COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCRUBGRASS CREEK WATERSHED ASSOCIATION and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2023-097-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SCRUBGRASS RECLAMATION COMPANY LP, Permittee	:	**Issued: November 26, 2024**

OPINION AND ORDER ON
DEPARTMENT'S AND PERMITTEE'S MOTIONS FOR SUMMARY JUDGMENT AND APPELLANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

By Steven C. Beckman, Chief Judge and Chairperson

Synopsis

The Board denies motions for summary judgment filed by the Department and permittee and denies a cross-motion for summary judgment filed by appellants. All three motions are based on the issue of appellants' standing and are denied because, based on the current record, it is not clear and free from doubt whether or not the appellants have the necessary standing to pursue this appeal.

O P I N I O N

Background

This matter involves an appeal filed with the Environmental Hearing Board ("the Board") by Scrubgrass Creek Watershed Association ("SCWA") and Citizens for Pennsylvania's Future ("PennFuture")(collectively, "Appellants") challenging a Consent Order and Agreement ("CO&A") entered into by the Department of Environmental Protection ("Department") and

Scrubgrass Reclamation Company, LP ("Scrubgrass"). Scrubgrass operates a waste coal burning powerplant in Scrubgrass Township, Venango County ("Plant") that generates ash as a result of the coal burning process. In 2007, Scrubgrass submitted a proposal to the Department ("2007 Proposal") requesting to construct a 4.98 acre pad at the Plant ("Ash Conditioning Area"), to enable ash to be spread into layers, compacted and watered, and allowed to exothermically react before being loaded onto trucks and removed from the Plant. The Department approved the 2007 Proposal and Scrubgrass constructed the Ash Conditioning Area at the Plant.

In July 2022, the Department determined that Scrubgrass was in violation of the Solid Waste Management Act ("SWMA"), after it discovered during a site inspection, that the storage of ash had exceeded the capacity of the Ash Conditioning Area and runoff from the pile of ash was not being collected or treated. To address the identified violations, Scrubgrass and the Department entered into a CO&A on November 9, 2023. The CO&A includes a "corrective action" section that, amongst other things, outlines a four-year schedule for Scrubgrass to remove the excess ash from the Ash Conditioning Area.

The Appellants filed their Notice of Appeal on December 15, 2023, challenging the terms of the CO&A as unreasonable, inappropriate and not in conformance with the law. Discovery in this matter closed on August 2, 2024. On September 6, 2024, the deadline for filing dispositive motions, the Appellants, the Department, and Scrubgrass, all filed separate motions for summary judgment. The parties timely filed their respective responses, with the Appellants including a cross-motion for summary judgment in their response. The Department and Scrubgrass filed reply briefs but did not file a response/reply to the Appellants' cross-motion. On November 6, 2024, the Board received a reply brief from the Appellants' concerning their cross-motion. The briefing is complete in this matter. This Opinion addresses the Motions for Summary Judgment filed by

Scrubgrass and the Department, and the Appellants' Cross-Motion for Summary Judgment. In their motions, the Department and Scrubgrass ask this Board to dismiss the Appellants' appeal for lack of standing while the Appellants request that the Board rule in their favor and find that they have standing to pursue this appeal.

Standard of Review

As a matter progresses before the Board, the appropriate standard of review in evaluating a challenge to standing changes depending on the stage of litigation. *Giordano v. DEP*, 2000 EHB 1184, 1187. When the question of standing is raised at or near the conclusion of discovery in the context of a summary judgment motion, as is the case here, we will only grant the motion if there are no issues of material fact and it is clear that the party does or does not have standing as a matter of law. Pa. R.C.P. 1035.1-1035.2; *Id*., citing *Ziviello*, 2000 EHB 999. In its recent decision in *Muth v. Dep't of Environmental Protection*, the Commonwealth Court stated that when a party's standing is challenged in a summary judgment motion, the party cannot rest on mere allegations of injury that resulted from the conduct at issue, but must set forth by affidavit or other evidence, the specific facts that demonstrate a genuine issue exists. *Muth v. Dep't of Environmental Protection*, 315 A.3d 185, 196 (Pa. Cmwlth. 2024). In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Sierra Club v. DEP*, 2023 EHB 97, 98–99. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Id.* at 99 (citing *Eighty-Four Mining Co. v DEP*, 2019 EHB 585, 587). In summary, the Board must determine whether based on the undisputed facts, whether any of the parties in this case are entitled, as a matter of law, to summary judgment on the issue of standing. *Giordano*, 2000 EHB at 1187-88.

Standing

In the Department's and Scrubgrass' motions, they each assert that the Appellants lack standing to bring this action and, therefore, the Board should dismiss the appeal. Appellants, naturally, disagree with this position and, in their cross-motion, request that we find that they possess standing. The Appellants in this case are two environmental organizations, SCWA and PennFuture.[1] Organizations, such as the two in this case, can have standing in their own right and/or as a representative of their members. *Citizens for Pennsylvania's Future v. DEP et al.,* 2015 EHB 750, 751; *Pennsylvania Trout v. DEP*, 2004 EHB 310 355, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004). Although it is not entirely clear from their arguments, SCWA and PennFuture do not appear to claim standing in their own right, relying instead on representative standing through identified members of the organizations.[2] Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has standing to challenge an action of the Department. 35 P.S. § 7514(c); *Citizens for Pennsylvania's Future*, 2015 EHB 750 at 752. An individual (and therefore its organization) has standing to appeal a Department action if the individual has a **direct interest** in the outcome of the appeal. See *Dengel v. DEP et al.,* EHB Docket No. 2022-092-B (Opinion and Order on Motion for Summary Judgment issued August 29, 2024, slip op. at 11), citing *Mountain Watershed Assn. v. DEP*, EHB Docket No. 2024-077-W (Opinion and Order on Petition to Intervene issued July 18, 2024, slip op. at 4), citing *Muth v. Dep't of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board,* 916 A.2d 624, 628 (Pa. 2007)).

[1] In their response to the Department's and Scrubgrass' Motions for Summary Judgment, SCWA and PennFuture interchangeably refer to the individual members and the organizations as the Appellants but that is not accurate. The only Appellants in this case are the two environmental organizations listed in the caption. The individual members did not file appeals in this matter.

[2] Scrubgrass specifically argued in its Summary Judgment Motion that neither SCWA nor PennFuture have standing in its own right. (Scrubgrass Motion at 5-6). SCWA and PennFuture did not clearly contest that point.

See also, *Food & Water Watch v. Dep't of Environmental Protection,* 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Dep't of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021).[3] A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Id*. (citing *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024). In order for an individual to have a direct interest, their material interests must be discrete to them or a limited class of persons from more diffuse interests common among the citizenry. *Muth*, 315 A.3d at 196 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). An appellant must also come forward with specific facts to credibly aver that they use the affected area and that there is a realistic potential that their use and enjoyment of the area will be adversely affected by the activity. *Muth v. DEP*, et al., 2022 EHB 411, 415, aff'd. 315 A.3d 185, 20 (Pa. Cmwlth. 2024) (citing *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643). Ultimately, the fundamental question for the Board when weighing standing is whether the party whose standing is challenged is the right party to bring the case in front of the Board because of their direct interest in the matter. Because the record before us is not sufficiently clear to determine whether, as a matter of law, the individual members on which Appellants rely have standing in this matter, we deny the Department's and Scrubgrass' motions for summary judgment and also deny the Appellants' cross-motion for summary judgment.

Discussion

[3] The Department and Scrubgrass argue that the direct interest standard is not the proper standard for reviewing standing questions in front of the Board and, therefore, the Board should not follow the Commonwealth Court's recent caselaw on this issue. We disagree and will follow the direct interest standard as set forth by the Commonwealth Court in the cited cases.

We first turn to the question of whether the Appellants have established that at least one of their members are sufficiently connected with the area affected by the CO&A to satisfy the requirement that their material interests are discrete from the general population. In third-party appeals, this is generally demonstrated by physical proximity to the location in question and/or use of the area that is arguably going to be impacted by the challenged Department action. PennFuture has identified one of its members, Thomas Thomas ("Mr. Thomas") and SCWA has identified three members, Douglas Struble ("Mr. Struble"), Bill Pritchard ("Mr. Pritchard"), and again, Mr. Thomas [4] to support their claim to representational standing. The record in this matter, which includes affidavits and depositions of all three individuals, provides extensive examples of Mr. Thomas', Mr. Struble's and Mr. Pritchard's proximity to and use of the area in question. The Appellants' members' affidavits and testimony established that, collectively, they live, work, hike, hunt, kayak, fish, bike and ski in the vicinity of the Plant.

Mr. Thomas is the Chair of SCWA and a member of PennFuture. He has lived approximately three to four miles from the Plant for over 40 years and walks his dogs daily in his neighborhood for approximately 40 minutes. He enjoys a multitude of outdoor activities such as splitting wood, gardening, yard work, playing with his grandchildren, woodworking, and spending time with family and friends on his property. He also spends time hunting and hiking on his neighbor's property, where he can see the Plant's smokestacks from a certain vantage point. As a

[4] In its Brief in Support of its Motion for Summary Judgment, the Department contends that the Appellants rely only on Mr. Thomas and Mr. Struble to support their claim of representational standing. The Department offers the Appellants' Response to an Interrogatory where the Appellants responded, in part, that "SCWA provides the affidavits of Thomas Thomas and Douglas Struble" to an interrogatory requesting Appellants to provide the factual and legal basis for SCWA's belief it has standing. (DEP Ex. 7, No. 17). Despite how Appellants responded to this interrogatory, the record before us presents evidence from SCWA members other than Mr. Thomas and Mr. Struble. An organization can have representational standing through its members and, as such, we believe it is our obligation to review all of the evidence before us, including evidence from any members, that goes to the question of representational standing.

member of the SCWA, he assists in monitoring and maintaining two passive treatment systems located at the headwaters of Scrubgrass Creek that are checked on a monthly basis and are approximately a 10-minute drive from the Plant.

Mr. Struble, the Secretary of SCWA, enjoys recreating in the vicinity of the Plant. Mr. Struble has fished for many years in the Allegheny River, often doing so three miles downstream from the Plant. Mr. Struble enjoys hiking on trials in the Clear Creek State Forest, which can bring him approximately three miles from the Plant. Weather-permitting, he also enjoys cross-country skiing in the area. Mr. Struble also rides his bike eight to twelve times per year along the Allegheny River Trail and comes within 100 yards of the Plant during these bike rides. He also periodically kayaks in the Allegheny River near the Plant. Mr. Struble participates in SCWA's monthly monitoring of the passive treatment systems.

Mr. Pritchard has been a member of SCWA for seven years and also participates in extensive recreational activities in the area. He testified that he often hikes the Kennerdell Tract of the Clear State Forest and has already done so five to six times this year. From this trail, he is able to see the Plant's smokestacks. He also enjoys skiing this same trail. Mr. Pritchard bikes on a trail that brings him within one mile from the Plant and also kayaks on the Allegheny River within one mile of the Plant.

There appears to be no dispute amongst the parties of the material facts regarding the members' activities that the Appellants rely on to establish standing. However, both Scrubgrass and the Department dispute that the areas where the members engage in their activities are in fact the "affected area" as contemplated by the CO&A. The Department complains that the Appellants did not delineate the "affected area" but instead suggests that the Appellants arbitrarily assigned the areas that the members either live or recreate in as all being affected by the CO&A. (See DEP's

Reply Brief at 3). According to Scrubgrass, the area that the CO&A affects "is limited to the excess coal ash that exceeds the bounds of the ash conditioning area within the footprint of the Scrubgrass plant." (Scrubgrass Reply Brief at 5). Scrubgrass argues that in order for the Appellants to establish standing, they "must demonstrate that they use the area affected by the excess coal ash." (*Id.*). It would seem, according to Scrubgrass, short of the members partaking in activities that occur directly on or adjacent to ash that is outside of the Ash Conditioning Area, but still located within the property bounds of the Plant, they cannot establish standing. This argument relies on too narrow an understanding of this issue and is in contradiction of Board precedent. In *Food & Water Watch v. DEP*, 2019 EHB 459, the Board explained that we have not imposed a restrictive standard for where recreation must occur relative to discharge point. *Id.*, at 467. While the case in the instant matter does not involve a discharge point like in *Food & Water Watch*, we find that logic is not limited only to appeals involving discharge points, and that relevant use can potentially take place well beyond the particular location where certain regulated activities are occurring. The area that must be considered is a fact driven inquiry defined by the regulated activity of concern and its associated risks, and any potential exposure to those risks posed by the proximity and activities engaged in by the party seeking standing. See *Id; Pa. Trout v. DEP,* 2004 EHB 349, 359; *Blose*, 1998 EHB 635, 635-637. Here, the Appellants' concerns are, in part, that leachate and dust could be released from the ash located in and beyond the Ash Conditioning Area, thereby potentially contaminating the air and water in areas surrounding the Plant, including the areas where they live and/or recreate in the Plant's vicinity. Mr. Pritchard and Mr. Struble both hike trails that bring them within several miles of the facility. They each kayak on the Allegheny River with Mr. Pritchard coming within less than a mile of the Plant and Mr. Struble kayaking past the Plant's outfall. (Scrubgrass Ex. H at 26; Ex. E at 35). Mr. Struble bikes the Allegheny River

Trail which takes him within 100-yards of the Plant. (Scrubgrass Ex. E at 30). Mr. Pritchard enjoys biking the Allegheny Valley Passage Trail which takes him within one mile of the Plant. (Scrubgrass Ex. H at 21). Further, Mr. Thomas has lived within three or four miles of the Plant for decades and spends an ample amount of time outdoors partaking in various hobbies. We find that the members' activities are sufficiently proximate to the Plant to conclude that they use the area that could be affected by the excess ash and the terms for addressing the ash set forth in the CO&A. Their proximity to the Plant and the Ash Conditioning Area during their activities convince us that their interests are discrete from those of the general population.

We now turn to the more difficult question in this matter which is whether the Appellants have demonstrated that they have credibly averred that there is an objectively reasonable threat that the Department action will impact their use of the affected area. Just as they came forward with specific facts to demonstrate that they use and enjoy the affected area, Appellants must do the same in showing that there is a realistic potential that they will be adversely affected by the CO&A. The Department and Scrubgrass adamantly assert that the Appellants presented only general concerns regarding the ash pile and that they failed to show how the CO&A personally affected them, their property or their activities. The Appellants disagree, arguing that the concerns their members raised are credible, and that there is a realistic potential that their use of the area could be affected by the excess coal ash. For the most part, the Department, Scrubgrass, and the Appellants all point to the same evidence in support of their positions but disagree as to whether the evidence is sufficient to support standing.

In their brief in opposition, the Appellants assert that they are worried about various forms of pollution that could be emanating from the ash pile and that the risk of such pollution is realistic. Specifically, in their brief, the Appellants assert that they are concerned about air contamination

from dust being blown off the ash pile, pollution of both groundwater and surface water, ground pollution, hazardous chemicals and leachate. A review of all three members' affidavits and depositions substantiate the concerns Appellants assert in their brief. In his depositional testimony, Mr. Thomas expressed his concern regarding water contamination, specifically, the Allegheny River because the Plant "is uphill from the River; so everything drains down to the River from that point […]" (Scrubgrass Ex. D, Thomas Deposition at 52). He stated that it was his understanding that the ash pile had no monitoring measures in place thereby making him more concerned about what contaminates the ash pile could be releasing. When asked what his greatest concern was, Mr. Thomas stated it was "a toss-up between their greenhouse gas production, and the fact that nobody knows what is leaching out of that pile. And as you know, the coal ash has everything in it. It has heavy metals, it has everything." (*Id.* at 54-55). Additionally, Mr. Thomas' affidavit that was filed with the notice of appeal provides:

> I am concerned about this ash pile. It's both an environmental issue and a public health issue. I'm concerned about dust blowing off of the pile. I'm familiar with the water quality issues from my work with SCWA, and I'm concerned about leachate from the pile. As I understand it, there is no monitoring of what's coming off that pile into the air, land, and water. It's a disaster waiting to happen.

(Scrubgrass Ex. A).

During his deposition, Mr. Struble testified he was concerned with "[p]ossible ground contamination, air pollution, and possible water pollution." (Scrubgrass Ex. E, at 50-51). He further stated in his affidavit that "I am concerned about material from this pile contaminating groundwater and possibly reaching the Allegheny River, a federal wild and scenic river. I'm also concerned that dirty ash will blow off this pile into the surrounding area and contaminate the air." (Scrubgrass Ex. B). Mr. Pritchard's concerns expressed during his deposition are similar to those of Mr. Thomas and Mr. Struble. Mr. Pritchard testified that he "was disturbed at the overall size

tonnage of the coal ash pile." (Scrubgrass Ex. H, Pritchard Deposition at 44). His affidavit provides:

> I am concerned about environmental and health impacts from the ash pile. I am concerned about the impacts of airborne dust from the pile. I am concerned about leachate and runoff from the pile. I am concerned about possible impacts to surface water, including from water flowing downhill to the Allegheny River, and to groundwater. I am concerned that the ash pile lacks soil erosion controls. I am concerned that the ash pile may be in violation of DEP regulations, including clean water violations.

(Appellants' Ex. 30).

In his affidavit, Mr. Pritchard expressed that he is also concerned that the pile contains constituents or chemicals that could be hazardous and that Scrubgrass did not post a bond to guarantee the ash pile's cleanup. All three gentlemen stated in their affidavits that "SCWA has appealed to get this pile removed as quickly as possible, and to obtain safeguards to protect health and the environment." (Scrubgrass Exs. A, B; Appellants' Ex. 30).

Scrubgrass counters that the Appellants' concerns, as described above, are "general" and "unspecified" and says that their concerns are too attenuated to provide a basis for standing. It emphasizes that Appellants' have only expressed concern for *possible* and *potential* pollution but that they failed to provide any specific evidence of such pollution. In challenging how realistic the Appellants' concerns are, Scrubgrass asserts that "there is no clear evidence that the excess coal ash has leaked or blown anywhere […]" and that the Appellants' expert report "contains no sampling data whatsoever and thus provides no specific facts demonstrating that the excess coal ash impacts areas used by Appellants." (Scrubgrass Reply Brief at 8). The Department touches on this line of argument as well, stating in its brief that "[Mr. Pritchard] has not smelled anything or seen any dust while on the trail, he stated that he has some concerns about quality from 'potential

dust from ash.' Also, Mr. Pritchard stated that he believes he has never been impacted by ash while hiking on the Kennerdell Tract." (DEP Reply Brief at 4 (internal citations omitted)).

Essentially, Scrubgrass and the Department suggest that for the Appellants to establish standing, they must produce specific facts showing that the ash pile has impacted the areas they use. However, contrary to these contentions, the Appellants need not produce specific evidence that pollution is occurring or has occurred in order to demonstrate that the harms they are concerned about are realistic ones. Such evidence goes to a determination on the merits of the case rather than to an inquiry of standing. While purely subjective apprehensions not grounded in reality are not enough to confer standing, at this stage in the proceeding, Appellants are only required to show that there is an objectively reasonable threat that adverse impacts may occur, rather than showing they have or will transpire. *Food & Water Watch*, 2019 at 470; *PennFuture*, 2015 EHB 750 at 754; *Ziviello v. DEP*, 2000 EHB 999, 1004-05. "In determining what constitutes a realistic threat, the Board has cautioned that an analysis of the merits has no place in the inquiry beyond determining a threat of harm is 'more than pure speculation.'" *Food & Water Watch*, 2019 EHB at 470; citing *CAUSE v. DEP*, 2007 EHB 632 at 674.

The Appellants concerns are centered around the possibility that pollution is being released or could be released from the ash pile. Mr. Thomas is particularly concerned that due to the lack of monitoring, contaminates could be leaching into the soil and into surface waters and groundwater. The members all specifically note that the Plant is located near the Allegheny River and fear that pollutants could be coming off of the ash pile and draining into the River. The Appellants have also articulated that their worries of pollution are heightened given the sheer size of the ash pile and are concerned that the dust could blow off of the pile and pollute the air. We

find these concerns are more than purely speculative and are sufficiently grounded in reality for the purposes of standing.

At this point, the Appellants have successfully showed that they use and enjoy the affected area and that their concerns pertaining to pollution are realistic and reasonable. However, they must also credibly aver how said pollution resulting from the terms of the CO&A could impact their personal use and enjoyment of the area. The Department and Scrubgrass assert that the Appellants failed to demonstrate that the CO&A will have any impact on them, arguing that the Appellants' concerns are not particularized but instead are no greater than the abstract interest of all citizens in having others comply with the law. They point out that the evidence shows that the Appellants' members' use and enjoyment of the affected area has remained unchanged and, moreover, the members' own depositional testimony confirms that the CO&A has not impacted them at all. After a careful examination of the record and when looking only at the undisputed facts, it is not clear whether the Appellants' have satisfactorily averred that the CO&A has a realistic potential to adversely impact them or their use and enjoyment of the affected area.

As stated above, Mr. Thomas said that he was concerned that the pollution from the ash pile could be impacting the health of the Allegheny River. He also expressed he was concerned about the impacts that the ash pile could have on the environment and public health. However, these impacts that he describes are not specific to him and his personal activities. He does not articulate the ways that the pollution from the ash pile could impact him, his personal health, or his activities. For instance, we do not doubt that Mr. Thomas is concerned that the ash pile is polluting the Allegheny River, but Mr. Thomas fails to explain how a potentially polluted Allegheny River has a personalized effect on him. Moreover, when the Department asked Mr. Thomas how the CO&A has impacted his activities, he responded: "It hasn't impacted my personal

activities at all. It has impacted my environmental activities." (Scrubgrass Ex. D, Thomas Deposition at 82). Both Mr. Struble and Mr. Pritchard participate in a variety of recreational activities near the Facility. However, as the Department points out, neither of these men have in any way altered or lessened their activities in light of the CO&A, and they did not express any reservations about continuing to recreate near the Plant in the future.

The Appellants dispute that they have failed to meet their burden and argue that they have provided ample evidence that their concerns regarding contamination and pollution are legitimate and that they have shown that they will be adversely impacted as a result. In support of their assertion, the Appellants reiterate the list of different kinds of pollution their members are concerned about and argue that these concerns clearly show a potential for harm and thereby impact. What the Appellants fail to understand is that they have not made the necessary connection between their members' concerns of pollution and how any such pollution could personally impact their use and enjoyment of the area. Appellants cite to *Friends of the Earth v. Laidlaw Environmental Services, Inc*., 528 U.S. 167 (2000), and say that their case is analogous to the circumstances in that matter. We disagree. In *Friends of the Earth*, the organization's members wished to recreate in various ways near a facility, but either refrained from doing so or ceased those activities altogether for fear the water contained harmful pollutants. Clearly, in that case, the facilities operations impacted the petitioners' willingness and ability to participate in their recreational activities.

A review of our cases also shows that where we have found third-party standing, the appellants in those cases effectively articulated how the Department action had the potential to impact their use and enjoyment of an area. Examples of the types of personal impacts the Board has found sufficient for standing purposes, include, but are not limited to, personal health concerns,

potentially relocating or ceasing recreational activities, diminishing the enjoyment of an activity, or the lessening of an aesthetic value. For instance, in *Food & Water Watch*, the Board found an appellant organization had standing where its members recreated in the watershed that a poultry processing facility would discharge its wastewater. In that case, the members described the impact the permit could have on them, explaining that they were concerned for personal health risks from recreating in polluted water and, in addition, feared damage of the surrounding ecosystem, thus, lessening their enjoyment and curtailing their recreational and aesthetic activities, such as birdwatching. *Food & Water Watch,* 2019 EHB at 471. In *Sierra Club v. DEP*, 2017 EHB 685, the appellants' members worried that the issuance of a solid-waste permit could negatively impact their health, fearing the coal ash pollution posed a cancer risk to them. The appellants also feared that the coal ash could contaminate their public drinking water since their water supply sourced water from the river the landfill was located near and, as a result, had purchased bottled water to avoid the risks of consuming potentially polluted water. *Id*., at 693. The Board also found representational standing to appeal a permit in *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750. There, the organization's member hiked in the general affected area where a large well pad and access road would be constructed, asserting that such activity would significantly and adversely impact the natural beauty and serenity the member enjoyed. *Id*., at 754.

Here, unlike the appellants in the above cases, the Appellants have not satisfactorily made the connection between the threat of pollution that the ash pile poses and the impacts their members could suffer as result. We cannot presume facts that would demonstrate ways in which Appellants' members could be impacted by the CO&A. It is the Appellants' burden to substantiate their averment that their activities could be affected by the challenged action with specific facts. While the record in large part fails to show how the CO&A will personally impact the Appellants, several

brief statements provided by Mr. Thomas and Mr. Pritchard during their depositions raise questions as to whether they have been negatively impacted or may potentially be. Although Mr. Thomas stated that the CO&A had not impacted his personal activities, he said in the following statement that, "[i]t has impacted my environmental activities." (Scrubgrass Ex. D, Thomas Deposition at 82). Mr. Thomas did not expand on what he meant by his "environmental activities" or the impacts on them. However, this statement suggests that he has perhaps in some way been impacted by the CO&A, and that in of itself is enough to create uncertainty regarding Mr. Thomas' aggrievement, thereby raising a question surrounding the standing of the organizations he is a member of, PennFuture and SWCA. The other statements that make the issue of standing unclear are found in Mr. Pritchard's testimony. When asked if he still enjoyed hiking on the Kennerdell tract notwithstanding the Plant's continued operation, Mr. Pritchard responded, "I enjoy. I have some concerns about air quality. Maybe my enjoyment is somewhat tampered." (Scrubgrass Ex. H, Pritchard Deposition at 16). Shortly after that statement, the following exchange occurred between counsel for Scrubgrass and Mr. Pritchard regarding his activities on the Kennerdell trail:

> Q: Anything else that when you are going through Kennerdell, that portion, that is impacting you while you are doing your trail riding near Kennerdell or in Kennerdell?
>
> A: Impacting it, air quality.
>
> Q: Air quality concerns. How are you impacted by the air?
>
> A: I could be potentially impacted by dust coming off the ash pile that becomes airborne.

(Scubgrass Ex. H, Pritchard Deposition at 22-23).

Mr. Pritchard's statements certainly lend themselves to the possibility that the enjoyment he experiences while hiking and biking is lessened due to his concern that the ash pile may be degrading the air quality in the area he recreates in. However, we find that Mr. Pritchard's brief

statements, without further elaboration, fall short of fully demonstrating that the CO&A could negatively impact his use and enjoyment of the area. His testimony does raise questions surrounding adverse impacts, which keeps the possibility open that SWCA may have representational standing through him as well as Mr. Thomas. We find that these statements by Mr. Thomas and Mr. Pritchard create disputed facts regarding the impacts of the CO&A. In light of the questions raised by these statements and because we can only grant a motion for summary judgment when the question of a party's standing is clear and free from doubt, we find that the Board cannot grant the Department's and Scrubgrass' motions or the Appellants' cross-motion as it is unclear whether the CO&A has a realistic potential to adversely impact the Appellants' or their use and enjoyment of the affected area.

The Department raises a second line of argument in support of summary judgment, asserting that the CO&A is not an appealable action as it pertains to the Appellants. It acknowledges that the CO&A is an "order" that is generally subject to appeal. However, the Department argues that the CO&A is not appealable by the Appellants because it does not affect their personal or property rights. This is merely a different framing of the Department's standing argument. A Department action affects a party's rights if the party is aggrieved by the action, hence, making the action appealable to the Board by that party. See *Borough of St. Clair v. DEP*, 2015 EHB 290, 302. As detailed above, a party is aggrieved if they can demonstrate they have a direct interest in the outcome of the appeal. At this stage, we are unable to resolve that question for the reasons discussed above.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCRUBGRASS CREEK WATERSHED ASSOCIATION and CITIZES FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2023-097-B**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SCRUBGRASS RECLAMATION COMPANY LP, Permittee	:	

O R D E R

AND NOW, this 26th day of November, 2024, it is hereby ordered as follows:

1. The Department's motion for summary judgment is **denied**.

2. The Permittee's motion for summary judgment is **denied**.

3. The Appellants' cross-motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

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

DATED: November 26, 2024

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