking place at the site right now according to anything in the Appellants' papers suggests that there is any immediate threat to the environment, the public, or the Appellants themselves. The Appellants point to a letter that Tri-County sent to the Grove City Airport at the end of March that notifies the airport that Tri-County will be commencing construction. However, the notice of construction that Tri-County provided to the airport in itself does not mean anything in terms of the landfill operating or accepting any new waste for disposal that could, for instance, potentially attract birds, or pose any other concern.

The Appellants' affidavits vaguely allude to harm to the hydrology in the area from earthmoving work at the site, but there is no explanation of how or in what ways any earthmoving activities conducted by Tri-County are affecting the hydrology at the site or impacting any surface waters or groundwater. There are simply no specific allegations of harm or quantification of impact to any waters of the Commonwealth. There is no credible allegation or evidence in the Appellants' papers of irreparable harm that is happening now at the site or will happen before the Board issues its Adjudication. The petition instead copies around 60 pages of material from the Appellants' pre-hearing memorandum consisting largely of factual material and legal argument integral to their merits claims, not any credible showing of irreparable harm. The comparatively small portion of the petition itself that is devoted to addressing the supersedeas criteria for the most part concerns arguments on the merits of whether the Department acted in accordance with the law in issuing the major permit modification, but adds nothing of substance supporting a finding of immediate harm pending adjudication on the merits.

Accordingly, the Appellants' failure to set forth what would constitute a *prima facie* case of pending irreparable harm compels us to deny the petition. That said, we would also point out

that, in its response to the petition, Tri-County indicates that it is conducting earth disturbance work for the construction of a sedimentation basin and it will also begin work excavating the area of the first landfill cell to install the liner. Tri-County is, of course, undertaking this work at its own risk. Tri-County expects this work to continue through September 2024. Tri-County says without contradiction that all of this work will be outside of the limits of the existing waste disposed decades ago at the site, and that this work will need to be completed before the landfill accepts any new waste for processing and disposal.

Furthermore, we must also acknowledge that we have already completed a 12-day hearing in this appeal. The hearing followed extensive discovery, detailed competing motions for summary judgment from all parties, and wide-ranging pre-trial motions practice over the course of two years. We heard from more than 20 fact and expert witnesses, with their testimony comprising over 2,000 pages of transcript. Several dozen exhibits were admitted from all parties. The parties fully and vigorously litigated their claims and defenses. As noted above, the Appellants have not amended or supplemented their petition during or following the hearing. We have now heard sworn, unrebutted testimony that no waste will be disposed of at Tri-County's landfill until the first landfill cell is constructed and the Department approves that it was constructed according to the specifications in the permit. No evidence emerged at the hearing of any *immediate* threat to air, land, surface water, or groundwater as a result of Tri-County's early construction activities. There is no evidence of any immediate threat to air safety from these activities. Having now presided over the merits hearing, we have an added sense of comfort that there is no immediate threat of harm to the Appellants, the public, or the environment if we concentrate on adjudicating the merits at this stage.

Finally, it is perhaps worth recognizing Tri-County's concern that its permit requires it to process or dispose of municipal waste within five years of the permit being issued, which is December 28, 2025. Tri-County says that it will need to engage in years of preparatory work on the site in order to meet this deadline, and that granting a supersedeas to immediately suspend Tri-County's preparatory work pending our adjudication could threaten Tri-County's ability to meet its permit activation deadline.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 20th day of June, 2023, it is hereby ordered that the Appellants' petition for supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 20, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Brian Lipkin, Esquire
Jake Oresick, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2022-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 27, 2023**
	:	

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's motion to compel seeking the identity of any person who filed a complaint with the Department or conservation district regarding the appellant's property because it has not been shown to be relevant to the validity of the Department order under appeal.

O P I N I O N

Salvatore Pileggi has appealed an administrative order issued to him by the Department of Environmental Protection (the "Department") on August 11, 2022 following inspections conducted by the Lackawanna County Conservation District (the "Conservation District") in 2021 and 2022 of property owned by Pileggi in Newton Township, Lackawanna County. The order alleges that Pileggi conducted earth disturbance activities on his property without first obtaining an NPDES permit, without implementing appropriate best management practices (BMPs) or stabilizing the site, and without developing an erosion and sedimentation control plan. The order requires Pileggi to cease any earth disturbance activity, implement appropriate BMPs, and submit an erosion and sedimentation control plan and an NPDES permit application to the Conservation District. In his notice of appeal, Pileggi broadly denies the allegations in the order, asserting

among other things that he was repairing flood damage, that he was conducting road maintenance activities that are exempt from regulation, and that any activity he conducted was under the one-acre threshold for a permit. He also contests the order's characterization of his property as a subdivision and says it is instead a farm containing his home.

Pileggi has now filed a motion to compel the Department to more fully respond to certain discovery requests that he served on the Department. The discovery at issue involves two interrogatories and one request for the production of documents. Interrogatory 4 states that two of the Conservation District's inspection reports say the inspections were conducted in response to a complaint and the interrogatory asks if the complainant(s) were "Newton Township Officials, an employee or anyone holding any position related to the Township." Interrogatory 5 then asks the Department to identify the complainant(s). Document Request 8 requests all documents and communications related to any complaints regarding Pileggi and his property. The Department objected to these requests in its answer to Pileggi's discovery, asserting that the identity of any complainants was not relevant or reasonably calculated to lead to the discovery of admissible evidence. The Department also contended that the identity of a complainant is information that is protected from discovery.

Pileggi's motion asks the Board to overrule the Department's objections and to compel the Department to reveal the name of any person who lodged a complaint with the Department regarding Pileggi's property. Pileggi argues that there is no privilege to withhold a complainant's identity in a non-criminal case, and that there is no public policy prohibiting the disclosure of a person who submits a complaint to the government. The Department in its response argues that the identity of complainants is privileged information, and that the information is not relevant or reasonably calculated to lead to the discovery of admissible evidence. The Department maintains

that it and the Conservation District determined that there were violations at the Pileggi property independently of any complainant allegations, and that the Department does not intend to rely on any information or testimony from any complainant to prove the violations at the hearing on the merits. For the reasons that follow, we deny Pileggi's motion.

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1. The standard for the discoverability of information "is *not* that the information sought is reasonably calculated to lead to the discovery of relevant evidence; the standard is that the information sought must in fact be relevant." *PQ Corp. v. DEP*, 2017 EHB 707, 708 (citing Pa.R.Civ.P. 4003.1(a); *City of Allentown v. DEP*, 2017 EHB 315). No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.Civ.P. 4011; *Haney v. DEP*, 2014 EHB 293, 296-97. "[T]he Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

When a discovery dispute arises, we must make an assessment of the relevancy of the material at issue. *PQ Corp.*, 2017 EHB at 708-09; *City of Allentown*, 2017 EHB at 324; *Cabot Oil & Gas Corp. v. DEP*, 2016 EHB 20, 24. In a motion to compel, the moving party needs to put forth a threshold showing of the relevance of the information sought. Only then, after the party seeking the discovery makes some showing of potential relevance, will the burden shift to the party

objecting to the discovery request to demonstrate its right to refuse to produce the requested information. *PQ Corp.* at 709 (citing *Consol Pa. Coal Co. v. DEP*, 2015 EHB 505, 506; *Wallace Twp. v. DEP*, 2002 EHB 841, 844; *Estate of Charles Peters v. DER*, 1991 EHB 653, 656). *See also Pozsgai v. DER*, 1990 EHB 1250, 1252 (mere allegation of relevance from moving party, standing alone, is insufficient). Before we even reach any questions of privilege or assess the respective burdens on the parties in fulfilling a discovery request, the information sought above all must be relevant to the subject matter of the appeal.

The fundamental problem with Pileggi's motion is he never explains why the identity of the complainants, and whether or not they have some association with Newton Township, is somehow relevant in this appeal. Pileggi has filed this appeal from an order. The Board's responsibility in performing our *de novo* review is centered on determining whether the Department, in issuing its order, acted reasonably, in accordance with the law, consistent with its constitutional responsibilities, and whether the action is supported by the facts. *See Stocker v. DEP*, 2022 EHB 351, 363. "Therefore, in order to be relevant, information sought in discovery must have a reasonable potential to shed light upon whether the Department's action was lawful, reasonable, supported by the facts and consistent with its constitutional responsibilities." *Logan v. DEP*, 2016 EHB 801, 805.

Pileggi does not say what information he hopes to glean from any complainant that would help him show that the Department's order is not supported by the facts or law. Indeed, Pileggi never discusses the relevance of a complainant's identity at all in his three-page motion or two-page brief in support of the motion. Instead of telling us why he needs to know the identity of complainants, Pileggi makes public policy arguments. However, we have no need to get into policy debates if the information at issue is not even relevant.

It is not for the Board to speculate on the possible relevance of information sought in discovery. *Logan*, 2016 EHB at 805 (it is not the Board's "job to imagine possible relevance"). It is certainly not self-evident why the identity of any complainants has any relevance in this appeal. The appeal will focus on such things as whether the earth disturbance activities were conducted in accordance with applicable regulatory requirements or not. For example, what BMPs were legally and factually required, and if required, were they properly implemented? Similarly, was an NPDES permit required? Were the remedial actions mandated by the order reasonable and in accordance with the law? It is simply not readily apparent how the identity of complainants could possibly factor into the resolution of such straightforward and regulatory issues, even if it were the Board's responsibility to discern relevance, which it is not.

Pileggi's approach in his motion can be explained (but not excused) by the Department's similarly heavy albeit not exclusive reliance on public policy considerations in its communications with Pileggi leading up to the motion. But the fact that the parties engaged in an interesting policy debate does not change the fact that we will not compel the disclosure of irrelevant material in discovery. It was up to Pileggi to explain the relevance of the information and he failed to do so.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2022-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of June, 2023, it is hereby ordered that the Appellant's motion to compel is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 27, 2023

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

For the Commonwealth of PA, DEP:
Sean L. Robbins, Esquire
(*via electronic filing system*)

For Appellant:
David E. Romine, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: June 28, 2023**

OPINION AND ORDER ON
MOTION FOR SITE VIEW

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

Synopsis

The Board denies a motion for a site view where there has already been extensive visual evidence presented at the merits hearing and the facility subject to the appeal is not yet constructed or in operation.

O P I N I O N

Liberty Township and CEASRA (the "Appellants") have appealed the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to Tri-County Landfill's ("Tri-County's") solid waste management permit. The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The hearing on the merits has already concluded, having begun on April 5, 2023 and lasting 12 days until April 28. The parties are currently in the midst of post-hearing briefing.

Before the Board is the Appellants' motion for a site view, which they have filed almost a month after the merits hearing concluded. The Appellants list in their motion 12 general areas and locations at the Tri-County landfill site that they would like to be covered in a site view. Those

locations include: the permit boundaries of the former landfill and the current permitted landfill; areas of wetlands; existing monitoring well locations; the waste transfer station that Tri-County operates at the same site; the leachate detection zone that will be constructed underneath a future landfill cell; the location of a future leachate treatment plant; the location of existing disposed waste that Tri-County proposes to relocate; the location of future methane flares; and the locations of what the Appellants claim are seeps where they say leachate has discharged from the landfill into the underlying aquifer. They also ask that a site view be performed of the nearby Grove City Airport. The Appellants assert that a site view would help the Board in its review of the issues in this appeal. They request that the site view be attended by legal and technical representatives of each party and by all members currently serving on the Board.

The Department and Tri-County oppose the motion. They argue that a site view of an inactive landfill would hold no real probative value and would be costly and burdensome on the parties. They add that a view of the site will not help the Board better understand any of the extensive evidence that was presented at the merits hearing, and that some of the Appellants' proposed locations for the site view are not relevant or are beyond the scope of the Appellants' notice of appeal. For the reasons that follow, we deny the Appellants' motion.

Our Rules authorize us to conduct a site view of premises "when the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board." 25 Pa. Code § 1021.115. The decision of whether to conduct a site view is fully committed to the Board's discretion. *Kiskadden v. DEP*, 2014 EHB 578, 580; *Lucky Strike Coal Corp. v. DER*, 1986 EHB 1233, 1235. The purpose of a site view is to help the Board better understand the record evidence in a case as a demonstrative aid. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 801; *Giordano v. DEP*, 2000 EHB 1163, 1164-65. A site view does not in itself constitute any record

evidence in an appeal, *Perano v. DEP*, 2011 EHB 275, 276 n.1, and it cannot serve as a substitute for establishing a party's case-in-chief, *Giordano*, 2000 EHB at 1164 (citing *Lucky Strike Coal*, 1986 EHB at 1235).

We do not think a site view is necessary. We have already held a 12-day hearing on the merits in this matter that contained extensive visual evidence by way of numerous maps, plan sheets, and photographs from the air and on the ground. The site was depicted in multiple formats through exhibits from all three parties. The Appellants also presented an in-flight aerial video taken by a pilot showing the landing approach route to the Grove City Airport and flying over the landfill site that was helpful in conveying the landscape and the spatial relationship between the landfill and the airport. We have a very good sense of the site in relation to the issues in dispute in this appeal.

We also find it significant that Tri-County's landfill is not currently in operation. The parties have told us that some preliminary earth disturbance work is underway for the construction of a sedimentation basin and the installation of erosion and sedimentation controls, but the Department has asserted that the landfill may be as much as two years away from accepting any waste for processing or disposal. The landfill's cells have not been excavated and the leachate and liner system has not been constructed for the disposal of new waste and the relocation of the older, existing waste at the site. The leachate treatment plant has not been constructed or permitted with a water quality management permit. Although we know from the merits hearing that Tri-County also operates a waste transfer station on the site, the transfer station is a separate operation subject to a different permit. A site view of a landfill is particularly useful when it provides an accurate representation of operating conditions and can contextualize the record evidence adduced at the hearing on the merits. Here, we would largely be viewing undeveloped land at a dormant landfill,

which we can fully appreciate based on the evidence provided by the parties at the merits hearing. We do not believe that a site view would aid us in furthering our understanding of this appeal. *Kiskadden*, 2014 EHB at 580.

We will also note the potential cost and burden on the parties in participating in a site view. "In cases where the incremental value of the view as an aid to understanding does not outweigh that cost and inconvenience, a view should not be conducted." *Giordano* at 1165. Significant resources have already been expended by the parties litigating this case through pre-hearing practice and several weeks of hearing. The parties are currently in the middle of drafting post-hearing briefs. The logistical effort involved in coordinating and attending a site view among all of the representatives who the Appellants request to be present militates against holding a site view of only nominal value.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 28th day of June, 2023, it is hereby ordered that the Appellants' motion for site view is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: June 28, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2022-072-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA) LLC, Permittee	:	**Issued: June 29, 2023**

OPINION AND ORDER ON
PERMITTEE'S MOTION FOR PARTIAL DISMISSAL

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies the permittee's motion to dismiss objections in the notice of appeal claiming that the Department of Environmental Protection failed to properly consider PFAS when issuing two unconventional gas well permits. Where discovery is ongoing, it is premature to rule on whether the claims are speculative. Further, we disagree with the assertion that the objections seek relief that is beyond the scope of the Board's authority. As to the assertion that a ruling on these claims may have an impact beyond the parties to this case, this argument may be made in many matters before the Board and is not a basis for dismissing the objections.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board (Board) by Protect PT. Protect PT challenges the issuance of two gas well permits by the Department of Environmental Protection (Department) to Apex Energy (PA) LLC (Apex). The permits authorize the drilling of unconventional gas wells known as the Drakulic 1H and Drakulic 7H wells in Penn

Township, Westmoreland County. According to the notice of appeal, Protect PT "is a grassroots nonprofit organization…formed in December 2014 to ensure the safety, security and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development." (Notice of Appeal, para. 7.)

At the joint request of the parties, the prehearing deadlines in this matter were extended on April 28, 2023. Discovery is set to end on August 30, 2023. Expert reports must be produced by Protect PT on or before July 31, 2023 and by Apex and the Department on or before August 30, 2023. The deadline for filing dispositive motions is September 29, 2023.

On March 28, 2023, Apex filed a Motion for Partial Dismissal seeking to dismiss the following two claims set forth in Protect PT's notice of appeal:

> 27. The Department is aware that hydraulic fracturing releases PFAS, PFOAS, and related chemicals into the environment and, therefore, the Department is permitting the release of PFAS, PFOAS, and related chemicals in issuing the Well Permits.
>
> * * * * *
>
> 67. Protect PT objects to the Department's approval of the Well Permits because the Well Permits allow the introduction of PFAS, PFOAS, and related chemicals into the environment through hydraulic fracturing, which do not break down and which are known to cause deleterious health effects, without properly limiting or regulating their use, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

(Notice of Appeal, para. 27 and 67.)

The Department filed a Memorandum of Law in support of Apex's motion on April 11, 2023, pursuant to 25 Pa. Code § 1021.94(b). In accordance with the timeframes set forth in the Board's rules, Protect PT filed a response in opposition to the motion on May 11, 2023, and Apex filed its reply on May 25, 2023. This matter is ripe for disposition.

Standard of Review

A motion to dismiss is appropriate where a party objects to the Board hearing an appeal due to a lack of jurisdiction, an issue of justiciability, or another preliminary concern. *Hopkins v. DEP*, 2022 EHB 103, 104. The Board evaluates a motion to dismiss in the light most favorable to the nonmoving party. *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op*. at 2 (Opinion and Order on Motion to Dismiss issued May 15, 2023); *Muth v. DEP*, 2022 EHB 262, 264. A motion to dismiss or for partial dismissal may be granted only where the matter is free from doubt and the moving party is entitled to judgment as a matter of law. *Scott, slip op*. at 2; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155 (citing *Burrows v. DEP*, 2009 EHB 20, 22; *Bartholomew v. DEP*, 2019 EHB 515, 517); *Hopkins*, 2022 EHB at 104. For the purpose of resolving a motion to dismiss, rather than combing through the parties' filings for factual disputes, the Board simply accepts the non-moving party's version of events as true. *Downington,* 2022 EHB at 155.

Discussion

Apex seeks to dismiss Protect PT's claims that the issuance of the permits allows the release of PFAS, PFOA and related chemicals into the environment in violation of Article I, Section 27 of the Pennsylvania Constitution (the PFAS claims). PFAS are per- and polyfluoroalkyl substances. U.S. Environmental Protection Agency (EPA), *PFAS Explained*, https://www.epa.gov/pfas/pfas-explained. According to EPA, "PFAS are widely used, long lasting chemicals, components of which break down very slowly over time . . . There are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products." *Id.* PFOA refers to perfluorooctanoic acid. Centers for Disease Control and Prevention, *Perfluorooctanoic Acid Fact Sheet*, https://www.cdc.gov/biomonitoring/pfoa_factsheet.html. PFOA is generally considered a subset of PFAS. EPA, *Fact Sheet: EPA's Proposal to Limit*

PFAS in Drinking Water, March 2023 https://www.epa.gov/system/files/documents/2023-04/Fact%20Sheet_PFAS_NPWDR_Final_4.4.23.pdf.

Apex makes the following legal arguments in support of its motion to dismiss the PFAS claims: 1) the Board lacks the authority to promulgate PFAS regulations or to compel the Department to promulgate such regulations; 2) the PFAS claims are based on speculation; 3) the PFAS claims are burdensome and it would be prejudicial to require Apex to defend against these claims in light of their alleged deficiencies; 4) the PFAS claims are not simply a challenge to the permits at issue here but an improper attack on the oil and gas industry as a whole. The Department joins in Apex's argument that the PFAS claims are speculative and prejudicial. It further sets forth its view of Article I, Section 27 and its application to this matter.

The Board's Authority to Adjudicate the PFAS Claims

Objection 67 of the notice of appeal asserts that the well permits allow the introduction of PFAS, PFOA and related chemicals into the environment through hydraulic fracturing "without properly limiting or regulating their use, in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution." (Notice of Appeal, para. 67.) Apex argues that, by raising this objection, Protect PT is seeking an order from the Board that would regulate PFAS use. Apex asserts that the Board does not have the power to grant this relief since it has no authority to promulgate regulations on behalf of the Department nor does it have the authority to order the Department to adopt regulations. *See Candela v. DEP*, 2001 EHB 263, 266 (The authority to promulgate regulations on behalf of the Department rests solely with the Environmental Quality Board).

We do not read Protect PT's appeal as asking the Board to either promulgate regulations or order the Department to promulgate regulations. Nor does Protect PT agree that this is the relief

it is seeking. In its response to the motion, Protect PT asserts that it is asking the Board to adjudicate whether the Department's action of issuing the well permits violated Article I, Section 27 of the Pennsylvania Constitution and, if so, it asks the Board either to vacate the permits or to impose terms and conditions in the permits. This, it argues the Board has the power to do, citing *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565-66 (Pa. Cmwlth. 1975) (Where the Department acts with discretionary authority, the Board may substitute its discretion for that of the Department.)

However, Apex argues as a practical matter if the Board finds that the Department improperly issued the permits because the Department failed to regulate PFAS in oil and gas operations, then:

> the Board would be compelled to either (1) adopt a legal standard for or prohibition of PFAS use in unconventional oil and gas operations, or (2) find that DEP was required to regulate or prohibit PFAS in issuing the Permits, which would have the practical effect of ordering DEP to begin the regulatory process.

(Permittee's Reply, p. 2.)

We disagree with Apex's assessment of what the Board is being asked to do in this appeal. Our role here is to determine whether the Department's action in issuing the permits is in accordance with the law and supported by the facts of this case. As explained in *Winegardner v. DEP*, 2002 EHB 790, 792-93 "Our role is necessarily circumscribed by the Departmental action that has been appealed. 35 P.S. 7514. . .Our responsibility is limited to reviewing the propriety of *that action*." (Emphasis in original) (quoted in *Lawson v. DEP*, 2018 EHB 513, 517). With regard to the PFAS claims, the question before the Board is straightforward: Did the Department act contrary to Article I, Section 27 in issuing the permits? This is an issue that is within the Board's jurisdiction to adjudicate. *New Hanover Township v. DEP*, 2020 EHB 124, 189-90 (citing *The*

Delaware Riverkeeper Network v. DEP, 2018 EHB 447, 493; *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 855-62; *Friends of Lackawanna* v. DEP, 2017 EHB 1123, 1160-62). The Board's standard for assessing Article I, Section 27 challenges is the following:

> We first must determine whether the Department has considered the environmental effects of its action and whether the Department correctly determined that its action will not result in the unreasonable degradation, diminution, depletion or deterioration of the environment. Next, we must determine whether the Department has satisfied its trustee duties by acting with prudence, loyalty and impartiality with respect to the beneficiaries of the natural resources impacted by the Department decision.

Delaware Riverkeeper, 2018 EHB at 493.

If this matter proceeds to summary judgment motions or a hearing, the Board will apply this standard to the record established by the parties regarding PFAS and the Department's permitting decision. *See* Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511- 7516, at § 7514 (The Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses and decisions of the Department). If the Department elects to promulgate regulations after the Board issues its ruling, that is a matter that is up to the Department. Our role is simply to determine whether the Department's permitting decision should be upheld under the facts and law pertinent to this case.

Whether the PFAS Claims are Speculative

Apex asserts that the PFAS claims are speculative and cannot succeed on the merits. It challenges the claims for failing to specify details such as: 1) which PFAS will be released, 2) whether the PFAS will present harm or a risk to the environment; 3) whether the PFAS will travel and, if so, the potential routes. The Department concurs with Apex's contention that the claims are speculative, and it argues that Protect PT cannot rely on the Environmental Rights Amendment to legitimize speculative claims.

Both Apex and the Department point to decisions in which the Board has ruled against a third-party appellant when the Board has found their claims to be speculative: For example, in *Benner Township v. DEP*, 2019 EHB 594, 633, the Board held, "An appellant must prove by a preponderance of the evidence that the problems it alleges are likely to occur." In *Delaware Riverkeeper*, *supra*, the Board denied third-party appeals of six unconventional gas well permits. One of the arguments made in that case was that the issuance of the permits violated the Department's responsibilities under Article I, Section 27. In explaining the standard of review to be applied, the Board held, "The party challenging the permit issuance may not simply raise an issue and then speculate that all types of unforeseen calamities may occur." 2018 EHB at 473 (citing *United Refining Co. v. DEP*, 2016 EHB 442, 448, *aff'd*, 163 A.3d 1125 (Pa. Cmwlth. 2017) (citing *Shuey v. DEP*, 2005 EHB 657, 711)).

Finally, both Apex and the Department cite *Stocker v. DEP*, 2022 EHB 351, which involved a challenge by a third-party appellant to the Department's approval of a township's revision to its Act 537 plan. One of the arguments made by the appellant was that the Department failed to account for the presence of PFAS which would be exacerbated by the installation of sewer lines approved under the plan. In rejecting the appellant's claim, the Board held:

> Stocker presented no evidence that there is likely to be any contamination to Spring Creek, either during the installation of the sewer lines, or from a discharge to Spring Creek from the Authority's sewage treatment plant. Nor has he sought to quantify any such contamination. At this point, it is merely supposition and speculation. An appellant bearing the burden of proof cannot simply point to the existence of PFAS, without more, and treat it as a foregone conclusion that all activity in an area with PFAS should be put on indefinite hold.

Id. at 370.

However, as Protect PT points out, the decisions relied upon by Apex and the Department are adjudications that were issued by the Board *after a hearing on the merits and based on a fully developed record.* Here, the parties are still engaged in discovery. According to Protect PT it anticipates deposing individuals regarding the use of PFAS and is awaiting responses to interrogatories and requests for production of documents. We cannot simply assume in the context of a motion to dismiss that an appellant's claims are speculative where discovery is still ongoing. This is especially true when considering the standard for granting a motion to dismiss. As noted earlier, a motion to dismiss may only be granted where a matter is free from doubt and the moving party is clearly entitled to judgment as a matter of law. *Scott, slip op*. at 2; *Downingtown,* 2022 EHB at 155; *Hopkins*, 2022 EHB at 104. Moreover, the motion must be viewed in the light most favorable to the non-moving party. *Id.* Viewing this matter in the light most favorable to Protect PT as the non-moving party, we cannot say with any degree of certainty that the claims are speculative at this stage of the proceeding.

Apex's motion and the Department's memorandum ask us to evaluate the strength and merits of the PFAS claims. However, that is not the purpose of a motion to dismiss. As discussed in *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54:

> A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern . . . In contrast, a motion for summary judgment requests that the Board make a ruling specifically regarding the merits of the appeal. . . .

A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant's claims; rather, "the operative question is: even assuming everything the non-moving party states is true, can – or should – the Board hear the appeal?" *Id.* at 55. Granting Apex's

motion to dismiss the PFAS claims as speculative at this stage of proceeding would be premature. On that basis we reject this argument.

Prejudice

Both Apex and the Department argue that allowing the PFAS claims to go forward would be burdensome and prejudicial. Apex acknowledges that burden alone is not a legal basis for dismissing the PFAS claims, but asserts it adds additional weight to its argument that the PFAS claims should be dismissed based on other alleged deficiencies. However, because we have rejected Apex and the Department's legal arguments for dismissing the PFAS claims in the context of the motion to dismiss, there is no basis for finding prejudice to Apex or the Department.

Apex points out that the Board recently refused to allow Protect PT to raise similar PFAS claims in another matter on the basis that it would result in undue prejudice to the opposing parties. In *Protect PT v. DEP and Olympus Energy, LLC*, EHB Docket No. 2022-037-B (Opinion and Order on Motion for Leave to Amend Notice of Appeal issued February 13, 2023), the Board denied Protect PT's motion for leave to amend its notice of appeal to add PFAS claims nearly identical to the claims raised in the instant matter. However, in that case the appeal had been filed in June 2022 and Protect PT sought to amend its appeal to add the PFAS claims in January 2023, six months after the appeal had been filed and near the completion of the discovery period (which had been extended at the request of the parties). The Board denied the motion to amend the appeal to add the PFAS claims, finding that it would be prejudicial to the Department and permittee at that late stage of the proceeding because it would have required a lengthy extension to the discovery period and delayed the scheduling of a hearing.

That reasoning is not applicable here. First, the timing is different in both cases. In the earlier *Protect PT* appeal the appellant sought to add the PFAS claims six months into the appeal.

Here, the claims have been made in the notice of appeal. Second, the standards for evaluating a motion to amend an appeal and a motion to dismiss are very different. When evaluating a motion to amend an appeal, leave may be granted "if no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). In the earlier case, the burden was on Protect PT to show that no prejudice would result to the opposing parties. Here, the motion to dismiss must be viewed in the light most favorable to Protect PT, as the non-moving party. When viewed in the light most favorable to Protect PT, we find no prejudice.

PFAS Claims and the Oil and Gas Industry

Finally, Apex argues that Protect PT's PFAS claims are not simply a challenge to the permits at issue in this appeal but, rather, they are an attack on the entire oil and gas industry. It points to the specific language of Objection 27 in the notice of appeal which avers that "hydraulic fracturing releases PFAS, PFOAS, and related chemicals into the environment." According to Apex, Protect PT's objection is not specific to this case but seeks a ruling impacting the entire oil and gas industry. Apex further argues that because PFAS are widely used substances, Protect PT's claims may be seen as extending to industries even beyond oil and gas.

As to Apex's argument that a ruling on the PFAS claims could have implications beyond this case, this is an argument that can be made in many cases before the Board. The Board's decisions routinely have broad applicability, and any ruling has the potential to reach beyond the immediate parties in a case. This is not a basis to avoid exercising our statutory duty to hear appeals of actions taken by the Department.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PROTECT PT	:	
	:	
v.	:	**EHB Docket No. 2022-072-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA) LLC, Permittee	:	

O R D E R

AND NOW, this 29th day of June , 2023, it is hereby ordered that Apex's Motion for Partial Dismissal is **denied** for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: June 29, 2023

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

For the Commonwealth of PA, DEP:
Forrest M. Smith, Esquire
Richard P. Bielawa, Esquire
(via electronic filing system)

For Appellant:
Jennifer Clark, Esquire
Tim Fitchett, Esquire
(via electronic filing system)

For Permittee:
Megan S. Haines, Esquire
Casey Snyder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2022-093-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENCINA DEVELOPMENT GROUP, Permittee	:	**Issued: July 14, 2023**

OPINION AND ORDER ON
MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis

The Board grants a motion to dismiss an appeal of a Department letter that informed a company that the company's proposed facility met the definition of an "advanced recycling facility" and did not require a permit under the Solid Waste Management Act.

O P I N I O N

Clean Air Council has appealed a letter sent from the Department of Environmental Protection (the "Department") to Encina Development Group, LLC ("Encina") dated August 1, 2022 concerning a proposed facility in Point Township, Northumberland County. The letter states the following:

> Thank you for the letter dated July 5, 2022, which was submitted by All 4 on behalf of Encina Development Group, LLC (Encina).
>
> Based upon the information provided to the Department of Environmental Protection (Department), your proposed facility meets the definition of an "Advanced Recycling Facility" per the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.101—6018.1001. Please be advised that in order to continue to meet this definition, the materials that you receive at your facility shall originate from residential, municipal or commercial sources, and may include source-separated recyclable plastics from a materials recycling facilities (MRFs), that are not mixed with solid waste, municipal waste, residual waste, regulated medical and

> chemotherapeutic waste, hazardous waste, electronic waste, waste tires or construction or demolition waste. Under the SWMA, an Advanced Recycling Facility cannot receive residual waste.
>
> We appreciate the breakdown of materials you expect to receive. The Department has evaluated these materials and have concerns that the expanded polystyrene logs, polypropylene super sacks, and the industrial high impact polystyrene may be indicative of material that could be originating from residual waste sources. Some consolidation programs collect from both municipal and residual sources. If Encina chooses to accept these types of materials, please be aware of the origin to avoid residual wastes.
>
> In order to receive residual waste material to conduct "advanced recycling," Encina would need to apply for and obtain a permit from the Department's Bureau of Waste Management, as residual waste does not meet the definition of a "post-use polymer" and, as a result, Encina would no longer meet the definition of an "advanced recycling facility."
>
> Additionally, in Pennsylvania, scrap yards, which are listed as a potential source of feedstock material for the proposed facility, are considered to be residual waste generators.
>
> Please note that the current exemption that applies to Encina for obtaining a permit under the SWMA does not apply to other permits that may need to be obtained from other Department Programs.
>
> If you have any questions about operating as an Advanced Recycling Facility or the requirements of the SWMA please contact me….

(Encina Ex. A.)

The letter from the Department was preceded by communications and meetings between Encina and the Department regarding what permits Encina would require for its proposed facility and whether the facility needed a permit under the Solid Waste Management Act, 35 P.S. §§ 6018.101 - 6018.1003. (CAC Ex. B-O.) The communication immediately preceding the letter under appeal was a letter from Encina dated July 5, 2022 identifying a list of the different types of materials Encina proposes to accept at its facility. (CAC Ex. N.) The letter from Encina also contained the following paragraph:

> Encina understands that, based on the type and origin of materials described herein, the Facility qualifies as an advanced recycling facility and therefore does not require a waste permit. Should Encina desire to accept waste from industrial or institutional establishments in the future, they can apply for a GP [general permit]

> or individual permit. Until such time as a permit would be received, materials considered residual wastes could not be accepted.

(*Id.*)

Clear Air Council argues in its appeal that the Department erred (1) "in determining that both phases of the planned Encina Point Township facility would meet the definition of an 'Advanced Recycling Facility'…where Phase 1 would be a standalone project that would engage in processing plastic waste and not in 'advanced recycling'" and (2) "in exempting both phases of the planned Encina Point Township facility from the requirement to apply for and receive a processing facility permit…where Phase 1 would be a standalone project not involving 'advanced recycling' but instead activities which meet the definition of 'processing'…." (Notice of Appeal, Obj. 1, 2.)[1]

Encina has now moved to dismiss this appeal. Encina argues, among other things, that the Department letter is not an appealable action because the letter merely reflects the Department's legal interpretation of definitions contained in the Solid Waste Management Act. Encina contends that, under the Solid Waste Management Act, there is no Departmental action necessary for what it calls the "advanced recycling exemption" to apply. In other words, Encina says it is a self-executing exemption; it arises from the definitions within the Act itself. Encina argues that the Department's letter does no more than confirm that Encina's proposed facility meets the statutory definition of an "advanced recycling facility," and it does not affect anyone's rights, privileges, immunities, duties, liabilities, or obligations.

The Department supports Encina's motion and has filed a memorandum of law pursuant to 25 Pa. Code § 1021.94(b). The Department argues that the Solid Waste Management Act does not

[1] The parties frequently discuss "Phase I" and "Phase II" of Encina's proposed facility. Clean Air Council tells us that Phase I would be a "mechanical sorting operation for recyclable materials" and that Phase II would involve "advanced recycling."

provide for a formal role for the Department to determine whether or not a facility qualifies as an "advanced recycling facility," nor does it provide for any process by which the Department would make such a determination. The Department says that it may at some point be responsible for administering and enforcing the Solid Waste Management Act at the facility, but at this point it is premature for Encina's proposed facility. Finally, the Department argues that the letter has no practical effect, and that Encina is in the same position as if the letter had never been issued because the letter does not affirmatively require Encina to do anything or refrain from doing anything.

Clean Air Council opposes the motion. Clean Air Council asserts that the Department engaged in a detailed review of information provided by Encina over the course of several months through emails, phone calls, and meetings, (*see* CAC Ex. B-O), and that the Department rendered a decision exempting Encina from obtaining a permit after significant consideration and evaluation of the information provided by Encina. Clean Air Council argues that the Department engaged in a fact-specific deliberation about Encina's proposed facility that resulted in a final action that authorizes Encina to operate its Phase I facility without a solid waste management permit.

For the reasons that follow, we grant Encina's motion and dismiss this appeal.

Standard of Review

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and will only grant the motion where the moving party is entitled to judgment as a matter of law. *Ritsick v. DEP*, 2022 EHB 283, 284; *Fox v. DEP*, 2008 EHB 515, 517. For the purposes of resolving motions to dismiss, the Board accepts the non-moving party's version of factual events as true. *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741. A motion to dismiss will be granted only when a matter is free from doubt. *Greyhound Aramingo Petroleum, Co. v. DEP*, 2022 EHB 96, 98; *Bartholomew v. DEP*, 2020 EHB 19, 21.

The Board only has jurisdiction over final Department actions affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2 (definition of "action"); *Monroe Cnty. Clean Streams Coalition v. DEP*, 2018 EHB 798, 800; *Kennedy v. DEP*, 2007 EHB 511, 511-12. There is no bright line rule for what constitutes a final, appealable action. *Chesapeake Appalachia, LLC v. Dep't of Envtl. Prot.*, 89 A.3d 724, 726 (Pa. Cmwlth. 2014); *HJH, LLC v. Dep't of Envtl. Prot.*, 949 A.2d 350, 353 (Pa. Cmwlth. 2008); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. The appealability of Department decisions needs to be assessed on a case-by-case basis. *Glahn v. DEP*, 2021 EHB 322, 326, *recon. denied*, 2021 EHB 347; *Dobbin v. DEP*, 2010 EHB 852, 858; *Kutztown*, 2001 EHB at 1121.

In determining whether a Departmental letter constitutes a final, appealable action, we generally consider: the wording of the letter; its substance, meaning, purpose, and intent; its practical impact; the regulatory and statutory context; the apparent finality of the letter; what relief, if any, the Board can provide; and any other indicia of the impact upon the recipient's personal or property rights. *Hordis v. DEP*, 2020 EHB 383, 388 (citing *Merck v. DEP*, 2015 EHB 543, 545-46; *Teska v. DEP*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB at 858-59; *Kutztown*, 2001 EHB at 1121). In short, we ask whether a Department decision adversely affects a person. 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2. Department decisions that "do not affect a party's personal or property rights, remedies, or avenues of redress are not appealable actions." *Sayreville Seaport Assocs. Acquisition Co. v. Dep't of Envtl. Prot.*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012). Further, "a letter that 'merely affirm[s] the status quo' is not a decision from which an appeal may be taken." *Glahn v. Dep't of Envtl. Prot.*, ___ A.3d ___, No. 1273 C.D. 2021, slip op. at 7 (Pa. Cmwlth. July 10, 2023).

Background

To frame the context of the Department's letter, it is necessary to have an understanding of a recent amendment to the Solid Waste Management Act, which became effective in January 2021. The amendment to the Act added new definitions for "advanced recycling," "advanced recycling facility," and "post-use polymers," and also changed the existing definitions of "municipal waste," "processing," and "treatment" in ways that address "advanced recycling" and "post-use polymers." *See* Act of Nov. 25, 2020, P.L. 1233, No. 127; 35 P.S. § 6018.103. In our view, the key definition is the newly added term "advanced recycling facility," which is defined as:

> A manufacturing facility that receives **post-use polymers** and separates, stores and converts the post-use polymers using **advanced recycling**. The term does not include a resource recovery facility, processing facility, municipal waste processing or disposal facility or any other facility that receives unsorted municipal waste for the purpose of separating out post-use polymers for use in advanced recycling.

35 P.S. § 6018.103 (emphasis added).

The definition of "advanced recycling facility" implicates two other newly defined terms in the Act: "post-use polymers" and "advanced recycling." "Post-use polymers" are defined as:

> Post-use plastic derived from any residential, municipal or commercial source that would not otherwise be recycled, including source-separated recyclable plastics from a materials recycling facility, that is not mixed with solid waste, municipal waste, residual waste, regulated medical and chemotherapeutic waste, hazardous waste, electronic waste, waste tires or construction or demolition waste and may contain incidental contaminants or impurities, such as paper labels or metal rings. **For the purpose of this act, post-use polymers that are converted using advanced recycling shall not be considered solid waste, municipal waste or residual waste**.

Id. (emphasis added). "Advanced recycling" is then defined as:

> A manufacturing process for the conversion of **post-use polymers** through processes, including pyrolysis, gasification, depolymerization, catalytic cracking, reforming, hydrogenation and other similar technologies, into any of the following:
>
> (1) Basic hydrocarbon raw materials, feedstocks, chemicals, liquid fuels, waxes and lubricants.

(2) Other products, including, but not limited to, monomers, oligomers, plastics, crude oil, naphtha, liquid transportation fuels and other basic hydrocarbons.

Id. (emphasis added).

In addition to adding new definitions to the Solid Waste Management Act, the amendment also revised existing definitions. The revision to the definition of "municipal waste" adds a sentence at the end that now explicitly excludes "post-use polymers that are converted through advanced recycling" from the definition of "municipal waste." *Id.* The definition of "processing" was amended so that "[t]he term does not include…[t]he conversion of post-use polymers through advanced recycling in which the manufacturing activities, handling of the post-use polymers at an advanced recycling facility and the products and by-products of the advanced recycling conversion comply with all applicable Environmental Protection Agency and department rules and regulations." *Id.* The definition of "treatment" also was amended to include the same language that was added to the definition of "processing."

The recent amendment to the Solid Waste Management Act, therefore, provides that the "advanced recycling" of "post-use polymers" shall not be classified as waste or waste processing or treatment, and appears to place facilities that engage in that activity outside of the solid waste permitting regime. *See* 35 P.S. § 6018.501 (requiring a permit for the processing, storage, treatment, or disposal of solid waste). There is no statutory or regulatory process for seeking the "advanced recycling facility" designation. It exists only by way of the above definitions.

Discussion

The question with which we are presented is whether the Department's letter stating that Encina's proposed facility meets the definition of an "advanced recycling facility," and therefore does not need to obtain a permit under the Solid Waste Management Act, is an appealable action. Initially, Encina asserts in its motion that the Department has only addressed the "first element"

of an "advanced recycling facility," which it construes as whether Encina's facility will be accepting materials that meet the definition of "post-use polymers." We do not read the letter that way. The letter plainly states that Encina's "proposed facility meets the definition of an 'Advanced Recycling Facility' per the Solid Waste Management Act." As laid out above, the definition of "advanced recycling facility" clearly states that it is for a manufacturing facility that (1) receives post-use polymers and (2) separates, stores, and converts them (3) using advanced recycling. By meeting the definition of an "advanced recycling facility," which incorporates the key terms of "post-use polymers" and "advanced recycling," the facility necessarily has been determined to receive post-use polymers (i.e. post-use plastic derived from any residential, municipal, or commercial source) and engage in advanced recycling (i.e. converting them through an approved process into hydrocarbon raw materials, etc.). Although the bulk of the letter does focus on the materials Encina has proposed to accept, we cannot ignore the clear language of the first substantive sentence in the letter.

Nevertheless, we find that this case falls in line with others in which we have determined that Department letters or communications are not appealable actions when they indicate that a proposed facility or activity meets a certain statutory or regulatory definition and does not require a permit under the law. In *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174, a developer sought to demolish a building at a shopping center to construct a new building. The project involved the placement of fill near a creek. The developer's consultant and staff from the Department met to discuss the plan for the site and the consultant then sent a letter enclosing its plans to the Department for a preliminary review to determine whether or not a water obstruction and encroachment permit was required. The Department issued a letter to the developer stating that some of the work would require a permit but other work would not. The developer and staff

from the Department then had a phone conversation about work being performed outside of the floodway of the creek. The developer then sent the Department another letter with additional plans. The Department responded with the letter that was the subject of the appeal determining that the proposed project did not constitute a water obstruction or encroachment within the floodway of the creek, relying on the definition of "floodway" in the Chapter 105 regulations when evaluating the submitted plans. The letter also stated that the permit requirement was waived under the Dam Safety and Encroachment Act for the placement of fill in the floodway of another small watercourse with a drainage area of 100 acres or less. We found that the letter did not constitute an appealable action because it provided the Department's interpretation of the law and regulations and did not affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of any person. We dismissed the appeal.

In *Gordon-Watson v. DEP*, 2005 EHB 812, the appellants had lodged a complaint with the Department after the Pennsylvania Department of Transportation dumped a significant amount of asphalt road millings on property across the street from the appellants. The appellants believed that PennDOT was disposing of waste without a permit. The Department responded to the appellants' complaint with a letter stating that the road millings were "recycled asphalt paving" that met the regulatory definition of "used asphalt," which is included in the definition of "clean fill," and that a solid waste permit was not required for the activity. The appellants filed an appeal of the letter, arguing that the Department's determination was incorrect and that PennDOT was dumping the millings without a solid waste permit. We granted a motion to dismiss the appeal because we determined that, although the Department's letter explained its decision to not require PennDOT to secure a permit, the letter did not actually authorize PennDOT to engage in any activity because the solid waste regulations simply state that no permit is required for the use of

clean fill. *Id.* at 814-15. We noted that the Department's letter did not require any party to do anything or refrain from doing anything.

In *Borough of Glendon*, 2014 EHB 201, we considered an email the Department sent to a company engaged in the processing of wooden pallets into wood chips and then into fiberboard. The email stated that the company's process "falls out of the definition of a waste and that a recycling permit is not needed from the Waste Management program." *Id.* at 202. We relied on our prior decisions in *Associated Wholesalers* and *Gordon-Watson* to dismiss the appeal, reasoning that the email did not affect anyone's rights or liabilities or direct anyone to do anything or refrain from doing anything. We determined that, even if the email "had said that [the company] does need a permit, we doubt it would have been appealable." *Id.* at 206.

In all three of those cases, the Department concluded, based on its view of the law and an assessment of statutory and regulatory definitions, that an activity or process did not require a permit. In *Borough of Glendon* and *Gordon-Watson*, the Department opined that the activity either met a definition that did not require a permit or did not meet the definition of something that would have required a permit. The same is true here. The Department looked at the new definitions in the Solid Waste Management Act and found that Encina's proposed facility met a definition of an activity that does not require a permit under the Act.

Clean Air Council attempts to distinguish *Borough of Glendon*, *Gordon-Watson*, and *Associated Wholesalers* by arguing that, in those cases, a Department communication was not issued in response to the facility seeking an exception or exemption from permitting. Instead, Clean Air Council argues, those cases involved errant communications from the Department or responses to third-party complaints. However, in *Associated Wholesalers*, a company engaged the Department about its project and whether or not it needed a permit and then had several

communications before the Department opined that certain activities did not need a water obstruction and encroachment permit. That is the same back-and-forth that Encina and the Department engaged in here.

Clean Air Council relies heavily on *Winner v. DEP*, 2014 EHB 135, where we denied a motion to dismiss an appeal of a Department letter that granted an exception from revising a township's sewage facilities plan for a proposed development with an onlot sewage system. However, in *Winner*, there was a defined and detailed regulatory process with several conditions that needed to be satisfied in order to obtain an exception to the planning revision process. *See* 25 Pa. Code § 71.55.[2] Under that process, a developer must submit a Component 1 Sewage Facilities

[2] That regulation outlines a somewhat extensive procedure to obtain exceptions from planning:

> (a) A municipality does not have to revise its official plan when the Department determines that the proposal is for the use of individual onlot sewage systems serving detached single family dwelling units in a subdivision of ten lots or less and the following apply:
>
> (1) The proposal, in addition to the existing or proposed subdivision of which it is a part, will not exceed ten lots.
>
> (2) The subdivision has been determined to have soils and site conditions which are generally suitable for onlot sewage disposal systems under § 71.62 (relating to individual and community onlot sewage systems).
>
> (3) For the purposes of determining whether a proposal qualifies for an exception under this section, the enumeration of lots shall include only lots created after May 15, 1972.
>
> (4) The proposal is consistent with the requirements of § 71.21(a)(5)(iii) (relating to content of official plans).
>
> (b) Documentation supporting a request for exception under this section shall be submitted to the Department using the Department's sewage facilities planning module and shall include:
>
> (1) A statement by the governing body of the municipality acknowledging that they and an existing municipal planning or zoning agency, or both, have reviewed the proposal and found it to be consistent with the municipality's official plan.
>
> (2) Evidence of review by the municipality's sewage enforcement officer.
>
> (c) The municipality shall review sewage facilities planning modules upon receipt. If appropriate documentation and comments required by subsection (b) were not included in the planning module, the municipality shall forward a copy of the sewage facilities planning module to the sewage enforcement officer and appropriate planning or zoning agency within 10 days of receipt. The municipality shall review and act upon an application

Planning Module to the Department that is coupled with a certification from a municipality that the proposed development is consistent with the municipality's sewage facilities plan, and evidence of review by a municipality's sewage enforcement officer. The planning module must also include a description of the site and an analysis of the soils for their suitability for use with an onlot sewage disposal system. The regulation at issue in *Winner* then *requires* the Department to act on the request for an exception within 30 days of receipt of a complete planning module and appropriate documentation or the exception will be deemed to apply. 25 Pa. Code § 71.55(d).

Clean Air Council also cites *Stern v. DEP*, 2001 EHB 628, where we denied a motion to dismiss Department letters granting an exemption from full sewage facilities planning for a housing development. But once again, like in *Winner*, *Stern* involved an assessment made by the Department utilizing a detailed process in the regulations for determining whether the exemption applies. *See* 25 Pa. Code § 71.51(b).[3] The regulatory process in *Stern* involved, among other

---

> for an exception to the requirement to revise an official plan within 60 days of receipt of a complete sewage facilities planning module or additional time that the applicant and municipality may agree to in writing. Failure of the municipality to act within the 60-day period or an agreed-to time extension shall cause the application for the exception to the requirement to revise to be deemed approved by the municipality and the complete application shall then be submitted to the Department by the municipality or the applicant. Documentation of the period of time the application for the exception to the requirement to revise was in possession of the municipality shall be in the form of a completeness checklist signed by a municipal official confirming that the requirements of subsections (a) and (b) have been met.
>
> (d) The Department may act on requests for exceptions to the requirement to revise official plans within 30 days of the Department's receipt of the properly completed and submitted components of the Department's sewage facilities planning module, and proper written documentation. If the Department fails to act within the 30-day period, the exception to the requirement to revise the official plan shall be deemed to be applicable.

25 Pa. Code § 71.55.

[3] That regulation provides in part:

> Except for new land developments proposing the use of retaining tanks, exemptions from sewage facilities planning for new land development will be processed as follows:
>
> (1) Revisions for new land development, exceptions to the requirement to revise and supplements are not required, and permits for onlot systems using a soil absorption area or

things, the submission and evaluation of information regarding area geology and soil testing to confirm an adequate soil absorption area. *See also* 35 P.S. § 750.7(b)(5) (statutory corollary in the Sewage Facilities Act providing that revisions to sewage facilities plans and permits are not required when the Department determines that five factors apply, including soil testing and an evaluation of local geology).

In contrast to *Winner* and *Stern*, for an "advanced recycling facility" there is no defined evaluative process in the statute or regulations, there is no provision of law requiring the Department to render a decision, there is no sampling or testing that needs to be conducted to demonstrate that site conditions are acceptable, there is no form or application or information that a person is required to submit to the Department to be declared an "advanced recycling facility." There is no process at all. Indeed, although the parties throughout their papers refer to an

---

> a spray field may be issued without this planning, when the Department or, in the case of supplements, a delegated agency determines that the following have been met:
>
> (i) The official plan shows that those areas of the municipality are to be served by onlot sewage disposal facilities using a soil absorption area or a spray field as confirmed by signature of the municipal officials.
>
> (ii) The area proposed for the use of individual or community sewage systems is not underlain by carbonate geology nor is this area within 1/4 mile of water supplies documented to exceed 5 PPM nitrate-nitrogen as confirmed by the Department from a USGS geology map or sampling data.
>
> (iii) The area proposed for development is outside of high quality or exceptional value watersheds established under the regulations and policies promulgated under The Clean Streams Law as confirmed by the Department from the location of the new land development on a USGS topographic quadrangle map.
>
> (iv) Subdivided lots and the remaining portion of the original tract after subdivision are 1 acre or larger as confirmed by signature of the applicant.
>
> (v) Complete soils testing and site evaluation establish that separate sites are available for both a permittable primary soil absorption area or spray field and a replacement soil absorption area or spray field on each lot of the subdivision as confirmed by a signed report of the sewage enforcement officer serving the municipality in which the new land development is proposed. The local agency or municipality may require deed restrictions or take other actions it deems necessary to protect the replacement soil absorption area or spray field from damage which would make it unsuitable for future use.

25 Pa. Code § 71.51(b)(1).

"advanced recycling facility" as a permitting "exemption," we are not sure that that is actually the appropriate nomenclature. The new definitions in the Solid Waste Management Act never use the term "exemption" or say that such a facility is "exempt" from permitting. The Act merely declares that a group of materials (post-use polymers) converted in a certain way (through advanced recycling) is not waste, and a facility that handles those materials in that way to be not engaged in the "processing" or "treatment" of waste under the Act. The effect of meeting the definition of an "advanced recycling facility" may be that no permit is required, but there is no formal "exemption" set forth in the Act.[4]

In *Winner*, we noted that, under the regulatory scheme to determine the applicability of an exception, "the Department makes a determination that certain conditions exist, entitling a municipality to permit a development without revising its official plan, **as it would otherwise be obligated to do under the law**." 2014 EHB at 140 (emphasis added). In other words, a defined process and evaluation was followed to determine whether or not an activity that would otherwise require a plan revision under the law met the conditions necessary to be granted an exception. Here, in contrast, the Act has declared an advanced recycling facility to be outside of the solid waste permitting regime because it is not dealing with waste. There is no permit that is otherwise required by law under the Solid Waste Management Act. Like in *Borough of Glendon* and *Gordon-Watson*, the letter here lays out the Department's interpretation that an activity meets a statutory or regulatory definition that falls outside of a particular permitting regime. Since the so-called "advanced recycling exemption" is merely a matter of meeting a definition, it would seem that Encina does not need any approval at all from the Department under the Solid Waste

[4] We do not mean to suggest that a Department decision always needs to definitively arise out of a statutory or regulatory process or obligation to be appealable. We simply hold here under the facts of this case that the Department's statement that Encina's proposed facility meets the definition of an advanced recycling facility and does not need a permit under the Solid Waste Management Act is not an appealable action.

Management Act to operate an advanced recycling facility so long as Encina is within the confines of the definitions in the Act.[5]

This is also not a situation where the Department follows a defined statutory or regulatory procedure for investigating a complaint and is required by law to render a determination on that complaint one way or the other, such as under the Oil and Gas Act, 58 Pa.C.S. § 3218, and the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.5e. *See Kiskadden v. DEP*, 2012 EHB 171 (complaint of water supply contamination under the Oil and Gas Act); *Love v. DEP*, 2010 EHB 523 (mine subsidence claim under the Bituminous Mine Subsidence and Land Conservation Act). *See also Carlisle Pike Self Storage v. DEP*, 2022 EHB 25 (complaint under Section 604 of the Clean Streams Law, 35 P.S. § 691.604). In *Borough of Glendon*, we noted that when the Department fulfills a mandatory statutory duty to investigate, analyze, and decide a claim, that decision impacts a person's property rights and we have jurisdiction over those actions. 2014 EHB at 207. However, like in *Borough of Glendon*, here there is no mandatory duty or defined statutory or regulatory procedure or framework requiring the Department to make a decision on whether an activity qualifies as an "advanced recycling facility."

Clean Air Council also focuses heavily on the communications between Encina and its consultants and the Department. However, as *Associated Wholesalers* demonstrates, the appealability of a Department letter does not necessarily turn on the extent of the communication between the Department and a party that led up to that letter. The documentation from Clean Air Council suggests that Encina's facility may be the first advanced recycling facility to be proposed in Pennsylvania. It does not strike us as unusual that the Department and Encina would have a

[5] Encina and Clean Air Council both tell us that there are several other permits, not under the Solid Waste Management Act, that Encina needs to obtain for the development and operation of its proposed facility, including an air quality plan approval, the application for which is apparently currently under review.

dialogue about whether or not Encina met the definition of such a facility and whether or not a permit was necessary under the Solid Waste Management Act. Although prefatory communications may be helpful as context, a series of communications between a party and the Department does not necessarily mean that a Department letter following those communications is an appealable action. What matters for appealability is if the letter affects any party's personal or property rights, privileges, immunities, duties, liabilities, or obligations. The Department's letter to Encina does not affect any of those things.

The appealability of a Department communication is always decided on a case-by-case basis. We find that the Department's letter to Encina is in community with other situations where we have held that Department communications are not appealable because they merely offer the Department's interpretation of the law that an activity meets or does not meet a statutory or regulatory definition. When Department letters "do not grant or deny a pending application or permit, and they do not direct [a company] to take any action nor impose any obligations on the company[,]" those letters typically are not appealable actions. *Sayreville Seaport Assocs., supra*, 60 A.3d at 872. "Rather, the letters are best characterized as advisory opinions, expressing the Department's understanding of Pennsylvania law." *Id.* The letter at issue here is just such a letter.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2022-093-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENCINA DEVELOPMENT GROUP, Permittee	:	

O R D E R

AND NOW, this 14th day of July, 2023, it is hereby ordered that the Permittee's motion to dismiss is **granted** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: July 14, 2023

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

For the Commonwealth of PA, DEP:
Geoffrey J. Ayers, Esquire
David M. Chuprinski, Esquire
(*via electronic filing system*)

For Appellant:
Alexander G. Bomstein, Esquire
Eleanor M. Breslin, Esquire
Joseph Minott, Esquire
(*via electronic filing system*)

For Permittee:
Robert D. Fox, Esquire
Carol F. McCabe, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEECH MOUNTAIN LAKES ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2022-053-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH MAURER, Permittee	:	**Issued: July 18, 2023**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a joint motion for summary judgment filed by the Department and a permittee and denies an appellant's motion for summary judgment where the appellant, bearing the burden of proof in this appeal, has relied on general assertions and not produced sufficient evidence to make out a *prima facie* case to show that the Department erred in approving coverage under a general permit for a small floating dock, or show that any issues remain for a merits hearing.

O P I N I O N

This matter involves an appeal by Beech Mountain Lakes Association, Inc. ("BMLA") of the Department of Environmental Protection's (the "Department's") approval of Permittee Seth Maurer's registration of a small floating dock under General Permit BWEW-GP-2, Small Docks and Boat Launching Ramps, on the Lake of the Four Seasons ("Lake") in Butler Township, Luzerne County. Mr. Maurer submitted application no. 024002122-002 to the Department for authorization to build a small floating dock on February 14, 2022. In the project description, Mr.

Maurer described the proposed dock as a recreational and temporary structure approximately 15 feet by 15 feet that would float on the Lake adjacent to Mr. Maurer's property. In late April, the Department issued a Correction Notice to Mr. Maurer, to which he responded. The Department determined that the application was administratively complete on May 8, 2022, and Mr. Maurer was granted coverage under the permit on May 10, 2022.

On August 2, 2022, BMLA appealed the Department's grant of coverage under the permit after receiving notice of the Department's authorization on July 6, 2022 via a Right-To-Know response from the Department. BMLA is an association comprised of various owners of interests in the Beech Mountain Lake Development and Quail Hollow Village in Butler Township, adjacent to the Lake. Mr. Maurer and Christina Maurer own two properties in Butler Township that are also adjacent to the Lake, but they are not members of BMLA. BMLA owns the Lake and issues policies concerning its use. BMLA contends that, although the Maurers own property on the Lake, they do not have the right to use the Lake. To that end, on March 18, 2022 BMLA initiated litigation in the Court of Common Pleas of Luzerne County against the Maurers and other defendants seeking declaratory judgment that the defendants collectively do not have the right to use the Lake.[1] That litigation remains ongoing.

Both BMLA and the Department, joined by Mr. Maurer, have moved for summary judgment in this matter. BMLA submits five arguments in support of its request for summary judgment: (1) Mr. Maurer did not include all relevant facts in his permit registration materials, primarily not disclosing the litigation before Common Pleas court; (2) Mr. Maurer did not address any potential effects his dock might have on public safety and failed to provide an adequate water

[1] There is no dispute that the Maurers hold title to the land wherefrom the dock will extend; what is apparently disputed is the substance of that title and what rights and restrictions it may or may not contain regarding use of the Lake.

dependency statement; (3) these omissions prevented the Department's consideration of the effect of the floating dock on the property or riparian rights of owners upstream, downstream, or adjacent to the project; (4) Mr. Maurer did not obtain releases from owners of affected riparian property; and (5) the Department did not hold a hearing prior to approving coverage under the permit.

The Department and Mr. Maurer, in their motion, argue that all of BMLA's objections to the grant of coverage under the permit flow from the property rights dispute between BMLA and Mr. Maurer over the right to use the Lake, and that such a dispute is not a factor that need be considered in reviewing coverage under the small dock general permit because it does not convey any property rights. They also argue that Mr. Maurer submitted all of the necessary information for coverage under the permit, and that, as third-party appellants of a permit bearing the burden of proof, BMLA has not submitted sufficient evidence of facts to make out a *prima facie* case. For the reasons that follow, we deny BMLA's motion, grant the Department and Mr. Maurer's motion, and dismiss this appeal.

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; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is also available:

> [I]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at

> trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2(2); *Whitehall Twp. v. DEP*, 2017 EHB 160, 163. In other words, the party bearing the burden of proof must make out a *prima facie* case. *Longenecker v. DEP*, 2016 EHB 552, 554. In third-party appeals of the Department's issuance of a permit, the party protesting the issuance of the permit bears the burden of proof to show that the Department erred in issuing the permit. 25 Pa. Code § 1021.122(2). BMLA bears that burden in this appeal.

Before getting into the merits of the parties' arguments, we think it is useful to have some brief background on permitting under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27 (DSEA). In order to construct a water obstruction or encroachment such as a recreational dock, a person must first obtain an individual permit or register for coverage under a general permit from the Department under the DSEA. Because projects involving water obstructions and encroachments are widely varied in size, structure, and risk, there are different permit types – standard, small project, and general – and each places specific application or registration requirements on the prospective permittee that fulfill the statutory mandates of the DSEA. *See generally* 25 Pa. Code §§ 105.1-105.451. Although there is some overlap in these requirements, the extent of the information that must be produced by the prospective permittee differs based on the permit type. *See Lyons v. DEP*, 2011 EHB 169, 180-81 (discussing the reasonability of differentiated application requirements based on permit type under the DSEA).

General permits function somewhat differently than individual permits. The DSEA grants the Department the authority to develop and issue general permits for certain classes of activities, and to waive certain permit requirements where appropriate:

(a) The Environmental Quality Board may, by regulation, waive the permit requirements for any category of dam, water obstruction or encroachment which it determines has insignificant effect upon the safety and protection of life, health, property and the environment.

(b) The department may, in accordance with rules adopted by the Environmental Quality Board, issue general permits on a regional or Statewide basis for any category of dam, water obstruction or encroachment if the department determines that the projects in such category are similar in nature, and can be adequately regulated utilizing standardized specifications and conditions.

(c) General permits shall specify such design, operating and monitoring conditions as are necessary to adequately protect life, health, property and the environment, under which such projects may be constructed and maintained without applying for and obtaining individual permits. The department may require the registration of any project constructed pursuant to a general permit.

(d) All general permits shall be published in the Pennsylvania Bulletin at least 30 days prior to the effective date of the permit.

32 P.S. § 693.7. *See also* 25 Pa. Code § 105.442 (elaborating on authorization for issuing general permits).

The regulations in Chapter 105 detail how a general permit satisfies the major regulatory permitting requirements and provides for a process of obviating the need for the submission of an individual permit application to utilize a general permit:

(a) When the Department issues a general permit for a specified category of dam, water obstruction or encroachment on either a regional or Statewide basis, persons who intend to construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment in accordance with the specifications and conditions of the general permit may do so without filing an individual application for, and first obtaining, an individual permit.

(b) Use of an applicable general permit shall satisfy the permit requirements set forth in § 105.11 (relating to permit requirements), so long as:

  (1) Activities are conducted in accordance with the specifications and conditions of the applicable general permit.

  (2) The owner of the dam, water obstruction or encroachment complies with the registration requirements set forth in the general permits, as authorized by § 105.448 (relating to determination of applicability of a general permit).

25 Pa. Code § 105.443. Persons seeking to avail themselves of a general permit for their project register for coverage under that permit instead of submitting an application for an individual permit. 25 Pa. Code § 105.447. All registration statements must include: "(1) The name and address of the person responsible for the project. (2) The location of the project. (3) The name or number of the general permit being utilized for the project." 25 Pa. Code § 105.447(c)(1)-(3).

For the general permit involved here, the Department first issued the BWEW-General Permit-2 for small docks and boat launching ramps on December 29, 1990 and modified and reissued it on August 6, 1994. (DEP Exhibits 1-5.) Since then, the permit has been available for use by anyone with an eligible project that satisfies the terms and conditions and first registers the project with the Department. 25 Pa. Code §§ 105.443, 105.447.

BMLA's first four stated grounds for summary judgment all concern the question of whether Mr. Maurer submitted a complete and accurate registration for coverage under the general permit, and thus whether the Department erred when it granted coverage to Mr. Maurer under the permit. BMLA says that, because of the allegedly missing information, the Department was prevented from carrying out its statutory and regulatory obligations in reviewing projects for permitting. *See* 25 Pa. Code § 105.21(a)(1) (the Department is only empowered to approve complete and accurate applications and registrations). However, "[a] party who would challenge a permit must show us that errors committed during the application process have some continuing relevance." *O'Reilly v. DEP*, 2001 EHB 19, 51. *See also Shuey v. DEP*, 2005 EHB 657, 712 (holding that revocation or remand of a permit must be based on material error in the permitting process). Parties who complain that the Department should have considered something in its review of a project need to "tell us how that consideration would have made any difference." *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484. In its motion, BMLA does not explain why any

of the information that it believes should have been included in Mr. Maurer's permit registration should have prompted a different result with respect to the approval of permit coverage.

The first of BMLA's arguments contends that Mr. Maurer should have disclosed to the Department the ongoing Common Pleas litigation regarding the Maurers' right to use the Lake so that the Department could have "been informed of and assessed these facts, regardless of [its] ultimate decision." The Department and Mr. Maurer, on the other hand, argue that the existence of the Common Pleas litigation is not a relevant fact for a grant of coverage under this general permit because the permit does not grant, convey, or otherwise affect property rights.

We agree with the Department and Mr. Maurer. First, it is clear by its own terms that the general permit does not grant or convey any property rights to the permit holder: "PROPERTY RIGHTS – This General Permit does not authorize trespassing on private property nor convey any property rights, either in real estate or material, or in any exclusive privileges; nor does it authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations." (DEP Exhibit 6, page 2-5, Section F, Paragraph 7 (underlining in original).) Regardless of the ongoing litigation in the Court of Common Pleas, the Department's authorization of coverage under the general permit does not somehow authorize Mr. Maurer to use the Lake if that right does not already exist. The permit does not independently grant Mr. Maurer any property interest in the Lake. *See Abod v. DEP*, 1997 EHB 872, 885 (the Department's authorization of a permit under the DSEA to build a dock where ownership is in dispute does not grant any property rights or allow the permittee to build and maintain a dock on the property of another).

The dispensation of the parties' dispute in the Court of Common Pleas may ultimately preclude the Maurers from having their small floating dock on the Lake, but that does not necessarily mean that the permit coverage was issued in error. We have held on several occasions

that the mere existence of a possible property dispute is irrelevant to the Department's review of a general permit registration absent a clear statutory or regulatory directive to the contrary. In *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, we dismissed an appeal from the Department's grant of coverage under a general permit where the only issue on appeal related to the permittee's right to use the property of another and the appellant had already initiated litigation in the court of common pleas to determine that right. We held that:

> The issuance of the Permits is DEP's decision that the proposed facilities satisfy the public's concern for safety, navigation and environmental conservation. It goes no further. Permittee's right to enter upon the land and install the facilities must be established independent of the Permits. That issue is properly left to the Court of Common Pleas of Bucks County.

Id. at 243. *See also Bentley v. DEP*, 1999 EHB 447, 450 (discussing the question of what is authorized by permits issued by the Department and finding that "the Department is not precluded from issuing a permit for an activity that requires use of the property of another. The right to enter or use the land of another must be independently established by the permittee and disputes regarding such use must be resolved in the courts of common pleas." (internal citations omitted)).

To the extent that any property interests are relevant, there is no dispute that Mr. Maurer is the record owner of the land from which the dock will extend. We cannot say that the Department erred when it authorized Mr. Maurer's dock under the general permit without knowledge of the Common Pleas litigation. The Department tells us that knowledge of the litigation would not have affected the Department's review of the Mr. Maurer's registration materials and would not have changed the Department's grant of coverage under the permit. We find no reason why the existence of the litigation should have prompted the Department to deny coverage under the general permit or why that litigation should prompt us to reverse or vacate coverage under the permit. The question of Mr. Maurer's right to use the Lake is properly before the Court of

Common Pleas. Therefore, BMLA's request for summary judgment based on the omission of the litigation from Mr. Maurer's permit registration is denied.

Next, BMLA argues that Mr. Maurer failed to describe, illustrate, or define the effect the dock will have on public safety and failed to provide an adequate statement on water dependency. Specifically, BMLA argues that because the Maurers are not members of BMLA and BMLA issues rules for using the Lake, their dock will create an inherent potential for conflict that will impact safety on the Lake, and that Mr. Maurer's general permit registration was misleading because he did not mention BMLA in his materials. The Department and Mr. Maurer respond that the Department has already considered the categorical effect of small docks and boat launches on public safety and their water dependency in its promulgation of the general permit, as it is authorized to do under the DSEA, 32 P.S. § 693.7. (DEP Exhibits 1-5, 7; Affidavit of Michael Tarconish.)

Small docks and boat launches strike us as precisely the class of activities that is appropriately regulated under a general permit due to their relatively standardized nature and predictable environmental impacts. An assessment of public safety and a water dependency statement are requirements under the DSEA and must be submitted by applicants for individual permits, 25 Pa. Code § 105.14(b)(7), but registration for coverage under the general permit does not require the prospective permittee to submit individualized information on these questions. Even if it did, BMLA has not explained why any of that information, if it were submitted to the Department, would matter here or warrants anything but coverage being approved. *See O'Reilly, supra*, 2001 EHB at 51.

Tellingly, BMLA does not explain what safety impact there will be because of Mr. Maurer's dock or how they will come about. BMLA produces no record evidence of any potential

safety issues. BMLA provides copies of some of its policies for using the Lake, (BMLA Exhibits 3, 4), but those alone are insufficient to establish a safety issue. BMLA says "one can imagine potential conflicts with the BMLA Boating and Lake Policy," but that obviously does not explain any potential safety issue, let alone one that would justify reversing coverage under the permit. While it is true that the Department should not approve misleading permit applications and registrations that lack all relevant facts, BMLA has failed to explain why its policies are relevant to this permitting process or why they should have prevented the Department from authorizing coverage under the general permit. With respect to water dependency, it is somewhat difficult to imagine how a dock is *not* a water-dependent project. It is inherent in the definition of a dock that it will have some projection into the water to allow for a boat to land. We would think that most if not all docks require access or proximity to or siting within water to fulfill their basic purpose. *See* 25 Pa. Code § 105.13(e)(1)(iii)(D).

BMLA next argues that the Department was prevented from considering potential adverse effects on property or riparian rights of owners upstream, downstream, or adjacent to the floating dock, again based on Mr. Maurer's failure to disclose BMLA's existence. While such considerations are required under the regulations for individual permits, 25 Pa. Code § 105.14(b)(3), for proposed projects under the small docks general permit, the Department looks at the placement of the proposed project to make a determination of impact. If the project is to be placed straight into the water from the permittee's land, the Department generally concludes that there will be no adverse effects on property or the riparian rights of owners upstream, downstream, or adjacent to the small floating dock. (Affidavit of Michael Tarconish ¶ 6.) Based on the project description, Mr. Maurer's dock is to be placed straight into the water from his land. (*Id.* ¶ 7.) Thus, even if Mr. Maurer had made mention of BMLA in his registration materials, that mention would

not have caused the Department to change its review of his registration unless he had indicated that the dock would not be built straight into the body of water.

Further, although BMLA has provided various documents related to its own policies and the property dispute, it has offered nothing to show that the placement of the dock has any actual effect on upstream, downstream, or adjacent property rights. BMLA has not articulated, let alone offered any evidence of, any impact on anyone's property or riparian rights as a result of Mr. Maurer's 15-foot by 15-foot floating dock. Accordingly, summary judgment is denied on this issue.

BMLA also argues that under Section 105.332 of the regulations, Mr. Maurer was required to obtain and furnish releases from the owners of affected riparian property. That regulation provides: "When an applicant proposes location of a structure on or in front of **riparian property not owned by the applicant**, the applicant shall obtain and furnish to the Department notarized and signed releases from the owners of the affected riparian property." 25 Pa. Code § 105.332 (emphasis added). First, to the extent this regulation even applies to this general permit, as opposed to an individual permit application submitted under 25 Pa. Code §§ 105.13 and 105.331, there is no dispute that Mr. Maurer owns the property from where the dock will attach. While BMLA suggests that every parcel on the Lake constitutes affected riparian property, and that Mr. Maurer should have obtained releases from BMLA or all riparian property owners on the Lake, that is simply not what the regulation requires.

Even so, BMLA once again has offered no evidence of how every riparian property owner on the Lake is specifically affected by the Maurers' proposed 15-foot by 15-foot floating dock running straight out from their property. *See Cooper v. DER*, 1982 EHB 250, 272 (holding that there must actually be "affected" riparian property to require the permittee to produce such

releases). BMLA's apparent position would result in requiring every riparian property owner on any body of water within the Commonwealth to obtain and furnish releases from every other riparian property owner on that body of water, no matter how distant from the project, thus reading "affected" out of the regulation. Without record support of how these riparian owners are affected, BMLA's assertions here are broad and generalized, and insufficient to rise to the level of specificity and support needed to succeed on a summary judgment motion. *See Shuey,* 2005 EHB at 712; *Goetz v. DEP*, 2003 EHB 16, 19; *Eagleshire v. DEP*, 1998 EHB 610, 614-15.

BMLA also argues that the Department should have held a hearing on Mr. Maurer's permit registration prior to granting coverage, but, as BMLA admits, the decision of whether or not to hold a hearing is discretionary. 32 P.S. § 693.8(c). BMLA argues that this situation is unique, and that the Department could only understand its complexities via a hearing. However, BMLA bases this argument once again within the context of the dock's general interaction with all other property owners and whether its use will be consistent with BMLA's policies for the Lake. Once again, these claims lack specificity and are unsupported in the record. Without specific claims and record support, it is impossible to say that the Department erred when it chose not to hold a hearing on a routine general permit registration.

By generally arguing that Mr. Maurer should have provided information that is not required by the Department under this general permit, BMLA in some ways appears to be lodging an attack on the entire concept of a general permit. BMLA's arguments here are not dissimilar from those put forth by the appellant in *Lyons v. DEP*, where the Board found that Lyons was attacking an entire category of permit, rather than the specifics of the permit at issue. 2011 EHB at 180-81. In that appeal, Lyons challenged the Department's issuance of a small projects permit under the DSEA, arguing that the dock at issue should not have been permitted under a small projects permit,

but rather that the Department could not rationally determine whether the dock qualified as a small project without all the information required by a standard permit application, and therefore the permittee should have been required to submit a standard permit application. *Id.* We rejected that argument, finding that the differing approach to individual permits was a

> reasonable way to apportion limited resources based on risk. The purpose of creating reduced requirements for small projects is to save permit applicants and permit reviewers the considerable time and expense associated with a full-blown application where such detailed information is simply not necessary. Lyons's approach would defeat that purpose. There would be no point to creating reduced application requirements for small projects if applicants for small projects were required to submit standard applications anyway.

Id.

Here, as in *Lyons*, Department personnel received Mr. Maurer's registration, requested and received more information, and then determined that the permit sought was the appropriate permit for this particular project. The Department has provided evidence describing what it does and does not consider in its review under this general permit for small docks and boat launches, including the rulemaking under which the general permit was promulgated and affidavits of Department personnel. (DEP Exhibits 1-5, 7; Affidavit of Michael Tarconish.) The Department's review of such projects generally, and specifically here with Mr. Maurer's project, appears to be a reasonable and appropriate exercise of its authority under the DSEA.

Turning to the Department and Mr. Maurer's motion, they argue that BMLA's entire appeal is about a property dispute that is more appropriately resolved before the Court of Common Pleas. They say this dispute is simply not relevant to a general permit that does not convey or establish any property rights, and there really is not anything more to BMLA's appeal. They also assert that discovery in this matter has closed and BMLA does not have sufficient evidence to prove its case.

In opposing the motion, BMLA says that its appeal is about more than simply property issues, pointing out that there are 16 objections in its notice of appeal.

There is certainly merit to the Department and Mr. Maurer's argument. As discussed above with respect to BMLA's motion, nearly all of BMLA's arguments relate to alleged property disputes, whether it is failing to identify the Common Pleas litigation, failing to consider nearby property or riparian rights, or failing to obtain releases from riparian owners, which we have already resolved in favor of the Department and Mr. Maurer.

Although BMLA says its appeal is about more than property issues, it never says which of its objections from its notice of appeal are not related to the property dispute or what aspect of its case remains beyond the property rights dispute that is appropriately before the Court of Common Pleas. The notice of appeal contains some general objections about the Department's decision to authorize coverage being "unreasonably and unlawfully motivated," "technically and procedurally deficient," "unlawful," "premature, unreasonable, arbitrary, and capricious," "unreasonable, unsupported by the facts, and/or not in accordance with applicable law," and without a "sufficient legal reason." (NOA Obj. 1-6.) These somewhat boilerplate objections lack any specificity and BMLA, in its response to the Department and Mr. Maurer's motion, has not produced evidence of any facts essential to establishing any of these claims in any detail. Pa.R.Civ.P. 1035.2(2). There are also certain objections that contend the project broadly violated the DSEA and the Chapter 105 regulations. Although the notice of appeal does not set forth any specific explanation of any provision that was violated, (NOA Obj. 11, 14), we have already dealt with the statutory and regulatory provisions that BMLA has since identified in its summary judgment papers and found BMLA's arguments unavailing.

BMLA never explains any specific basis for its appeal that is not tied to its baseline disagreement that Mr. Maurer is not allowed to use the Lake. All of the more specific objections in BMLA's notice of appeal identify property issues or complain that Mr. Maurer did not tell the Department about the Common Pleas litigation, which we have already determined to be inconsequential to the approval of coverage under this general permit. (NOA Obj. 7-10, 12, 13, 15.) Just as BMLA has not produced any evidence to establish any of these claims in its own motion, it has not produced any evidence to establish these claims in response to the Department and Mr. Maurer's motion.

The final objection in the notice of appeal argues that the Department failed to review the Maurer dock to determine the cumulative impact of the project and other potential or existing projects, 25 Pa. Code § 105.14(b)(14). (NOA Obj. 16.) We have already addressed a portion of this concern above regarding the effect of Mr. Maurer's dock on the property or riparian rights of owners upstream, downstream, or adjacent to the project. In addition, there is no explanation from BMLA of why the 15-foot by 15-foot floating dock has some negative cumulative impact in conjunction with, for instance, existing or potential other docks on the Lake beyond the refrain that Mr. Maurer's use of his dock might not comply with BMLA's policies and that it might cause some vague and unspecified conflict. BMLA does not identify any other projects. The Department identifies another small dock that it permitted under a general permit on the Lake, but there is no suggestion that that dock along with Mr. Maurer's creates any environmental impact or concern in the aggregate. The remainder of the regulatory provision cited in BMLA's objection says the Department will evaluate whether several piecemeal changes could result in a major impairment of wetland resources or whether an affected wetland is part of a larger, interrelated wetland area. We have not been informed of anything like that at issue in this appeal. Section 105.14(b) lists the

factors the Department is to consider when reviewing a permit application to make an assessment of the project's impact. To the extent it even applies to a registration for coverage under a general permit, there is simply no credible showing of any impact on anyone from Mr. Maurer's dock, either on its own or in conjunction with any other project in the area.

Under our Rules, an adverse party to a summary judgment motion may not rest upon the mere allegations or denials of the adverse party's notice of appeal. 25 Pa. Code § 1021.94a(*l*). Instead, the adverse party's response, by way of affidavits or otherwise, must set forth specific facts showing there is a genuine issue for a hearing. *Id.* A party that does not respond accordingly risks having summary judgment entered against it. *Id.*; *Clean Air Council v. DEP*, 2022 EHB 350, 362. The onus is on BMLA to show us what remains of its case that is not related to property issues more appropriately resolved before the Court of Common Pleas. BMLA has failed to provide any evidence to show us that there are issues left to be adjudicated at a hearing on the merits before this Board. In so doing, BMLA has also failed to make out a prima facie case, making summary judgment appropriate. Pa.R.Civ.P. 1035.2(2); *Casey v. DEP*, 2014 EHB 439, 443-44. Based on the foregoing, BMLA's motion for summary judgment is denied, and the Department and Mr. Maurer's joint motion for summary judgment is granted.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEECH MOUNTAIN LAKES ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2022-053-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH MAURER, Permittee	:	

O R D E R

AND NOW, this 18th day of July, 2023, it is hereby ordered that the Appellant's motion for summary judgment is **denied** and the Department and Permittee's motion for summary judgment is **granted**. The docket for this appeal will be marked closed.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Michelle Coleman
MICHELLE A. COLEMAN
Judge

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: July 18, 2023

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

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

For Appellants:
John Kenneth Lisman, Esquire
William L. Byrne, Esquire
(*via electronic filing system*)

For Permittee:
Brett Woodburn, Esquire
Christine Line, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDNA ONGACO	:	
	:	
v.	:	**EHB Docket No. 2023-022-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 25, 2023**

OPINION AND ORDER ON
MOTION TO DISMISS

By Sarah L. Clark, Judge

Synopsis

The Board grants the Department's motion to dismiss for lack of jurisdiction where the record demonstrates that the Appeal was filed beyond the 30-day appeal period, and the appellant failed to fully respond to the Board's Order to Perfect, and did not file a response to the motion to dismiss.

O P I N I O N

On January 12, 2023, the Department of Environmental Protection ("Department") issued an Administrative Order ("Order") to AESO, Inc. ("AESO"), a Pennsylvania corporation with a mailing address listed as 335 Schoonmaker Avenue, Monessen, PA, 15062. The Order seeks compliance with provisions of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 and regulations promulgated thereunder in relation to four aboveground storage tanks situated on property located at Route 906 N. Rostraver Township, Westmoreland County, Pennsylvania. According to the Department, AESO has been the record owner of the property since September 8, 2006. The Order was sent via certified mail to AESO's listed president, Edna Ongaco, at 1545 Belgreen Drive, Whittier, CA, 90601, the same

address listed as Ms. Ongaco's residence in the Notice of Appeal.[1] Specifically, the Order directs AESO to register as the owner of the four aboveground storage tanks, pay the delinquent registration fees for those storage tanks, have the storage tanks permanently closed by a Department-certified individual or individuals, and submit a properly completed closure report to the Department.

While the Order was directed to AESO through its president, Ms. Ongaco, the company itself did not file an appeal. Instead, Ms. Ongaco filed an incomplete appeal *pro se* on her own behalf with the Board on March 8, 2023. In her appeal, she claims no knowledge of, nor responsibility for, the storage tanks. On March 13, 2023, the Board issued an Order to Perfect the appeal, requesting a complete copy of the Department action being challenged, proof of service of the Notice of Appeal upon the persons listed on Page 3 of the Notice of Appeal form, and the specific date on which Ms. Ongaco received notice of the Department's action. Thus far, Ms. Ongaco has provided a complete copy of the Department action, but she has not provided proof of service or the date that the Department's Order was received.

On June 1, 2023, the Department filed a motion to dismiss for lack of jurisdiction based on the untimeliness of Ms. Ongaco's filing of the Notice of Appeal.

The Board's rules of practice and procedure provide that a response to a dispositive motion must be filed within thirty days of service of the dispositive motion. 25 Pa. Code § 1021.94(c). When, as in this case, the dispositive motion is served by mail, it is deemed served three calendar days after the date of actual service. 25 Pa. Code § 1021.35(b)(3). The rules further provide that failure to respond may result in the motion to dismiss being granted. 25 Pa. Code 1021.94(f).

[1] The Department directs our attention to the Pennsylvania Department of State's website as the source of this information.

Thirty-three days after the Department's motion was filed elapsed on July 5, 2023, and Ms. Ongaco did not file a response to the Department's motion to dismiss. As such, the Board will proceed to consider the Department's motion.

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and only grants the motion where the moving party is entitled to judgment as a matter of law. *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op*. at 2 (Opinion and Order on Motion to Dismiss issued May 15, 2023) (citing *Muth v. DEP*, 2022 EHB 262, 264); *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, EHB Docket No. 2022-093-C, *slip op*. at 4 (Opinion and Order on Motion to Dismiss issued July 14, 2023) (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Where the non-moving party does not file a response to a motion to dismiss, the Board "will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.91(f); *Burnside Twp. v. DEP*, 2002 EHB 700, 701. The Board will only grant a motion to dismiss where the matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517.

The Board's rules provide that, where the Department has issued an order to a party, the party must file its appeal within thirty days of receiving written notice of the order for jurisdiction to attach, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Rostosky v. Commonwealth, Dep't of Envtl. Res.*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *see also Burnside*, *supra*, 2002 EHB at 703 (dismissing an appeal filed thirty-one days after the appellant received notice). The Storage Tank and Spill Prevention Act does not afford additional time for appellants to file. 35 P.S. § 6021.1313. Further, when required information is missing from the

Notice of Appeal and the Board issues an Order to Perfect, the appellant must supply that missing information within 20 days of the Board's Order "or suffer dismissal of the appeal." 25 Pa. Code § 1021.52(b); *see also Tanner v. DEP*, 2006 EHB 468, 469 (discussing the appellant's failure to comply with the Board's Order to Perfect as an indication of disinterest in participating in the appeals process).

The Department seeks dismissal of Ms. Ongaco's appeal on the basis that it was not timely, therefore the Board lacks jurisdiction to hear the appeal, and that Ms. Ongaco did not fully comply with the Order to Perfect and therefore the appeal must suffer dismissal. Specifically, the Department asserts that Ms. Ongaco's appeal was not timely because she received the Order via certified mail on January 18, 2023, but did not file the appeal until 49 days later, on March 8, 2023. In support of this assertion, the Department has provided evidence in the form of a certified mail return receipt signed by Ms. Ongaco accepting the Department's Order on January 18, 2023. (DEP Exhibit B.) By electing not to file a response to the Department's motion, Ms. Ongaco has not contested this timeline or her signature on the certified mail return receipt, and we will thus consider those facts admitted. 25 Pa. Code § 1021.91(f).

As the appeal was filed 49 days after notice was received, and the Storage Tank and Spill Prevention Act does not provide any additional time to file an appeal, we conclude that Ms. Ongaco's appeal is untimely and the Board lacks jurisdiction to hear the appeal.

Accordingly, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDNA ONGACO	:	
	:	
v.	:	**EHB Docket No. 2023-022-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 25th day of July, 2023, it is hereby ordered that the Department's motion to dismiss is **granted** and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven Beckman
STEVEN BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: July 25, 2023

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

For the Commonwealth of PA, DEP:
Tyra Oliver, Esquire
Edward S. Stokan, Esquire
(via electronic filing system)

For Appellant:
Edna Ongaco
1545 Belgreen Drive
Whittier, CA 90601
(via first class U.S. mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN AND ELLEN GERHART	:	
	:	
v.	:	**EHB Docket No. 2017-013-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: July 28, 2023**

OPINION AND ORDER ON
RULE TO SHOW CAUSE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses and closes an appeal following a remand from the Pennsylvania Supreme Court where the only issue before the Board on remand—the division of the payment of attorney's fees between the Department and a permittee—has been settled by the Department and the permittee, and the fee applicants were paid following the Board's award of fees and costs in 2020.

O P I N I O N

This matter is before us on remand from the Pennsylvania Supreme Court. In 2017, Stephen and Ellen Gerhart appealed a water obstruction and encroachment permit and an erosion and sedimentation control permit issued to Sunoco Pipeline, L.P. ("Sunoco") from the Department of Environmental Protection (the "Department") for the installation of a natural gas liquids pipeline that crossed the Gerharts' property. Sunoco's pipeline was part of its Mariner East 2 project. In 2019, we issued an Adjudication sustaining in part the Gerharts' appeal, finding that a forested wetland on the Gerharts' property had been improperly classified by the

Department and Sunoco as an emergent wetland. *Gerhart v. DEP*, 2019 EHB 534. Since the wetland had been improperly classified, we ordered Sunoco to restore the portion of the wetland that was impacted from the installation of the pipeline as a forested wetland in accordance with Sunoco's permits and approved restoration and replanting plans. We denied the Gerharts' appeal in all other respects.

Following the issuance of our Adjudication, the Gerharts filed an application for costs and fees, seeking to recover $265,976.27 in attorney and expert witness fees from both the Department and Sunoco under Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).[1] On January 7, 2020, we issued an Opinion and Order in which we awarded the Gerharts $13,135.77 in fees due to the Gerharts' limited success in relation to their overall appeal, and the fact that Sunoco had offered a settlement early on in the litigation that would have given the Gerharts precisely the relief we eventually afforded to them in our Adjudication. *Gerhart v. DEP*, 2020 EHB 1. With respect to the question of the division of responsibility for payment of the award, we relied on a then-recent Board decision on attorney's fees in which we held that, in order to seek fees from a permittee or other private party (as opposed to the Department), the fee applicant needed to demonstrate that the permittee engaged in dilatory, obdurate, vexatious, or bad faith conduct. *See Clean Air Council v. DEP*, 2019 EHB 228. Because the Gerharts did not address this standard in their fee application filings, and we did not detect any bad faith on behalf of Sunoco, we ordered the Department to pay the Gerharts the fee award on its own.

The Department, but not the Gerharts or Sunoco, then filed a petition for review of our Opinion and Order with the Commonwealth Court, challenging the bad faith standard applied by the Board when an applicant for costs and fees seeks to recover from both the Department and a

[1] Section 307(b) provides in relevant part: "The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b).

permittee. Soon after filing its petition for review, the Department filed an application requesting that we stay its obligation to pay the Gerharts the fee award pending the outcome of the Commonwealth Court appeal. The Gerharts argued in opposition that, depending on the outcome of the appellate litigation, Sunoco could simply reimburse the Department for any fee amount and there was no reason to delay payment to the Gerharts. We issued an Order on March 24, 2020 denying the Department's application to stay the fee payment.

On February 21, 2021, the Commonwealth Court affirmed the Board's Opinion and Order. *Cmwlth. v. Gerhart*, No. 107 C.D. 2020, 2021 Pa. Commw. Unpub. LEXIS 97 (Pa. Cmwlth. Feb. 16, 2021). On the same day the Court's *Gerhart* Opinion was issued, the Commonwealth Court also affirmed the Board in an appeal of the *Clean Air Council* attorney's fees decision in which we discussed the bad faith standard for collecting fee awards from permittees and other private parties, which we relied on in our *Gerhart* fees decision. *See Clean Air Council v. Cmwlth.*, 245 A.3d 1207 (Pa. Cmwlth. 2021). Both of the Commonwealth Court decisions were appealed to the Pennsylvania Supreme Court. *See* No. 73 MAP 2021 and No. 74 MAP 2021. Our Supreme Court consolidated argument on the two cases and decided them in the same Opinion, vacating the Commonwealth Court's affirmance of our two decisions and remanding both appeals back to the Board for further proceedings.[2] *Clean Air Council v. Cmwlth.*, 289 A.3d 928, 955 (Pa. 2023).

The Supreme Court rejected the standard we had established requiring a fee applicant to show that a permittee engaged in bad faith or vexatious conduct in order to recover fees from a permittee. In terms of the *Gerhart* appeal, the Supreme Court held:

> In *Gerhart*, DEP is the appellant, and its argument is not that it should not have been assessed the modest fees ordered, but rather that it should not have to bear

[2] Further proceedings in the Clean Air Council appeal, EHB Docket No. 2017-009-L, are currently pending.

> the cost of those fees alone. Even more so than in *Clean Air Council*, we cannot conclude that the Board, bereft of the *per se* rule upon which it relied, would not have divided those fees between the parties, especially because the Board limited fees specifically to those incurred before Sunoco offered to restore the Gerharts' wetlands as requested. Up until that point at least, Sunoco was very much a target of the Gerharts' appeal. We will return this case as well to the Board to make this determination in the first instance.

Clean Air Council v. Cmwlth., 289 A.3d 928, 955 (Pa. 2023). Thus, the Court directed that on remand we must determine how to divide the payment of the $13,135.77 in fees we awarded to the Gerharts between the Department and Sunoco.

Following the issuance of the Supreme Court's Opinion, we held a conference call with the parties on March 27, 2023 to discuss the procedures moving forward following the remand. On the call, it was evident that there was not a consensus among the parties on whether additional proceedings would be necessary. The parties suggested that they confer further on whether or not a mutually agreeable resolution could be obtained and then inform the Board of the outcome of those discussions.

On May 12, 2023, the Department and Sunoco filed what they called a Notice of Settlement and Request to Mark Case Settled. In that filing, the Department and Sunoco asserted that the only issue to be resolved following the Supreme Court's remand was the allocation of the payment of the award of costs and fees between the Department and Sunoco. They told us that, on March 23, 2023, they resolved the allocation of the fee award between the two of them. Accordingly, the Department and Sunoco asserted that there was no longer any issue for the Board to adjudicate. Although the Department and Sunoco said that the Gerharts declined to consent in the filing, the Department and Sunoco asked that we issue their proposed order marking the case settled and closed.

On May 30, the Gerharts filed an answer objecting to the Department and Sunoco's request. The Gerharts asserted that they were not permitted to review any agreement between the Department and Sunoco regarding the allocation of the payment of the fees. They argued that, because the settlement agreement was related to Commonwealth funds, the agreement could not be kept private or confidential because they maintained that the General Assembly disfavors hiding public access to Commonwealth financial records. The Gerharts said that they would not object to the settlement if it were made part of the public record on the Board's docket. The Gerharts then said that, if the settlement agreement was not made part of the record, the Board should hold a hearing to allocate the fees between the Department and Sunoco.

We issued an Order on May 30 denying the Department and Sunoco's request to have the case marked settled because it appeared that a settlement had not been reached between all of the parties. We ordered the parties to propose, by June 29, mutually agreeable dates for prehearing proceedings and an evidentiary hearing, or, if the parties were unable to agree on dates, to submit individual proposals by the same date. On June 29, instead of getting either a joint proposed schedule of prehearing proceedings or individual proposals, we received from Sunoco and the Department a letter requesting that we hold a conference call to discuss the status of the case and the scope of any necessary proceedings. The letter said that the parties attempted in good faith to resolve the appeal without the necessity of any further proceedings before the Board, but the parties had been unable to come to a resolution. The Department and Sunoco said that, after a conference call with the Board, the parties could then provide the Board with a proposed case management order, if necessary. We did not receive anything from the Gerharts by the June 29 deadline.

On June 30, we issued a Rule to Show Cause calling attention to the fact that none of the parties complied with our earlier Order requiring them to submit joint or individual case management proposals. We also stated that it was unclear what further relief the Board could provide in this appeal, based on the parties' filings since the remand. For these reasons, we directed the parties to show cause why this appeal should not be dismissed and to file responses to the Rule to Show Cause by July 17. The parties have now filed their responses to the Rule.

The Gerharts assert in their response that they had proposed hearing dates to the Department but never heard back. They say they regret not responding to the Board's May 30 Order but fault Sunoco for not providing any input on scheduling dates or making an effort to coordinate a response from the parties. The Gerharts claim that neither Sunoco nor the Department provided a response to the Gerharts' request that any settlement between the Department and Sunoco be filed on the docket. The Gerharts contend that having a settlement be on the record "is important for accountability for the reasons raised in the Supreme Court's opinion," citing the Supreme Court's opinion at 289 A.3d 928, 951-52.

The Department and Sunoco argue that this appeal should be dismissed because the only issue remaining on remand is the allocation of the previously-awarded fees, which they say has been resolved already through a settlement between the Department and Sunoco. They tell us that their settlement involved Sunoco reimbursing the Department for the entire $13,135.77, which has already occurred, and the agreement was not reduced to writing. The Department and Sunoco add that they informed the Gerharts' counsel of the reimbursement arrangement and proposed multiple drafts of a three-party joint notice of settlement to be filed with the Board, which included the reimbursement amount, but they claim that the Gerharts' counsel rejected those drafts over the inclusion of a statement where Sunoco declined to admit any liability.

Nevertheless, the Department and Sunoco point out that the amount of the fee award to the Gerharts was not appealed by any party and the Gerharts have been paid long ago the full amount of the award. They take the position that there is nothing left for the Board to adjudicate, and that the settlement agreement has rendered moot any further proceedings.

We find ourselves in agreement with the Department and Sunoco that there is nothing left for the Board to do on remand. The only issue the Pennsylvania Supreme Court left open for us on remand was to divide the fees between the Department and Sunoco that we previously awarded to the Gerharts, and the Department and Sunoco have already resolved that division among themselves. The Gerharts contend the Board should hold a hearing to allocate the fee award between the Department and Sunoco, but the Gerharts have not explained why the Board would discard a settlement agreement between two parties and force them to go to a hearing over the very issue they have settled. The Gerharts have not challenged any of the terms of the agreement between the Department and Sunoco. The Gerharts have already been paid the fees we awarded to them by the Department. Thus, the Gerharts are not awaiting the payment of the fee award in whole or in part, from any party. The money they received is not dependent in any way on the allocation of who ultimately bears responsibility for the payment of the award. In their filings since the remand, the Gerharts have provided us with no convincing reason why there is any role left for the Board to play in this matter or why there is any need for us to hold a hearing.

We also reject the Gerharts' insistence that the settlement agreement between the Department and Sunoco be filed on the docket. The Gerharts have not directed us to anything in the Supreme Court's Opinion that requires a settlement for the allocation of fees to be filed on a public docket. More generally, the Gerharts do not point to any relevant legal provision that

requires this Board or a court to force parties to make their settlement agreements public. In their answer to the Department and Sunoco's earlier request to have the case marked settled, the Gerharts cited 27 Pa.C.S. § 3131(b) for what they contended was the precept that "[t]he Department has no right to privacy in its settlement agreements, especially the financial elements of its financial agreements." (Answer at ¶ 12.) However, 27 Pa.C.S. § 3131 is a provision that falls under a statute concerning statewide water resources planning and the creation of a state water plan to inventory surface and groundwater resources and assess water demands. The specific provision cited by the Gerharts says that reports or other documents obtained by the Statewide Water Resources Committee shall be public documents. The Gerharts offer no explanation of how this is in anyway relevant to a settlement agreement between the Department and another party in a proceeding before the Environmental Hearing Board for a fee request under the Clean Streams Law. It offers absolutely no support for the Gerharts' apparent argument that we should force settlements made with the Department to be filed on our docket. It does not compel us to find that the settlement agreement here should be filed on the docket, particularly since this appeal had nothing to do with the development of a statewide water resources plan.

The Gerharts also cited *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), for what they said was a policy of favoring public access to Commonwealth financial records. However, that case involved an appeal of a decision of the Office of Open Records concerning the disclosure of bids to run concessions at a baseball park that was owned by a municipal authority. The Supreme Court held that such bids were public records under the Commonwealth's Right to Know Law, 65 P.S. §§ 67.101 – 67.3104, and the bids should be provided to the news reporter who requested them. There is simply no support in *SWB Yankees*

for the proposition that legal settlements between a government agency and another party must be filed on the docket of the court or tribunal presiding over the litigation.

The Gerharts have cited the Board's rules at 25 Pa. Code § 1021.141(b)(2) for support for their claim that the settlement should be filed on the docket. However, that rule provides only one option for terminating proceedings before the Board by way of notifying the Board of a settlement and providing the Board a copy of the settlement agreement for inclusion in the record. Our rule on terminating proceedings also allows parties to simply notify the Board of a settlement and request that the docket be marked settled, 25 Pa. Code § 1021.141(b)(1), or for an appellant to simply withdraw its appeal, 25 Pa. Code § 1021.141(a)(1). The Board does not require parties to terminate a proceeding in any particular way. We do not typically second-guess whether or not parties want to file a settlement on the docket.

Even so, we feel compelled to point out that, to the extent the Gerharts still want the settlement (which apparently was not reduced to writing) to be public, the Department and Sunoco have already publicly stated on this docket in their response to the Rule to Show Cause that Sunoco paid the Department the full amount of the fees because Sunoco thought it was cheaper than litigating the allocation before the Board. We are not sure what more the Gerharts want.

In the context of mootness, we have held that "[a] matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome." *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 55 (quoting *Horsehead Res. Dev. Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001)). It is not at all clear what the Gerharts' stake in the outcome of this appeal is anymore. What is clear, however, is that there is no longer any effective relief the

Board can offer and there is no reason to have a hearing or any further proceedings on the division of the already-paid fee amount. Because there is simply nothing left for the Board to decide at this point, we will dismiss this appeal and close the docket.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 28th day of July, 2023, it is hereby ordered that this appeal is **dismissed** for all purposes and the docket shall be marked **closed**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: July 28, 2023

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

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

For Appellants:
Richard Raiders, Esquire
(*via electronic filing system*)

For Permittee:
Robert Fox, Esquire
Diana Silva, Esquire
Aaron S. Mapes, Esquire
Mica T. Iddings, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL, THE DELAWARE RIVERKEEPER NETWORK, AND MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2017-009-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUNOCO PIPELINE, L.P., Permittee	:	**Issued: August 9, 2023**

OPINION AND ORDER ON
MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board largely grants a motion to compel responses to discovery requests that appear to be appropriately tailored to the issues potentially implicated in the parties' applications for attorney's fees and costs.

O P I N I O N

Before the Board are the Appellants' application for fees and costs and, potentially, Sunoco Pipeline, L.P.'s ("Sunoco's") application for fees and costs. The Board previously denied both fee applications, but the Pennsylvania Supreme Court vacated the Commonwealth Court's affirmance of our decision and remanded the matter to us for further consideration. *Clean Air Council v. Cmwlth.*, 289 A.3d 928 (Pa. 2023).

The litigation underlying the fee applications is complex. There were two appeals. The first, docketed at EHB Docket No. 2017-009-L, was the Appellants' appeal of three E & S control permits and 17 water obstruction and encroachment permits issued by the Department of

Environmental Protection (the "Department") to Sunoco. The second appeal, docketed at EHB Docket No. 2018-023-L, was the Appellants' appeal from a consent order and agreement entered into between Sunoco and the Department. There were multiple applications for temporary supersedeas, petitions for supersedeas, and settlement agreements in the appeals. Neither appeal culminated in a hearing on the merits. The Board consolidated the two appeals from April 2, 2018 until April 16, 2018, when the appeal docketed at 2018-023-L was marked closed and settled pursuant to a stipulated order of the parties, approved by the Board. The Appellants withdrew the appeal docketed at 2017-009-L on July 31, 2018. During the pendency of the appeals there was also some litigation in the Commonwealth Court. The Appellants and Sunoco filed their original applications for fees on August 30, 2018 and have since supplemented those applications following the remand.[1] Included in both applications are requests for the reimbursement of expert witness fees.

Neither the Appellants nor Sunoco are seeking reimbursement for all of their fees. Rather, the Appellants are only seeking fees for those "portions of the underlying proceedings where Sunoco was the party providing Appellants the concessions binding its hands going forward." They say they have parsed out work "related to" a stipulated order entered on August 10, 2017 in EHB Docket No. 2017-009-L, and the aforementioned stipulated order entered on April 16, 2018 in the consolidated appeals. It remains to be determined how the Appellants divided out those fees from fees incurred in whole or in part related to other aspects of the

[1] Sunoco argues, among other things, that the Appellants' application was filed too late under the Board's rules to the extent it includes a demand for fees incurred in the 2018-023-L matter because the application was not filed within 30 days of the final order in that case. This is one of the many issues complicating this matter going forward.

underlying litigation.[2] Sunoco is also only seeking some of its fees, which it has also unilaterally divided out according to its own view of entitlement.

On March 27, 2023, we held a telephonic case management conference with the parties following the Supreme Court's remand. We established prehearing procedures leading up to an evidentiary hearing set to begin on November 13, 2023. Among other things, and with the parties' agreement, we ordered that all discovery is to be completed by September 29. The Appellants have resisted some of Sunoco's discovery requests, which has resulted in Sunoco filing the motion to compel that is currently before us.

Sunoco served the Appellants with three discovery requests: (1) a Notice of Intent to Serve Non-Party Subpoenas for document production and depositions of the Appellants' experts, (2) a Notice of Depositions of the Appellants' Attorneys, and (3) a Second Request for Production of Documents. Sunoco's Second Request for Production of Documents seeks communications between the Appellants and the Department pertinent to the developments in the underlying litigation upon which the Appellants base their claim for fees and costs. The requests seek information regarding the Appellants' development of time records and expenses underlying their fee application. The requests also seek documents relevant to the Department's payment to the Appellants of $27,500 in attorney's fees and costs pursuant to a July 26, 2018 Stipulation of Settlement.

In addition, Sunoco noticed the depositions of the attorneys who represented the Appellants in this matter and for whom the Appellants seek fees: Alexander G. Bomstein, Esquire, Kathryn Urbanowicz, Esquire, and Melissa Marshall, Esquire. Sunoco also served a Notice of Intent to Serve Subpoenas pursuant to Pennsylvania Rule of Civil Procedure 4009.1 to

[2] The Appellants also seek reimbursement of the fees they incurred in appealing our original decision on their fee application.

obtain documents and depose Aaron J. Stemplewicz, Esquire, former attorney of the Delaware Riverkeeper Network, as well as three experts engaged by the Appellants in connection with this litigation and for whom the Appellants seek to recover fees and costs: Phillip C. Getty, P.G., Mark W. Eisner, P.G., and Amy Parrish, P.G..

On May 8, 2023, the Appellants served objections to Sunoco's Notice of Intent to Serve Subpoenas. The Appellants objected to each of the proposed subpoenas, claiming they were sought in bad faith, would cause unreasonable annoyance, embarrassment, oppression, burden, or expense, were beyond the scope of discovery, would invade the attorney-client privilege and/or attorney work-product doctrine, and would require an unreasonable investigation. Following Sunoco's service of the discovery requests and Notices of Deposition, the Appellants' counsel also advised Sunoco's counsel that they objected to the depositions of the Appellants' counsel Alexander G. Bomstein, Esquire, Kathryn Urbanowicz, Esquire, and Melissa Marshall, Esquire. On May 18, 2023, the Appellants served Sunoco with objections to Sunoco's Second Request for Production of Documents. The Appellants objected to each and every document request, and at least initially, declined to provide either substantive responses or produce any of the requested documents.

In accordance with Board Rule 1021.93, 25 Pa. Code § 1021.93, throughout May and through early June, Sunoco's counsel met and conferred with the Appellants' counsel to attempt to resolve the Appellants' objections to the discovery requests, notice of depositions, and proposed subpoenas. These meet and confer attempts were made through multiple phone calls between counsel for the parties, as well as email exchanges. It appears that both parties made some concessions. Among other things, Sunoco agreed not to depose Aaron Stemplewicz, former counsel for Appellant Delaware Riverkeeper Network. Sunoco also agreed to take the

depositions of the Appellants' experts remotely in a total of a day and a half, as a concession to the Appellants' concerns regarding timing and costs associated with the depositions. The Appellants also made some concessions. Unfortunately, the parties were not able to resolve their differences in the end, which brings us to Sunoco's motion to compel. Sunoco wants the Appellants to comply with its discovery requests as modified by the parties' mutually accepted concessions. The Appellants oppose the motion, but we find that their objections for the most part lack merit, and to some extent, reflect what we believe may be a fundamental misunderstanding of the nature of the inquiry presently before us. The Department has not weighed in on the dispute.[3]

Discovery before the Board is governed by the relevant Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa.R.Civ.P. 4003.1. No discovery may be obtained that is sought in bad faith or would cause unreasonable annoyance, embarrassment, oppression, burden, or expense with regard to the person from whom discovery is sought. Pa.R.Civ.P. 4011; *Haney v. DEP*, 2014 EHB 293, 296-97. "[T]he Board is charged with overseeing ongoing discovery between parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required." *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

Discovery before the Board is also governed by a proportionality standard. Discovery obligations must be consistent with the just, speedy, and inexpensive determination and

[3] On July 20, 2023, Sunoco filed a motion for leave to file a memorandum of law in reply to the Appellants' response to Sunoco's motion to compel. The Appellants did not respond to the motion for leave. Because the motion has already been adequately briefed by both Sunoco and the Appellants, we deny the motion for leave. Sunoco's memorandum of law attached to its motion for leave played no role in our consideration of the motion to compel.

resolution of litigation disputes. *Clean Air Council v. DEP*, 2016 EHB 567, 571 (citing 2012 Explanatory Comment Prec. Rule 4009.1, Part B). The Board considers the following factors when evaluating whether a discovery request is proportional: (1) The nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (2) The relevance of the information sought and its importance to the Board's adjudication in the given case; (3) The cost, burden, and delay that may be imposed on the parties to deal with the information; (4) The ease of producing the information and whether substantially similar information is available with less burden; and (5) Any other factors relevant under the circumstances. *Tri-Realty Co. v. DEP*, 2015 EHB 552, 556-57; 2012 Explanatory Comment Prec. Rule 4009.1, Part B.

Several justifications for resisting Sunoco's discovery requests pervade the Appellants' response in opposition to Sunoco's motion to compel. Most of them have little merit. Initially, the Appellants' response to Sunoco's motion seems to reflect a mistaken impression that they should be able to submit some affidavits and bills to Sunoco and that Sunoco should then write them a check for approximately half a million dollars without Sunoco having any opportunity to probe the accuracy or reasonableness of those bills. The Appellants vaguely complain that Sunoco has been unreasonable, refused to compromise, and is simply trying to harass the Appellants. Our review of Sunoco's discovery requests and the parties' communications leading up to the instant dispute does not bear out those lamentations. Contrary to the Appellants' complaint, we have reviewed Sunoco's discovery requests and they appear to largely be appropriately tailored to the issues at hand. Sunoco is seeking relevant information going to the heart of the Appellants' claim for fees. The parties' communications reveal that Sunoco has already limited its requests in the spirit of compromise, and we detect no evidence of an intent to

harass the Appellants. It does not appear to us that either party is acting in bad faith here. The Appellants' accusation that Sunoco is engaged in a campaign of harassment is not borne out by the record.

The Appellants' next complaint is that Sunoco is seeking stale information. (E.g. Sunoco wants to "drag experts out of retirement to interrogate them about their opinions on litigation five years ago." (App. Memo at 2.)) This complaint is, at best, curious, because the fees and expenses that are the subject of the instant proceedings were in fact incurred starting more than five years ago. The information is necessarily becoming stale because of the lengthy litigation and appeals process regarding the fee applications, not because of anything that Sunoco has done.

The Appellants next rely on the rules regarding the discovery of experts as a basis for responding to Sunoco's discovery requests regarding its experts. *See* Pa.R.Civ.P. 4003.5. It would seem to us, however, that those rules were developed with the merits litigation in mind, i.e., concerning the facts known and opinions held by an expert on the substantive merits issues in a case. Those rules should give way to some extent in litigation of a fee application seeking reimbursement for the fees and expenses of the very experts the Appellants would now shield from discovery. Allowing the Appellants to simply submit their experts' bills and demand that Sunoco pay them without any opportunity to inquire into the basis for those bills seems problematic regarding consultants, whose bills are notoriously lacking in detail. Sunoco is entitled to inquire into, among other things, the work performed and to explore how if at all that work contributed to any alleged success achieved by the Appellants related to those parts of the complex proceedings that are the subject of their fee application. We are informed that there were some discussions between the parties on streamlining this discovery. The Appellants

refused to make the experts available for depositions but suggested that interrogatories be served instead. Sunoco offered to conduct the depositions remotely over a combined day and a half as a reasonable and efficient way of dealing with this discovery. We are not convinced that further efforts at compromise would be fruitless and we encourage the parties to continue their efforts.

To be clear, the Appellants may need to present expert testimony in support of their fee application, but this is distinct from expert participation in the litigation in the underlying appeals. As one example, the Appellants allege in their fee application that, as a result of their efforts, Sunoco drilled in "more stable rock formations where drilling fluids were less likely to escape into wetlands, streams, and drinking wells." Whether there were such "more stable rock formations" is a question it would seem can only be answered by experts. This is an entirely different area of inquiry, and in this area the limitations on expert discovery clearly *do* apply. Similarly, the Appellants claim their efforts in the underlying appeals resulted in Sunoco engaging in better engineered management practices. Sunoco disputes this at multiple levels, but the point here is that expert disputes over this aspect of the case are covered by the discovery rules regarding experts, without limitations. In contrast, to the extent it is proven that Sunoco drilled in "more stable rock formations" or used better management practices, and those things happened *because of* the Appellants' efforts (causation), the extent to which the Appellants' experts made them happen and charged fees for it would seem to be entirely relevant in the fees litigation. These are admittedly fine distinctions, but the Appellants' wholesale objection to the deposition of their experts regarding their work *in the underlying litigation* are not well taken.

The Appellants further lament that Sunoco's discovery requests are overly broad given "the very narrow issue of attorneys' fees and costs." (App. Memo at 11.) Again, this complaint has no merit. Sunoco is seeking precisely the sort of information that is directly relevant to the

fee application. Although we will not take this opportunity to expound on our understanding of the Supreme Court's Opinion remanding the matter to us, we can at a minimum say that the inquiry mandated by the Court is anything but a "very narrow" inquiry. For example, we may need to assess who is at "fault" for "errors" committed in the permitting process. *See Clean Air Council, supra*, 289 A.3d at 953 ("Each case, complicated and rife with the potential for mistake, error, or even mis- or malfeasance, stands alone. In a given case, fault for an error (if any) may lie to a greater extent with either DEP or the applicant. *Here* is where the broad discretion conferred upon the Board, discretion that, once exercised, may only be evaluated for its abuse, is vital."). We, of course, have no record based on an evidentiary hearing on the merits to go on. Even if we did, it is unlikely the Board would have made findings of "fault." These findings must be made for the first time here. The Board's extremely broad discretion in awarding fees, perhaps limited only by the need not to base it entirely on a bad faith finding or otherwise act arbitrarily and capriciously, necessarily entails a broad inquiry. We do not discern anything in Sunoco's discovery requests that falls outside of this very broad inquiry.

Indeed, there are several other factors that militate in favor of broad discovery in this matter. We are on essentially new ground from a legal standpoint. The Supreme Court has severely cautioned against a narrow reading of the law. There was no final Adjudication in this case; we have no evidence of record on the merits. There was not even a final settlement of one of the appeals, and the final settlement in the other appeal did not involve Sunoco. If we get into a catalyst-type analysis, there are multiple factual disputes that will need to be resolved, including the extent to which any success was achieved, and the extent to which any success can be attributed to the Appellants' efforts. There is a potential issue regarding the appropriate allocation of any fees to be awarded between the Department and Sunoco. We are, of course, not

bound by any allocation determinations made in the context of the Appellants and the Department's settlement agreement regarding fees.[4] Both the Appellants and Sunoco are only requesting fees for parts of the case, but it remains to be seen how those parts can be separated from the overall effort. It cannot be forgotten that very substantial fees are at stake in this case. There is the disputed question of whether the Supreme Court's vacatur resurrected Sunoco's petition. This is only a partial list and is in addition to the normal panoply of issues raised in connection with any fee application. For the Appellants to claim that we are only faced with a very narrow inquiry is simply not true.

The Appellants argue that Sunoco's discovery requests will force the revelation of privileged material. Initially, the fact that some information from a particular witness or contained in a particular document may be privileged does not entitle the Appellants to preclude Sunoco from obtaining *any* information from a particular witness or document. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014) ("Generally, evidentiary privileges are not favored, as they operate in derogation of the search for truth." (internal quotation omitted)); *BouSamra v. Excela Health*, 210 A.3d 967, 975 (Pa. 2019) ("Courts should permit utilization of an evidentiary privilege only to the very limited extent that excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." (internal quotation omitted)). Privilege claims must be narrowly tailored and justified with specificity. *St. Luke's Hosp. of Bethlehem v. Vivian*, 99 A.3d 534, 542 (Pa. Super. 2014) (party asserting a privilege must produce sufficient facts to

[4] We are not suggesting the Department would need to pay any more fees. We simply point out that, if we find the Appellants are entitled to *X* fees, we still must decide how much of those fees should be paid by Sunoco. *See Clean Air Council*, 289 A.3d at 952 (Board is best positioned to determine what considerations should inform the allocation of responsibility for fees, if any, between the Department and a permit applicant); *id.* at 953 (Board must make an assessment of who is responsible for fees and whether a permit applicant is "as responsible" for fees as the Department is, or vice-versa).

show that privilege is properly invoked). The Appellants may object to specific questions but they cannot rely on privilege to prevent the deposition of a witness altogether.

Second, privilege must to some extent bend to the inquiry required in fees litigation. As our Supreme Court noted in *In re Estate of McAleer*, 248 A.3d 416 (Pa. 2021), with respect to the attorney-client privilege:

> Though a mainstay of our legal system, the privilege is not absolute. Because it "has the effect of withholding relevant information from the factfinder," courts construe the privilege narrowly to "appl[y] only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). Where the interests protected by the privilege conflict with weightier obligations, the former must yield to the latter.

Id. at 425-26. *See also Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, 32 A.3d 800, 812 (Pa. Super. 2011) (attorney work-product discoverable if directly relevant to the underlying action), *aff'd*, 91 A.3d 680 (Pa. 2014). We look forward to the parties' elucidation on how we are to conduct the broad inquiry mandated by the Supreme Court without delving into what would otherwise constitute privileged matters. In the meantime, the Board has various mechanisms available to protect privileged materials, such as filings under seal and *in camera* review, should such mechanisms become necessary.

The Appellants say Sunoco's discovery is out of all proportion to the fees requested. They point out the danger the fee litigation will end up using more resources than the underlying litigation. We do not disagree, but we fail to see how that eventuality can be avoided given the Supreme Court's instructions on remand combined with the complicated facts involved in what might turn out to be a catalyst-type case, and we fail to see how the potential danger translates into some arbitrary limitation on Sunoco's otherwise reasonable discovery requests in this case. The Appellants have asked for approximately half a million dollars in fees and expenses. Furthermore, we wonder whether the Appellants' tack of resisting discovery and requiring the

Board to resolve a motion to compel is accomplishing anything more than adding time and expense to the proceedings. The Appellants concede that some of Sunoco's discovery is "fair game." They of course fail to define the boundaries of what they consider acceptable with any degree of specificity. Simply failing to produce witnesses for *any* deposition questions or produce *any* documents is not the appropriate way to proceed.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

O R D E R

AND NOW, this 9th day of August, 2023, in consideration of Permittee Sunoco Pipeline L.P.'s Motion to Compel and the Appellants' opposition thereto, it is hereby ordered that the Motion to Compel is **granted**. It is further ordered as follows:

1. The Appellants shall provide responses to Sunoco's Second Set of Requests for Production within **21 days** of entry of this Order;
2. Appellants shall produce for deposition Alexander G. Bomstein, Esquire, Kathryn Urbanowicz, Esquire, and Melissa Marshall, Esquire; and
3. Appellants' Objections to Permittee's Notice of Intent to Serve Subpoenas to Phillip C. Getty, P.G., Mark W. Eisner, P.G., and Amy Parrish, P.G. are overruled.
4. Sunoco's Motion for Leave to file a reply memorandum is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: August 9, 2023

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

For the Commonwealth of PA, DEP:
Curtis C. Sullivan, Esquire
Margaret O. Murphy, Esquire
William J. Gerlach, Esquire
George Jugovich, Jr., Esquire
(*via electronic filing system*)

For Appellant, Clean Air Council:
Alexander G. Bomstein, Esquire
Kathryn L. Urbanowicz, Esquire
Joseph O. Minott, Esquire
Lauren E. Otero, Esquire
Elanor M. Breslin, Esquire
(*via electronic filing system*)

For Appellant, Delaware Riverkeeper Network:
Kacy C. Manahan, Esquire
(*via electronic filing system*)

For Appellant, Mountain Watershed Association, Inc.:
Melissa Marshall, Esquire
(*via electronic filing system*)

For Permittee:
Robert D. Fox, Esquire
Diana A. Silva, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC	:	
v.	:	**EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: September 27, 2023**

OPINION IN SUPPORT OF ORDER ON
MOTION TO SUPPLEMENT THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies what is styled as a motion to supplement the record, in which an appellant seeks to further delay the recently rescheduled hearing on the merits in this matter.

O P I N I O N

This case involves two consolidated appeals, one filed by Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum (hereinafter "the Riverkeeper"), and one filed by Steven Gidumal and Virtus Capital Advisors, LLC ("Gidumal") (referred to collectively as the "Appellants"). Both appeals were filed on November 15, 2021. The Riverkeeper and Gidumal are appealing Water Obstruction and Encroachment Permit No. E0901120-026 issued by the Pennsylvania Department of Environmental Protection (the "Department") to the Pennsylvania Department of Transportation ("PennDOT") on September 29, 2021. The appealed permit authorizes PennDOT to remove the Headquarters Road Bridge in Tinicum Township, Bucks

County, and construct a new replacement bridge. The Headquarters Road Bridge spans Tinicum Creek. The bridge was constructed in 1812 and has been closed to vehicles and pedestrians since 2011 because of advanced deterioration and resulting safety concerns.

On the same day the Riverkeeper filed their notice of appeal, they also filed a petition for supersedeas. We scheduled a conference call with the parties in the Riverkeeper appeal to discuss moving forward on the supersedeas proceedings. On November 30, 2021, the day of the scheduled call, Gidumal filed a letter in their own appeal indicating that they also intended to file a petition for supersedeas and that they were available to participate in the scheduled conference call. We held the call with the parties from both appeals and discussed the consolidation of the two appeals and a timeline for proceeding toward a hearing on the supersedeas petitions. The parties asked to begin the supersedeas hearing more than three months later on March 2, 2022. Following the call, we issued an Order consolidating the two appeals at EHB Docket No. 2021-108-L, staying the deadlines set forth in our Pre-Hearing Order No. 1 pending the outcome of the supersedeas proceedings, and requiring the parties to submit a joint proposed schedule regarding the supersedeas.

The parties filed a joint proposed pre-hearing schedule for the supersedeas, which we adopted in an Order, providing for Gidumal to file their petition for supersedeas by December 8, for the Department and PennDOT to file responses to the Riverkeeper's petition by December 21, and for the Department and PennDOT to file supplemental responses to address Gidumal's petition by January 7, 2022. The scheduling Order also contained dates for serving answers to discovery requests and exchanging lists of witnesses and exhibits. We held a pre-hearing conference call with the parties on February 25 to discuss final logistics in advance of the hearing. The supersedeas hearing was held on four days: March 2, 3, 4, and 7, 2022. The parties agreed to brief the

proceedings on the basis of expedited transcripts and filed simultaneous briefs on March 21, 2022. On April 1, 2022, we issued an Opinion and Order denying the Appellants' petitions for supersedeas. *Del. Riverkeeper Network v. DEP*, 2022 EHB 113.

In the supersedeas filings of the Department and PennDOT, the Board was given the impression that the Headquarters Road Bridge was a situation that needed immediate attention. In its brief following the supersedeas hearing, the Department impressed upon us that the bridge was a threat to public safety that could no longer be tolerated:

> Expert testimony establishes that the Bridge is structurally unsound, functionally obsolete, and in a state of imminent failure, posing a danger of collapse. The Bridge is a public nuisance that poses an ongoing threat to public health and safety and injury to the public. No supersedeas can properly issue, as such a grant would perpetuate the nuisance conditions and associated threat to public health and safety and injury to the public during the period of the supersedeas.

(DEP Brief at 17.) PennDOT conveyed to us the costs associated with any delay of this project, asserting that a 12-month delay would increase the cost of the project by $140,000 and an 18-month delay would increase the cost by $190,000—costs to be borne by the taxpayers of the Commonwealth. (PennDOT Brief at 37-38.) PennDOT claimed in March 2022 that an 18-month delay of the project would push the opening of the new bridge to October 2024. As far as we know, nothing has happened with the construction of this project in the two years since this permit was issued or the 18 months since our supersedeas decision.

Following our supersedeas decision, there was no activity on the docket until September 16, 2022, when the Appellants jointly moved for an extension of the deadlines for conducting discovery and filing dispositive motions. The motion stated that the Appellants understood the Board's November 30, 2021 Order to mean that the 180-day discovery period began to run on April 1, 2022 when the Board issued its Opinion and Order on the petitions for supersedeas, meaning that discovery was to be completed by September 28, 2022. The motion averred that the

Appellants and PennDOT had been conducting discovery but the Department had not served any discovery requests. The Appellants said that they were working on settling the Board appeal and other court actions regarding the bridge and that a mediation had been scheduled in federal district court in the Eastern District of Pennsylvania on September 28, 2022. The Appellants requested that the discovery deadline be extended until January 15, 2023, and the deadline for dispositive motions be extended until March 15, 2023. PennDOT in part opposed the Appellants' motion for an extension, asking that the discovery deadline be extended until October 31, 2022, and the dispositive motion deadline be extended until November 29, 2022. The Department in its response generally echoed PennDOT's position on a more modest extension of the deadlines. The Department also acknowledged that it had not served any discovery requests in this appeal. We denied the motion for an extension in an Order on September 30, 2022 and did not extend any of the existing deadlines.

Seeing no reason to wait for the dispositive motion deadline to schedule the hearing on the merits, staff from the Board then communicated to the parties the presiding judge's desire to schedule the merits hearing for the week of January 9, 2023. Both PennDOT and the Department confirmed their availability for that date. Counsel for Gidumal indicated that Gidumal first wanted to establish a hearing schedule in related litigation before the State Board of Property. Counsel for the Riverkeeper indicated a preference for the hearing to be held in April 2023. On October 6, 2022, we issued our Pre-Hearing Order No. 2 and scheduled the hearing on the merits to begin on January 9, 2023. The Order provided that "[a]ny party may, but is not encouraged to, file a dispositive motion at any point prior to the commencement of the hearing." The Order also provided that the Appellants were to file their pre-hearing memoranda by November 28, 2022, and the Department and PennDOT were to file their pre-hearing memoranda by December 19, 2022.

On October 14, 2022, the Department and PennDOT filed a joint motion for summary judgment. On November 11, 2022, the Riverkeeper filed a letter with a proposed order requesting an extension of time until November 22 for the Appellants to respond to the motion for summary judgment, which was not opposed by the Department or PennDOT. The Board granted the extension on November 14. On November 22, both Gidumal and the Riverkeeper filed their responses to the motion for summary judgment. On November 28, Gidumal filed their pre-hearing memorandum.[1] On the same day, instead of filing their pre-hearing memorandum, the Riverkeeper filed a motion seeking an extension of time to file their pre-hearing memorandum until December 5, 2022, citing the complexity of the appeal, having to respond to the summary judgment motion, and certain personal issues of one of the Riverkeeper's attorneys as justification for the request.

On November 30, the Appellants collectively filed a motion to postpone the hearing.[2] The Appellants said they had been working diligently on a settlement in the federal court case that would also settle the appeal before the Board. The Appellants noted Gidumal's pursuit of a quiet title action against PennDOT before the State Board of Property and claimed that the adjudication of Gidumal's property rights claim was relevant to this appeal before the Environmental Hearing Board. The Appellants said the Board of Property could potentially adjudicate the property claim by mid-January 2023 if it granted Gidumal's summary judgment motion, or otherwise the Board of Property trial was scheduled for February 2023. The motion purported to attach the Board of Property's pre-trial scheduling order but attached instead was a Board of Property order scheduling a telephone conference for June 1, 2022.

[1] The exhibits accompanying Gidumal's pre-hearing memorandum were filed later on November 30.

[2] At the same time, one of the attorneys for the Riverkeeper contacted staff at the Board and indicated her desire to postpone the hearing because of recent and ongoing personal matters.

The Appellants requested in their motion that the hearing then-scheduled for January 2023 be postponed until at least July 2023 so that various other litigation involving the property could be resolved:

> For all of the above reasons, Appellants seek a postponement to July 2023 of the hearing on the merits of the pending appeal, to afford Appellants additional time to work with PennDOT and the Township on a global resolution of the issues now pending before this Board, the Board of Property, and in separate litigation in the Bucks County Court of Common Pleas and the United States District Court for the Eastern District of Pennsylvania. As well, Appellant VCA [Gidumal] believes the hearing on the merits should be postponed until a date after the Board of Property adjudicates the quiet title action respecting some of the lands to be impacted under the PaDEP permit that is the subject of this appeal.

(Motion at ¶ 6.)

The motion reflected that the Department and PennDOT did not oppose the request to postpone the hearing:

> Appellants have conferred with Appellees PaDEP and PennDOT. PennDOT and PaDEP authorize Appellants to convey to the Board that they do not oppose the requested postponement subject to the availability of witnesses on the rescheduled trial date, while also noting that counsel for PennDOT will be out of the country and unavailable for trial during most of the month of May 2023. As well, the Board should not construe PennDOT's or PaDEP's agreement not to oppose the motion to continue as acceptance or assent to any of the factual recitations and legal averments contained herein, as PennDOT and PaDEP disagree with several of the recitations and averments set forth herein.

(Motion at ¶ 7.)

On December 1, 2023, faced with an unopposed motion to postpone the hearing, we issued an Order granting the motion and continuing the deadlines set forth in our Pre-Hearing Order No. 2, including the Riverkeeper's outstanding pre-hearing memorandum:

> AND NOW, this 1st day of December, 2022, in consideration of the Appellants' motion to continue the hearing on the merits in this matter, which is unopposed, much to the surprise of the Board given the fact that PennDOT vigorously opposed the Appellants' petitions for supersedeas, it is hereby ordered that the hearing previously scheduled to begin on January 9, 2023 is continued to a date to be determined later. All other pre-hearing deadlines in the Board's Pre-Hearing Order

> No. 2, including the remaining pre-hearing memoranda, are continued pending further order of the Board.

On December 19, 2022, we issued an Order denying the motion for summary judgment filed by the Department and PennDOT.

In February 2023, counsel for PennDOT emailed staff at the Board, copying counsel for the other parties in this matter, to ask for a new hearing date to be scheduled. Staff at the Board stated that the parties were welcome to confer and propose dates to the presiding judge or file a joint proposal on the docket. Staff at the Board informed the parties that the presiding judge was available for a hearing the week of July 24. Counsel for PennDOT then responded that one of PennDOT's witnesses would be out of the country from July 4 until August 11, 2023. Counsel for PennDOT stated that coordinating witness availability with the Department had been difficult for the summer months and suggested a hearing in September 2023. Staff at the Board suggested the week of September 25. Counsel for the Department and PennDOT indicated they were available. Counsel for Gidumal stated that they would check with their client and witnesses. Counsel for the Riverkeeper did not respond.

No communication from the parties was received for nearly two months when, in April 2023, counsel for PennDOT with the concurrence of the other parties emailed staff at the Board a proposal that the hearing begin on September 25, 2023, that the Riverkeeper file its pre-hearing memorandum by August 18, and that the Department and PennDOT file their pre-hearing memoranda by September 5. Counsel for the Riverkeeper then indicated that the Riverkeeper had asked the parties to include in the proposal the opportunity to provide supplemental expert reports in advance of the hearing including dates for responsive expert reports, but that the Department and PennDOT did not agree to that request. The Riverkeeper said, consequently, it would be filing a motion addressing supplemental expert reports. Staff from the Board thanked the parties for the

proposal and informed the Riverkeeper that any outstanding disputes among the parties could be addressed in appropriate motions.

The Board issued an Order on April 24, 2023, rescheduling the hearing to begin on September 25, 2023. The Order provided that, by August 18, the Riverkeeper was required to file its pre-hearing memorandum and that Gidumal could supplement their pre-hearing memorandum by that date. The Order provided for the Department and PennDOT to file their pre-hearing memoranda by September 5.

No filings were made on the docket, and no communications were made to the Board, until August 28, 2023, when the Department and PennDOT filed a motion noting that the Riverkeeper had not filed their pre-hearing memorandum by the August 18 due date.[3] The Department and PennDOT's motion requested that their pre-hearing memoranda deadline be "extended by the amount of days [the Riverkeeper's] pre-hearing memorandum is overdue."

On September 5, 2023, having still not received the Riverkeeper's pre-hearing memorandum or any other filing or communication from the Riverkeeper, we issued a Rule to Show Cause noting that the Riverkeeper had failed to comply with our April 24, 2023 Order by not filing their pre-hearing memorandum by August 18. We required the Riverkeeper to file a response to the Rule by September 8 and show cause why the Board should not impose sanctions, which could include dismissing the Riverkeeper's portion of this consolidated appeal. Later on September 5, both the Department and PennDOT filed their pre-hearing memoranda by the due date established in the Board's April 24 Order. We later denied as moot the Department and PennDOT's motion to extend their pre-hearing memoranda deadline.

[3] Gidumal did not file a supplement to their November 2022 pre-hearing memorandum.

On September 6, the Riverkeeper filed what we interpreted to be its response to the Rule to Show Cause, which was styled as a "Motion for Adjournment of September 25, 2023 Hearing Date and for Extension of Other Deadlines in Order Dated April 24, 2023 and for Dismissal of Proposed Sanctions Filed by the Board on September 5, 2023 Pursuant to Pa. Code § 1021.161." In the response, one of the attorneys for the Riverkeeper detailed a series of personal challenges spanning the preceding approximately year and a half to explain why the attorney was unable to file the pre-hearing memorandum by the due date or thereafter or file a request for an extension or otherwise communicate with the Board. The response did not note any personal challenges on the part of the Riverkeeper's co-counsel. The response requested that the Riverkeeper be given until September 15 to file its pre-hearing memorandum and that the merits hearing be rescheduled to start on October 23.

The response to the Rule to Show Cause also stated that in April 2023 the attorney for Riverkeeper informed the parties that it "would be filing a motion to introduce and admit expert opinion on the technical feasibility of the rehabilitation of the Headquarters Road Bridge by Douglas Bond, P.E. and on the applicability of PADEP General Permit # 11 to that rehabilitation project by Mary Paist Goldman, P.E." The response foreshadowed a future filing that would make good on that promise from months earlier. The response indicated that counsel for Riverkeeper had just received Mr. Bond's expert report and would be receiving Paist-Goldman's report "shortly" and would be providing both to the other parties that week.

On September 11, both the Department and PennDOT filed responses to the Riverkeeper's response to the Rule to Show Cause and the motion contained therein. The Department and PennDOT generally did not oppose allowing the Riverkeeper to file its pre-hearing memorandum and rescheduling the hearing, given one of the Riverkeeper's attorney's personal matters.

However, the Department noted that the Riverkeeper is represented by two attorneys in this matter and the Department questioned why the Riverkeeper's co-counsel could not have filed the pre-hearing memorandum or at the very least filed a motion or letter requesting more time due to co-counsel's personal issues. PennDOT and the Department in particular also objected to any attempts by the Riverkeeper to utilize new expert testimony after the close of discovery.

On September 12, staff at the Board emailed the parties to convey that the presiding judge was still considering the response to the Rule to Show Cause and the Department's and PennDOT's subsequent responses but, if the hearing were extended, that the presiding judge could conduct it on dates in mid-October and early November, but then not until mid- to late-January 2024. Counsel for PennDOT responded the next day and stated that PennDOT and the Department were ready to proceed with the hearing on the November dates. Counsel for the Riverkeeper responded and indicated the Riverkeeper's preference to have the hearing held in late January. Counsel for PennDOT reiterated its position to have the hearing held in November. Gidumal did not respond.

On September 13, we issued an Order discharging the Rule to Show Cause and rescheduling the hearing for November 1-3, 6, and 7, 2023. We required the Riverkeeper to file its pre-hearing memorandum by September 22 and allowed the Department and PennDOT to supplement their pre-hearing memoranda by October 13. Our Order provided that "[n]o further postponements or continuances will be granted in this appeal." To the extent the Riverkeeper's response to the Rule to Show Cause and the motion contained within the response requested any relief not otherwise addressed by our Order, we denied it.[4]

[4] On September 15, counsel for the Riverkeeper emailed staff at the Board and counsel for the other parties and said that the Riverkeeper had not had a chance to see if their witnesses were available for the November hearing but that counsel would respond again once counsel conferred with the Riverkeeper's witnesses.

After hours on September 15, 2023, the Riverkeeper filed the instant motion, which they had been teasing since April 2023. The motion was docketed on the morning of Monday, September 18. The motion seeks to "supplement the record" by allowing the Riverkeeper to introduce at the upcoming merits hearing "an expert opinion by Douglas Bond, P.E. regarding the technical feasibility of rehabilitation of the Headquarters Road Bridge, and a supplemental expert opinion by Mary Paist Goldman, P.E. on the applicability of General Permit #11 to the rehabilitation of the Headquarters Road Bridge…." (Motion at 1.) The motion attaches the expert report of Mr. Bond and again says that the Riverkeeper expects to receive the Paist-Goldman report "shortly." However, the motion also asks that the merits hearing be postponed yet again until some undefined point in the future after the Department and PennDOT have an opportunity to review the Riverkeeper's new expert reports and respond to them:

> Delaware Riverkeeper Network and Delaware Riverkeeper respectfully request that the full hearing on the merits of this Appeal be continued until after the Agencies have an opportunity to read and respond to Mr. Bond's and Ms. Paist Goldman's reports, should they desire to do so, and that the reports of Mr. Bond and Ms. Paist Goldman be received into evidence and that the Appellants' experts be permitted to testify to the additional evidence at the full hearing on the merits, and the opinions they draw from that additional and supplemental evidence.

(Motion at 5-6.)

The motion did not contain any indication of the position of any other party on the relief requested. On the morning of September 18, we issued an Order requiring any responses to the Riverkeeper's motion to be filed by 5:00 p.m. on September 20. The Department and PennDOT filed responses in opposition to the motion on September 20. Both PennDOT and the Department oppose rescheduling the hearing. Gidumal did not file a response to the motion. On September 21, 2023, we issued an Order denying the Riverkeeper's motion and indicated that this Opinion would follow in support of that Order.

Discussion

Although the Riverkeeper has filed what it calls a motion to supplement the record, in reality we are now presented with merely the latest request for a continuance of the merits hearing. The motion cites our rule on reopening a record prior to adjudication, 25 Pa. Code § 1021.133, but that rule only applies "[a]fter the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication…." The hearing on the merits has not yet happened in this case, despite repeated efforts from the Board to move forward with it. Simply put, there is not any record from a merits hearing to reopen. This rule has no applicability to the current situation and it was appropriate to deny the motion on that basis alone.

Putting the procedural infirmity aside, we still must address the Riverkeeper's fundamental request that we further delay the merits hearing. However, we just rescheduled the hearing for the second time to accommodate the Riverkeeper and the Riverkeeper now asks that we reschedule it yet again. Just a few weeks ago, in its response to the Rule to Show Cause, the Riverkeeper proposed starting the hearing on October 23, more than a week earlier than when we ultimately rescheduled the hearing for on November 1. Now the Riverkeeper essentially wants an indefinite postponement. The Riverkeeper's motion asks "that the Hearing be adjourned until the Agencies are able to review and respond to the supplemental reports of Appellants' experts." (Motion at ¶ 17.) There is no indication how long it would take the Department and PennDOT to review the new reports and retain their own experts, who would then presumably need time to develop their own expert opinions, with whatever predicate research or investigation that would need to be conducted to form those opinions. This process could take untold months, even assuming that new outside events do not prompt counsel to request even more delays.

As the extensive procedural history above reveals, these appeals were filed nearly two years ago. Discovery concluded more than a year ago. The hearing in this matter was originally scheduled for January of this year, before *all* the parties requested that it be postponed so that various other litigation and settlement efforts in those matters could play out. Perhaps unsurprisingly with a project that has been embroiled in litigation for several years, those settlement efforts were apparently fruitless. Indeed, Gidumal has told us that the State Board of Property decision that Gidumal claims is integral to this appeal of a water obstruction and encroachment permit is now pending on appeal to the Commonwealth Court.

It is not merely the Board's own interest in ensuring the just, speedy, and inexpensive determination of every appeal that compels us to deny the request to further delay these proceedings. *See* 25 Pa. Code § 1021.4. There are significant public interest concerns at issue as well. During the supersedeas hearing, we heard extensive testimony about the risk of collapse of the Headquarters Road Bridge due to its deteriorated condition. There is no compelling reason why this hearing should be further postponed in the face of such a risk, even if PennDOT has declined to move forward with this project for the last two years. The existing bridge has been closed since 2011 because of concerns over the bridge's safety and structural integrity. We received evidence at the supersedeas hearing of a four-foot wide hole in the bridge deck. We also heard testimony about a 15.6-mile detour that residents must endure while the bridge has been closed. We heard testimony that, not only is this inconvenient to residents, but it also impacts the ability of emergency vehicles to respond to the area, as they too must utilize the more than 15-mile detour.

Whether or not Mr. Bond will ultimately be permitted to testify on behalf of the Riverkeeper and whether or not Ms. Paist-Goldman will be permitted to offer the additional

opinions proffered by the Riverkeeper will be resolved in a forthcoming Opinion and Order deciding a joint motion in limine filed by the Department and PennDOT on September 22, seeking a ruling on that issue among others. However, the attempted use of new experts and new expert opinions is simply not a basis to justify putting off this hearing any longer. Even more so here because the Riverkeeper's own papers show that it contemplated filing such a motion at least five months ago. The Riverkeeper's desire to use new experts and offer new expert opinions a year after the close of discovery does not establish a compelling reason for delaying the hearing for an indefinite period of time, particularly in a case already replete with inexplicable delays.

While we are sympathetic to the personal challenges of one of the attorneys for the Riverkeeper, at a certain point, the interests of the attorneys in a particular case need to give way to the broader interests of the public in receiving a determination in an appeal one way or the other. The desire of one party to unilaterally dictate the litigation schedule must give way to the rights of the other parties in the litigation and the right of a permittee to have the litigation over its permit resolved one way or the other. *See Clean Air Council v. DEP*, 2019 EHB 685, 701-02. As we made clear in our Order issued on September 21, we will not counsel further delays.

For the foregoing reasons, we issued the Order that is attached to this Opinion.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 27, 2023

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

For the Commonwealth of PA, DEP:
William J. Gerlach, Esquire
Jason Goodman, Esquire
(*via electronic filing system*)

For Appellants, Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum:
Janine G. Bauer, Esquire
Daryl Grable, Esquire
(*via electronic filing system*)

For Appellants, Steven Gidumal and Virtus Capital Advisors, LLC:
Timothy Bergere, Esquire
Bianca Valcarce, Esquire
(*via electronic filing system*)

For Permittee:
Kenda Jo M. Gardner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC	:	
v.	:	**EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

O R D E R

AND NOW, this 21st day of September, 2023, in consideration of the Delaware Riverkeeper Network's motion to supplement the record, and the responses in opposition thereto filed by the Department of Environmental Protection and the Department of Transportation, and having received no response from Steven Gidumal, it is hereby ordered that the motion is **denied**. An Opinion in support of this Order will follow.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 21, 2023

c: **For the Commonwealth of PA, DEP:**
William J. Gerlach, Esquire
Jason Goodman, Esquire
(*via electronic filing system*)

For Appellants, Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum:
Janine G. Bauer, Esquire
Daryl Grable, Esquire
(*via electronic filing system*)

For Appellants, Steven Gidumal and Virtus Capital Advisors, LLC:
Timothy Bergere, Esquire
Bianca Valcarce, Esquire
(*via electronic filing system*)

For Permittee:
Kenda Jo M. Gardner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2022-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 28, 2023**
	:	

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an appellant's motion for summary judgment in an appeal of a Department order where material facts remain in dispute over the nature and extent of the appellant's earth disturbance activities and where the Department has produced sufficient evidence to make a *prima facie* case in support of its order.

O P I N I O N

Salvatore Pileggi has appealed an administrative order issued to him by the Department of Environmental Protection (the "Department") on August 11, 2022 following several inspections conducted by the Lackawanna County Conservation District (the "Conservation District" or "District") in 2021 and 2022 of property owned by Pileggi in Newtown Township, Lackawanna County. The order alleges that Pileggi conducted earth disturbance activities on his property without first obtaining an NPDES permit, without implementing appropriate best management practices (BMPs) or stabilizing the site, and without developing an erosion and sedimentation (E&S) control plan. The order requires Pileggi to cease any earth disturbance activity, implement

appropriate BMPs, and submit an E&S control plan and an NPDES permit application to the Conservation District.

Pileggi has now moved for summary judgment. Pileggi does not dispute that he engaged in earth disturbance on his property. Rather, he argues that his earth disturbance activities fall within the regulatory definition of "road maintenance activities" and thus do not require an NPDES permit. He contends that the Department, which bears the burden of proof in this appeal, has not produced sufficient evidence to show otherwise. Additionally, Pileggi argues that his earth disturbance activities have ceased and are all in the past and therefore there is no "proposed" earth disturbance within the meaning of the regulations requiring an NPDES permit or an E&S plan. Finally, Pileggi contends that the Department has not sufficiently controverted his assertion that he did use BMPs while engaging in the earth disturbance.

In its response, the Department argues that Pileggi did not engage in any "road maintenance activities," but rather constructed roads on his property where before there were none. The Department asserts that the earth disturbance activities Pileggi undertook to construct those roads exceeded an acre and are part of a common plan of development and sale, thereby requiring him to obtain an NPDES permit, which he did not do. Additionally, the Department maintains that an E&S plan was never submitted for the project and that over multiple inspections it did not appear that BMPs were implemented. Overall, in response to the motion, the Department argues that it has made out a *prima facie* case to support its order and that several material facts in Pileggi's motion remain in dispute. Accordingly, the Department contends that summary judgment must be denied and that the issues in this appeal should be decided on a fully developed record following a hearing on the merits. Having reviewed the parties' filings, we deny Pileggi's motion.[1]

[1] In his reply brief, Pileggi argues that the Department's response was filed one day late and we should disregard it. The Department sought leave to respond to this argument, without opposition from Pileggi,

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; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP,* 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is also available:

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

Pa.R.Civ.P. 1035.2(2). *Whitehall Twp. v. DEP*, 2017 EHB 160, 163. In other words, the party bearing the burden of proof must make out a *prima facie* case. *Beech Mountain Lakes Ass'n, Inc. v. DEP*, EHB Docket No. 2022-053-L, *slip op*. at 4 (Opinion and Order on Motions for Summary Judgment issued July 18, 2023). In an appeal of a Department order such as this, the Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(4).

Summary judgment is usually only granted in cases where a limited set of material facts are truly undisputed, and a clear and concise question of law is presented. *Sierra Club v. DEP*,

---

which we granted in an Order on September 19, 2023. In its sur-reply, the Department includes exhibits of emails generated from the Board's electronic filing system showing that the Department's response was initially filed after business hours on August 28, the day the response was due, but was rejected by the Board on the morning of August 29. The Department then refiled its response shortly thereafter. The Board's electronic filing system experienced issues that were discovered the morning of August 29 that prevented documents from being processed and docketed. Therefore, the Board rejected the Department's filing. Because the fi ling delay was caused by a breakdown in the Board's electronic filing operations and Pileggi has not claimed any prejudice from the tardy filing, we will not disregard the Department's response and will instead decide the motion on the merits.

EHB Docket No. 2022-032-B, *slip op*. at 3 (Opinion and Order on Partial Motion for Summary Judgment and Cross-Motion for Summary Judgment issued Apr. 6, 2023). Issues that involve mixed questions of fact and law are best decided at a full hearing and are generally not fit for summary judgment. *Ctr. for Coalfield Justice v. DEP*, 2016 EHB 314, 347. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217.

Pileggi and the Department could hardly be farther apart in their depiction of the material facts of this appeal, or how the law applies to those facts, which is a hallmark indication that these issues are ill-suited for resolution by way of summary judgment. Pileggi describes grading and removing vegetation and dead branches in 2020 from Wooded Lane and Bonnie Circle, two dirt roads on his property that he classifies as township roads and/or rights-of-way.[2] He asserts that a faulty PennDOT swale under Forest Acres Drive adjacent to Wooded Lane failed in 2021, causing flooding on Wooded Lane, and that the work he did was caused by the exigent circumstances of the flood. He claims that he did only what was necessary to protect his own land and rescue a neighbor who was cut off from Wooded Lane by the flooding. In Pileggi's notice of appeal and motion for summary judgment, he characterizes himself as a farmer caring for his property and a good Samaritan who stepped up to help a neighbor out of a jam caused by state and local regulatory failure. The Department, in contrast, disputes that the roads at issue even existed prior to Pileggi's activities, claiming instead that Wooded Lane was merely a two-track farm lane with grass growing between the tire track paths and trees lining the sides, and that Bonnie Circle was nothing more than a field.

[2] The Department disputes that these roads, if that is what they are, are public.

Pileggi's primary contention is that all of his work constituted "road maintenance activities" that fall outside of the requirement to obtain an NPDES permit. The regulations in Chapter 102 generally require a person conducting an acre or more of earth disturbance to have first obtained an NPDES permit before proceeding with any work:

> Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a). One of the stated exceptions to the permit requirement is for "road maintenance activities," which are defined as:

> (i) Earth disturbance activities within the existing road cross-section or railroad right-of-way including the following:
>
> (A) Shaping or restabilizing unpaved roads.
> (B) Shoulder grading.
> (C) Slope stabilization.
> (D) Cutting of existing cut slopes.
> (E) Inlet and endwall cleaning.
> (F) Reshaping and cleaning drainage ditches and swales.
> (G) Pipe cleaning.
> (H) Pipe replacement.
> (I) Support activities incidental to resurfacing activities such as minor vertical adjustments to meet grade of resurfaced area.
> (J) Ballast cleaning.
> (K) Laying additional ballast.
> (L) Replacing ballast, ties and rails.
> (M) Other similar activities.
>
> (ii) The existing road cross-section consists of the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features.

25 Pa. Code § 102.1. Importantly, regardless of whether or not a person is required to obtain a permit for their earth disturbance work, the regulations still require compliance with the other provisions of Chapter 102, 25 Pa. Code § 102.5(k), such as, for example, developing an E&S plan

for disturbances of 5,000 square feet or more (25 Pa. Code § 102.4), implementing BMPs (25 Pa. Code § 102.11), and stabilizing the disturbance on the site (25 Pa. Code § 102.22).

Relying on the definition of road maintenance activities, Pileggi argues that the Department has produced no facts showing that any of his earth disturbance activities occurred outside of the original graded area and any associated drainage features of the existing cross-section of the roads, and that such a showing would be impossible because the Department has not defined the exact location of the original graded area of the roads or associated drainage features.

The Department pushes back on Pileggi's assertions. The Department has provided an affidavit from Jerry Stiles, District Manager of the Lackawanna County Conservation District, who inspected the site five times between April of 2021 and December of 2022 and who avers that there were no roadway or cross-sections on Pileggi's property before Pileggi engaged in his work. (DEP Ex. 19.) Stiles avers that Pileggi constructed the two gravel access roads and drainage features, which appear designed to service a subdivision, without first having obtained the necessary approvals or having implemented environmental protections. All of Stiles's inspection reports with accompanying photographs are attached to the Department's response. (DEP Ex. 3-7.) The reports document similar observations of roadways and other areas being graded and not stabilized and the absence of erosion and sedimentation controls. The December 2022 report included a Google Earth image from 2019 that the Department claims shows only a field where Bonnie Circle now lies. (DEP Ex. 3). In the July 11, 2022 and December 6, 2022 inspection reports, Stiles estimated the total disturbance of the site to be greater than an acre. (DEP Ex. 3, 7.)

In his reply brief, Pileggi accuses the Department of moving the goalposts without notice by arguing for the first time that he was engaged in road construction rather than road maintenance. On this basis, Pileggi argues that we should disregard this "new" allegation from the Department.

However, Paragraphs S and T of the Department's order make it clear that it has always been the Department's position that Pileggi was engaged in construction rather than maintenance activities:

> S. On May 27, 2021, Pileggi sent an email to the District, stating he believes he is doing road maintenance activities, which are excluded from the NPDES permitting requirements. Pileggi requested the District to inform him if an E&S control plan is required.
>
> T. On June 2, 2021, the District responded via email informing Pileggi the road widening and additional drainage practices are not a maintenance activity and are considered earth disturbance activities for construction. The District also explained that because an E&S control plan is part of an NPDES permit, the first step is the NPDES permit.

(Notice of Appeal at 19.)

Pileggi goes on to argue that, because road construction is not regulatorily defined, it is legally irrelevant and would not be determinative or tend to show that Pileggi was required to obtain a permit. Instead, Pileggi insists that the only yardstick the Department and Board may use to determine whether Pileggi was or was not engaged in earth disturbance activities requiring a permit is the definition of road maintenance activities. This argument has no merit and belies the fact that earth disturbance activities related to a road may or may not fall under the definition of road maintenance activities depending on the particular actions taken by the entity or individual engaged in earth disturbance activities. Were this not the case, the specific enumerated activities described in the definition of "road maintenance activities" would be superfluous.

Furthermore, although road construction is not specifically defined, "earth disturbance activity" is, and it clearly encompasses construction work:

> A construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

25 Pa. Code § 102.1. Here, the Department argues that Pileggi's activities do not fit within the definition of road maintenance activities and instead are earth disturbance activities – "construction or other human activity which disturbs the surface of the land" – which the Department describes as road construction.

In short, this dispute cannot be resolved through summary judgment. All we have from Pileggi are a series of conclusory assertions in which he maintains that he has unequivocally shown that he was engaged only in road maintenance activities and claims that the Department has produced no evidence to the contrary. The Department's exhibits, however, including the inspection reports and photos, as well as the Stiles Affidavit, are sufficient to support a *prima facie* case at the summary judgment stage that Pileggi's activities were not road maintenance. At the very least, the Department's exhibits make it abundantly clear that the nature of Pileggi's work is a material fact remaining in dispute. Further, the parties' continued argument back and forth over the regulatory definitions only supports the need to develop a full record at a hearing to determine what kind of activities Pileggi engaged in and which requirements apply. The question of whether Pileggi's activities constitute road construction or maintenance is a mixed question of fact and law and is inappropriate for dispensation in summary judgment. *See Williams v. DEP*, 2019 EHB 764, 773-74 (discussing the need for a full hearing where there is an interaction between a legal definition and factual evidence that will be further elucidated from a hearing providing further context than the summary judgment filings and exhibits can alone).

Other aspects of the permitting issue are also best resolved following a merits hearing. For instance, the Department contends in its response that Pileggi's work is a common plan for development and sale of a subdivision. The Department claims that Pileggi currently has Lot 5 in the subdivision listed for sale, (DEP Ex. 9), and points to the construction of roads to create

frontage lots, the grant of an easement to PPL Electric Utilities to serve those lots, and Pileggi's prior litigation before the Board relating to sewage access for those lots as evidence that the land is a common plan for development and sale. (DEP Ex. 1, 18.) Pileggi contests this classification of his property, arguing that "advertising land for sale and proposing earth disturbance activities are different things, and it would be unreasonable to infer from evidence of advertising for sale that Mr. Pileggi is proposing earth disturbance activities, or anything other than sale." (Reply at 6.) As with the question of whether Pileggi engaged in road maintenance or road construction activities, the question of whether the land at issue here is a common plan for development and sale is a mixed question of law and fact that is inappropriate for resolution at summary judgment. *See Williams*, *supra* at 773-74.

Next, Pileggi seeks summary judgment on the part of the order requiring him to submit an E&S plan for his work. The regulatory requirement for an E&S plan provides:

> (2) A person proposing earth disturbance activities shall develop and implement a written E&S Plan under this chapter if one or more of the following criteria apply:
>
> (i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more.
>
> (ii) The person proposing the earth disturbance activities is required to develop an E&S plan under this chapter or under other Department regulations.

25 Pa. Code § 102.4(b)(2).

Pileggi argues that, because his earth disturbance activities occurred in the past, he is not "proposing" anything at this time, and so the regulation cannot apply to him. He asserts that it is pointless to require him to submit an E&S plan now since his work is already done. We reject Pileggi's argument. To the extent Pileggi is arguing that the Department cannot issue an order addressing earth disturbance after the work has already occurred, we have plenty of cases where that has happened. *See, e.g.*, *DEP v. Colombo*, 2013 EHB 635; *DEP v. Simmons*, 2010 EHB 262;

DEP v. Pecora, 2008 EHB 146; *DEP v. Angino*, 2007 EHB 175. To the extent that Pileggi is challenging the remedy required in the order, we cannot say based on the existing record whether or not it is unreasonable for the Department to require Pileggi to submit an E&S plan. Nor can we say on the basis of the existing record whether or not Pileggi has in fact finished his work, as he claims. For instance, we have no evidence on whether or not the site has been stabilized as alleged in the order. We also do not know the extent of the disturbance at the site, which the Department claims to exceed an acre and Pileggi has previously asserted in an email to the Conservation District that at that time he estimated his earth disturbance to be approximately 12,800 square feet. (DEP Ex. 12.) These are all issues that need to be resolved at a hearing.

Finally, Pileggi challenges the provision of the order requiring him to implement BMPs. Under the regulations, a person engaging in earth disturbance must implement appropriate BMPs regardless of the size of the disturbance. 25 Pa. Code § 102.4(b)(1). Pileggi asserts that he used a variety of BMPs while engaging in his work, including bumper areas, slope fencing, mulching, and the installation of a sediment basin. (DEP Ex. 1, 12.) On the other hand, in its response the Department contends that it has supplied evidence of the lack of BMPs via the Conservation District's inspection reports, which consistently note that it did not appear to the inspectors as though BMPs were in use at the site. (DEP Ex. 4, 5, 6.) Pileggi argues that these reports are equivocal, and therefore Pileggi's own deposition testimony stating that he did implement BMPs should overcome the inspectors' observations. The resolution of this type of factual dispute is not a determination that can be made in the context of the summary judgment motion based on the current record. Weighing the facts in the light most favorable to the Department, the inspection reports at the very least create a dispute over a material fact that needs to be resolved at a hearing.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2022-068-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 28th day of September, 2023, it is hereby ordered that the Appellant's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: September 28, 2023

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

For the Commonwealth of PA, DEP:
Sean L. Robbins, Esquire
(*via electronic filing system*)

For Appellant:
David Romine, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN LATKANICH	:	
	:	
v.	:	**EHB Docket No. 2023-043-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT CHAP, LLC, Permittee	:	**Issued: October 6, 2023**

OPINION AND ORDER ON
DEPARTMENT'S PARTIAL MOTION TO DISMISS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants in part the Department of Environmental Protection's Partial Motion to Dismiss certain objections raised in an appeal of a Department Determination Letter issued pursuant to Section 3218 of the Oil and Gas Act. The Appellant's objections asserting that the Department failed to take action pursuant to the Hazardous Sites Cleanup Act, the Air Pollution Control Act and its Mission Statement are dismissed to the extent they challenge the Department's failure to take action unrelated to the Determination Letter that is the subject of this appeal. The Board lacks jurisdiction over Department inaction. The Motion is denied to the extent that the Appellant is asserting that soil contamination or air pollution resulting from the drilling, alteration or operation of oil or gas wells played a role in contaminating his water supply and should have been considered by the Department in its Section 3218 investigation. Finally, the Board denies the Department's Motion with regard to Article I, Section 27 of the Pennsylvania Constitution where it is unclear which portions of the objection the Department seeks to dismiss.

O P I N I O N

Background

This matter involves a Notice of Appeal filed by Bryan Latkanich, challenging an April 20, 2023 letter (the Determination Letter) from the Department of Environmental Protection (Department). The Determination Letter advised Mr. Latkanich, through his attorney, that following an investigation into Mr. Latkanich's water supply the Department could not conclude that the water supply had been adversely affected by oil and gas operations, including oil and gas activities conducted by Chevron Appalachia, LLC (Chevron). Mr. Latkanich appealed the Department's Determination Letter on May 8, 2023 and filed an Amended Notice of Appeal on May 31, 2023.

The matter before the Board is a Motion for Partial Dismissal (Motion) filed by the Department seeking to dismiss certain objections raised in the Amended Notice of Appeal. Chevron's successor, EQT CHAP, LLC (EQT), joined in the Motion.[1] Mr. Latkanich filed a Response objecting to the Motion. Although the Department could have filed a Reply to Mr. Latkanich's Response pursuant to 25 Pa. Code § 1021.94(d), it did not do so.

According to the parties' filings, Mr. Latkanich owns property and resides at 95 Hill Road, Frederickstown, Washington County, Pa. (the Latkanich Property). The Latkanich Property is served by a private groundwater well (the Water Supply). (Notice of Appeal, Schedule 1, para. 7.)

[1] We understand EQT to be a successor in interest to Chevron in this matter. Paragraph 3 of the Department's Motion states "Sometime after restoration, Chevron became EQT CHAP, LLC" but provides no citation to the record. The Notice of Appeal, citing a letter from Chevron to the Department, states, "[O]n October 29, 2020, Chevron Appalachia notified the Department that 'on or around November 30, 2020, EQT Aurora LLC, a subsidiary of EQT Corporation, intended to purchase Chevron Northeast Upstream LLC, which owns all of the membership interests of Chevron Appalachia.'" (Notice of Appeal, Schedule 1, para. 33; Exhibit P to Notice of Appeal.) Additionally, as evidenced by Exhibit Q to the Notice of Appeal, the Department issued an Erosion and Sediment Control General Permit-3 to EQT CHAP LLC for the Latkanich well site. (Exhibit Q to Notice of Appeal.)

Mr. Latkanich states that in 2009 and 2010 he entered into oil and gas lease agreements with Phillips Exploration, Inc. that were subsequently held by Chevron. (Notice of Appeal, Schedule 1, para. 12; Exhibit B to Notice of Appeal.) Chevron constructed a well site and drilled two unconventional gas wells approximately 500 feet from the Water Supply on what is known as the "Latkanich Well Site." (Notice of Appeal, Schedule 1, Objections 19a and 19b; Department's Motion, para. 3; Exhibit A to Notice of Appeal.) According to the Department's Motion, drilling, well development and operations commenced at the Latkanich Well Site in 2011. (Department Motion, para. 3.) The wells were plugged in 2020. (Exhibit A to Notice of Appeal, p. 2.)

On April 22, 2022, Mr. Latkanich filed a complaint with the Department requesting an investigation of his Water Supply pursuant to § 3218 of the Oil and Gas Act, Act of February 14, 2012, P.L. 87, *as amended*, 58 Pa. C.S. §§ 2301-3504, at § 3218.[2] According to the Notice of Appeal, Mr. Latkanich "requested that the Department investigate environmental complaints involving his property's water, air, and soil." (Notice of Appeal, Schedule 1, para. 1.) On April 20, 2023, the Department issued its Determination Letter addressed to Mr. Latkanich's counsel. The Determination Letter states in relevant part:

[2] Section 3218(b) of the Oil and Gas Act states:

> A landowner or water purveyor suffering pollution or diminution of a water supply as a result of the drilling, alteration or operation of an oil or gas well may so notify the department and request that an investigation be conducted. Within ten days of notification, the department shall investigate the claim and make a determination within 45 days following notification. If the department finds that the pollution or diminution was caused by drilling, alteration or operation activities or if it presumes the well operator responsible for pollution under subsection (c), the department shall issue orders to the well operator necessary to assure compliance with subsection (a), including orders requiring temporary replacement of a water supply where it is determined that pollution or diminution may be of limited duration.

58 Pa.C.S. §3218(b).

> The Department has completed its investigation of your client's (Bryan Latkanich) water supply listed in Exhibit A ("Water Supply"). Based on the sample results and other information obtained to date, the Department cannot conclude that the Water Supply was adversely affected by oil and gas activities including but not limited to the drilling, alteration, or operation of an oil or gas well.
>
> * * * * *
>
> The Department investigated whether oil and gas activities have occurred in the recent past that may be associated with an impact to your Water Supply. The closest oil and gas activity to your Water Supply is the Latkanich unconventional gas well pad, previously operated by Chevron, located about 500 feet northwest of your Water Supply. No recent activity appears to have occurred at this well site. After the wells on this well pad were plugged in 2020, earth was moved in large volumes and then seeded to fully restore the site. The Department reviewed historic activity at this well site to determine any evidence of the use of PFAS substances. The Department also reviewed compliance records which included violations in 2012 for releases that were addressed at the time and did not note any PFAS related chemicals.

(Exhibit A to Notice of Appeal, p. 1, 2.) The Determination Letter went on to state:

> While the Department did not determine that oil and gas activities polluted your Water Supply, please do note that your water quality does not meet (i.e., is worse than) health and/or aesthetic statewide standards. You may consider exploring remedial actions regarding the levels of hardness, sodium, total dissolved solids, and total coliform as identified above. Or, alternatively, you may consider replacing your water with the public water that is plumbed to your home already and, if desired, installation of filtration or treatment for any constituents of concern in that public water.

(*Id*. at p. 4.)

Standard of Review

The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Ongaco v. DEP*, EHB Docket No. 2023-022-CS, *slip op*. at 3 (Opinion and Order on

Motion to Dismiss issued July 25, 2023); *Scott v. DEP*, EHB Docket No. 2022-075-B, *slip op*. at 2-3 (Opinion and Order on Motion to Dismiss issued May 15, 2023); *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol Pennsylvania Coal Co., LLC v. DEP*, 2015 EHB 48, 54; *Winner v. DEP*, 2014 EHB 135, 136-37. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570. The standard for motions to dismiss also applies to motions for partial dismissal. *Popovich v. DEP*, EHB Docket No. 2021-082-B (Opinion and Order on Motion to Dismiss Certain of Appellants' Objections issued March 22, 2023).

Discussion

The Department seeks to dismiss paragraphs 16 through 19 of the "Additional Objections" set forth in Mr. Latkanich's Amended Notice of Appeal.[3] We address each of these objections below.

Objections 16 and 17 of Amended Notice of Appeal

Objections 16 and 17 state as follows:

> 16. The Department Violated its Obligations under the Hazardous Sites Cleanup Act
>
> - The Department did not investigate as is its obligation under Section 501(a) and (d).
>
> - The Department abused its discretion by not acting further under 502(c)(3).

[3] The Amended Notice of Appeal incorporates the objections of the original Notice of Appeal and adds new objections numbered 1-22 in the section entitled "Additional Objections." The Department's Motion focuses on Objections 16 through 19 of the "Additional Objections." Therefore, references to Objections 16 through 19 in this Opinion are to paragraphs 16 through 19 of the "Additional Objections" set forth in the Amended Notice of Appeal.

- The Department has not required that Chevron and/or EQT remediate the site.

17. The Department violated the Air Pollution Control Act (35 P.S. §§ 4001-4015)

- The Department failed to abate the air pollution caused by the Operations, which has been inimical to public health, safety and welfare, and which is and was injurious to Appellant, his family, and the Property and such air pollution unreasonably interfered with Appellant and his family's comfortable enjoyment of their lives and the Property.

- The Department had a mandatory duty under Section 4(8) and with respect to the Operations, [to] receive, initiate and investigate Appellant's complaints, institute and conduct surveys and testing programs, conduct general atmospheric sampling programs, make observations of conditions which may or do cause air pollution, make tests or other determinations at air contamination sources, and assess the degree of abatement required.

- Nothing in the documentation provided by the Department exempted the Operations from air quality and pollution regulations under Title V or otherwise.

(Amended Notice of Appeal, Schedule 1, Additional Objections 16-17.)

The Department asserts that these objections should be dismissed because they pertain to alleged inaction on the part of the Department and, as such, fall outside the scope of the Board's jurisdiction.

The Board's jurisdiction "extends only to matters that fall within its statutorily-established subject matter jurisdiction." *Glahn v. Department of Environmental Protection*, 298 A.3d 455, 459 (Pa. Cmwlth. 2022) (*Glahn II*), *aff'g, Glahn v. DEP*, 2021 EHB 322 (*Glahn I*). Section 4 of the Environmental Hearing Board Act establishes the Board's jurisdiction. Pursuant to that section, the Board "has the power and duty to hold hearings and issue adjudications…on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a).

The Board has jurisdiction over final *actions* of the Department. *Jake v. DEP*, 2014 EHB 38, 59. The Board's Rules of Practice and Procedure define an "action" as the following:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.

25 Pa. Code § 1021.2 (Definitions). Thus, the Board has jurisdiction over final Department actions that affect personal or property rights, privileges, immunities, duties, liabilities or obligations. *Glahn I*, 2021 EHB at 325; *Jake*, 2014 EHB at 59.

This appeal involves a discrete action – the determination by the Department that it could not conclude that oil and gas activities had adversely affected Mr. Latkanich's Water Supply. The determination was made following an investigation conducted pursuant to Section 3218 of the Oil and Gas Act. That action is reviewable by the Board. However, Objections 16 and 17 do not pertain to the Department's determination under Section 3218. Rather, they allege that the Department failed to take action pursuant to two statutes that are not at issue in this appeal - the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305 (HSCA), and the Air Pollution Control Act, Act of January 8, 1950, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015 (APCA).

It is well-established that the Board does not have jurisdiction over Department inaction or failure to act. *Lower Salford Township v. DEP*, 2011 EHB 333, 335; *Westvaco Corp. v. DEP*, 1997 EHB 275, 277; *Westinghouse Electric Corp. v. DER*, 1990 EHB 515, 518. The Commonwealth Court recently held in *Glahn II,* 298 A.3d at 461, that "inaction or failure to act is not an 'action' subject to the Board's jurisdiction because it is not 'an order, decree, decision, determination or ruling by the Department.'" The Board addressed the non-appealability of Department inaction in *Glahn I*:

> We have consistently held that the Board lacks jurisdiction over Departmental inaction. See e.g., *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333, 335 ("Whether the Department could have or should have established the TMDLs, the fact of the matter is that it did not. There simply is no final Departmental action for us to review…The Board has no jurisdiction over Department inaction."); *Westvaco Corp. v. DEP*, 1997 EHB 275, 277 ("While the denial or issuance of an application for a permit revision is a final appealable action, the Department's inaction on an application is not."); *Royer v. DER*, 1992 EHB 611 (dismissing appeal of Department's failure to take action on appellants' letter requests to lift a moratorium on issuing sewage permits for a certain subdivision; rejecting the argument that the Department's inaction amounted to a denial) [footnote omitted]. To the extent that there was any old caselaw of the Board permitting appeals of Departmental inaction, we overruled that caselaw in *Westinghouse Electric Corp. v. DER*, 1990 EHB 515, 518.

2021 EHB at 334.[4] Moreover, to the extent that Mr. Latkanich is objecting to the Department's failure to take enforcement action pursuant to the APCA or HSCA, the Board's jurisdiction does not extend to review of the Department's exercise of its prosecutorial discretion. *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1168; *Law v. DEP*, 2008 EHB 213, 215 ("[I]t is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board.") As the Board has previously held, "We cannot order the Department to issue violations… Whether or not the Department issues a violation is a matter of its enforcement discretion." *Glahn I*, 2021 EHB at 329. See also, *Mystic Brooke Development, L.P. v. DEP*, 2009 EHB 302, 304 ("This Board has no authority to order the Department to take enforcement action against [the permittee]").

In his Response, however, Mr. Latkanich argues that Objections 16 and 17 are directly related to the Department's Determination Letter that is on appeal in this matter and, therefore,

[4] Although there are statutory exceptions to the general rule that Department inaction is not appealable, as pointed out in *Glahn I*, those exceptions are not present here.

within the Board's jurisdiction. Mr. Latkanich asserts that air and soil pollution can cause groundwater pollution. In support of his argument, Mr. Latkanich cites a Department document entitled "Source Water Assessment & Protection Program" that he says lists air pollution as a potential source for surface and groundwater pollution. (Exhibit A to Latkanich Response). He also cites a previous case before the Board in which a permittee oil and gas operator sought to gain entry to an appellant's property for the purpose of conducting air, soil and water testing in connection with allegations of water supply contamination. *Kiskadden v. DEP*, 2013 EHB 21 (Opinion and Order on Motion for Order Authorizing Entry Upon Property).[5] Mr. Latkanich communicated his concerns regarding air and soil contamination to the Department when he filed his complaint pursuant to Section 3218, and the Department included this statement in its Determination Letter:

> The Department understands from ongoing discussion that concern remains regarding soil and air on your property. Summaries of soil sampling were provided to the Department during this complaint investigation, but data to support those results has not yet been received, including location data, certified results, and quality control/quality assurance data documentation. The program assigned to this complaint (Southwest District Oil and Gas District) has informed the Regional Director of the Department's Southwest Regional Office about continued concerns regarding soil and air that you have expressed during the course of this investigation.

(Exhibit A to Notice of Appeal, p. 4.)

Mr. Latkanich asserts that Objections 16 and 17 of his Amended Notice of Appeal do not seek separate action by the Department under the APCA and HSCA. Rather, he asserts that air and soil investigations should have been conducted as part of the Department's Section 3218 investigation into his Water Supply:

[5] The motion to which Mr. Latkanich is referring appears at *Kiskadden v. DEP*, Docket No. 2011-149-R, Docket Entry No. 97.)

> The Department tries to mischaracterize Appellant's allegations as seeking to have the Board find the Department violated laws "by not performing additional investigation and taking additional actions." However, Appellant's appeal is not based on the need for "additional investigation." Rather, Appellant's appeal is based on the Department's violation of its obligations to perform a lawful investigation into the Water Supply under the Oil and Gas Act, which necessarily includes air and soil investigations.

(Appellant's Memorandum in Support of Response, p. 5.) The Department did not file a Reply to Mr. Latkanich's Response and therefore did not respond to these arguments.[6]

The wording of Objections 16 and 17 is not consistent with Mr. Latkanich's explanation that he is not asking the Department to undertake any action other than that related to the Determination Letter. For example, Objection 16 clearly states, "The Department did not investigate as is its obligation under [Section] 501(a) [of HSCA]" and "The Department abused its discretion by not acting further under [Section] 502(c)(2)[7] [of HSCA]." Objection 16 also indicates that the Department should have required Chevron or EQT to "remediate the site." Likewise, Objection 17 states that the Department "had a mandatory duty under Section 4(8) [of the APCA]…[to] receive, initiate and investigate Appellant's complaints" and take further action under that section. The language of these objections clearly conveys the intent that Mr. Latkanich was seeking action by the Department pursuant to the APCA and HSCA.

As we have stated, the Board does not have jurisdiction to review Department inaction. To the extent that Mr. Latkanich is asking the Board to review whether the Department *should have* taken action pursuant to the APCA and HSCA, those objections are dismissed. However, to the

[6] Although Section 1021.94(d) of the Board's Rules of Practice and Procedure says that the moving party *may* file a reply to a response to its motion, 25 Pa. Code § 1021.94, the Board would have benefited from hearing the Department's reply to this argument.

[7] The Department points out that there is no Section 502(c)(2) of HSCA and presumes the citation was intended to be to Section 501(c)(2). (Department Motion, n. 4.) We agree.

extent that Mr. Latkanich is arguing that soil contamination or air pollution resulting from the drilling, alteration or operation of oil or gas wells played a role in contaminating his Water Supply and should have been considered by the Department in its Section 3218 investigation, he may pursue those claims in his appeal of the Determination Letter.[8]

Objection 18 of Amended Notice of Appeal

Objection 18 of the amended notice of appeal states as follows:

> The Department Violated the Pennsylvania Constitution
>
> - Pennsylvania's Environmental Rights Amendment at Article 1, Section 27 states: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.
>
> - The Department violated the Environmental Rights Amendment both by its actions and its failures to act.
>
> - The Department was obligated to first review Appellant's environmental complaints and to perform investigations in response thereto under the Environmental Rights Amendment and this obligation is self-executing.
>
> - The Property is located in an area that is already overburdened by pollution and is medically underserved, and the Department should be exercising increased scrutiny in its exercise of fiduciary duties of loyalty, impartiality, and prudence in protecting Pennsylvania's natural resources. See Exhibit RR.[9]
>
> - The Department's own records reflect that the Operations contaminated Appellant's air, water, and soil by virtue of the underlying facts of the Chevron Violations, the Consent Order, and the PFAS test results.

[8] We take no position on the merit of those claims, only that the Board has jurisdiction to hear them.

[9] Exhibit RR is entitled "Hydraulic Fracturing Fluid Product Component Information Disclosure."

> - The Department cannot credibly dispute the testing that has been performed on the Property and presented by the Appellant.
>
> - The Department, well aware of the health impacts on Appellant and his minor child, proceeded in a wanton, negligent, and knowingly reckless disregard for their health, and its actions have contributed to the worsening of the health of Appellant and his child.
>
> - The Department has admitted that freshwater sources used by oil and gas operators contain PFAS, and that the use of such water in oil and gas operations is spreading PFAS contamination throughout the state, yet the Department has taken no further action to halt such practices or to remediate the same, including on Appellant's Property.
>
> - The Department's actions and failures to act deprived Appellant and his family of the full use and enjoyment of the Property and Home, both on a temporary and permanent basis.
>
> - The Department's actions and failures deprived Appellant and his family of a right to be timely heard.
>
> - Appellant makes and urges the Board to undertake an analysis of a takings claim and in connection therewith, inverse condemnation in this matter.
>
> - Appellant and his family are not "outlier" cases; the Grand Jury Report and other documented cases across the state reveal that the Department's knowing actions and failures have endangered and continue to endanger the environment and human health.

(Amended Notice of Appeal, Schedule 1, Additional Objection 18.)

In its Motion, the Department makes the same argument regarding Objection 18 as it did with Objections 16 and 17, i.e., that the objection pertains to inaction by the Department and, therefore, the Board lacks jurisdiction. However, in a footnote the Department states:

> The Department is not moving to dismiss parts of Paragraph 18 to the extent they are intended to apply to the action on appeal, the Determination Letter. This motion is just in regard to alleged inaction.

(Department's Motion, n. 6.)

The Department does not specify which parts of Objection 18 it seeks to dismiss, nor does it expand on its argument in its Memorandum of Law. The specific inaction it is referring to is unclear. For example, one subpart of Objection 18 reads, "The Department violated the Environmental Rights Amendment both by its actions and its failures to act." To the extent this objection is contending that the Department failed to fulfill its duties as trustee under Article I, Section 27 in connection with the Section 3218 Water Supply investigation and Determination Letter, that is a matter that is within the scope of the Board's jurisdiction.

In his Response, Mr. Latkanich focuses on the Department's "failure to obtain information regarding all environmental effects in this matter" and cites *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), in which a plurality of our Supreme Court held:

> Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. *The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.*

Id. at 952 (Emphasis added). We understand Mr. Latkanich's argument to align with his contention that the Department should have investigated soil contamination and air pollution in connection with its investigation of his Water Supply. However, without the benefit of more information from the Department or Mr. Latkanich, it is difficult to sort out the parties' arguments.

Motions to dismiss may be granted only when a matter is free of doubt. *Bartholomew,* 2019 EHB at 517. In considering a motion to dismiss, the Board should not be required to guess which objections a moving party seeks to dismiss or the basis for their dismissal. Because it is unclear which parts of Objection 18 the Department seeks to dismiss, and without further support for dismissal set forth in its Memorandum of Law, we find that it is not appropriate to dismiss any portion of Objection 18 at this time.

Additionally, in Objection 18 Mr. Latkanich asks the Board to undertake a takings analysis. The Department's Motion does not specifically address the takings claim, nor does Mr. Latkanich reference it in his response. However, paragraph 26 of the Department's Motion states that the Department "only seeks dismissal of 'objections' stating that the Department failed to investigate or take other actions than the specific action on appeal, a water supply determination letter issued pursuant to Section 3218 of the Oil and Gas Act…" (Department's Motion, para. 26.) Because this particular objection does not allege a failure to investigate or take action by the Department, and because it is unclear whether the takings claim relates to the Department's Determination Letter, we find that the Department has presented no basis for dismissal of this claim at this time.

Objection 19 of the Amended Notice of Appeal

The Department seeks to dismiss Objection 19, which states as follows:

> The Department Violated its Mission, and the underlying Constitutional, regulatory, and statutory obligations attendant thereto.
>
> - The DEP's Mission Statement is: The Department of Environmental Protection's mission is to protect Pennsylvania's air, land and water from pollution and to provide for the health and safety of its citizens through a cleaner environment. We will work as partners with individuals, organizations, governments and businesses to prevent pollution and restore our natural resources.
>
> - The Department clearly did not protect the air, land, and water from the pollution caused by the Operations.
>
> - The Department's actions and failures to act harmed and jeopardized Appellant and his family's health and safety.
>
> - The Department did not work with Appellant to prevent pollution and to restore his Property and Home.
>
> - The Department failed to abate the nuisances caused by the Operations in violation of applicable law.

(Amended Notice of Appeal, Schedule 1, Additional Objection 19.)

As with the earlier objections, the Department argues that the Board has no jurisdiction to hear Objection 19 because it deals with the Department's alleged failure to act. In his Response, Mr. Latkanich reiterates that the Department's failure to conduct an air or soil investigation in connection with the Water Supply investigation is within the Board's authority to consider.

To the extent that Objection 19 challenges the Department's failure to take action outside the scope of the Department's Section 3218 investigation and Determination Letter, that claim is beyond the Board's jurisdiction, as explained earlier. However, to the extent that Mr. Latkanich is arguing that soil contamination or air pollution resulting from the drilling, alteration or operation of oil or gas wells played a role in contaminating his Water Supply, and the Department violated its Mission Statement by failing to investigate the alleged soil contamination or air pollution in connection with its Section 3218 investigation and Determination Letter, the Board has jurisdiction to hear this claim.[10]

In conclusion we enter the following Order:

.

[10] Although the Department does not raise this issue in its motion, we make no ruling at this time as to whether the Mission Statement is binding and enforceable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRYAN LATKANICH	:	
	:	
v.	:	**EHB Docket No. 2023-043-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EQT CHAP, LLC, Permittee	:	

O R D E R

AND NOW, this 6th day of October, 2023, it is hereby ordered as follows:

1. The Department's Motion is granted as to Objections 16 and 17 to the extent they challenge the Department's failure to act pursuant to the Hazardous Sites Cleanup Act and the Air Pollution Control Act. The Motion is denied to the extent that Objections 16 and 17 assert that soil contamination or air pollution resulting from the drilling, alteration or operation of oil or gas wells played a role in contaminating the Water Supply and should have been considered by the Department in its Section 3218 investigation.
2. The Department's Motion is denied as to Objection 18.
3. The Department's Motion is granted as to Objection 19 to the extent it challenges the Department's failure to take action outside the scope of the Section 3218 Water Supply investigation. The Motion is denied to the extent that Objection 19 asserts that soil contamination or air pollution resulting from the drilling, alteration or operation of oil or gas wells played a role in contaminating his Water Supply, and the Department

violated its Mission Statement by failing to investigate the alleged soil contamination or air pollution in connection with its Section 3218 investigation.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: October 6, 2023

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

For the Commonwealth of PA, DEP:
Richard Watling, Esquire
Anna Zalewski, Esquire
(via electronic filing system)

For Appellant:
Lisa Johnson, Esquire
Michael Bruzzese, Esquire
Jakob Norman, Esquire
Erin Power, Esquire
Ansley O'Brien, Esquire
(via electronic filing system)

Brian Ward, Esquire
(via electronic mail)

For Permittee:
Kathy Condo, Esquire
Jean M. Mosites, Esquire
Joshua Snyder, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: October 13, 2023**

OPINION AND ORDER ON
PETITION TO REOPEN THE RECORD

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

Synopsis

The Board denies a petition to reopen the record where the appellants have failed to satisfy the criteria for reopening the record set forth in the Board's Rules at 25 Pa. Code § 1021.133. In addition, the new evidence proposed to be added to the record is not admissible for multiple reasons.

O P I N I O N

Liberty Township and CEASRA (the "Appellants") have appealed the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to Tri-County Landfill's ("Tri-County's") solid waste management permit. The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The landfill is located approximately 6,000 feet from the Grove City Airport. The hearing on the merits has concluded, having begun on April 5, 2023 and lasting 12 days until April 28. The parties have filed their post-hearing briefs, and the Appellants' reply brief is due on October 16, 2023.

The Appellants have filed a petition to reopen the record prior to the issuance of our Adjudication in this matter. Their petition was filed on September 26, 2023. The Appellants seek to reopen the record to enter into evidence two exhibits attached to the petition: (1) an aerial photograph of what the Appellants say is the Tri-County Landfill taken on July 19, 2023 (Exhibit A); and (2) a "Strike Report" dated July 15, 2023 that appears to document a bird striking an airplane on July 14, 2023 (Exhibit B). The Appellants have not asked for the record to be reopened for any additional testimony. The Department and Tri-County oppose the petition. For the reasons explained below, the petition is insufficient to justify reopening the record and must be denied.

Our Rules provide that, following the conclusion of the merits hearing but before the Board issues its adjudication, the record may be reopened "upon the basis of recently discovered evidence" when the following circumstances are present:

> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b). A petition to reopen the record must (1) identify the evidence the petitioner seeks to add to the record, (2) describe the efforts the petitioner made to discover the evidence prior to the close of the record, and (3) explain how the evidence was discovered after the close of the record. 25 Pa. Code § 1021.133(d). The petition must also be verified. 25 Pa. Code § 1021.133(d)(3).

Reopening the record is a decision within the discretion of the presiding judge. *Friends of Lackawanna v. DEP*, 2017 EHB 664, 666 (citing *Wheeling-Pittsburgh Steel Corp. v. Dep't of Envtl. Prot.*, 979 A.2d 931, 943 (Pa. Cmwlth. 2009); *Al Hamilton Contractor Co. v. Dep't of Envtl. Res.*, 659 A.2d 31, 35 (Pa. Cmwlth. 1995)). Even when all the above criteria in our Rules are met,

the decision to reopen the record remains within the Board's discretion. *M&M Stone Co. v. DEP*, 2010 EHB 227, 235. The circumstances under which a record will be reopened are narrow:

> "Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence." [*M&M Stone Co. v. DEP*, 2010 EHB 227, 235] (quoting *Lang v. DEP*, 2006 EHB 7, 25-26). We are generally reluctant to give parties "two bites at the proverbial apple," *Noll v. DEP*, 2005 EHB 24, 32 (quoting *Exeter Citizens' Action Comm. v. DEP*, 2004 EHB 179, 181), because hearings, like many other things in life, must eventually come to an end, even if the ending is less than perfectly satisfying to all concerned.

Perano v. DEP, 2011 EHB 270, 272-73.

Before we even get to the criteria for reopening the record set forth in 25 Pa. Code § 1021.133 and our case law, there must be some indication that the evidence is admissible to justify the extraordinary measure of opening the record. Exhibits A and B standing alone are clearly not admissible.[1] First, the Appellants make no attempt to authenticate the documents, other than boilerplate verifications from the spokespersons for the Appellants themselves, Jane Cleary and Robert Pebbles, neither of whom are pilots. The strike report is not signed and there is no other indication who wrote it. We have been provided with no basis for finding that the items are what the proponents claim them to be. Pa.R.E. 901. Authentication is not particularly difficult in Board proceedings, but here there is nothing.

In *Pine Creek Valley Watershed Association v. DEP*, 2011 EHB 579, there was a dispute among the parties as to whether a proposed development would harm bog turtle habitats. Subsequent to the hearing, the U.S. Fish and Wildlife Service sent a letter to the Department stating that it had found two bog turtles at the site. The appellant petitioned to reopen the record to include this letter and we granted the petition. Unlike here, in *Pine Creek Valley* there was no question as to the authenticity or authorship of the piece of evidence that was sought to be introduced.

[1] Nor do we want to speculate that the exhibits would necessarily be admissible had they been supported by testimony.

Relatedly, we have no indication that whoever wrote the report made the comments contained therein based on personal knowledge. Pa.R.E. 602. *See also Gibson v. Workers' Comp. Appeal Bd.*, 861 A.2d 938, 947 (Pa. 2004) ("another fundamental rule of law is that witnesses must have first-hand knowledge of the subject on which they are testifying for that testimony to be admissible.").

The bird strike report is inadmissible hearsay. It is an out of court statement offered for the truth of the matters asserted therein. Pa.R.E. 801(c). Indeed, that is even assuming that the hearsay document was not based on hearsay statements of another person, making for hearsay within hearsay. The Appellants have not shown that the document would fall within any exception to the hearsay rule. The Appellants offer, again without proper verification, that the bird strike report was submitted to the Federal Aviation Administration (FAA), but to the extent this can be interpreted as a claim that the document is a public record, that exception to the prohibition against hearsay applies to "a record of a public office" that was created by someone performing an "official public duty." Pa.R.E. 803(8). This report does not appear to have been created as an official public duty by someone at the FAA; it appears to be a report filled out by an unidentified person who may or may not have been a pilot involved in the alleged incident.

Beyond the lack of authentication, lack of a showing of personal knowledge, and inadmissible hearsay, the report is made more problematic by the fact that it contains what appear to be gratuitous editorial comments about the landfill expansion that go beyond what we think would be appropriate in such a report. The report says, "Landfill off the east end of the runway attracts birds. We are usually only at 400-500 foot AGL as we approach runway 28 and cross the landfill. The landfill is scheduled to be expanded and this is a threat to aviation safety." (Exhibit B at 2.)

Even if it were appropriate to add such comments about a landfill expansion in a bird strike report, no proper foundation has been laid for what are obvious opinion statements. We think that it would require expert testimony to link a certain species of bird, let alone an individual bird involved in a strike with an airplane, to the operations happening at the landfill, which currently do not include the disposal of any waste. Indeed, at the merits hearing both the Appellants and Tri-County presented extensive testimony from experts opining on whether the landfill posed a threat to aviation safety due to potential bird strikes. The Appellants have not established that the unidentified author of the report is a qualified expert capable of rendering such opinions.

Turning to the criteria for reopening the record, even if the evidence were admissible, it would at best be cumulative. There was a wealth of testimony and evidence at the 12-day hearing on the merits on the threat of bird strikes even in the absence of landfilling. The parties' respective experts' testimony spanned two full days and more than 400 pages of the transcript. There does not seem to be any dispute among the parties that bird strikes happen. The bird strike report at best stands for no more than that. The report standing alone tells us nothing about the bird strike and the disposal of waste at a landfill. The Appellants use the photo to show there is a pond at the landfill site, but the report alone does not show that there is any connection. The report would simply add more evidence, not remedy any mistake in the record. *Perano, supra*, 2011 EHB at 272.

The proffered bird strike report in no way conclusively establishes a material fact or contradicts a material fact of the case. 25 Pa. Code § 1021.133(b)(1). The evidence does not support a finding that landfilling would increase the risk of bird strikes. For example, the report appears to refer to a bird species, purple martin, that is not associated with landfilling. There was

no mention of a purple martin during the hearing. There has been no indication that purple martin is a species that is attracted to landfills.

The Appellants assert that entering the report and photograph into the record would not result in the further continuation of these proceedings, but we fail to see how that could be the case, particularly since there has not been a basic foundation laid for the documents. In *Pine Creek Valley, supra*, the record was reopened to admit evidence of a discrete material fact regarding the existence of bog turtles at the site. The letter in *Pine Creek Valley* did not require any additional testimony or additional evidence to be considered in conjunction with the letter. The parties even stipulated to the main fact contained in the letter that a certain individual with the U.S. Fish and Wildlife Service found two bog turtles on the site.

The situation here is more like *Friends of Lackawanna v. DEP*, 2017 EHB 664, where the appellant claimed that the letter contained "self-explanatory Department admissions." We rejected that characterization and found that the letter would at least require further explanation from the author, with appropriate cross-examination from the other parties, and potential testimony from other witnesses. The additional testimony and evidence required to contextualize the letter was one of the factors that militated toward us denying the petition to reopen the record. Here, there is no question that reopening the record would necessitate additional testimony and evidence from all parties to explain the bird strike report and to debate the opinions contained therein. *See Perano*, 2011 EHB at 273 ("This case illustrates that reopening the record to add one more piece of evidence will rarely end the matter."); *Perano v. DEP*, 2011 EHB 275, 278 ("reopening the record to allow Perano to present his new theory would in fairness require us to accept evidence regarding the Department's response to that theory.").

Finally, it is not clear why the July report and photograph are only being offered now. The bird strike report says that the bird strike occurred on July 14, 2023. The Appellants say in their petition that they had knowledge of the bird strike on that same day, July 14, and that the Appellants notified the Department and Tri-County about the incident the next day on July 15. The Appellants say the photograph was taken on July 19. There is no explanation for why the Appellants waited more than two months, until September 26, 2023, to file their petition to reopen the record. The Appellants say they are not interested in delaying the adjudication of this matter, but their own delay is puzzling.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 13th day of October, 2023, it is hereby ordered that the Appellants' petition to reopen the record is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 13, 2023

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

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	**Issued: October 18, 2023**

OPINION AND ORDER ON MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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

Synopsis

The Board denies a motion for leave to file an *amicus curiae* brief because the motion was filed too late, and because it does not satisfy the criteria for filing such a brief set forth in the Board's Rules.

O P I N I O N

Liberty Township and CEASRA (the "Appellants") have appealed the issuance by the Department of Environmental Protection (the "Department") of a major permit modification to Tri-County Landfill's ("Tri-County's") solid waste management permit. The permit authorizes Tri-County to operate a municipal waste landfill in Liberty and Pine Townships, Mercer County, within the boundary of an inactive landfill that was operated by Tri-County from 1950 to 1990. The landfill is located approximately 6,000 feet from the Grove City Airport. The hearing on the merits has concluded, having begun on April 5, 2023 and lasting 12 days until April 28. Post-hearing briefing has now been completed and the Board has begun preparation of the Adjudication.

On October 12, 2023, four days before the last post-hearing brief was due, Grove City Aviation, LLC ("GCA") filed a motion for leave to file an *amicus curiae* brief. Tri-County opposes the motion. The Department indicated by letter that it will not file a response. The Appellants indicated by letter that they support the motion. For the interrelated reasons that follow, we deny the motion.

First, given what the motion seeks, it is much too late. The last brief of the parties was filed on October 16, 2023. An *amicus* briefing request should not be used as a vehicle for, or have the effect of, delaying adjudication of the appeal. If the motion were granted, it would undoubtedly necessitate further responsive briefing and concomitant further delay and expense. This appeal was filed in January 2021. No further delay is warranted. GCA has provided no explanation or excuse for why the motion has been filed so late. The late filing is particularly curious because GCA is owned by Michael Baun. Mr. Baun testified on behalf of the Appellants at the hearing on the merits in April, more than five months ago. Mr. Baun has been an active opponent of the landfill for quite some time.

We might have been more receptive to the motion if it had not asked to exceed the limits of *amicus* participation as contemplated by our Rules. Those Rules provide for an *amicus curiae* brief or memorandum of law on distinct *legal* issues. 25 Pa. Code § 1021.25. Instead, GCA has asked for permission to address the largely *factual* issues regarding the "negative impact TCL's landfill will have on the Grove City Airport and GCA including economic impact, aviation safety, public safety, FAA regulations and TCL's Bird Control Plan." These are not the sort of discrete legal issues that are appropriate for *amicus* briefing. GCA is essentially asking to step into the role of a litigating party, after all the parties who did actively participate in the hearing have completed their briefing. If GCA wanted to intervene, which is essentially what it is asking, it should have

petitioned to do so long ago. *See* 25 Pa. Code § 1021.81(a) (person may petition to intervene prior to the initial presentation of evidence).

Further, GCA in its two-page motion fails to explain how its proffered brief would add any value in these proceedings. It sounds like it merely wants to parrot the Appellants' case, but we already have nearly 200 pages of briefing from the Appellants who were represented by able counsel. Aviation issues were front and center in the parties' presentations. We have the benefit of almost 600 pages of briefs from all of the parties. We heard the perspective of several pilots including Mr. Baun at the hearing.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LIBERTY TOWNSHIP and CEASRA	:	
	:	
v.	:	**EHB Docket No. 2021-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee	:	

O R D E R

AND NOW, this 18th day of October, 2023, it is hereby ordered that the motion for leave to file an *amicus curiae* brief is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: October 18, 2023

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

For Grove City Aviation, LLC
Kenneth D. Perkins, Esquire
(*via electronic mail*)

For the Commonwealth of PA, DEP:
Carl D. Ballard, Esquire
Dearald Shuffstall, Esquire
Michael A. Braymer, Esquire
Angela N. Erde, Esquire
(*via electronic filing system*)

For Appellants:
Lisa Johnson, Esquire
Marc T. Valentine, Esquire
(*via electronic filing system*)

For Permittee:
Alan Miller, Esquire
Jake Oresick, Esquire
Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 18, 2023**

OPINION AND ORDER
ON THE DEPARTMENT'S MOTION TO STRIKE EXHIBITS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants in part and denies in part the Department's motion to strike three exhibits. The Board grants the motion where two of the exhibits were not introduced at the time of the hearing on the merits. While the other exhibit was also not introduced at the hearing, the exhibit itself is referenced in the Department's own regulations and in the Department's post-hearing brief, making it appropriate for the Board to consider.

O P I N I O N

This matter involves the appeal of a compliance order that the Department of Environmental Protection ("the Department") issued to Craig High ("Mr. High"), citing violations arising from work he conducted on his farm property. The Department alleged that Mr. High violated certain requirements of Chapter 105 and the Dam Safety and Encroachments Act and ordered him to restore an excavated ditch and to develop and implement an erosion and sediment control plan or conservation plan. Mr. High appealed the Department's order and a hearing on the merits was held before the Environmental Hearing Board ("the Board") on May 17, 2023, and May 18, 2023. The Department and Mr. High filed their post-hearing briefs on August 11, 2023,

and September 15, 2023, respectively. On September 29, 2023, the Department filed its reply brief and, in addition, filed a Motion to Strike Exhibits ("the Motion") from Mr. High's post-hearing brief. Mr. High filed his Response in Opposition to the Motion ("the Response") on October 10, 2023.

Mr. High attached four exhibits to his post-hearing brief, designated as Exhibit A, B, C, and D. In its Motion, the Department opposes the introduction of Exhibits B, C, and D, arguing that these exhibits should be struck since Mr. High failed to introduce them as evidence at the time of hearing. The Department does not contest Exhibit A attached to Mr. High's post-hearing brief as it was introduced during the hearing. Mr. High argues in the Response that none of the contested exhibits provide any new evidence or facts for the Board to consider and, therefore, the Board should deny the Department's Motion. We will discuss each of these Exhibits in turn below.

Exhibit B is a public record from the Congressional Research Service describing the history of the "prior converted cropland" designation. The Department asserts that the Board's caselaw holds that testimony and exhibits that were not presented at the hearing cannot be included in a party's post-hearing brief, and cites *Newlin Corp., et al., v. DER*, 1989 EHB 453, in support of that position. Mr. High argues that the document is publicly available and, as such, the Board can take judicial notice of it despite the fact it was not presented at the hearing. Our rules provide that the Board may take official notice of matters which may be judicially noticed by the courts of the Commonwealth. 25 Pa. Code § 1021.125. It is further recognized that Pennsylvania courts have "the right to take judicial notice of public documents." *Bykowski v. Chesed, Co*., 625 A.2d 1256, 1258 (Pa. Super. 1993). However, the Board's rules explicitly state that a party requesting that the Board take official notice of a document after the conclusion of the hearing "shall do so in accordance with § 1021.133 (relating to reopening of the record prior to adjudication)." 25 Pa.

Code § 1021.125(c). Mr. High did not follow this rule when he attached the document to his post-hearing brief and this failure supports our decision to strike this exhibit. Further, Exhibit B is dated February 24, 2023 and was thus available to Mr. High long before the hearing took place in mid-May of 2023. This document could have been discovered prior to the close of the record at the hearing with the exercise of due diligence by Mr. High or his counsel. The proper legal procedure would have been to introduce Exhibit B into evidence at the time of the hearing, allowing greater context to be afforded to it by the testifying witness, while also allowing the Department to cross-examine the witness regarding the exhibit. Finally, Mr. High suggests that Exhibit B was provided for the Board's convenience so that we may save time conducting research outside of the record before us. The Board has previously stated that "[a]lthough the Code of Judicial Conduct does not apply to us (see 207 Pa. Code Ch. 33, Canons, Application at Paragraph (2)), it nevertheless sets forth a set of worthy goals that we strive to emulate." *DEP v. EQT Production Co.,* 2014 EHB 797, 799. Rule 2.9(c) of the Code provides that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." 207 Pa. Code Part II, Ch 33, Subch A, Rule 2.9(c). Keeping this rule in mind, the Board is wary to expand the breadth of the record through our own independent research, even in relation to public records. The burden rests on the parties to make their respective cases and it is their duty to produce evidence at the appropriate times during the hearing before the Board. For all of the stated reasons, we conclude that the proper course of action for the Board is to strike Exhibit B as the Department requests in its Motion.

We turn next to Appellant's Exhibit C which is an excerpt from the National Food Security Act Manual, Third Edition ("NFSA Manual"). Like Exhibit B, Exhibit C was not introduced during the hearing. However, as Mr. High points out, this document is referenced in the

Department's own regulations pertaining to the status of prior converted cropland. In 25 Pa. Code § 105.452(c), the NFSA Manual is explicitly mentioned and provides that the Department recognizes the terms "prior converted cropland" and "normal circumstances" as they are defined in the NFSA Manual. Because the NFSA Manual is referenced in the Department's own regulations (admitted as Exhibit A-8) and is clearly relied upon by the Department in defining the terms in its own regulations, we conclude it is an appropriate document for the Board to review on its own accord despite the fact the NFSA Manual and the specific portions attached as Exhibit C were not presented as an exhibit at the hearing. Further supporting our decision is the fact that the NFSA Manual is referenced in the Department's own post-hearing brief. The Department's post-hearing brief repeatedly discusses and quotes extensively from the Board's decision in *DEP v. Seligman*, 2014 EHB 755. *See* DEP's Post-Hearing Brief at 23-28. The quotes from the *Seligman* decision relied on by the Department specifically discuss the NFSA Manual. *See* DEP's Post-Hearing Brief at 23 ("Relying on the definition contained in the National Food Security Act Manual (3d ed. 1994)"); at 25 ("This distinction is consistent with the [National Food Security Act Manual (3d ed. 1994)]"). For the stated reasons, the Board denies the Department's Motion to strike Exhibit C.

Lastly, we consider Mr. High's Exhibit D which is an affidavit of his expert witness, Robert A. Baines. Mr. High states in the Response that the affidavit was attached to clarify that the opinions provided by Mr. Baines were offered with a reasonable degree of certainty and explains he felt the need to include this clarifying affidavit because the Department had stated in its post-hearing brief that Mr. Baines had in fact not testified that his opinions were given with a reasonable degree of certainty. The Department argues that this is Mr. High's "attempt to introduce testimony not presented at the hearing on the merits by incorporating it into an affidavit attached to a post-

hearing brief." DEP's Memorandum in Support of its Motion at 2. We agree with the Department and will not accept testimony presented through Exhibit D when such testimony should have been presented at the hearing. While we grant the Department's Motion as to Exhibit D, we also hold that the absence of "magic words" like "reasonable degree of scientific certainty" or "reasonable degree of certainty" does not necessarily discount or reduce the weight of Mr. Baines' testimony. In the *City of Harrisburg v. DER, and Pennsylvania Fish and Boat Commission,* 1996 EHB 709, the Department argued that the City's expert's testimony should have been discounted because the expert failed to express that the opinions were held to a reasonable degree of scientific certainty. This Board disagreed and reasoned "[i]t is well-settled that in order to be competent, expert testimony must be stated with reasonable certainty. *Al Hamilton Contracting Co. v. DER*, 659 A.2d 31 (Pa. Cmwlth. 1995). However, an expert's failure to recite the words "to a reasonable degree of scientific certainty" does not render his testimony inadmissible so long as his testimony is expressed with reasonable certainty. *Id*. at 36-37. *See also*, *Kravinsky v. Glover*, 396 A.2d 1349, 1356 (1979) (An expert need not express his opinion in precisely the same language as we use to enunciate the legal standard.)" *Id.* at 715-16. In *Blythe Township and FKV, LLC v. DEP and Borough of St. Clair*, 2011 EHB 433, the Board affirmed this position stating "there is actually no absolute requirement that the phrase "reasonable degree of scientific certainty" be used at the hearing, … so long as the testimony, when taken in context and a whole, reflects the requisite level of confidence. *Mitzelfelt v. Kamrin*, 584 A.2d 888 (Pa. 1990)." at 435. Therefore, while we agree with the Department that Exhibit D was an improper attachment to Mr. High's post-hearing brief and should be struck, we find that the testimony that Mr. Baines presented during the hearing was expressed with the requisite level of confidence to evidence his competency as an expert in the

areas that he was admitted for at the hearing and we will credit his testimony as such in reaching our decision in this matter[1].

In sum, the Board accepts the introduction of Mr. High's Exhibit C, as that document is mentioned and relied upon in the Department's regulations and in the Department's post-hearing brief. We do not accept Exhibit B or D attached to Mr. High's post-hearing brief as part of our record in this case. We view those documents as an attempt to provide additional evidence and testimony that should have been presented at the time of the hearing. If Mr. High wishes the Board to consider additional evidence not presented at the hearing, his proper recourse is to petition the Board to reopen the record as is described in section 1021.133 of our rules, not through attaching new exhibits to his post-hearing brief.

Therefore, we issue the following Order:

[1] We do not intend by this to suggest to counsel that they should abandon in any way the practice of eliciting testimony from their experts that the opinions offered by the expert were held to a reasonable degree of scientific certainty.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRAIG HIGH	:	
	:	
v.	:	**EHB Docket No. 2021-052-B**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 18th day of October, 2023, it is hereby ORDERED as follows:

1. The Department's motion to strike in regard to Mr. High's Exhibits B and D is **granted**.

2. The Department's motion to strike as it pertains to Mr. High's Exhibit C is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

DATED: October 18, 2023

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

For the Commonwealth of PA, DEP:
David M. Chuprinski, Esquire
Amanda Chaplin, Esquire
(via electronic filing system)

For Appellant:
Philip L. Hinerman, Esquire
(via electronic filing system)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2022-038-CP-B**
RANDY J. SPENCER	:	
	:	**Issued: December 4, 2023**

OPINION AND ORDER
ON THE DEPARTMENT'S MOTION FOR SANCTIONS

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board grants in part the Department's motion for sanctions by entering a default judgment as to the liability of the defendant but reserves its ruling regarding the amount of civil penalties until an evidentiary hearing is held.

O P I N I O N

The present matter before the Environmental Hearing Board ("Board") is a Complaint filed by the Department of Environmental Protection ("the Department") requesting the Board to asses $123,459.80 in civil penalties against the Defendant, Randy J. Spencer ("Mr. Spencer). The Complaint follows our earlier resolution of Mr. Spencer's appeal of the Department's Administrative Order issued on September 30, 2019 ("September 2019 Order"). Mr. Spencer filed his notice of appeal of the September 2019 Order on October 31, 2019 and the appeal was docketed at EHB No. 2019-121-B ("2019 Appeal"). The Department's September 2019 Order alleged violations of the Clean Streams Law and the Dam Safety and Encroachments Act and required Mr. Spencer to, among other things, cease placement of campers and vehicles in the floodway on two parcels he owns on Lower Twomile Run in Cranberry Township, Venango County (Tax Map

Parcel Numbers 08-01-66 and 08-01-67); not place any material substance or object in the floodway that will diminish the course, cross-section, or current of the floodway without first obtaining the written approval of the Department; and within 30 days, remove from the floodway all of the items, campers and vehicles located on his property. The Board granted the Department's motion for summary judgment in the 2019 Appeal when Mr. Spencer failed to file a response to the motion and, in addition, found that there was no genuine dispute of material facts. *Spencer v. DEP*, 2020 EHB 416, 420. Mr. Spencer did not appeal the Board's ruling in the 2019 Appeal.

On June 7, 2022, the Department filed a Complaint for Civil Penalties ("the Complaint") requesting that the Board assess a civil penalty pursuant to Section 605 of the Clean Streams Law 35 P.S. § 691.605, 25 Pa Code§ 1021.71 and Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21, in the amount of $123,459.80. The Board received Mr. Spencer's Answer to the Complaint ("the Answer") on July 12, 2022 and issued a Prehearing Order No. 2, setting deadlines for discovery and dispositive motions. On January 30, 2023, the Board granted the Department's motion to extend discovery after Mr. Spencer failed to respond to the Department's motion asserting that Mr. Spencer had not responded to the Department's written discovery or served any discovery upon the Department. On March 9, 2023, the Board granted another extension of discovery and dispositive motions after receiving a joint request from the Parties to extend the prehearing deadlines. On April 14, 2023, the Department filed a Motion to Compel Discovery Responses after Mr. Spencer again failed to fully respond to the Department's discovery requests. When we received no response to the Motion to Compel from Mr. Spencer, the Board granted the Department's motion on May 8, 2023, and ordered Mr. Spencer to complete the answers to the Department's first set of interrogatories and to produce all documents related to the Department's first request for production of documents, on or before May 22, 2023. On September

13, 2023, the Board granted the Department's Motion to Set Deadline for Filing Sanctions Motion. The Department filed its Motion for Sanctions ("the Motion") on October 13, 2023. Mr. Spencer has not responded to the Motion. The Board is now ready to rule on the Department's Motion.

In its Motion, pursuant to Rule 161 of the Board's Rules of Practice and Procedure, the Department asks the Board to enter an adjudication against Mr. Spencer and assess a civil penalty in the amount of $123,459.80 as a sanction in the form of default judgment. The Department argues that it is within the Board's authority to render a default judgment in this instance on both liability and the assessment of civil penalties and invokes the Board's rules on sanctions and default judgment, as well as Pennsylvania's Rules of Civil Procedure in support of its position. We will address each of these arguments in turn.

The Board's rule on sanctions provides that:

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

25 Pa. Code § 1021.161.

As the Department points out in its Memorandum of Law in Support of its Motion ("Memorandum"), the Board enjoys broad authority to impose sanctions upon parties for violating its rules and orders. *Swistock, Jr. v. DEP*, 2006 EHB 398, 400. The Department cites several Board cases where the Board has dismissed appeals as a sanction when a party failed to abide by Board rules and orders, including violations that centered around a party's failure to respond to discovery requests. For example, in *Swistock, Jr. v. DEP*, 2006 EHB 398, the Board dismissed an appeal as a sanction where the appellant failed to respond to discovery requests and abide by Board orders. In reviewing the history of the appellant's noncompliance with Board rules, the Board

found that "[t]he Appellant engaged in a pattern of behavior which amounts to a steadfast refusal to participate in the process." *Swistock, Jr. v. DEP*, 2006 EHB at 401. Other Board cases cited by the Department are consistent with the holding in *Swistock, Jr.* and support the Department's assertion that Board rules and Board case law show that "[t]he Board has consistently imposed sanctions, including those as severe as dismissal, where a party has completely failed to comply with the rules of discovery or abide by Board orders." (Memorandum at 7).

Additionally, the Department advances its argument that it is appropriate for the Board to enter a default judgment as to both liability and assess civil penalties in this case in its discussion of the Pennsylvania Rules of Civil Procedure pertaining to sanctions. The Board's rule on sanctions explicitly provide that "sanctions may include […] appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters)." 25 Pa. Code § 1021.161. Under our rules, it is appropriate for us to consider what guidance Pa.R.C.P. 4019 can provide in this instance where it is clear that Mr. Spencer violated both our discovery rules and our orders respecting discovery. Pa.R.C.P. 4019 authorizes sanctions against a party that fails to comply with discovery rules, including instances where a party fails to answer interrogatories, fails to respond to requests for production of documents, and when a party fails to obey a court order respecting discovery. Pa. R.C.P. 4019(a)(1)(i), (vii), (viii). A court acting under Pa.R.C.P. 4019 may also enter an order for default judgment against a party that violates discovery rules. Pa.R.C.P. 4019(c)(3). The Pennsylvania Supreme Court has stated "where a court imposes a judgment by default against a defendant as a sanction for failure to respond adequately to discovery requests, it is acting well within its discretion and the latitude given it by our Rules of Civil Procedure to enter 'a judgment by default against the disobedient party.'" *Fox v. Gabler*, 626 A.2d 1141, 1143 (Pa. 1993) (citing Pa. R.C.P. 4019(c)(3)).

The Department's Memorandum cites numerous cases from Pennsylvania's appellate courts that support the proposition that trial courts have broad authority to impose default judgment as a sanction when a party violates the rules of discovery and/or court orders regarding discovery. The Department details the Commonwealth Court's decision in *Redek Auto Service*, where the Court affirmed an administrative judge's entry of default judgment against the Pennsylvania Department of Transportation ("DOT") for its failure to respond to the appellee's request for production. *Com. v. Redek Auto Serv*., 458 A.2d 614, 614 (Pa. Cmwlth. 1983). It is notable in *Redek* that the appellee did not attempt to resolve the discovery dispute by prompting DOT to provide the requested discovery after discovery went unanswered or through a request to the court for the administrative law judge to compel discovery. *Redek Auto Serv*., 458 A.2d at 615. Instead, the appellee's counsel deferred making any motion for sanctions under Pa.R.C.P. 4019 until the day of the hearing.[1] *Id.* After the administrative law judge afforded DOT the opportunity to present evidence explaining its nonresponse at the hearing, which DOT did not address, the judge entered default judgment against DOT. *Id*. The Commonwealth Court affirmed that decision, holding that "we cannot conclude that Administrative Judge Papadakos abused his discretion in settling upon the sanction which he here imposed, expressing his concern and responsibility for the prompt disposition of matters before the court." *Id.*

The Department's invocation of 25 Pa. Code § 1021.161 and Pa.R.C.P. 4019 in conjunction with the cited legal precedents related to those rules, offers support for the proposition that the Board has broad authority to issue a default judgment in this matter. However, none of the cases the Department cites in support of its argument involve our factual scenario where the case was

[1] The Department points out that in this matter, on multiple occasions, it attempted to obtain responses from Mr. Spencer, including seeking extensions for discovery on two occasions, and moved to compel responses from Mr. Spencer before ultimately filing its Motion for Sanctions.

initiated by an agency by a complaint for civil penalties. The Department attempts to bridge that gap by turning to the Board's rule on default judgment, the history behind its adoption, and the change in Board decisions following its adoption. The Department emphasizes that "the Board's authority to enter a full adjudication against Mr. Spencer as a sanction is not foreclosed or otherwise limited simply because this case was initiated by a complaint for civil penalties." (Memorandum at 9).

The Board's rule on default judgment authorizes the Board to enter judgment as to both liability and the assessment of the amount of civil penalties without a hearing. 25 Pa. Code § 1021.76a. The case of *DEP v. Wolf*, 2010 EHB 611 was the first time the Board considered a motion filed under Section 1021.76a. As Judge Mather explained "prior to the promulgation of Section 1021.76a the Board questioned whether it had the authority to enter default judgment as to both liability and assess the amount of civil penalties without a hearing." *Wolf*, 2010 EHB at 614. Section 1021.76a made clear that the Board does have the authority to assess civil penalties in the amount of the plaintiff's claim without holding a hearing. Since our decision in *Wolf*, there have been numerous instances where the Board has granted the Department's motion for default judgment and assessed the civil penalties without conducting a hearing. See, *DEP v. Froehlich*, 2022 EHB 309, 312; *DEP v. Jackson Geothermal HVAC and Drilling, LLC,* 2016 EHB 397, 398*; DEP v. Turnbaugh,* 2014 EHB 124, 125*; DEP v. Comp,* 2012 EHB 343, 344*; DEP v. White Oak Reserve Ltd. P'ship,* 2012 EHB 75, 76-77*; DEP v. Danfelt,* 2011 EHB 839, 842*; DEP v. Wolf,* 2010 EHB 611, 613-15. However, each of these cases involved an important factual distinction from the matter before us. The defendants in each of the above cited proceedings never filed an answer to the Department's complaint for civil penalties, whereas in this case, Mr. Spencer did file an answer. Section 1021.76a(a) provides that "[t]he Board, on motion of the plaintiff, may enter

default judgment against the defendant *for failure to file within the required time an answer* to a complaint that contains a notice to defend. 25 Pa. Code § 1021.76a(a) (emphasis added). Our rules make clear that we may enter a default judgment specifically when the defendant fails to respond to a complaint, which is not the case here where Mr. Spencer filed his Answer with the Board. Additionally, Section 1021.76a further provides that, "[w]hen default judgment is entered in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim *or may assess the amount of the penalty following an evidentiary hearing*, as directed by the Board, at which the issues shall be limited to the amount of the civil penalties." 25 Pa. Code § 1021.76a(d) (emphasis added). Therefore, even when a defendant fails to respond to a complaint for civil penalties, the Board has the discretion to assess the civil penalties with or without a hearing.

Although Mr. Spencer's participation in this matter has been lackluster at best, he did file an answer to the Complaint demonstrating a modicum of interest in pursuing his defense. In light of the wording in Section 1021.76a that states that we may enter default judgment when a defendant fails to file an answer to a complaint, we find that we cannot rely on that section as a basis for a default judgment under the specific facts of this case. It is clear that we do have the authority to issue a default judgment against Mr. Spencer under our rule on sanctions found at 25 Pa. Code § 1021.161. Our review of the facts of this case convinces us that Mr. Spencer should be sanctioned for his failure to comply with the Department's discovery requests and related Board orders. Therefore, we grant a default judgment against Mr. Spencer as to his liability for the violations identified in the Department's Complaint. However, we decline to grant the Department's Motion requesting a default judgment as to the amount of the civil penalty. The Department is seeking a significant penalty against an individual and we think that the correct

course of action is to hold an evidentiary hearing to assess the reasonableness of the Department's civil penalties. While the Department has done a thorough job in supporting the basis for the amount of civil penalties by the averments in the Complaint, the amount remains a suggestion, and the suggestion is purely advisory. *DEP v. Keck*, 2019 EHB 322, 332; *DEP v. Seligman*, 2014 EHB 755, 763. "The guidance the Department uses in determining a suggested civil penalty is not binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent." *Keck*, 2019 EHB at 332; (citing, *DEP v. EQT Production Company*, 2017 EHB 435, 480).

We will proceed to schedule an evidentiary hearing in this matter. The hearing will be limited to testimony and evidence concerning the amount of civil penalties to award in this case and will not extend to issues regarding liability.

Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2022-038-CP-B**
RANDY J. SPENCER	:	

O R D E R

AND NOW, this 4th day of December, 2023, following review of the Department's Motion for Sanctions and having received no response from Mr. Spencer, it is hereby ORDERED as follows:

1. The Department's Motion for Sanctions in the form of default judgment as to the liability of Mr. Spencer is **granted**.
2. The Department's Motion for Sanctions as to the assessment of civil penalties is **denied**. The Board will schedule a hearing to address the reasonableness of the amount of the civil penalty.

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

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

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: December 4, 2023

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

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

For Defendant:
Randy J. Spencer, ***Pro se***
166 Garden Lane
Franklin, PA 16323
(via U.S. first class mail)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERIKOHL MINING INC.	:	
	:	
v.	:	**EHB Docket No. 2023-002-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 27, 2023**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By Sarah L. Clark, Judge

Synopsis

The Board denies a motion for summary judgment where material facts remain in dispute and the law does not clearly favor summary judgment.

O P I N I O N

This matter arises from the Department of Environmental Protection's ("Department") denial of Amerikohl Mining Inc.'s ("Amerikohl") Completion Report for Stage II Bond Release for a portion of the Guild Mine site owned by Robert and Lynnette Hutton ("Hutton property") and Stage III Bond Release of the entire Guild Mine site.

According to the Parties' Statements of Undisputed Facts, in December of 2012, Amerikohl entered into a lease agreement with the Huttons allowing Amerikohl to conduct surface coal mining activities on a portion of their property. In February of 2014, the Department issued Surface Mining Permit 63120103 to Amerikohl, authorizing surface mining activities on the entire Guild Mine site, including the Hutton property. In September of 2014, a post-mining land use change from "forestland" to "pastureland and/or land occasionally cut for hay" upon reclamation

was submitted to the Department and approved in a revised permit issued in November of 2014[1]. In late 2015, Amerikohl concluded coal extraction and began reclamation, and in March of 2016, the Department approved Stage I Bond Release.

Although Amerikohl initially applied for Stage II Bond Release for the entire Guild Mine site, the Department denied that application, and Amerkohl submitted a revised application in April of 2017 which excluded the Hutton property because the vegetation on the Hutton property had failed to thrive to the same extent as the rest of the site due to the Huttons' continued overgrazing of their horses on the revegetated land[2]. The Department approved Stage II Bond Release excluding the Hutton property in early May of 2017. Later that month, Mr. Hutton, Amerikohl Vice President Dave Maxwell and then Bureau Director of District Mining Operations, William Plassio, met at the Hutton property to confer about issues with reclamation of said property ("Hutton/Maxwell/Plassio conversation")[3]. At that meeting, it was discussed that Amerikohl would reseed Pasture 4, leaving Pastures 5 and 6 for the Huttons to use for their horses. It seems to be that the Huttons and Amerikohl planned to rotate between reseeding and using the pastures

[1] While the Department categorizes the land use change request as a joint venture between the Huttons and Amerikohl, Amerikohl contends that this change came about entirely at the behest of the Huttons and Amerikohl simply went along with the landowner wishes.

[2] That the Huttons have consistently overgrazed their horses and caused Amerikohl's revegetation efforts to fail is well established across multiple Department inspection reports, and we conclusively accept the Hutton's interference with Amerikohl's revegetation efforts as the reason those efforts have not been entirely successful on the Hutton property.

[3] While both Parties agree that this conversation occurred, the Department does not address the exact language that passed between the participants, and instead repeatedly states that it "denies that William Plassio, on behalf of the Department, entered into an agreement by which the Department promised to take any action or refrain from taking any action related to the Guild Mine." DEP Response to Amerikohl's Statement of Additional Facts ¶¶ 12b-d, 14a, 22a. However, while maintaining the Department's position that no binding agreement was made during this conversation, Mr. Plassio does admit to the contents of the conversation in his deposition testimony. Plassio Depo. p. 37. For its part, Amerikohl argues that this conversation was an agreement that if unmet should result in the release of the bond. Amerikohl Mining Inc. Response to Statement of Undisputed Facts ¶12b.

for the horses until all the pastures were sufficiently revegetated. However, this never came to pass, because the conversation included the idea that if the Huttons allowed horses on Pasture 4 prior to an agreed upon date[4], "all bets are off and Amerikohl is done." Plassio Depo. p. 37. On August 29, 2017, well before either presumptive date for the Huttons to be able to use Pasture 4 for their horses, Mr. Maxwell drove by the Hutton property and witnessed horses on Pasture 4, at which point he took a photograph and sent it to Mr. Plassio by email, along with a message stating: "Hutton has horses pasturing in pasture number 4. Deal broken so we are done. He's on his own. It does look good though." Amerikohl Ex. AM 266. Two days later, Mr. Plassio responded: "Understood, I have not heard anything from Bob [Hutton]." *Id*. From August of 2017 until September of 2021, Amerikohl made no further reclamation efforts on the Hutton property. In September of 2021, after further discussions with the Department, Amerikohl replanted and made several repairs. This was to be Amerikohl's final effort at the Hutton property.

In July of 2022, Amerikohl filed a civil complaint against the Huttons in the Washington County Court of Common Pleas seeking monetary damages upwards of $125,000 to cover the costs of reclamation and reseeding efforts made that did not thrive because of the Huttons' premature grazing and continued overgrazing of horses on the land undergoing reclamation efforts. Claims brought against the Huttons include bad faith/doctrine of necessary implication, nuisance, and unjust enrichment. By its complaint, Amerikohl avers that it "is precluded from obtaining Stage II Bond Release on the Hutton property and Stage III Bond Release on the entire Guild Mine site due to lack of growth on the Hutton property caused by Huttons' continued overgrazing of horses for over six years." DEP Ex. A. ¶ 59. Later that year, on October 4th, Amerikohl submitted

[4] While the exact date discussed is unclear from the filings, based on Mr. Plassio's deposition testimony, it appears that it was either six months from the date the actual reseeding work on Pasture 4 was accomplished or sometime in April of 2018. Plassio Depo. p. 37.

Stage II and III completion reports seeking Stage II Bond Release of the Hutton property and Stage III Bond Release for the whole Guild Mine site. The Department inspected the Guild Mine site on November 16, 2022 and observed riles and gullies, an exposed cropline, and a bare spot exceeding 3,000 square feet on the Hutton property. Based on those observations, the Department found that the site failed to meet the regulatory requirements found in 25 Pa. Code §§ 87.146(a), 87.146(b), 87.146(c), 87.155(a)(3), and 87.155(b)(2) and denied Amerikohl's request for Stage II and Stage III Bond Release on December 8, 2022. Amerikohl timely filed this appeal on January 3, 2023, objecting to the Department's denial on the basis that, *inter alia*, continued revegetation efforts had been and would continue to be fruitless in the face of the Huttons' interference with those efforts, and denial of the bond release under such circumstances is an abuse of the Department's discretion.

The Department has now moved for summary judgment, arguing that the Hutton property does not meet the applicable standards for bond release under Section 4(g) of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4(g) and its implementing regulations. The Department further argues that there is no exception for third-party interference when assessing completion reports for bond release and that it therefore lacks the discretion to release Amerikohl's bonds for the Guild Mine site. To the extent that the Board does not grant summary judgment, the Department asks that the Board limit the issues for appeal to whether Amerikohl has met the statutory criteria for Stage II bond release of the Hutton property and Stage III bond release of the entire Guild Mine site. Amerikohl has filed a Response, and the Department has filed a Reply. This matter is ripe for dispensation.

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; *Camp Rattlesnake v. DEP*, 2020 EHB 375, 376. In evaluating whether summary judgment is proper, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Issues that involve mixed questions of fact and law are best decided at a full hearing and are generally not fit for summary judgment. *Ctr. For Coalfield Justice v. DEP*, 2016 EHB 314, 347. Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217. Where the Department's discretion is at issue, it is rare that summary judgment is appropriate. *PQ Corp. v. DEP*, 2016 EHB 826, 838.

The circumstances here present a mixed question of fact and law, namely, whether the Department has the discretion under the statute and its implementing regulations to release the bond where the Permittee operating the site has revegetated the site in accordance with the Department approved reclamation plan, but the vegetation has yet to take hold due to landowner interference. While by its Motion the Department argues that it absolutely does not have that discretion, Amerikohl has offered evidence that this may not, in fact, be the Department's position: 1) a Standard Operating Procedure (SOP) issued by the Department in 2016 that contemplates what the Department should do when faced with third-party interference beyond the control of the permittee[5]; 2) a conversation with former Bureau Director Plassio that left Amerikohl with the understanding that it would not be responsible for further revegetation efforts if the Huttons put horses out to graze on a particular pasture before a particular date; and 3) deposition testimony

[5] bmp-006 third party interference.pdf (state.pa.us)

from Mr. Plassio stating that the Huttons' interference with Amerikohl's revegetation efforts could be a basis to release the bond.

While the law is fairly clear on what is required of a company seeking bond release at different stages, it may not be as clear as the Department would have it, particularly under these circumstances. The Department argues that the bond release standards are objective and that there are no exceptions for third party interference; however, Section 4(g) of the Surface Mining Conservation and Reclamation Act states:

> (g) Subject to the public notice requirements of subsection (b), if the department is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by this act, it may, upon request by the permittee or any other person having an interest in the bond, including the department, release in whole or in part the bond or deposit according to the following schedule:
>
> . . . .

52 P.S. § 1396.4(g). The plain language of the statute, which declares that the Department *may* release a bond if it is *satisfied* that the reclamation has been accomplished as required by the act, imposes a standard that is arguably subjective, potentially granting the Department discretion on whether or not to release a bond. Further, this Board has previously opined that the Department's decision to deny a bond release is discretionary. *Al Hamilton Contracting Company v. DER*, 1995 EHB 855, 872 ("Al Hamilton correctly points out that DER's decision to deny the release of Al Hamilton's bonds is discretionary."). In addition, while the Department argues that it is constrained by federal law, it was the U.S. Department of the Interior Office of Surface Mining Reclamation and Enforcement that commissioned the Coalex State Comparison Report-144 on Third Party Interference Preventing Phase 3 Bond Release asking the states whether, and if so, how, third-party interference is handled for the purposes of bond release, indicating that the federal law may contemplate space for an exception when the task of revegetation becomes Sisyphean.

Although Pennsylvania responded to the federal survey in 1990 that it did not believe the Department had discretion to release bonds where the area at issue has not been reclaimed to the extent required by statute because of third-party interference outside the permittee's control, in 2016, the Department Bureau of Mining Programs issued Standard Operating Procedure for District Mining Operations: Third-Party Interference. While this SOP is only a guidance document without the force of law, its mere existence shows that as of 2016, the Department had at least contemplated the issue of third-party interference, stating that "[t]he Department generally attempts to resolve the third-party interference by either having the responsible third-party repair the damage or by holding the permittee responsible for repairing the damage." SOP at 1. This statement alludes to the Department's discretion in this area, and while the SOP is owed no deference, we find it peculiar that the Department has never attempted to have the responsible third-party – here the Huttons – repair the damage when approximately seven years of inspection reports consistently and conclusively establish the Huttons' interference as the reason that the land at issue may not meet the regulatory requirements for Stage III Bond Release. *See generally* Appellant's Appendix A 1-2. We wonder if the Department's position would be the same if, for example, the Huttons had not requested a post-mining land use change from forest to pasture, and instead of allowing a multitude of horses to graze on the revegetated lands before the plants could take hold, the Huttons were simply cutting down the trees planted by Amerikohl to return the mined land to forest. Regardless of the answer to that question, the very fact that it can be asked seems to indicate that the Department may have discretion as to how it handles third-party interference, as do the articulated factors a reviewer "should consider and document" in the few specific cases where changing the post-mining land use or repairing the damage may not be possible as a solution to the interference:

- How the Department has verified the third-party's role in the interference
- Whether the third party's activity is beyond the permittee's control
- How the interference affects the permittee's ability to achieve the post-mining land use
- Whether the interference has the potential to cause environmental harm to air, water or land resources or danger to the public health and safety
- The size and scope of the area under review

SOP at 2. This may very well be one of those few cases, and, while it appears that the Department has opted not to exercise that discretion, triggering Amerikohl's appeal, the question of whether that discretion was exercised – or not exercised – reasonably is not an appropriate question for summary judgment. *See PQ Corp. v. DEP*, *supra* at 838.

In addition to the SOP casting doubt on the Department's argument that its hands are tied, the actions and deposition testimony of Mr. Plassio indicate that, when he was the Bureau Director, he did not conclusively believe that the Department lacks the discretion to release a bond where third-party interference is the only thing standing in the way of complete reclamation. First, there is the issue of the Plassio/Hutton/Maxwell conversation upon which Amerikohl relied when ceasing revegetation efforts and applying for Stage II Bond Release for the Hutton property and Stage III Bond Release for the entire Guild Mine site[6]. Further, that Mr. Plassio stated that Amerikohl would be "done" if the Huttons continued interfering with revegetation efforts is more evidence supporting the Department's belief in its own discretion. What is even more pertinent than the Hutton/Maxwell/Plassio conversation in the discussion of the Department's own understanding of its discretion is found in Mr. Plassio's deposition testimony:

[6] Amerikohl argues that this conversation and its reliance thereon rise to the level of promissory estoppel; however, the Board would note that promissory estoppel does not tend to be a winning argument in administrative proceeding and is unlikely to be one here: "The doctrine of equitable estoppel applies when a Commonwealth agency has 1) intentionally or negligently misrepresented a material fact; 2) knowing or having reason to know that another person would justifiably rely on that misrepresentation; 3) or where the other person has been induced to act to his detriment because he justifiably relied on the misrepresentation." *Natiello v. Commonwealth, DEP*, A.2d 1196, 1203-204 (Pa. Cmwlth. 2010).

> **Q. Okay. If vegetation is a result of the Hutton's [sic] interference, to your mind's eye, is that a basis to release the bonds?**
> A. Possibly. I think there would have to be an investigation and documentation of the issue to prove that it was third-party interference. And a finding would need to be made that the --- that specific example would fall into the Department's acceptance as a third-party interference.
> **Q. Assuming, for the sake of discussion, that the inspection reports are replete with notations of overgrazing by the Huttons, does that fit within your mind's eye of landowner interference?**
> A. Yes.

Plassio Depo. p. 53. Mr. Plassio's answer here seems to indicate not only that the Department may have the ability to accept third-party interference as a basis to release bonds, but that there could be a way for a scenario to "fall into" that acceptance. This "acceptance" goes directly to the heart of the question of the Department's exercise of discretion, which, as this Board has said many times before, is not a question that is typically appropriate for summary judgment.

In the matter before us, Amerikohl claims that the Department's denial of its completion report for bond release was an abuse of discretion under the circumstances and provides evidence that the Department may have discretion when it denies a completion report for bond release. While a guidance document such as the SOP does not have force of law, its mere existence – along with some of its substance – would seem to indicate that the Department may believe that it has discretion and simply chose not to exercise it here. As we have said before, "once we enter the world of reviewing the Department's discretion, we tend to exit the world where summary judgment is appropriate." *Tri-County Landfill v. DEP*, 2015 EHB 324, 333. This, along with the Hutton/Maxwell/Plassio conversation and Mr. Plassio's deposition testimony, creates a genuine question of material fact – and indeed a question of law – that is inappropriate for dispensation at summary judgment. For these reasons, summary judgment is denied, as is the Department's request in the alternative to limit issues.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERIKOHL MINING INC.	:	
	:	
v.	:	**EHB Docket No. 2023-002-CS**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of December, 2023, it is **ordered** that The Department's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Sarah L. Clark
SARAH L. CLARK
Judge

DATED: December 27, 2023

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

For the Commonwealth of PA, DEP:
Wendy Carson, Esquire
Brian Leland Greenert, Esquire
(via electronic filing system)

For Appellant:
Jeffrey T. Olup, Esquire
(via electronic filing system