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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
v.	:	**EHB Docket No. 2020-082-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	**Issued: November 15, 2024**

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

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

Synopsis

The Board dismisses an appeal where the third-party appellant failed to carry its burden of proving that the Department incorrectly concluded that a poultry CAFO qualified for the production of agricultural commodities exemption in the Pennsylvania Air Pollution Control Act and, therefore, did not need to obtain an air quality permit.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Air Pollution Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001 – 4015 ("APCA"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stipulation of the Parties No. ("Stip.") 1.)

Judge Paul J. Bruder, Jr. is recused in this matter and did not participate in the decision.

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2. Herbruck's of Pennsylvania, LLC, a partially owned subsidiary of Herbruck's Poultry Ranch, Inc. ("Herbruck's"), is a family-run business that owns and operates the Blue Springs Farm, located at 8069 Corner Road, Mercersburg, Franklin County, Pennsylvania. Herbruck's conveyed the Blue Springs Farm to Herbruck's of Pennsylvania, LLC by deed, dated January 7, 2021. (Stip. 3.)

3. The Appellant in this matter is Montgomery Township Friends of Family Farms. (Stip. 4.)

4. Construction of the Blue Springs Farm began in 2021. As of the date of the hearing in this matter, Herbruck's had constructed six cage-free aviary layer barns housed with approximately 1,000,000 hens. (Stip. 8.)

5. The Blue Springs Farm is a family run egg laying and processing farm that will eventually consist of eight cage-free aviary layer barns designed to house a total of 2,200,000 hens when fully constructed. (Stip. 9, 13.)

6. Herbruck's dries the manure produced at the farm using an Accelerated Feces Dehydration Process ("AFDP") system, pelletizes the dried manure into a fertilizer, and exports the fertilizer. (Stip. 15.)

7. The AFDP used at the Blue Springs Farm is designed to quickly remove the manure from beneath the hens and dry the manure to a moisture content below 25 percent within 48 hours of excretion. (Notes of Transcript Page No. ("T.") 287, 290-91, 362.)

8. The AFDP utilizes a unique design that is not comparable to conventional drying tunnel designs used at other egg laying facilities. It is designed to maximize the retention of nitrogen in the manure and minimize ammonia emissions. (T. 293-94, 302, 362, 364, 369-70, 381, 484, 519-23; Department Exhibit No. ("DEP Ex.") 37.)

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9. The AFDP uses computer programmed belts to remove hen manure from beneath the hens within twenty hours of excretion. The belts then run through the system for a total of four hours. (T. 288; Herbruck's Exhibit No. ("H. Ex.") 1.)

10. As the belt moves through the system, the manure is compressed into thin layers of approximately ¼ to ½ inch to increase the surface area of the manure. (T. 287; H. Ex. 1.)

11. The AFDP then elevates the individual belts approximately thirty-five feet as it travels upward towards the overhead drying tunnel. This is achieved by compressing all the layers of the belts together, which effectively traps the manure between each belt as it travels upward. (H. Ex. 1.)

12. The belts are then split apart before each belt passes through the overhead drying tunnel a total of three times. (T. 289-90; H. Ex. 1.)

13. On day two of the AFDP, the manure enters its first pass in the drying tunnel on individual belts. After the first pass, the moisture content of the manure is significantly reduced. (T. 290-93; H Ex. 1.)

14. On day three of the AFDP, the manure begins its second pass in the drying tunnel. After the second pass, the moisture content is further reduced to approximately 15 percent by the end of the second pass. (T. 292; H. Ex. 1.)

15. On day four of the AFDP, the manure is then lifted to the top of the drying tunnel for its third and final pass. After the third pass, the moisture content is reduced to 10 to 12 percent. (T. 292; H. Ex. 1.)

16. The AFDP's overhead drying tunnel is different than other drying tunnels. First, the overhead drying tunnel only uses ambient air to dry the manure rather than applying supplemental heat. Ambient air enters on each end of the tunnel and at three different points within

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the drying tunnel. Ambient air continuously passes over the flattened manure to increase its drying. Second, in Herbruck's drying tunnel there is only one day's worth of manure on the belt rather than as much as five to six days of manure in traditional systems, which often need additional heat to rapidly dry the manure. Third, the tunnel is an indoor drying tunnel rather than an external drying tunnel. (T. 287, 293, 294, 411, 521-22, 524, 527; H. Ex. 1.)

17. After three passes through the Herbruck's drying tunnel, the dried manure is accumulated onto a conveyor and comingled with other dried manure that is scraped from the barn's floors. (T. 294, 317, 318.)

18. The AFDP uses a fully enclosed Patz conveyor to deliver the dried manure to the central processing center where it is heat sanitized. (T. 294-95; H. Ex. 1.)

19. In accordance with requirements of the United States Department of Agriculture, the already dried manure is heat sanitized at approximately 185 degrees Fahrenheit to kill E. coli and any other pathogens in the manure. (T. 295-96; H. Ex. 1.)

20. The manure is then conveyed into large pellet mills where the manure is compressed into pelletized or crumbled saleable products. (T. 300, 344; H. Ex. 1.)

21. The dried pelletized fertilizer is then cooled and stored. (T. 300.)

22. The AFDP dries the manure rapidly to ensure that the maximum amount of nitrogen is retained in the manure to create a saleable fertilizer product. (T. 281, 302.)

23. The Blue Springs Farm does not store wet manure. (T. 344, 372, 380.)

24. The Blue Springs Farm's manure storage is unique from other layer barns because it only stores dried pelletized fertilizer. Other layer farms store wet manure for as much as twelve months. (T. 184, 372, 380-81.)

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25. In January 2017, Herbruck's submitted a Notice of Intent and General Information Form (GIF) to the Department requesting coverage under the NPDES General Permit for Concentrated Animal Feeding Operations (CAFOs) (Permit No. PAG-12). Question 13 of the GIF asked whether the project would involve operations that produce air emissions. Herbruck's checked the "no" box. (Appellant's Exhibit No. ("App. Ex.") 3, 4.)

26. The Appellant appealed the Department's approval for coverage under PAG-12. *Montgomery Township Friends of Family Farms v. DEP and Herbruck's Poultry Ranch, Inc.*, EHB Docket No. 2017-080-R. In that case, it objected to, *inter alia*, the Department approving coverage based on the statement in the GIF that there would be no air emissions. (EHB Docket No. 2017-080-R, Notice of Appeal, Docket Entry 1.)

27. The appeal docketed at EHB Docket No. 2017-080-R was resolved by a Joint Stipulation of Settlement, which was approved by former Chief Judge Thomas W. Renwand in November 2019. Herbruck's committed to submitting to the Department, within a reasonable time, sufficient information to allow the Department to determine whether Herbruck's could avail itself of the agricultural exemption from the need to apply for an air quality permit, which is set forth in Section 4.1 of the Air Pollution Control Act, 35 P.S. § 4004.1.[1] The Department committed to make its determination within a reasonable time. (EHB Docket No. 2017-080-R, Joint Stipulation of Settlement, Docket Entry 66-68.)

28. Herbruck's submitted information to the Department on July 14, 2020. (App. Ex. 2.)

29. The Department reviewed the information, and it drafted a three-paragraph internal memorandum to the Herbruck's file regarding the applicability of the agricultural exemption to

[1] The exemption is discussed *infra*.

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the Blue Springs Farm. The file memo stated that the Department agreed with Herbruck's conclusion that emissions from the Blue Springs Farm were exempt from air permitting pursuant to the agricultural exemption. (Stip. 7; App. Ex. 2.) The Appellant brought this appeal from the file memo.

30. The Department's determination set forth in the file memo is premised entirely on the farm not housing more than 2.2 million hens, and it handling manure using the AFDP described in its various submissions to the Department. (Stip. 12-15; T. 253-55, 299-300, 301, 445-47.) If those things change, the Department's determination no longer applies. (T. 445-47, 450, 459, 461, 506-07.)

31. The most appropriate method for estimating Herbruck's potential to emit ammonia and volatile organic compounds (VOCs) would be to develop a reliable emission factor. (T. 150-51, 171, 376, 389, 433-36.) An emission factor is simply a given quantity of emissions per chicken per a given time period (e.g. grams/hen/day). (*Id.*)

32. No credible alternative method for estimating Herbruck's potential to emit pollutants, aside from developing an emission factor, was identified on the record.

33. The Appellant has failed to prove that there is an accurate, credible emission factor that can be used to estimate potential ammonia or VOC emissions at the Blue Springs Farm.

34. The Appellant's failure to prove that there is a reliable emission factor means that there is insufficient evidence of record to conclude that the Blue Springs Farm is a major source that is not entitled to the agricultural exemption.

DISCUSSION

The Department's August 14, 2020 memorandum under appeal was authored by Virendra Trivedi, P.E., the Department's Program Manager for the Permits Division in the Bureau of Air

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Quality. The memo is addressed to "Herbruck's File" with a copy to "Southcentral Region - Permit File." The subject line is "Applicability of Section 4.1 of the Air Pollution Control Act (APCA), (35 P.S. § 4004.1), for the proposed Herbruck's Poultry Ranch facility in Montgomery Township, Franklin County, PA." The memo consists of only three paragraphs and provides in its entirety:

> On July 14,2020, Mr. Daniel Fields, Compliance Director of Herbruck's Poultry Ranch, Inc., provided Herbruck's assessment of air emissions for its proposed egg laying and processing farm in Montgomery Township, Franklin County to the Department's Bureau of Air Quality. Herbruck's intends to construct cage free chicken egg-layer houses and committed to operate with a population up to a total of 2,200,000 birds.
>
> Herbruck's submitted a sufficient assessment that includes supporting information, explains the basis of the emissions assessment, and provides estimates of facility air emissions. The operation is a poultry ranch to house laying hens in multi-tier aviary-style houses (egg-layer house or house) to produce food grade eggs for sale. This operation qualifies as "production of agricultural commodities" as defined under Section 4.1(b) of the APCA, 35 P.S. § 7004.1(b) [sic].
>
> Herbruck's assessment provides estimates and supporting information for facility air emissions from the production of an agricultural commodity. Herbruck's plans to avail itself of the statutory exemption under Section 4.1 of the APCA based on its conclusion that the emissions do not trigger the requirements of the Clean Air Act (CAA) or the regulations promulgated thereunder, and thus Herbruck's facility falls within the exemption under Section 4.l(a) of the APCA, 35 P.S. § 7004.1(a) [sic]. Herbruck's concluded that it does not need to apply for air quality plan approval or permit under the APCA. Based on the information supplied in the assessment, DEP agrees with Herbruck's conclusions.

(App. Ex. 2.)[2]

The memo concludes that, based on Herbruck's assessment of its air emissions, the Herbruck's farm falls under an exemption in Pennsylvania's Air Pollution Control Act (APCA) for the "production of agricultural commodities," and therefore, Herbruck's does not need to apply for a plan approval or permit under the Act. Section 4.1(a) of the APCA sets forth the exemption for the production of agricultural commodities:

[2] The memo mistakenly cites to 35 P.S. § 7004.1, which does not exist in the Air Pollution Control Act, instead of 35 P.S. § 4004.1(a), which contains the exemption for the production of agricultural commodities.

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> Agricultural Regulations Prohibited.—(a) Except as may be required by the Clean Air Act or the regulations promulgated under the Clean Air Act, this act shall not apply to the production of agricultural commodities and the Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities.

35 P.S. § 4004.1(a).[3] As discussed in more detail below, the dispute in this appeal centers on Herbruck's air emissions, specifically ammonia and VOCs. The APCA exemption's phrase, "except as may be required by the Clean Air Act," means that, if Herbruck's has the potential to exceed certain emissions thresholds, it is not eligible for the permitting exemption.

How the Department's memorandum came about relates back to an earlier appeal filed by the Appellant in 2017 and docketed at EHB Docket No. 2017-080-R. In that appeal, the Appellant appealed both the Department's issuance of a water quality management (WQM) permit to Herbruck's and the Department's authorization to Herbruck's for coverage under the PAG-12 general NPDES permit for CAFOs. Despite the fact that the appealed permits dealt with water quality, the Appellant's dispute centered on air emissions issues. When Herbruck's was seeking the WQM permit and PAG-12 coverage, it answered in the negative a question on a Department form asking whether or not the project would involve operations that produce air emissions. *See Montgomery Twp. Friends of Family Farms v. DEP*, 2018 EHB 749 (Opinion and Order denying motion for summary judgment filed by the Appellant and motion to dismiss filed by the Department). Herbruck's, therefore, did not submit to the Department any information on the type or amount of air emissions from its farm. The Appellant alleged in that appeal that this was an error and that the Herbruck's operation would likely generate significant emissions of particulate matter and VOCs.

[3] The phrase "production of agricultural commodities" is defined in 35 P.S. § 4001.4(b). It is not disputed that Herbruck's egg-laying farm falls within that definition.

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During that appeal, the Department admitted that Herbruck's response to the air emissions question on the form was incorrect and the operation would in fact produce air emissions. *Id.*, 2018 EHB at 751. Following our 2018 Opinion and Order denying the parties' dispositive motions, Herbruck's submitted to the Department the air emissions information required by the form. *Montgomery Twp. Friends of Family Farms v. DEP*, 2019 EHB 430, 432 (Opinion and Order denying motion for partial summary judgment filed by the Appellant). As of July 2019, the Department was still evaluating the information submitted by Herbruck's and trying to decide whether or not Herbruck's would need to obtain an air quality plan approval and permit. *Montgomery Twp. Friends of Family Farms v. DEP*, 2019 EHB 437, 439 (Opinion and Order denying the Department's and Herbruck's motions to dismiss certain objections in the notice of appeal).

In November 2019, Herbruck's, the Appellant, and the Department filed with the Board a joint stipulation of settlement in EHB Docket No. 2017-080-R. Relevant to the memo at issue in the current appeal, the joint stipulation provided, in part, that Herbruck's would submit information to the Department on the production of agricultural commodities exemption, and the Department would review that information and make a determination on the applicability of the exemption to the Herbruck's facility. (EHB Docket No. 2017-080-R, Docket Entry 65.) On November 25, 2019, former Chief Judge Renwand issued an Order approving the parties' joint stipulation of settlement and retaining jurisdiction for the purpose of the enforcement of the joint stipulation. (EHB Docket No. 2017-080-R, Docket Entry 66.) In July 2020, Herbruck's submitted to the Department an assessment concluding that its farm qualified for the production of agricultural commodities

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exemption in the APCA.[4] On August 14, 2020, the Department prepared the memorandum currently under appeal memorializing the Department's agreement with Herbruck's conclusion.

At this point in the proceedings, all the parties seem to believe we have jurisdiction over the Department's memo. In March 2024, we denied a motion to dismiss filed by Herbruck's arguing that the Department's memo was not an appealable action. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L (Opinion and Order on Motions to Dismiss and Motion to Strike, Mar. 8, 2024). However, Herbruck's has not preserved this argument in its post-hearing brief. Herbruck's includes a footnote in the summary of its argument in the beginning of its brief stating that it maintains its position that the Department's memo is not an appealable action (Herbruck's Brief at 2 n.3), yet later in its brief, in direct contradiction, Herbruck's very first proposed conclusion of law is an unambiguous statement that the Board has jurisdiction over this appeal. (*Id.* at 58.) There is no actual argument in Herbruck's brief addressing jurisdiction. The Department, which did not indicate any agreement in Herbruck's earlier motion to dismiss, also does not question the Board's jurisdiction in its post-hearing brief. The Appellant does not discuss jurisdiction in its post-hearing brief or reply brief.

[4] The Appellant pointlessly devotes considerable attention in its briefs to this four-year-old assessment, which the Department only relied upon in part for the calculation of the farm's potential emissions. (T. 448, 466-67, 471-72, 473-74, 476-77.) The Appellant contends that *that* report did not support the Department's determination that the agricultural exemption applies. However, we review the Department's action based upon the *de novo* record developed before the Board. *New Hanover Twp. v. DEP*, 2020 EHB 124, 201; *Solebury School v. DEP*, 2014 EHB 482, 519. "[T]he Board does not conduct a review of the record the Department relied upon to make its decision under appeal. Rather, the Board relies on the record established before the Board, which may include evidence that the Department did not consider." *Wetzel v. DEP*, 2017 EHB 548, 563 (citing *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004)). Indeed, we routinely admit and consider evidence that was not before the Department when it made its initial decision, including evidence developed since the filing of the appeal. *Telegraphis v. DEP*, 2021 EHB 279, 288. *See also Pequea Twp. v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Whether Herbruck's earlier submissions to the Department were insufficient as claimed by the Appellant is of historical interest only now that a *de novo* record has been created before this Board.

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The Appellant's Standing

Herbruck's and the Department asserted for the first time at the hearing and then in their post-hearing briefs that the Appellant does not have standing. We have searched the pre-hearing memoranda of Herbruck's and the Department for any mention of the Appellant's standing and have come up empty. There is no mention of standing at all in the pre-hearing memoranda, let alone a suggestion that the Appellant's standing would be challenged.

It is black letter law that issues not raised in a party's pre-hearing memorandum are waived. In our Pre-Hearing Order No. 2 issued in this case, we advised that "[a] party may be deemed to have abandoned all contentions of law or facts not set forth in its pre-hearing memorandum." (PHO-2 at ¶4.) *See also* 25 Pa. Code § 1021.104(a)(2) (a pre-hearing memorandum shall contain "[a] statement of the legal issues in dispute, including citations to statutes, regulations and caselaw supporting the party's position"). A long line of cases holds that issues not raised in a party's pre-hearing memorandum are waived and cannot be raised for the first time in a post-hearing brief. In *Jay Township v. DER*, 1994 EHB 1724, we held that appellants raising the issue of noise generated by trucks in opposition to the issuance of a solid waste permit for a landfill had waived the issue by not including it in their pre-hearing memorandum:

> Exceptional circumstances must be present, however, before the Board will permit a party to raise an issue in post-hearing memoranda where the party omitted the issue from his pre-hearing memorandum. How a party presents his case at hearing depends upon the issues he believes are involved. If the Board accedes to one party's request to add issues after the hearing on the merits, the Board would have to either reopen the record or deprive the opposing party of the opportunity to present evidence on that issue.

Id. at 1752. Many other cases have reached the same holding. *See, e.g.*, *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 823 n.2 (finding issue waived where "[i]t was not raised in the pre-hearing memorandum and should not be raised for the first time in the post-hearing memorandum"); *DEP*

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v. Seligman, 2014 EHB 755, 779 (deeming issue waived where "nothing in the [pre-hearing] memorandum…even indirectly or tangentially references the issue"); *Gasbarro v. DEP*, 1998 EHB 1264, 1271 ("it has long been the law that issues not raised in a party's pre-hearing memorandum are waived"). This is because a party's case should be fully defined by the time it files its pre-hearing memorandum. *Maddock v. DEP*, 2002 EHB 1, 7 ("It is in the *prehearing* memorandum that the theories that a party may raise are to be finalized.") (citing *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1473).

We have also specifically held with respect to standing that it is inappropriate to raise a challenge to a party's standing for the first time in post-hearing briefing without having previously raised the issue in one's pre-hearing memorandum. In *Oley Township v. DEP*, 1996 EHB 1098, a permittee raised a challenge to an appellant's standing for the first time in its post-hearing brief. We held that it was too late. "Permittee's failure to raise the question of whether or not the Appellants have standing either in dispositive motions or their pre-hearing memorandum precludes our consideration of the question at this late date." *Id.* at 1126. More recently, in *Jake v. DEP*, 2014 EHB 38, we rejected a challenge to the appellant's standing because the Department failed to challenge standing in its pre-hearing memorandum and waited until its post-hearing brief to raise the issue. Because of the failure to include the challenge in its pre-hearing memorandum, we held that the Department raised the issue too late and waived it. *Id.* at 58-60. *See also Nat'l Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 920 n.1 (finding that Department challenge to appellant's standing raised for the first time in a post-hearing brief was waived); *Blose v. DEP*, 2000 EHB 189, 191 n.2 ("a challenge to standing must be raised earlier than in a supplemental brief filed after the conclusion of a hearing"). These cases stand for the proposition that a challenge to standing must, at the latest, be preserved in a party's pre-hearing memorandum or risk waiver.

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Herbruck's and the Department rely heavily on *People United to Save Homes v. DEP*, 2000 EHB 1309 ("*PUSH*"), to argue that a challenge to standing can, under certain circumstances, be raised for the first time in parties' post-hearing briefs. In *PUSH*, an appellant put a witness on the stand to testify at the merits hearing for purposes of standing. At the post-hearing briefing stage, the permittee raised a challenge to the appellant's standing for the first time. The appellant asserted that, by not raising the issue earlier, the permittee had waived the challenge. The Board in *dicta* opined that, since a witness testified at the hearing to establish standing and since the issue had been briefed by the parties, the Board could consider the issue. *Id.* at 1321. The Board then held that the appellant had standing as an organization to represent the interests of its affected members. *Id.* at 1321-22. We find *PUSH* to be an outlier in the Board's overall caselaw that consistently holds that standing, like all other issues, needs to be raised in a party's pre-hearing memorandum. To the extent that *PUSH* held that an appellant's standing can be challenged for the first time in a party's post-hearing brief, we hereby overrule that holding.

Herbruck's adds that it did not need to identify standing as an issue in its pre-hearing memorandum because the Board's rules only require a pre-hearing memorandum to stake out a party's case-in-chief, and the standing of the Appellant, Herbruck's says, was not part of its own case-in-chief. *See* 25 Pa. Code § 1021.104(c) (requirements for the content of a party's pre-hearing memorandum only apply to the party's case-in-chief). However, we have held that a challenge to standing is akin to an affirmative defense, and therefore, it still needs to be included in a party's pre-hearing memorandum:

> [S]tanding has been treated under Pennsylvania law as akin to an affirmative defense. As such, it must be raised by the party asserting a lack of standing in early pleadings at the trial level or else it is waived on appeal. In the context of Board litigation, therefore, the defense of lack of standing must be raised by dispositive motion or in a party's Pre-Hearing Memorandum or it is waived.

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Smedley v. DEP, 2000 EHB 90, 93-94 (citing *Oley Twp.*, 1996 EHB at 1126-27) (citations omitted).

There is intuitive logic to the requirement that a standing challenge needs to be in a pre-hearing memorandum. Clearly if a party does not know that standing will be put at issue prior to a hearing, the party's presentation of its case-in-chief will be different. An appellant is not required to plead standing in its notice of appeal. *Winner v. DEP*, 2014 EHB 135, 140 (quoting *Ziviello v. DEP*, 2000 EHB 999, 1003); *Mayer v. DEP*, 2012 EHB 400, 401; *Riddle v. DEP*, 2001 EHB 417, 419. Standing, unlike jurisdiction, is waivable in Pennsylvania so it may never come up in an appeal before the Board. *Jake*, 2014 EHB at 58 (citing *Beers v. Unemployment Comp. Bd of Review*, 633 A.2d 1158, 1160 n.5 (Pa. 1993); *In re Nomination Petition of Paulmier*, 937 A.2d 364, 368 n.1 (Pa. 2007); *Erfer v. Commonwealth of Pa.*, 794 A.2d 325, 352 (Pa. 2002); *Mixon v. Commonwealth of Pa.*, 759 A. 2d 442, 452 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001)); *PUSH*, 2000 EHB at 1320. Thus, if not put at issue, an appellant may never need to provide evidence of its standing in an appeal. If, however, an appellant knows that standing is being challenged, it may put on different or additional witnesses at the hearing, elicit different testimony from those witnesses on direct examination, or have other evidence prepared to establish standing. It is a matter of basic fairness. An appellant cannot reasonably be expected to demonstrate its standing by a preponderance of the evidence at the merits hearing if it has no idea how its standing is being challenged in the first place. *See Food & Water Watch v. DEP*, 2020 EHB 229, 235 (appellant must demonstrate standing by a preponderance of the evidence *when standing is challenged in a pre-hearing memorandum and in a post-hearing brief*).

Herbruck's attempts to bolster its position by saying that the Appellant was on notice that its standing would be challenged. Herbruck's points to an email exchange between counsel two

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days before the hearing commenced, initiated by counsel for the Appellant, who asked if Herbruck's and the Department would stipulate to standing to obviate the need for Curtis Smith testifying because of health issues in Mr. Smith's family. Only in response to counsel for the Appellant's email did Herbruck's state that standing was an issue Herbruck's intended to address at the hearing.[5] Although Herbruck's says this shows the Appellant was on notice that standing would be contested, instead it shows that Herbruck's clearly planned to challenge standing and failed to include anything of the sort in its pre-hearing memorandum. To the extent we should even be looking behind the pre-hearing memorandum at the parties' private discussions to determine waiver, an email on a Sunday afternoon two days before the hearing is to commence where counsel makes a vague statement that it "intends to address" standing hardly qualifies as being put on notice in the same way a party would be if the issue were properly outlined as a legal issue in dispute in a pre-hearing memorandum filed weeks earlier.

Herbruck's and the Department also claim surprise at Curtis Smith, who was apparently only revealed in the Appellant's pre-hearing memorandum. They say they were under the impression from the parties' discovery that another member of Montgomery Friends of Family Farms, Robert Rhodes, would be potentially testifying as a representative of the organization. However, if the disclosure of Mr. Smith in the Appellant's pre-hearing memorandum all of a sudden made Herbruck's and the Department question the Appellant's standing, they still fail to explain why they omitted any mention of standing in their own pre-hearing memoranda filed three weeks later.

[5] Herbruck's attaches this email chain to its post-hearing brief. Herbruck's has not requested that this document be made part of the record or petitioned to reopen the record pursuant to our rules. 25 Pa. Code § 1021.133.

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Any claim of surprise is also belied by Herbruck's detailed, prepared questioning at the hearing about the legal form of Montgomery Friends of Family Farms and its structure as an organization. The questions concerning the legal formation of the entity of Montgomery Friends of Family Farms have no obvious connection to Curtis Smith as an individual. Herbruck's does not explain how the apparent change in witnesses from Robert Rhodes to Curtis Smith had any impact on Herbruck's position contesting Montgomery Friends of Family Farms *as an organization*.[6] If Herbruck's intended to challenge the Appellant's existence as an organization, those questions would be asked irrespective of which person from the organization were testifying. The disclosure of Mr. Smith as a witness had nothing to do with Herbruck's line of questioning or the extensive arguments Herbruck's presents now in its post-hearing brief. (*See* Herbruck's Brief at 34-41.) The simple fact is that these challenges should have been raised in Herbruck's pre-hearing memorandum and they weren't. Nothing about the disclosure of Curtis Smith qualifies as an exceptional circumstance as discussed in *Jay Township, supra* to leave the standing issue out of a pre-hearing memorandum.

Herbruck's Party Status

The Appellant's next argument is that Herbruck's Poultry Ranch, Inc. does not have "standing." We put standing in quotes because our research has not revealed any other case in which the right of the recipient of the Department's action to participate in the appeal has been questioned. The cases cited by the Appellant in support of its novel argument relate to third-party appellants and intervenors. The standing of the recipient of the Department's action would seem to go without saying.

[6] Herbruck's seems to suggest that it only occurred to Herbruck's to ask detailed questions about the structure of the organization when it had a witness who was merely a member of the organization, with no role in its formation or management, who would be unlikely to be able to answer such questions.

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In a joint statement to the Board on October 28, 2020, the parties informed us that the "Permittee's name is Herbruck's Poultry Ranch." (Docket Entry 5.) Although referring to Herbruck's in this case as a "permittee" is rather strained, the Appellant nevertheless does not question that Herbruck's was properly identified as the object or recipient of the memo to file that is the Departmental action under appeal. As the subject of that memo, Herbruck's attained automatic party status under our rules.[7] Herbruck's is still the subject of the memo. The Department has not withdrawn the memo or otherwise indicated in any way that it is directed at or intended to apply to any party other than Herbruck's. Pursuant to the memo, Herbruck's was and is entitled to the agricultural exemption at the Blue Springs Farm. Herbruck's interest in the case stems from the fact that it is the subject of the Department's memo, not whether it, for example, owns the real estate where the farm is located. Whether a subsequent owner, revised corporate entity, or anyone other than Herbruck's is entitled to the agricultural exemption at the Blue Springs Farm by virtue of a memo written about Herbruck's is not an issue that is presented in this case. The point here is that Herbruck's remains the interested party in the memo and it is without question entitled to continue to participate in this appeal.

We feel compelled to address the remedy the Appellant seeks because Herbruck's is alleged to lack "standing." The Appellant asks us not only to dismiss Herbruck's from the case but also to not credit Herbruck's expert testimony and "any evidence introduced since the property

[7] Under our rules, the service of a notice of appeal upon a "recipient of a permit, license, approval, certification or order…shall subject the recipient to the jurisdiction of the Board, and the recipient shall be added as a party to the appeal without the necessity of filing a petition for leave to intervene…." 25 Pa. Code § 1021.51(h)(1) and (i). The recipient is automatically made a party by operation of our rules, and we typically refer to these parties as "permittees." Although there was no true "recipient" of the Department's internal memo, Herbruck's essentially obtained an approval from the Department to avail itself of the permitting exemption. The purpose of the rule is straightforward: to provide due process to the person or entity that has a direct stake in the operation or facility affected by the appeal. *See White Twp. v. DEP*, 2005 EHB 611, 614.

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was sold in January 2021," whatever that means. (App. Brief at 39.) The Appellant provides no legal support for this remedy. The Appellant does not support its request with any authority for why we would strike all of the exhibits Herbruck's introduced at the merits hearing, disregard the testimony of its witnesses, or strike any questioning from Herbruck's counsel from the transcript. This appeal would obviously not go away if Herbruck's were dismissed as a party. The Appellant would not automatically meet its burden of proof in this appeal if Herbruck's were no longer part of it. The Appellant's expert's testimony, for instance, would not be suddenly more credible, as discussed *infra*.

Merits

There is no dispute that Herbruck's egg-laying farm is classified as the production of agricultural commodities. The only issue in this case on the merits is whether Herbruck's is a major source of emissions under the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q. As mentioned above, under the agricultural exemption in Section 4.1(a) of Pennsylvania's Air Pollution Control Act, Herbruck's farm may only be regulated if "required by the [federal] Clean Air Act or the regulations promulgated under the Clean Air Act." 35 P.S. § 4004.1(a). The Herbruck's farm is only covered by the federal Clean Air Act within the meaning of Section 4.1(a) if it is a major emitting facility. Relevant here, a major emitting facility (a.k.a. major source) within the ozone transport region, which includes Pennsylvania, is a source that emits or has the potential to emit more than 100 tons per year of ammonia or 50 tons per year of VOCs.[8] If Herbruck's has the potential to emit more than that, it is not entitled to the agricultural exemption; less than that, it is exempt from regulation under the APCA. The Department determined that Herbruck's has the potential to emit less than these regulatory thresholds, and therefore, is entitled

[8] Emissions of particulate matter are not at issue in this case. (Stip. 10.)

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to the agricultural exemption. In other words, it found that Herbruck's is not required to get a permit.

The Appellant, as a party who was not the recipient of the Department's action, bears the burden of proof. 25 Pa. Code § 1021.122(c)(2); *Joshi v. DEP*, 2019 EHB 356, 364. In order to prevail in this appeal, the Appellant needed to prove by a preponderance of the evidence that Herbruck's farm is a major source, and therefore, is not entitled to the agricultural exemption from air permitting. *See Logan v. DEP*, 2018 EHB 71, 90. In order to do that, the Appellant needed to prove that Herbruck's farm has the potential to emit more than 100 tons per year of ammonia or 50 tons per year of VOCs. The Appellant has failed to make that showing.

Ammonia

The Appellant's case was based almost entirely on the expert testimony of Albert Heber, Ph.D. Weighing competing expert testimony is one of the Board's core functions. *Gerhart v. DEP*, 2019 EHB 534, 558. *See also DEP v. EQT*, 2017 EHB 439, 497, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The weight given an expert's opinion depends upon factors such as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 561. "We also look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case." *EQT*, 2017 EHB at 497. "Resolution of evidentiary conflict, witness credibility, and evidentiary weight are matters committed to the discretion of the Board." *EQT Prod. Co. v. Dep't of Envtl. Prot.*, 193 A.3d 1137, 1149 (Pa. Cmwlth. 2018) (citing *Kiskadden v. Dep't of Envtl. Prot.*, 149 A.3d 380, 387 (Pa. Cmwlth. 2016)).

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Dr. Heber is eminently qualified, but we are unable to credit much of his testimony in this case. First, although Dr. Heber made a rough attempt to estimate potential ammonia emissions from the farm based on a partial nitrogen mass balance analysis, we see that his estimate using this method is not endorsed in the Appellant's post-hearing briefs; the estimate is only mentioned once, in passing, in the Appellant's post-hearing reply brief. The Appellant appears to have abandoned this approach, which is understandable because Dr. Heber himself acknowledged the many deficiencies in this part of his work (*see, e.g.*, T. 115, 124, 143-44, 148-49, 189-202), and conceded it was an unreliable approach for estimating potential emissions (T. 142-43, 188-91). Robert Burns, Ph.D., Herbruck's well-qualified expert witness, and Virendra Trivedi, the Department employee who made the determination that the agricultural exemption applies and who also served as an expert witness, and Kelley Matty, the Department's other expert, all credibly opined that Dr. Heber's nitrogen mass balance exercise was fatally flawed. (T. 295, 389, 391-401, 483, 541.) The fact that Dr. Heber posited this method at all did not help his credibility generally.

The methodology that Dr. Heber did adopt for estimating emissions was to develop an emission factor. There was no disagreement among the witnesses testifying at the hearing that the use of an emission factor is an appropriate and acceptable method for estimating total potential emissions. (T. 150-51, 171, 376, 389, 433-36.) Indeed, no other acceptable method was presented or discussed. An emission factor is simply a certain quantity of emissions per hen per time period (e.g. grams of emissions per hen per day). One then multiples that number by the total number of hens and does the math to convert the result into tons per year to come up with total potential annual emissions to see if the 100 tons per year (ammonia) or 50 tons per year (VOCs) thresholds are exceeded.

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Dr. Heber never testified what emission factor he proposed in his direct testimony, although it was brought out by Herbruck's on cross-examination. (T. 172-79.) Curiously, the Appellant did not cite or endorse any particular emission factor in its post-hearing briefs, despite the fact that the entire analysis hinges on that factor. Dr. Heber testified the *total* potential to emit is 241 or 249 tons at the hearing. (T. 73, 90, 182.) This lack of precision on the key issue in the case is not explained. 241 tons is cited in the Appellant's brief. (App. Brief at 16.) Appellant's counsel curiously seemed to concede during closing argument that the number might not be correct. (T. 549.) Indeed, counsel said 270 tons at that point. (*Id.*) The Appellant's other statements in its brief to the effect that emissions are "significant" are obviously not helpful. Although the emission factor, as opposed to the total emissions derived from that factor, was absolutely pivotal to Dr. Heber's conclusion, without *Herbruck's* counsel's questioning and briefing, we would not have known what it is. We will assume the number attributed to Dr. Heber by Herbruck's is correct.

In point of fact, it does not entirely matter what the actual number is because Dr. Heber's method of arriving at the number, whatever it may be, lacks credibility and adequate support in the record. Dr. Heber derived his proposed emission factor for use in this case by averaging emission factors developed by others in two separate published studies. Of course, the studies, although appropriately relied upon as support for expert testimony, are nevertheless hearsay. The authors of the studies did not testify. We have very little understanding of how the factors contained in the studies were derived. Although it is comforting to know that the studies were peer reviewed and can be reasonably relied upon by experts, it nevertheless would have bolstered the credibility of Dr. Heber's methods if we had a better grasp on how the authors of the studies arrived at their figures. For example, we have only rudimentary testimony from Dr. Burns and Mr. Trivedi on how sampling was done or how measurements were taken for one of the studies.

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We are told there was "continuous monitoring," but we do not know what poultry facilities were studied, where they are located, how similar they are to the Herbruck's farm, what the feces drying process is like, what the design of the barns is, what the diet of the hens is, etc.—all factors that would be helpful to know in determining whether a certain emission factor is an appropriate fit for calculating emissions from the Herbruck's farm.

It appears that Dr. Heber derived his emission factor by averaging together emission factors from two separate studies. The first factor that he used for averaging was a figure from the "Environmental Assessment of Three Egg Production Systems – Part II. Ammonia, Greenhouse Gas, and Particulate Matter Emissions," Shepherd, *et al.* ("2015 Shepherd study") of 0.112 grams of ammonia/hen/day. (T. 177.)[9] Aside from the fundamental problem of being required to accept this number at face value, the facilities that were studied did not appear to handle manure like the Herbruck's facility does. (T. 408.) Herbruck's farm by unanimous agreement is not particularly representative of poultry CAFOs in general in the way it handles and processes manure. (T. 153, 159, 163-64, 356, 379, 380; H. Ex. 1.) There is no evidence that the facilities studied in the reports used by Dr. Heber were materially similar to the Herbruck's facility. The record suggests the opposite is true. (T. 111, 177, 181-84, 283-93, 299-300, 378-79, 390-91, 411, 521-22.) Indeed, the Appellant admits that Herbruck's "facility is unique with its non-patented drying system." (Reply Brief at 22.) The Appellant's and Herbruck's expert witnesses both agreed that adjustments needed to be made to the figure used in the 2015 Shepherd study to try to account for the differences in the facilities used in that study and the Herbruck's farm.[10]

[9] The Department also used this number. However, Mr. Trivedi conceded that he is not an expert on coming up with an emission factor for ammonia emissions from poultry operations. (T. 486.)

[10] The Department did not agree that adjustments needed to be made.

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Dr. Heber's first adjustment was to also use an emission factor of 0.150 grams/hen/day derived from the "Ammonia, Greenhouse Gas, and Particulate Matter Emissions of Aviary Layer Houses in the Midwestern U.S." by Hayes, *et al.* ("Hayes study"). (T. 178-79.) Again, he told us virtually nothing about this study, yet the Appellant expects us to accept that the 0.150 figure can be relied upon for the facilities studied, let alone the Herbruck's farm. Neither Herbruck's nor the Department's experts used or vouched for this study. We know almost nothing about it. Again, there is no reason to assume the facilities studied by Hayes, *et al.* are relevant here, and every reason to assume the opposite, given Herbruck's unique operation. Both the 2015 Shepherd and the Hayes studies are becoming dated as well, which suggests that they may be approaching obsolescence given the major changes that have occurred in recent years regarding the operation of poultry CAFOs. (T. 202, 395-96.)

Then, instead of using either the Shepherd or the Hayes number, Dr. Heber averaged the two to come up with 0.131 grams/hen/day. Dr. Burns credibly testified that there is no scientific basis for using such an average (T. 390, 453), but more fundamentally than that, there is only the vaguest explanation of why Dr. Heber thought it was necessary, advisable, or appropriate to use an average. (T. 136-37.) Did averaging all of the various facilities studied in both studies with no explanation make the conclusion more likely to be Herbruck-like? We have no idea. Dr. Heber conceded that he made no attempt to determine which of the two studies was more analogous to Herbruck's and weigh them accordingly. (T. 181.)

Dr. Heber then added another 0.15 grams/hen/day to account for "manure storage." (T. 181-84.) There is even less explanation for where this number comes from than what was provided for the other numbers that were totaled to arrive at Dr. Heber's 0.281 grams/hen/day emission factor (0.131 + 0.15), other than perhaps mention of a "CES study" that is not otherwise identified.

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Even if this value was verifiable in its own right, once again, it does not accurately account for Herbruck's unique facility. Dr. Heber acknowledged that he was adding a factor for "manure storage" despite the fact that Herbruck's storage shed stores only pelletized fertilizer, which we cannot assume was the case in the "CES study." (T. 184.)

In sum, Dr. Heber's cobbled together emission factor for ammonia does not hold up to scrutiny. It is not supported or credible. The Appellant has not pointed to any evidence other than Dr. Heber's testimony in the record that is sufficient to carry its burden of proving that the Herbruck's facility has the potential to emit more than 100 tons per year of ammonia. With respect to ammonia, there is no basis for finding that the Department erred in determining that Herbruck's is entitled to the agricultural exemption.

VOCs

Dr. Heber used data from the National Air Emission Monitoring Study (NAEMS study) as the basis for his proposed emission factor for VOC emissions. (T. 117, 134-35, 151.) The NAEMS study commenced in 2004, with a final report having been submitted in 2010. (T. 53.) The report was apparently prepared pursuant to a consent agreement between the livestock industry and the EPA due to the lack of reliable methods for estimating air emissions from CAFOs. (T. 55.) The study was not limited to poultry CAFOs. (T. 53.)

Once again, we are frustrated by the fact that the Appellant never tells us in its post-hearing briefs what it thinks the proposed emission factor should be.[11] Our independent review of the record, however, finds that Dr. Heber revealed on cross-examination that his proposed factor was 59.5 milligrams of VOCs per hen per day. (T. 152.) Dr. Heber provided some basic information

[11] The Appellant's reply brief only asks us to sustain its appeal based on the potential of the Herbruck's farm to emit ammonia. VOCs are not mentioned. Nevertheless, we will not treat this as a waiver of the issue.

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about the NAEMS study, but there is once again a lack of testimony on how the emission factor was derived in the study. For example, there is no evidence regarding what sampling was done and how that raw data was used to devise a factor.

The NAEMS study, which is now 14 years old, was submitted to the EPA but it is undisputed that the EPA has never adopted it. Multiple witnesses testified without objection that the EPA concluded that the study lacked the quality and quantity of data needed to form a reliable basis for establishing an emission factor. (T. 57-58, 140, 156, 159, 378, 455, 525.) Dr. Heber, who was heavily involved in the preparation of the study, testified:

> One of the issues with VOCs is that it is complicated and it takes a long time because you are looking at over 70 different compounds and having to calibrate the instruments for over 70 compounds. It takes a long time and it is not -- it is not simple. And so I think that is one of the reasons that we don't have a lot of data on VOCs.

(T. 141.)

What the Appellant is essentially asking us to do is accept an emission factor for use in this case that the EPA has rejected as being insufficient in quality and quantity to support a reliable emission factor. We decline this invitation. The Department has declined the invitation as well. (T. 455, 525.) Herbruck's expert, Dr. Burns, also does not support the use of the NAEMS factor. (T. 378-79.) Aside from the data gathering problems, we are not convinced that Dr. Heber's extrapolations from the NAEMS data, which appear to have been collected at very different facilities with dissimilar manure handling practices from the Herbruck's facility, are warranted. (T. 153, 159, 163-64, 356, 379, 380, 521-24.) In short, as with ammonia, the Appellant has failed to prove that Herbruck's potential to emit VOCs will be greater than the 50 tons per year needed to qualify it as a major source. The Appellant has failed to prove that Herbruck's CAFO is not entitled to benefit from the agricultural exemption as a result of its potential VOC emissions.

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The Appellant complains that there are no physical or operational design limits that constrain Herbruck's to stay below the major source thresholds. It says a synthetic minor air quality permit would establish such enforceable limits. Thus, it makes the rather bizarre argument that Herbruck's should be required to obtain an air quality permit to qualify for the agricultural exemption that obviates the need to obtain an air quality permit. In other words, it needs to get a permit to prove it doesn't need a permit. This argument would obviously defeat the whole purpose of the agricultural exemption and it lacks all merit.

The Appellant, and to some extent Herbruck's, exaggerates the impact and consequence of the memorandum to file that is the subject of this appeal. The memo concludes that, **if** Herbruck's keeps below 2.2 million hens and **if** it uses its advanced manure handling system, it is not a major source and is exempt from air permitting. The memo does not commit Herbruck's to staying below 2.2 million hens or using the AFDP system. If circumstances change, e.g. if Herbruck's adds one chicken above 2.2 million, the memo no longer applies. The fact that other permits or approvals happen to limit Herbruck's options is irrelevant.

The Department's original instinct in this case seems to have been to refrain from making a determination one way or the other on Herbruck's eligibility for the agricultural exemption until reliable emission factors for poultry CAFOs could be established. This partially explains why this litigation has lingered in one form or another now for more than seven years. No poultry CAFO in the entire country has been found to be a major source. (T. 211.) Neither EPA nor the Pennsylvania Environmental Quality Board has adopted emission factors for poultry CAFOs, despite years of study. If those agencies have not promulgated appropriate factors after years of consideration, query how we would be able to endorse a factor for use in this case with any confidence based upon a two-day hearing, even putting aside the deficiencies in the record

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discussed above. The Appellant has neither asked for nor supported a case for requiring further study by the Department as a remedy in this appeal.

It was incumbent upon the Appellant to show that the Department reached an incorrect result when it decided the agricultural exemption applies, and it failed to do so. It is not necessary for us to endorse the emission factors championed by Herbruck's and/or those used by the Department to be able to conclude that the factors advocated by the Appellant are not supported by the record and the Appellant has failed to satisfy its burden of proving the Department reached an incorrect result. In the absence of a reliable emission factor (or some other reliable method for estimating emissions), it would not be appropriate for the Department to order Herbruck's to apply for or obtain a permit in spite of the agricultural exemption.

CONCLUSIONS OF LAW

1. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *New Hanover Twp. v. DEP*, 2020 EHB 124, 201; *Wetzel v. DEP*, 2017 EHB 548, 563; *Solebury School v. DEP*, 2014 EHB 482, 519; *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *Warren Sand & Gravel Co. v. Dep't Envtl Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

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

3. The appellant must show by a preponderance of the evidence that the Department's action was not lawful, reasonable, or supported by our *de novo* review of the facts. *Logan v. DEP*, 2018 EHB 71, 90; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

4. In order to be lawful, the Department must have acted in accordance with all applicable statutes, regulations, and case law, and acted in accordance with its duties and

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responsibilities under Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art. 1, § 27. *Stocker v. DEP*, 2022 EHB 351, 363 (citing *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016)).

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

6. Herbruck's Poultry Ranch, Inc. is a proper party to this appeal. 25 Pa. Code § 1021.51(h)(1); 25 Pa. Code § 1021.51(i); *Dep't of Envtl. Prot. v. Schneiderwind*, 867 A.2d 724, 727-28 (Pa. Cmwlth. 2005).

7. Issues not raised in a party's pre-hearing memorandum are waived. *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 823 n.2; *DEP v. Seligman*, 2014 EHB 755, 779; *Gasbarro v. DEP*, 1998 EHB 1264, 1271; *Jay Twp. v. DER*, 1994 EHB 1724, 1752.

8. Like all other issues, standing is an issue that must be raised in a party's pre-hearing memorandum or it is waived. *Oley Twp. v. DEP*, 1996 EHB 1098, 1126; *Jake v. DEP*, 2014 EHB 38, 58-60; *Nat'l Fuel Gas Midstream Corp. v. DEP*, 2015 EHB 909, 920 n.1; *Blose v. DEP*, 2000 EHB 189, 191 n.2.

9. A challenge to standing is an affirmative defense and must be raised in a party's pre-hearing memorandum and not for the first time in a party's post-hearing brief. *Smedley v. DEP*, 2000 EHB 90, 93-94; *Oley Twp. v. DEP*, 1996 EHB 1098, 1126-27.

10. Herbruck's and the Department waived the ability to challenge the Appellant's standing by not including the issue in their pre-hearing memoranda.

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11. The Appellant has not met its burden to prove that the Herbruck's farm has the potential to emit ammonia or VOCs at levels in excess of major source thresholds established by the federal Clean Air Act.

12. The Appellant has not met its burden to prove that the Herbruck's farm is not eligible for the agricultural commodities exemption from permitting in Pennsylvania's Air Pollution Control Act. 35 P.S. § 4001.4.

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MONTGOMERY TOWNSHIP FRIENDS OF FAMILY FARMS	:	
	:	
v.	:	**EHB Docket No. 2020-082-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBRUCK'S POULTRY RANCH, INC., Permittee	:	

O R D E R

AND NOW, this 15th day of November, 2024, it is hereby ordered that the Appellant's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

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

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

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

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Board Member and Judge

*** Judge Paul J. Bruder, Jr. is recused in this matter and did not participate in the decision.**

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DATED: November 15, 2024

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