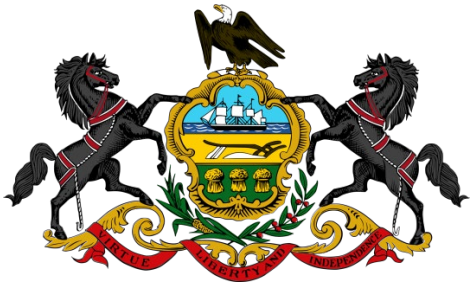
Environmental Hearing Board

# Adjudications and Opinions




## 2024
## VOLUME II

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

# 2024

# JUDGES OF THE

# ENVIRONMENTAL HEARING BOARD

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|---|---|
| Chief Judge and Chairperson | Steven C. Beckman |
| Judge | Bernard A. Labuskes, Jr. |
| Judge | Sarah L. Clark |
| Judge | MaryAnne Wesdock |
| Judge | Paul J. Bruder, Jr. |
| Secretary | Christine A. Walker |

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2024 EHB 1

## FOREWORD

This reporter contains the Adjudications and Opinions issued by the Commonwealth of Pennsylvania, Environmental Hearing Board during the calendar year 2024.

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

## ADJUDICATIONS

## OPINIONS

**Please Note: The Opinion and Order on Motion to Dismiss issued issued on July 25, 2024, in EHB Docket No. 2024-024-W was inadvertently omitted from the original. The Opinion has been added at the end of Volume II.

## 2024 EHB DECISIONS INDEX

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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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** | : | **Issued: July 3, 2024** |

**OPINION AND ORDER ON**
**MOTION IN LIMINE**

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

**Synopsis**

The Board grants a motion in limine precluding the testimony of an expert witness for the appellant where the expert will not offer testimony relevant to the Department's narrow factual determination under appeal.

**O P I N I O N**

Montgomery Township Friends of Family Farms ("Montgomery Friends") has appealed an August 14, 2020 memorandum written by the Department of Environmental Protection (the "Department") that memorializes an evaluation of information provided by Herbruck's Poultry Ranch, Inc. ("Herbruck's") assessing air emissions for an egg laying and processing farm in Montgomery Township, Franklin County that is now in operation. The memorandum says the Department agrees with Herbruck's conclusion that Herbruck's operation qualifies as the "production of agricultural commodities" as defined under Section 4.1(b), 35 P.S. § 4004.1(b), of the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, that the estimated emissions do not trigger the major source requirements of the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q, and that,

therefore, Herbruck's is eligible for the exemption set forth in Section 4.1(a) of the Air Pollution Control Act, 35 P.S. § 4004.1(a).[1]

The exemption in Section 4.1(a) provides that the Air Pollution Control Act does not apply to the "production of agricultural commodities":

> 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).[2] The effect of qualifying for the exemption is that Herbruck's does not need to apply for a plan approval or a permit for the air emissions generated by its facility under the Air Pollution Control Act. However, according to the parties, if the Herbruck's facility exceeds major source thresholds of air emissions, a permit for those emissions would still be required under the Clean Air Act, irrespective of the exemption set forth in Pennsylvania's Air Pollution Control Act. One of the allegations made by Montgomery Farms in its appeal is that Herbruck's air emissions actually do exceed major source thresholds, if those emissions are properly calculated, and Herbruck's is thus not eligible for the exemption.

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[1] Whether or not the Department's memorandum would ordinarily be appealable, we previously denied a motion to dismiss filed by Herbruck's because in an earlier appeal the same parties entered into a stipulation of settlement, approved by this Board, that required Herbruck's to submit certain information to the Department pertaining to the Section 4.1 exemption and then required the Department to render a determination on that information one way or the other. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L (Opinion and Order issued Mar. 8, 2024). We found that, under these unique and unusual circumstances, the memorandum was an appealable action. We reasoned there was not any real difference between the Department being required to make a determination pursuant to a stipulation of settlement and the Department being required to make a determination pursuant to statute or regulation, which we have held to be appealable on a number of other occasions. *See id.*, slip op. at 7-8 (discussing *Winner v. DEP*, 2014 EHB 135; *Kiskadden v. DEP*, 2012 EHB 171; *Love v. DEP*, 2010 EHB 523; *Stern v. DEP*, 2001 EHB 628).

[2] Section 4.1(b) goes on to extensively define the "production of agricultural commodities." There does not appear to be any dispute in this appeal that Herbruck's egg laying farm falls within that definition.

The hearing on the merits in this matter is scheduled to begin on July 22, 2024. The parties have filed their prehearing memoranda. Herbruck's has now filed a motion in limine seeking to preclude the testimony of one of the experts Montgomery Friends has identified in its prehearing memorandum, Abel Russ. Herbruck's asserts that Abel Russ's expert report is focused on the possible effect of the facility's ammonia and particulate matter emissions on public health and the environment. Herbruck's argues that Russ will not offer any testimony that is relevant to the narrow issue of Herbruck's qualifying for the permitting exemption. Montgomery Friends argues in opposition that Russ's testimony is relevant because it relates to issues raised by Montgomery Friends in its notice of appeal, including issues addressing the facility's alleged impact on public health and the environment, and issues pertaining to Article I, Section 27 of the Pennsylvania Constitution.[3] The Department has filed a response in support of the motion, agreeing with Herbruck's that Russ will not offer any testimony relevant to the narrow scope of this appeal.[4]

The purpose of a motion in limine is to provide the Board with an opportunity to consider potentially prejudicial evidence and rule on the admissibility of such evidence before it is referenced or offered at trial. *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93 (citing *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635). *See also* 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine.").

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[3] Article I, Section 27 provides:

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

PA. CONST. art I, § 27.

[4] The Department adds in its response, perhaps as a failsafe, that, to the extent the Department's constitutional obligations are implicated by the motion, the Department has complied with Article I, Section 27.

The Board generally only accepts expert testimony if the testimony will assist us in understanding the evidence or determining a fact in issue. Pa.R.E. 702. "[T]he first question we must ask ourselves when presented with a proffer of expert testimony is whether the expert's specialized knowledge will aid us in understanding the evidence or determining a fact in issue." *Rhodes v. DEP*, 2009 EHB 237, 239. A threshold determination for whether expert testimony will be an aid to us is whether the testimony will be relevant. The scope of our review in any given appeal, and therefore what is generally relevant, is circumscribed by the action under appeal. *See Winegardner v. DEP*, 2002 EHB 790, 793. "Only issues relevant to the particular action being appealed are relevant." *PA Waste, LLC v. DEP*, 2010 EHB 98, 100 (citing *Winegardner*, 2002 EHB at 793). Although relevance can sometimes be quite broad in an appeal, *Bucks County Water & Sewer Authority v. DEP*, 2014 EHB 143, 152, the Board still generally follows the rules of evidence and will only consider evidence that is relevant to the issues before us, *Groce v. DEP*, 2006 EHB 335, 338. *See also* 25 Pa. Code § 1021.123(a) (Board generally applies the rules of evidence; relevant and material evidence of reasonable probative value is admissible). Accordingly, only relevant evidence is admissible and irrelevant evidence must be excluded. Pa.R.E. 402; *Kiskadden*, 2014 EHB at 635. If an expert witness will not offer relevant testimony, the testimony is not admissible.

This is a very narrow appeal. It is an appeal of a factual determination that the Department has made in a memorandum that the Herbruck's facility produces agricultural commodities within the meaning of the Air Pollution Control Act, and that the air emissions from that facility do not exceed major source thresholds under the Clean Air Act. As confirmed by Montgomery Friends' response, instead of addressing the exemption determination, Abel Russ's expert report "concentrates on the public health and environmental impacts of particulate matter and ammonia

emissions." (Resp. Memo at 2-3.) Indeed, the Russ report begins by saying that it "summarize[s] the health and environmental threats posed by particulate matter (PM) and ammonia from poultry confinements, including my own research into the role that poultry-related ammonia emissions play in the ongoing water quality impairments in the Chesapeake Bay and its tributaries." (Russ Report at 1.) The report spends a great deal of time discussing the hazards posed by emissions from concentrated animal feeding operations (CAFOs). The report discusses the public health impacts from particulate matter emissions and argues that any additional source of emissions, regardless of amount, will increase the mortality rate in Franklin County. It asserts that the ammonia produced from the facility will deposit onto the Chesapeake Bay and increase the nitrogen load in the Bay. It says that, even if the Herbruck's facility emits less than the major source thresholds for a pollutant, this will still increase the risk to human health and the environment.

We struggle to see how any of the issues addressed in Abel Russ's expert report are relevant to this limited appeal of whether or not, as a factual matter, Herbruck's qualifies for the statutory exemption. The Russ report, and therefore his purported testimony, is instead entirely focused on things the Department *did not* act upon or decide in the memorandum under appeal. The Department has not made a determination on the effect of the emissions from the facility on the environment or public health. The Department has not made an assessment of any impact of the facility's emissions on the facility's immediate vicinity or on any areas downwind of the facility like the Chesapeake Bay. The Department has not made a determination on the risk associated with the emissions from the facility. The Department has not made a determination on any emission reduction controls that should be or are being used at the facility. All that the Department has done in the memorandum under appeal is made a factual determination that, based on the

information provided by Herbruck's, the facility meets the requirements of the exemption in Section 4.1 by producing agricultural commodities and falling under federal major source thresholds. We do not see how the proffered testimony of Abel Russ could help us determine any fact in issue regarding Herbruck's qualification for the exemption.

None of the arguments in Montgomery Friends' response make a convincing case for the relevance of the report. Montgomery Friends says that the expert report relates to issues raised in the notice of appeal regarding the health effects of poultry farms and the Department's responsibilities under Article I, Section 27, but that does not automatically convert otherwise irrelevant expert testimony into something that is relevant to the subject of this appeal. Montgomery Friends says that the Department failed to consider the public health and environmental impacts of Herbruck's admitted amounts of potential emissions of ammonia and particulate matter, but Montgomery Friends never explains how that should have entered into the decision of whether Herbruck's qualifies for the Section 4.1 exemption. For instance, Montgomery Friends never explains how, even if the Department did consider the public health effects of the emissions, that would have or could have changed the conclusion that Herbruck's emissions do not meet major source thresholds. Absent from Montgomery Friends is any explanation of how public health assessments enter into the factual determination the Department made in the memorandum.

The response also puts forth some unremarkable propositions that the Board can determine whether a Department action violates Article I, Section 27, but Montgomery Friends does not explain how Article I, Section 27 is implicated in the Department's decision here. Montgomery Friends cites other cases where the Board has considered the Department's action in terms of Article I, Section 27, but those cases involved the exercise of the Department's discretion in, e.g.,

renewing a solid waste management permit for an operating landfill, *Friends of Lackawanna v. DEP*, 2016 EHB 641, or in issuing a plan approval for a natural gas compressor station, *Snyder v. DEP*, 2015 EHB 857. In both of those cases, the Department evaluated a permit or plan approval application, decided how to act on that application, and decided what permit conditions and, in *Snyder*, pollution control technologies, that the operation would be subject to. That sort of discretion is just not present here in the factual determination made by the Department.

Montgomery Friends adds that the Department can consider public health effects under the Air Pollution Control Act, citing the Act's declaration of policy, 35 P.S. § 4002(a), but again, there is no explanation how that comes into play in the very defined, narrow decision under appeal. The exemption explicitly says that the Air Pollution Control Act does not apply to the production of agricultural commodities. Even if the Department did believe that there was a risk from the below-major-source emissions from the Herbruck's facility, Montgomery Friends does not explain how the Department somehow could have nevertheless required Herbruck's to apply for an air quality plan approval or permit, or otherwise regulate the emissions from the facility.

This appeal will turn whether or not Herbruck's has satisfied the elements of the exemption in Section 4.1 of the Air Pollution Control Act, not the merits of CAFOs or poultry farms writ large or the potential impacts from those facilities generally, or the potential public health or environmental impacts from Herbruck's facility in particular; those issues simply do not relate to the exemption determination. Montgomery Friends tells us that it has other experts to opine on the issue of whether Herbruck's emissions exceed major source thresholds. We expect those experts to offer testimony more relevant to this appeal and more helpful to our review of the Department's determination.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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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 3rd day of July, 2024, it is hereby ordered that Herbruck's Poultry Ranch, Inc's motion in limine is **granted**. Abel Russ is precluded from testifying at the upcoming hearing on the merits in this matter.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: July 3, 2024**

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

**For the Commonwealth of PA, DEP:**
Alicia R. Duke, Esquire
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**For Appellant:**
William J. Cluck, Esquire
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**For Permittee:**
Robert D. Fox, Esquire
Carol F. McCabe, Esquire
Jessica D. Hunt, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **LAURA M. TIGHE AND MATTHEW A. TIGHE** | : | |
| **v.** | : | **EHB Docket No. 2023-046-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: July 11, 2024** |

**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION TO DISMISS**

**By Steven C. Beckman, Chief Judge and Chairperson**

**Synopsis**

The Board dismisses an appeal of a Department letter for lack of jurisdiction. The letter does not require any action from the Appellants and does not affect the Appellants' personal or property rights, privileges, immunities, duties, liabilities or obligations.

**O P I N I O N**

**Introduction**

This appeal concerns a letter sent by the Department of Environmental Protection ("the Department") to Appellants, Laura and Matthew Tighe (collectively, "the Tighes"). The Tighes reside on Crane Road in Washington Township, Erie County, Pennsylvania. Based on our reading of the filings in this matter, the Tighes apparently own property adjacent to Lovett's Mobile Home Park located on Lisa Lane in Washington Township ("LMHP"). The Tighes are concerned with earthmoving and stormwater issues at LMHP. LMHP has been inspected repeatedly by staff from both the Department and the Erie County Conservation District ("ECCD"). On February 24, 2023, ECCD staff conducted an inspection at LMHP. The observations and findings of that inspection are contained in a Chapter 102 inspection report dated March 3, 2023 ("March 2023 Report"). An

informal hearing was held concerning the March 2023 Report at the request of the Tighes pursuant to 25 Pa. Code § 102.32(c), which allows for persons aggrieved by a conservation district action to request an informal hearing with the Department.[1] Following the informal hearing, the Department sent a letter dated April 19, 2023 ("April 2023 Letter") to the Tighes. The April 2023 Letter states in pertinent part:

> This letter is in response to the informal hearing on April 13, 2023 held by the [Department] pursuant to 25 Pa. Code § 102.32(c). You requested the informal hearing to challenge [March 2023 Report] summarizing the inspector's observations in response to a complaint at the [LMHP] in Washington Township, Erie County.
>
> The Department has reviewed the substantive language of the [March 2023 Report] and the information and materials provided by you during the informal hearing. The Department has determined that the [March 2023 Report] is informative in nature and merely records the inspector's observations. The [March 2023 Report] is descriptive and advisory and not prescriptive or imperative. Accordingly, the [March 2023 Report] is not a challengeable action. See *Karnick v. DEP*, 2016 EHB 1.
>
> During the informal hearing you also raised various other concerns beyond the observations set forth in the [March 2023 Report]. The Department will follow up and conduct a full site inspection of [LMHP] in response to your expressed concerns. The Department will then proceed accordingly with any necessary further action to ensure compliance with National Pollutant Discharge Elimination Permit No. PAC250067 and all applicable statutes and regulations.

(Tighes' Notice of Appeal, at 8).

The Tighes' filed their appeal with the Environmental Hearing Board (the "Board") on May 18, 2023. Included in their Notice of Appeal, the Tighes attached the April 2023 Letter (along with an email transmittal from the Department and an email response from the Tighes), a copy of

[1] Neither party discussed why the Department granted the Tighes' request for an informal hearing and whether they were aggrieved by the actions of the conservation district as those terms are used in the regulation. We make no decision about whether the Tighes were sufficiently aggrieved to require the granting of an informal hearing pursuant to 25 Pa. Code § 102.32(c).

the March 2023 Report, the first page of the coverage approval letter addressed to LMHP for the PAG–02 General Permit dated February 17, 2021, and the first page of the General Permit with a start date of February 17, 2021 and an expiration date of December 7, 2024. In their Notice of Appeal, the Tighes state the subject of their appeal as follows:

> We are appealing the final determination from the [D]epartment's informal hearing conducted April 3, 2023, (see attached letter dated April 19, 2023) in accordance with a Chapter 102.32(c) request. The Department's final determination that the inspector's report of Lovett's mobile Home Park dated February 24, 2023 was only informative in nature and merely recorded the inspectors' observations did not address the numerous violations and evidence provided at the hearing. We contend the inspection report of the informal hearing was prescriptive, imperative and accordingly an appealable action. The Appellants will argue this report cannot be disguised as anything other than false and subject to the provisions of the Clean Streams Laws under Section 611 as: Unlawful Conduct. In addition, the Department stated in its April 19, 2023 letter that a full site inspection of the development at the Lovett's Mobile Home Park would commence, but failed to respond to a following email, (see attached copy) requesting when the full site inspection would occur and if we would have access to it after its completion within our 30 day time limit to file another chapter 102.32(c) request for an informal hearing. We will also argue the Department's failure to address these violations in accordance with Section 601(d), Section 609, and Section 611 of the Clean Streams Law shows an indifference unbecoming of the Department and is inconsistent with the clear intent of the Clean Streams Law.

(Tighes' Notice of Appeal at 1).

Additionally, the Tighes set forth five numbered objections in their Notice of Appeal alleging the following: 1) At the start of the informal hearing, the Department stated that the prior inspections were undertaken because of complaints and denied that any earthmoving activities had commenced; 2) The March 2023 Report, as well as older inspection reports, failed to note numerous violations they produced evidence for during the informal hearing; 3) The statement in the March 2023 Report that provides "Continue work as per approved plans" wrongly permits LMHP to continue work where there are outstanding violations; 4) Due to ongoing violations of

the Washington Township Storm Water Management Ordinance and inaccurate information provided by LMHP, the ECCD should not have provided LMHP coverage under the PAG-02 General Permit. Additionally, because the placement of the outlet of a storm sewer pipe was not in compliance with engineering plans, best management plans necessary to control erosion were not in place; and 5) the Department's statement at the informal hearing whereby it asserted that it had no jurisdiction over uncontrolled releases from a beaver lake even though, according to the Tighes, the released water enters the storm sewer pipe and has caused flooding of the cartway of State Highway Route 99.[2]

Discovery has been ongoing, and the Board has ruled on discovery issues arising from the Tighes' service of subpoenas on both parties and non-parties to this case. The Board quashed the subpoena directed to Washington Township staff and denied requests to quash subpoenas directed at a former ECCD employee, a current ECCD employee and Department staff. We placed certain limits on the three depositions we allowed to proceed regarding the length and subject matter of the proposed depositions. The Department filed its Motion to Dismiss ("Motion") and its Memorandum of Law in Support thereto on March 6, 2024. The Tighes filed a Response in Opposition to the Department's Motion ("Response") and a Memorandum of Law in Opposition to the Motion on April 22, 2024.[3] The Department filed its Reply to the Tighes' Response on May 24, 2024. The deadline for discovery, May 28, 2024, passed shortly after we received the

[2] The length and wording of the Tighes' stated objections in their Notice of Appeal are difficult to parse out and cohesively summarize for the purposes of this Opinion. We have summarized their five objections in this opinion for the sake of our reader, but the Board considered the full text of the stated objections in reaching this decision.

[3] The Tighes' Response also included two cross-motions requesting that we: 1) compel the Department to provide sufficient and proper discovery responses to the Appellants' previously served discovery demands and interrogatories; and (2) conduct a site inspection. (Response at 1). Because we grant the Department's Motion to Dismiss in this Opinion and Order, the Tighes' cross-motions are moot and are, therefore, dismissed without further consideration by the Board.

Department's Reply and neither party requested a further extension prior to that time. We are prepared to rule on the Department's Motion.

**Standard of Review**

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, aff'd, 129 A.3d 28 (Pa. Cmwlth. 2015). The Board evaluates motions to dismiss in the light most favorable to the non-moving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*, 2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144*; Consol*, 2015 EHB at 54; *Winner v. DEP*, 2014 EHB 135, 136-37. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Scott*, 2023 EHB at 140. A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant's claims; rather, the "operative question is: even assuming everything the non-moving party states is true, can – or should – the Board hear the appeal." *Protect PT v. DEP*, 2023 EHB 191, 198, citing *Consol*, 2015 EHB at 55.

**Analysis**

In its Motion, the Department sets forth two reasons why the Board should dismiss the Tighes' appeal. First, the Department argues that the Board lacks jurisdiction over the appeal because the April 2023 Letter is not an appealable action. (Motion ¶ 45 at 9). The Department's second argument is that the appeal is not justiciable because it is aimed at Department inactions and the Board cannot offer meaningful relief. (Motion ¶ 46 at 10). In response to the Department's

position, the Tighes offer three arguments. First, the Tighes state the Motion is fatally flawed and exceeds the proper scope of a motion to dismiss because the Department included an affidavit from Tom McClure as an exhibit to the Motion which contains factual testimony and inherently creates a question of fact.[4] In their second argument, they assert that the March 2023 Report and the April 2023 Letter are appealable because of what they argue is a directive to LMHP in the March 2023 Report to "[c]ontinue work as per the approved plans." The Tighes assert that this language requires LMHP to act and that this action will affect their rights. Lastly, the Tighes argue that questions of fact exist as to whether the Department has abused its discretion by issuing what the Tighes allege is a false report and taking an action that is not supported by the facts. The primary basis for this argument is the Tighes' contention that in reaching its determination, the Department failed to acknowledge and/or consider violations, illegal conduct, and deviations from the approved plans and specifications.

The Board has not previously considered 25 Pa. Code § 102.32(c), the regulation that is at the center of this case. Section 102.32(c) provides as follows:

> A person aggrieved by an action of a conservation district under this chapter shall request an informal hearing with the Department within 30 days following the notice of the action. The Department will schedule the informal hearing and make a final determination within 30 days of the request. Any final determination by the Department under the informal hearing may be appealed to the EHB in accordance with established administrative and judicial procedures.

25 Pa. Code § 102.32(c).

In this case, the final determinations that the Department made pursuant to the Section 102.32(c) informal hearing are set forth in the second paragraph of the April 2023 Letter, whereby

[4] In arriving at our holding in this Opinion and Order, the Board did not consider the affidavit that the Department included in its Motion. Therefore, because the Board did not accord any weight to the affidavit, any question of fact that could have arisen from the affidavit's contents is a non-issue.

the Department concludes that the March 2023 Report was 1) informative in nature and merely recorded the inspector's observations; 2) descriptive and advisory and not prescriptive or imperative; and 3) not a challengeable action. The Department argues that the right to appeal to the Board provided for in Section 102.32(c), does not make all final determinations by the Department following an informal hearing automatically appealable. Instead, it asserts that the right to appeal is qualified by the language "may be appealed […] in accordance with established administrative and judicial procedures." 25 Pa. Code § 102.32(c). Specifically, the Department contends that Section 102.32(c) does not expand the Board's jurisdiction and that the Board only has jurisdiction if the Department's final determination following the informal hearing otherwise satisfies our statutory jurisdiction. After reviewing the arguments of the parties, we agree with the Department and hold that 25 Pa. Code § 102.32(c) does not expand our jurisdiction by making final determinations reached by the Department after an informal hearing automatically appealable to the Board. If the issue of the Board's jurisdiction is challenged in a Section 102.32(c) appeal, we must still evaluate the specifics of the Department's decision to determine if it meets our jurisdictional requirements.[5]

The Board's jurisdiction is limited by statute and regulation. We only have jurisdiction over final actions of the Department affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514 and 25 Pa. Code § 1021.2(a). Here, if the Department's final determination in the April 2023 Letter satisfies this language outlining our

[5] Often, Department letters contain appeal paragraphs provided for in boilerplate language, which frequently state something to the effect that "any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514." We have held that such paragraphs do not in and of themselves transform a non-appealable action into an appealable action. See, *Ballas v. DEP*, 2009 EHB 652, 655; *Law v. DEP*, 2008 EHB 216, 217; *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 415; *Eljen Corp v. DEP*, 2005 EHB 918, 927. While the present appeal involves an appeal-paragraph contained in a regulation rather than a Department letter, the precedent pertaining to Department letters helps guide our decision.

jurisdiction, then the April 2023 Letter is appealable, but if it does not, then the determination is not appealable. There is no rigid rule we apply that makes a Department letter either appealable or non-appealable. Instead, the question of jurisdiction over a Department letter must be made on a case-by-case basis and certain factors such as: the wording of the Department communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and the relief, if any, the Board can provide, guide our determination. See *Northhampton Bucks Cnty. Mun. Auth. v. DEP*, 2017 EHB 84, 86, citing *Merck*, 2015 EHB 543, 545-46; *Teska*, 2012 EHB 447, 454; *Dobbin*, 2010 EHB 852, 858-59 and; *Borough of Kutztown*, 2001 EHB 1115 at 1121-24. "In short, we ask whether a Department decision adversely affects a person." *Northhampton Bucks Cnty. Mun. Auth* at 86, citing 35 P.S. § 7514(a) and (c); 25 Pa. Code § 1021.2.

While the Department action under appeal is specifically the April 2023 Letter, in their Response, the Tighes frequently either confuse or conflate the March 2023 Report as the action under appeal. However, because the March 2023 Report underlies the April 2023 Letter and was the basis for the informal hearing which ultimately gave rise to the Letter, we begin our discussion by briefly addressing the March 2023 Report. Even if the March 2023 Report was the action the Tighes appealed, we still would lack jurisdiction to review that matter. Inspection reports are not ordinarily appealable to the Board unless they direct an action or impose some obligation on a person.[6] See *Robert K. Goetz, Jr. d/b/a Goetz Demolition v. DEP*, 2000 EHB 840. The Tighes are neither the subject of the March 2023 Report nor is there any action directed at them or required

[6] Under the Board's rules, a "person" is defined as "[a]n individual, partnership, association, corporation, political subdivision, municipal authority or other entity." 25 Pa. Code § 1021.2.

of them.[7] As such, the Tighes could not have directly appealed the March 2023 Report itself. Instead, the Tighes requested an informal hearing with the Department concerning the March 2023 Report, the avenue made available to them through Section 102.32(c).

Turning to the April 2023 Letter, the actual Department communication that is on appeal, after careful evaluation, we find that this specific document falls outside our jurisdiction. While a letter from the Department may under certain circumstances constitute an appealable action, generally, comment letters are not reviewable. See *Ballas v. DEP*, 2009 EHB 652, and; *Lower Salford Twp. Auth. v. DEP*, 2011 EHB 333. A letter that does not 1) create rights or obligations; 2) requires anyone to alter their conduct; or 3) direct action from anyone and is merely an interpretation of the law, is typically not appealable. *Lower Salford Twp. Auth.,* 2011 EHB at 340. The April 2023 Letter's wording and substance simply does not rise to the level of an appealable action of the Department. The first paragraph sets out basic information about the hearing process provided under the governing regulation and confirms the subject of the informal hearing. It does not set forth any decisions by the Department and does not adversely affect the Tighes. The last paragraph is forward looking and simply advises the Tighes that the Department will follow up on the other concerns raised by them beyond the March 2023 Report. As noted above, the operable language in the April 2023 Letter is found in paragraph two in which the Department sets forth its opinion that the language used in the March 2023 Report is "informative in nature[,]" is "descriptive and advisory and not prescriptive and imperative[,]" and that it "is not a challengeable action." The substance of these statements demonstrates that the Department's communication is confined to an opinion of its legal position with respect to the March 2023 Report and we do not

[7] The March 2023 Report was directed at LMHP and did not note any violations nor directed LMHP to undertake any action.

see how these statements have any practical impact on the Tighes. Like the March 2023 Report, the April 2023 Letter does not mandate the Tighes (or LMHP) to perform a specific course of conduct, it does not impose obligations that subject the Tighes to liability, and it does not make any directives changing the status quo. Moreover, the language does not indicate any apparent finality. The April 2023 Letter strikes us as the type of advisory communication from the Department that the Board has routinely found to not provide a basis for appeal. We do not see what relief the Board can provide to the Tighes since the letter imposes no requirements on them. We find that the April 2023 Letter is simple a statement of the Department's interpretation of the March 2023 Report and the law governing inspection reports. See *Bucks Cnty. Water & Sewer Auth. V. DEP*, 2013 EHB 659 (a letter that merely advises an applicant of administrative incompleteness and does not order an action is not a final Department action and was merely an interim decision and not appealable by the third-party appellant or applicant); *Chesapeake Appalachia, LLC v DEP*, 2013 EHB 447, aff'd 89 A.2d 724 (Pa. Cmwlth. 2014) (A Department letter that does not affect Chesapeake's rights, obligations, or liabilities does not constitute an appealable action); *Perano v. DEP*, 2011 EHB 750 (A Department letter that does not in and of itself require anything and does not impose new or different obligations is not appealable.).

In their Response, the Tighes specifically challenge the Department's legal opinion set forth in the April 2023 Letter that the March 2023 Report was "descriptive and advisory and not prescriptive or imperative." The Tighes argue that the statement "[c]ontinue work as per the approved plans" found in the March 2023 Report under the heading "Compliance Assistance Recommendations," directed LMHP to take an action and that this directive affected their own rights and those of the public at large. Therefore, they argue, the March 2023 Report was actually prescriptive and/or imperative and the Department's decision otherwise is wrong. We disagree

with the Tighes' interpretation of the language in the March 2023 Report. To us, the phrase "continue work as per the approved plans" does not convey that the Department is ordering LMHP to act, but rather appears to merely confirm LMHP's existing obligation to comply with its permit.[8] The language in and of itself does not require anything of LMHP and does not impose new or different obligations than those that already pre-existed in its permit. But more importantly, for the purposes of this Motion, we again cannot agree with the Tighes' position that somehow the Department's interpretation that the March 2023 Report, including the compliance assistance recommendation section, was "descriptive and advisory" has any impact on them or their rights and thereby makes the April 2023 Letter appealable.

The Tighes' remaining issues and objections are not directed at the April 2023 Letter on appeal but are aimed at what the Tighes contend is the Department's overall inaction at the LMHP site. As such, it is not clear that these issues are even properly in front of the Board in this appeal. However, in order to be as complete as possible, we will briefly address them. In their remaining issues, the Tighes assert that there were violations that should have been noted in the inspection reports and that the Department made statements indicating that it did not have jurisdiction to address an alleged release of water from the breach of beaver dam.[9] These are the types of

[8] The Board and the Commonwealth Court have repeatedly stated that a Department communication that affirms the status quo is not an appealable action. See *Glahn v. DEP*, 2021 EHB 322, aff'd 298 A.3d 455, 460 (Pa. Cmwth. 2023).

[9] As summarized above, in their Notice of Appeal, the Tighes set forth two objections concerning oral statements made by the Department during the informal hearing. In the first statement, the Tighes allege the Department announced that the informal hearing was being held due to complaints, which, according to the Tighes, implied that the Department denied LMHP engaged in earthmoving activities. The second communication the Tighes challenge concern the Department's statement that it did not have jurisdiction over a water release. Oral statements made by Department employees are generally not appealable unless the statement meets the definition of an appealable action. See *City of Allentown v. DEP*, 2017 EHB 908, 920 and *Medusa Aggregates Company v. DER*, 1995 EHB 414, 421-22. Because neither of these statements involve an order or directive but are merely advisory and/or the Department's own interpretation of its jurisdiction, they are not appealable.

inactions by the Department that the Board has routinely stated do not fall under the Board's jurisdiction. In *Glahn v. DEP*, 2021 EHB 322, aff'd 298 A.3d 455 (Pa. Cmwth. 2023), the Board once again made clear that it cannot force the Department to address violations nor require the Department to take action in the face of Department inaction. The Board has repeatedly held that the Department's enforcement discretion is not subject to judicial review by the Board and that its enforcement discretion

> derives from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. **Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department. Similarly, when the Department performs an investigation of a complaint and concludes that there are no violations, that decision, too, will generally remain undisturbed.**

*Ballas v. DEP*, 2009 EHB 652, 654, citing *Law v. DEP*, 2008 EHB 216 (footnotes omitted), (emphasis added).

The Tighes also raise an objection to coverage approval under the PAG-02 Permit issued to LMHP. The permit coverage was issued in February 2021 and cannot be appealed by the Tighes in a Notice of Appeal filed in May 2023. The time to appeal that permit has long since passed. Moreover, we are unable to grant the relief sought by the Tighes in their appeal. The Tighes ask the Board "to review the facts at issue involved in this appeal and determine that the Department abused its discretion by failing to prosecute [LMHP] for permit non-compliance and/or violations." (Tighes' Memorandum at 9). The relief sought by the Tighes is once again asking us to address Department inaction and its exercise of enforcement discretion. The only conceivable relief we could offer is an order directing the Department to take enforcement action against LMHP (who is not a party to this appeal) which, as explained above, is not something we have the authority to

do as the case law has made clear. See *Glahn v. DEP*, 2021 at 329 ("[the Board] cannot order the Department to issue violations […]"). Even if these issues were before the Board, we would not have the jurisdiction to address them.

**Conclusion**

The April 2023 Letter is not an appealable action. It does not require any action by the Tighes and does not impact any of their rights, privileges, immunities, duties, liabilities or obligations. Nothing about the language in 25 Pa. Code § 102.32(c) changes our analysis. That regulation may create the opportunity for a party to appeal a determination by the Department following an informal hearing, but it does not obviate the need for there to be an appealable Department action consistent with Board statutes, regulations and jurisprudence. The Tighes' appeal of the April 2023 Letter should be dismissed. Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURA M. TIGHE AND MATTHEW A. TIGHE** | : | |
| **v.** | : | **EHB Docket No. 2023-046-B** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 11th day of July, 2024, it is hereby ORDERED that the Department's Motion is **granted** and the Appellants' appeal is hereby **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

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

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

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

Judges Clark and Wesdock concur in the result.

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: July 11, 2024**

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

**For the Commonwealth of PA, DEP:**
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Jennifer N. McDonough, Esquire
Dearald Shuffstall, Esquire
*(via electronic filing system)*

**For Appellants, *Pro se*:**
Laura M. Tighe
Matthew A. Tighe
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURA DENGEL** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2022-092-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW SEWICKLEY MUNICIPAL AUTHORITY, Permittee** | : | **Issued: July 15, 2024** |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL**

**By Steven C. Beckman, Chief Judge and Chairperson**

**Synopsis**

The Board denies a motion for leave to amend notice of appeal where it contains no verification as required by 25 Pa. Code § 1021.53(c) and fails to demonstrate that the proposed amendments would not cause undue prejudice to the opposing parties at this late stage in the proceeding.

**O P I N I O N**

**Background**

This matter involves an appeal filed with the Environmental Hearing Board ("Board") by Laura Dengel ("Ms. Dengel") on October 21, 2022. The appeal challenges the Department of Environmental Protection's ("Department's") issuance of a water allocation permit to New Sewickley Township Municipal Authority ("Authority"). In her Notice of Appeal, Ms. Dengel stated her objection as follows: "I am objecting to the Department's actions for granting the issuance of a New Water Allocation Permit to New Sewickley Township Municipal Authority." (Notice of Appeal, Dkt #1). On November 14, 2022, Ms. Dengel filed an Amended Notice of

Appeal ("Amended Appeal"), expanding on her previously stated objection by adding that her reason for objecting is as follows:

> Signed, dated and notarized 06-21-2022; however, this application (Reference No. 62504) was voted on July 7th, 2022. Therefore, the entire application package is null and void because it was illegitimate from the moment it was created. Such application never comes into effect with submission of the Water Allocation Permit Application package to the Department because it misses essential elements of a legal application and violates Federal and State laws.

(Amended Appeal, Dkt # 7).

Throughout this proceeding, the Board has granted several requests to stay proceedings and for extensions of the pre-hearing deadlines. The time for discovery ultimately concluded on December 22, 2023. On March 1, 2024, the deadline for filing dispositive motions, the Department filed a Motion for Summary Judgment ("SJ Motion").[1] Following the SJ Motion, the Authority timely filed a memorandum of law in support thereto and Ms. Dengel filed her Response in Opposition to the Department's SJ Motion ("SJ Response") on April 1, 2024. In her SJ Response, Ms. Dengel incorporated her own request for summary judgment. Following Ms. Dengel's SJ Response, the Department and the Authority quickly filed a Joint Motion to Stay Filing Deadlines ("Motion to Stay") and to Strike ("Motion to Strike") (collectively, the "Joint Motions"). The Joint Motions requested the Board to strike Ms. Dengel's motion for summary judgment as untimely and for raising issues outside the scope of the Amended Appeal and further requested that the Board stay the deadline to respond to Ms. Dengel's summary judgment motion until the Board ruled on the Motion to Strike. On May 9, 2024, Ms. Dengel filed her response to the Joint

[1] The Board set the deadline for dispositive motions on January 31, 2024 in its Order dated October 13, 2023. However, the Board granted the Department's motion to extend the dispositive motion deadline after receiving no response to the motion from either Ms. Dengel or the Authority.

Motions and concurrently filed a motion to amend her appeal. Shortly thereafter, the Department filed a Motion to Stay Proceedings Pending Ruling on its SJ Motion.

On May 17, 2024, following a conference call with the parties, the Board issued two orders. The first order granted the Department's Motion to Strike Ms. Dengel's request for summary judgment after Ms. Dengel stated on the conference call that she did not oppose the Motion to Strike. Additionally, the first order stayed all other deadlines until the Board ruled on Ms. Dengel's verbal request to supplement her motion to amend that she made during the conference call. The Board's second order denied the Department's Motion to Stay Proceedings Pending Ruling on its Motion for Summary Judgment. The Board issued an Order on May 20, 2024, permitting Ms. Dengel to supplement her motion to amend and staying the deadline for replies to Ms. Dengel's SJ Response. On May 24, 2024, Ms. Dengel filed her Motion for Leave to Amend Appeal ("Motion to Amend" or "Motion") and the Department and the Authority filed their Joint Response to the Motion to Amend ("Joint Response"). We are now prepared to rule on the Motion to Amend.

**Standard of Review**

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

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

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

The decision of whether to allow a party to amend its appeal after the period for amendment as-of-right has expired "rests firmly within the Board's discretion" and involves an assessment of whether the amendment will result in undue prejudice to the opposing parties. *Tapler v. DEP*, 2006 EHB 463, 465. In assessing whether the opposing parties will suffer undue prejudice, the Board considers such factors as the following:

1) the time when amendment is requested relative to other developments in the litigation, including but not limited to the hearing schedule;

2) the scope and size of the amendment;

3) whether the opposing party had actual notice of the issue, including whether it was raised in other filings;

4) the reason for the amendment; and

5) the extent to which the amendment diverges from the original appeal.

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

**Discussion**

In reviewing the Motion to Amend, it is not entirely clear to the Board the exact issues/objections Ms. Dengel is raising. The Memorandum in Support of the Motion to Amend includes a brief description of the Pennsylvania Administrative Procedures Act and, in addition, includes the following statement:

> Including but not limited to: Permit Decision Guarantee, coordinated permits, the Water Rights Act, the Safe Drinking Water Act, the Fourteenth Amendment of the United States Constitution, and the public participation requirements pertaining to Freedom of

> Information Act, Open Meetings and Sunshine Act are a few of the additional encompassing laws and legal principles which are being objected by the Department's Permit approval action.

(Memorandum in Support of the Motion to Amend at 2). While this list presumably sets forth laws that Ms. Dengel believes the Department violated, the Motion does not offer any facts or further explanation to assist the Board in understanding how or in what way Ms. Dengel alleges the Department and/or Authority violated any of these laws and/or legal principles. Ms. Dengel contends that she is not seeking to raise any new objections but instead, she is merely attempting "to state the legally specific arguments which will clearly define the issues raised in the [Amended Appeal]." (Motion to Amend ¶ 5). She goes on to argue that although "it has taken [her] a while to unpack what the correct claims are" neither the Department nor the Authority should be surprised by any of the claims she is now asserting. ("Memorandum in Support of Motion to Amend at 3). She asserts that the requested amendments will not result in undue prejudice to either the Department or the Authority but would instead offer clarification of the issues to the opposing parties. (See Motion to Amend ¶ 3). She further states that in ruling in favor of her Motion, the Board and the parties would be spared further confusion moving forward. (See Motion to Amend ¶ 6).

The Department and the Authority oppose the Motion to Amend on the basis that it is procedurally deficient because it is not verified. Additionally, they argue that the proposed amendments are sweeping in their scope, diverge significantly from the Amended Appeal, and that it is far too late in the proceedings to entertain the many new claims set forth by Ms. Dengel without incurring prejudice. Additionally, they argue that they had no notice that Ms. Dengel intended to raise such issues and that she has provided no persuasive reason for waiting until this late stage in the proceeding to amend her appeal. After reviewing the parties' arguments, we agree

with the Department and the Authority and conclude that Ms. Dengel's Motion to Amend should be denied by the Board.

First, Ms. Dengel's Motion to Amend is procedurally deficient. Section 1021.53(c) of the Board's rules requires that a motion to amend is both verified and supported by affidavits. While Ms. Dengel included an affidavit with her Motion to Amend, it lacks verification and therefore the Motion can be denied on that basis alone. As we held in *Harvilchuck v. DEP*, 2013 EHB 544, "a motion for leave to amend an appeal must be denied where it is not verified and supported by affidavits […]" *Id*. at 546 (quoting *Robachele*, 2006 EHB at 375 (citing *CNG Transmission Copr. v. DEP*, 1998 EHB 1, 3).

Even if we were to look past the procedural deficiencies of Ms. Dengel's Motion, she still has not met her burden to convince us that the Department and the Authority would not suffer undue prejudice by granting her Motion. Ms. Dengel has not provided any legitimate explanation for, or extenuating circumstances justifying, the proposed late amendment in this appeal. As we noted earlier, we look to five factors when assessing whether an amendment to an appeal will cause undue prejudice (i.e., timing of the request, the scope of the amendment, the extent to which it diverges from the original appeal, whether the opposing parties had notice, and the reason behind the request to amend). All five factors favor the conclusion that the Department and the Authority would be prejudiced if we allowed the requested amendment.

Ms. Dengel's filed her Motion to Amend extremely late in this matter's proceedings. Discovery was closed and the deadline for dispositive motions had passed. The Department's Motion for Summary Judgment was already pending in front of the Board. Recently, in *Protect PT v. DEP*, 2023 EHB 15, the Board denied the appellant's motion to amend. While we denied that motion on the basis it was not verified and lacked the required affidavits, we also noted the

late stage of the case when the motion was filed, approximately two weeks before the close of discovery. In *Starr v. DEP*, 2002 EHB 799, the Board denied a motion to amend the appeal where discovery had been closed for one month after having been extended and amending the appeal would have required the reopening of discovery. Here, the matter is significantly further along than either of these two cases. Discovery had been closed for over three months and the dispositive deadline motion had also passed before Ms. Dengel requested an amendment. At this late stage and considering the litany of legal theories Ms. Dengel has raised, discovery would have to be reopened and a new deadline set for dispositive motions. Presumably, the Department would need to reevaluate its pending dispositive motion and decide whether to withdraw and replace it or abandon it entirely. All of this would result in further delay and clearly prejudices the Department and the Authority.

Moreover, the Motion to Amend requests the introduction of at least nine legal principles that have not been directly raised in this matter prior to Ms. Dengel's Motion to Amend. The scope of the proposed amendments is extremely broad, and the new legal allegations diverge significantly from the objection set forth in the Amended Appeal. Further, Ms. Dengel has indicated that the scope of her legal objections could be larger still, stating in her affidavit that "additional laws or legal principles may come to my attention between now and when the final Notice of Appeal is submitted […]" (Affidavit of Ms. Dengel in Support of Motion to Amend ¶ 3). Ms. Dengel has not provided us a credible reason for allowing her new legal arguments to come in at this late stage. In *Joshi v. DEP*, 2018 EHB 787, the Board denied a *pro se* appellant's request to amend his appeal where it was clear to the Board that the appellant's proposed amendments did not rise from new information revealed in discovery but instead, the only real reason he sought to amend was because he had learned of new legal issues that were relevant to

his appeal. We stated that "[o]ur overriding impression is that this is a simple case of a party doing more research and devising new theories as the case goes along based upon long-known information." *Joshi*, 2018 EHB at 792. We are under that same impression here. Ms. Dengel has not pointed out any discovery that revealed new information leading to the need to amend her appeal. Further, she offers no persuasive reason in support of her late filing or for the breadth of entirely new and unrelated objections other than she learned of new legal theories while responding to the Department's SJ Motion and/or upon further thought and legal research.

Finally, Ms. Dengel insists that the broad set of legal principles that she is just now spelling out for the first time, were somehow inherent in her original objection and that her new legal assertions should have been apparent to the Department and the Authority all along. Ms. Dengel cites to the objection contained in her Amended Appeal which states that the Permit application/issuance "misses essential elements of a legal application and violates Federal and State laws." (Motion to Amend ¶ 1). Ms. Dengel is in essence arguing that this singular statement has preserved her right to object to any Federal and/or Pennsylvania law in existence that could have application in this matter. The Board's Notice of Appeal Form clearly denotes that when filing an appeal, all objections must be included and that the objections *must be specific* whether they are factual or legal. (See Board's Notice of Appeal Form ¶ 4). Ms. Dengel's Amended Notice of Appeal specifies the factual circumstances that formed the basis of this matter; the date on the permit application is earlier than the date the application was voted on. At this late stage of the proceedings, we find that reliance on the catchall phrase asserting that the application violates "Federal and State Laws" is not adequate to have put the Department and the Authority on notice of the broad new issues she is seeking to raise in her request to amend. The sole issue that Ms. Dengel raised in her appeal with any specificity was the date of the signature on the permit

application. The proposed amendments to her appeal are far afield of the original complaint. We are not persuaded by her assertion that the opposing parties should not be surprised by these new issues.

Ms. Dengel has failed to meet her burden to demonstrate that the Department and Authority would not suffer undue prejudice by allowing her to amend her appeal. The Motion to Amend was filed extremely late in this proceeding and the proposed amendments are vast in the scope of the legal issues that she seeks to raise and dramatically diverge from the original objection in the Amended Appeal. The prejudice to the Department and the Authority are readily apparent if we were to grant the Motion to Amend. Therefore, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURA DENGEL** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-046-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW SEWICKLEY MUNICIPAL AUTHORITY, Permittee** | : | |

**O R D E R**

AND NOW, this 15th day of July, 2024, it is hereby ORDERED that the Appellant's Motion for Leave to Amend Notice of Appeal is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: July 15, 2024**

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

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Christopher L. Ryder, Esquire
*(via electronic filing system)*

**For Appellant, *Pro se*:**
Laura Dengel
*(via electronic filing system)*

**For Permittee:**
Paul A. Steff, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **MOUNTAIN WATERSHED ASSOCIATION** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-077-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: July 18, 2024** |
| | : | |

**OPINION AND ORDER ON**
**PETITION TO INTERVENE**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Board grants intervention to an underground mining company in an appeal involving a petition to designate an area as unsuitable for surface mining. Although the appellant has set forth strong arguments against intervention, the mining company has sufficiently demonstrated a direct interest in the appeal.

**O P I N I O N**

**Introduction**

In January 2024, Mountain Watershed Association (Mountain Watershed) submitted to the Department of Environmental Protection (Department) a petition seeking to have approximately 11,000 acres of land near the headwaters of Four Mile Run in Westmoreland County declared "unsuitable for mining" (UFM) under 25 Pa. Code Chapter 86, Subchapter D (the UFM petition). Subchapter D sets forth the criteria and procedures for designating areas of land unsuitable for surface mining operations. By letter dated February 23, 2024, the Department rejected the petition stating as follows:

> The Department has found that the MWA's petition lacks sufficient allegations of facts and supporting evidence to establish that the petition area is unsuitable for all or certain types of surface mining operations, as required by 25 Pa. Code § 86.123(c)(2). *The Department has determined that the allegations of harm lack serious merit and therefore deemed the MWA's petition frivolous, as defined in 25 Pa. Code § 86.124(a)(2).* As per 25 Pa. Code § 86.124(a)(4), the petition is being returned (enclosed).

(Ex. B to Notice of Appeal) (emphasis added). Section 86.124(a)(2) defines a "frivolous petition" as "one in which the allegations of harm lack serious merit." 25 Pa. Code § 86.124(a)(2).

The Department's letter set forth the reasons for its determination that Mountain Watershed's UFM petition was frivolous:

> The petition does not establish a causal relationship between the allegations of harm cited in the petition and surface mining activities in the petition area. The allegations of harm cited in the petition include impacts to surface water bodies; these impacts include the potential for changes in stream flow and the introduction of pollution from parameters such as temperature, pH, iron, and manganese. The petition provides facts and supporting evidence that only associate those impacts with underground mining activities; the petition does not adequately link those impacts to surface mining activities as defined in §86.101.
>
> The Department has determined that this petition does not qualify for review under the UFM program. However, the Department will still consider the concerns raised in the petition through the permit application review process.

(Ex. B to Notice of Appeal.)

On March 22, 2024, Mountain Watershed appealed the Department's determination to the Environmental Hearing Board (Board). On May 8, 2024, LCT Energy, L.P. (LCT) filed a petition to intervene in the matter. According to LCT's petition, it is a metallurgical coal producer that operates an underground coal mine known as the Rustic Ridge #1 mine (sometimes referred to herein as simply the "Rustic Ridge mine") in the area covered by the UFM petition. (Petition to Intervene, para. 3, 4.) LCT has applications pending before the Department to renew its Coal

Mining Activity Permit (permit) for Rustic Ridge #1 and to modify the permit to include additional underground acreage (the Rustic Ridge #1 Expansion). (*Id*. at para. 11, 13, 15.) Additionally, in August 2022, LCT filed a pre-application with the Department to construct a new underground mine known as the Rustic Ridge #2 mine. (*Id*. at para. 18.) According to the map submitted with Mountain Watershed's UFM petition, LCT believes that the area subject to the petition would include LCT's existing and planned mining operations, "including the north central portion of Rustic Ridge #1 as it currently exists, nearly all of the forthcoming Rustic Ridge #1 Expansion, and a substantial portion of Rustic Ridge #2." (*Id*. at para. 23-24.) Although LCT operates an underground mine, the UFM petition includes several references to the Rustic Ridge mine and the proposed Rustic Ridge #2 mine as a basis for why the petition seeking to designate the area as unsuitable for surface mining should be granted. Specifically, the UFM petition addresses what Mountain Watershed contends are surface impacts from LCT's underground mining operation. Shortly after the UFM petition was submitted, LCT sent a letter to the Department opposing the petition. It now seeks to intervene in this appeal. Mountain Watershed filed an answer opposing the intervention petition. LCT was granted leave to file a reply, and Mountain Watershed a sur-reply. According to the petition to intervene, the Department does not oppose intervention. (Id. at para. 43.)

**Standard for Intervention**

Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), governs intervention and provides that "any interested party may intervene in any matter pending before the Board." In the context of intervention, the phrase "interested party" means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. Department of Environmental Resources,* 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). The interest

required to demonstrate standing to intervene "must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination." *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 879, 880 (quoting *P.H. Glatfelter v. DEP*, 2000 EHB 1204 (quoting *Giordano v. DEP*, 2000 EHB 1154, 1155-56)).

The right to intervene in a pending appeal is comparable to the right to file an appeal at the outset and, therefore, an intervenor must have standing. *Lananger v. DEP*, EHB Docket No. 2024-016-B et al., *slip op*. at 2 (Opinion and Order issued May 30, 2024) (citing *Logan v. DEP*, 2016 EHB 531, 533; *Wilson v. DEP*, 2014 EHB 1, 2; *Pileggi v. DEP*, 2010 EHB 433, 434). In order to have standing to appeal an administrative decision, persons must have a direct interest in the subject matter of the case. *Muth v. Department of Environmental Protection*, 315 A.3d 185, No. 1346 C.D. 2022, *slip op*. at 19 (Pa. Cmwlth. Apr. 16, 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). *See also, Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Muth, supra.*

**Review Process for UFM Petitions**

Before proceeding to the parties' arguments, it is helpful to review the regulatory process that is in place for declaring an area unsuitable for mining. Pursuant to 25 Pa. Code § 86.123(a), "[a] person who has an interest which is, or may be, adversely affected has the right to petition the Department to have an area designated as unsuitable for surface mining operations." The Department may determine a petition to be incomplete, in which case it will return the petition to

the petitioner and ask for additional information. The Department may also determine that a petition is "frivolous" under Section 86.124(a)(2), in which case it will reject the petition outright and will not proceed with further review. As noted earlier, this is the determination that was made by the Department in this matter. Petitions that are complete and not rejected by the Department as frivolous will be processed in accordance with the procedures set forth in 25 Pa. Code §§ 86.124, 86.125 and 86.126. This process involves several opportunities for public comment as well as a public hearing. *Id*. at § 86.124(b)(1), § 86.125(a), § 86.125(j). Persons who are able to demonstrate that they will be directly impacted by the UFM designation may participate in the process as intervenors. *Id* at § 86.123(c). Following the hearing and public comment period, the Department will make a recommendation to the Environmental Quality Board (EQB). *Id*. at § 86.125(j). If the EQB moves forward to designate an area as unsuitable for surface mining, the designation is made through the rulemaking process in accordance with the Regulatory Review Act. *Id*. at § 86.126(b)(1).

**Discussion**

LCT asserts that it should be permitted to intervene in this appeal of the Department's determination that Mountain Watershed's UFM petition was frivolous in order "to preserve and protect the direct, substantial, and immediate interests in the continued and uninterrupted operation of Rustic Ridge #1 and the further development of its mining operations in the Rustic Ridge area..." (Petition to Intervene, para. 37.) As a mine operator within the proposed UFM area, LCT asserts that its interests in this matter are greater than that of the general public. Additionally, LCT contends that it has a direct interest in this matter due to its concern that a decision by the Board requiring the Department to accept Mountain Watershed's UFM petition for review could impose a permit bar in the proposed petition area for the duration of the review period.

Mountain Watershed opposes intervention and strongly argues that LCT does not have standing in this matter because it will neither gain nor lose by direct operation of the Board's decision. Mountain Watershed argues that this appeal presents a very narrow question, i.e., whether "the Department appropriately engaged in its regulatory role when determining a threshold question under the UFM process." (Mountain Watershed Sur-reply, p. 2.) While Mountain Watershed acknowledges that a decision granting the UFM petition could impact LCT, it points out that this is not the action before the Board. The Board, at this juncture, is simply being asked to rule on the question of whether the Department erred in rejecting the UFM petition as "frivolous" under 25 Pa. Code § 86.124(a)(2). Mountain Watershed contends that even if the Board were to issue a decision in its favor, that decision would have no immediate or substantial adverse effects on LCT because if the Board finds that the Department erred, the next step is not approval of the UFM petition but simply the beginning of the review process outlined above. In other words, the outcome of the appeal before the Board is simply to determine whether that process begins; it is not a decision on the merits of the UFM petition itself. Mountain Watershed points out that, should that review take place, LCT will have an opportunity to participate as an intervenor in that process.

Mountain Watershed further argues that even if the Board finds that the Department must accept the UFM petition for review, there is no guarantee that it will result in a UFM designation. Nor would any such designation come quickly – both Mountain Watershed and LCT agree that the review process can take upwards of three years. Thus, argues Mountain Watershed, LCT has failed to establish that it has a "direct and immediate interest" in this matter, i.e., an interest that is not remote, but rather, one which establishes "a sufficiently close causal connection between the

asserted interest and the actual or potential harm associated with the challenged action." *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

LCT disagrees and argues that even if Mountain Watershed's UFM petition is simply accepted for review it could have an immediate and substantial adverse impact on LCT's operations. In particular, LCT expresses concern that while the UFM petition is under review it could act as a block on its pending permit applications. Mountain Watershed counters this argument, pointing out that the UFM regulations no longer contain a permit block provision. While Section 86.124(a)(6) previously contained language prohibiting the Department from issuing permits for surface mining activities in proposed UFM areas where certain conditions were met, that language was removed several years ago.[1]

Nonetheless, LCT argues that the Department could choose to delay action on applications pending in the proposed UFM area even in the absence of regulatory language. As both the operator of a currently active mine and the applicant for a new mine within the proposed UFM area, LCT asserts that its interests in this matter are greater than that of the general public. LCT cites to several UFM regulations as support for its assertion that mine operators and/or permit applicants within a proposed UFM area have a substantial interest in UFM proceedings: For example, Section 86.124(a) requires the Department to provide notice of receipt of a UFM petition to operators with pending permit applications within the proposed petition area; Section 86.124(a)(6) authorizes the Department to dismiss a UFM petition for a proposed petition area in

[11] 25 Pa. Code § 86.124(a)(6) previously stated as follows: "The Department *will not issue permits for surface mining activities in areas included within a petition for a designation* under § 86.122 (relating to criteria for designating lands as unsuitable) if the petition is received by the Department prior to the close of the public comment period for the permit, unless the permit applicant establishes prior substantial legal and financial commitments in a surface mining operation within the proposed permit area." (Emphasis added.) This language was removed effective November 29, 1997. *See* 27 *Pa. B*. 730 (February 8, 1997) and 27 *Pa. B*. 6186 (November 29, 1997).

which an administratively complete permit application is pending; and Section 86.124(b)(2) requires the Department to give priority to UFM petitions that include areas with pending permit applications.

Mountain Watershed points out that the regulations relied on by LCT apply only to applicants for *surface mining operations*. Because LCT's pending permit applications are for underground mines, Mountain Watershed argues that LCT's interest is no greater than that of the general public. LCT acknowledges that the regulations pertain to surface mining operations but asserts "they nonetheless demonstrate a regulatory intent to respect the [Department's] broader permitting processes and the interests of mine operators who have invested resources in those processes." (Petition to Intervene, n. 2.) Moreover, LCT argues that Mountain Watershed's UFM petition is premised on the contention that the Department should consider environmental harms resulting from LCT's underground mining operations in determining whether to designate the area as unsuitable for mining, and, therefore, LCT's interests in this matter are more than merely a general interest.

Mountain Watershed argues that this appeal is primarily a matter of interpretation surrounding the term "surface mining operations," for which LCT can offer no meaningful input. It directs our attention to the following statement in the Department's determination letter finding the petition to be frivolous: "The petition provides facts and supporting evidence that only associate those impacts [cited in the UFM petition] with underground mining activities; the petition does not adequately link those impacts to surface mining activities as defined in §86.101." According to Mountain Watershed, this language indicates the following:

> [T]he Department *did* find that there were allegations of harm present, but rejected those harms based on its incorrect interpretation of §86.101. Accordingly, the Department's "frivolous" finding was fundamentally based on its unsupported interpretation that the UFM

> statutory scheme does not include impacts from surface mining incidental to underground operations.

(Mountain Watershed Sur-reply, p. 7.) Mountain Watershed argues that, although LCT may have a general interest in the legal precedent established by the resolution of this question, its interest is not enough for intervention. In support of its argument, Mountain Watershed cites *TJS Mining, Inc. v. DEP,* 2003 EHB 507. In *TJS*, the Board rejected a petition by the United Mine Workers of America (UMWA) to intervene in an appeal of a mining company's challenge to compliance orders dealing with miner safety. In denying the petition, the Board determined that the petitioner had failed to explain how it had a direct interest in the outcome of the case, as opposed to a general interest in the precedent. The Board stated:

> What [the petitioner] is really arguing is that it has a keen interest in the legal issue that is presented in this appeal. A party with such an interest may very well be entitled to participate as an *amicus curiae*, but such as [sic] interest, without more, is insufficient to justify standing as a party.

*Id.* at 509 (quoting *Joseph J. Brunner, Inc. v. DEP*, 2003 EHB 186, 189).

Mountain Watershed argues that LCT, like the petitioner in *TJS*, simply has an interest in the legal precedent that may be set in this case, which is insufficient to convey standing to intervene as a party. Mountain Watershed states:

> The purpose of this appeal is not to determine whether any or all of LCT's mining operations qualify as surface mining operations, but rather, to determine what qualifies as surface mining operations in general. Thus, this appeal has the potential to establish a legal precedent with respect to how a definition is interpreted for a particular regulatory scheme for the state and all mining companies as a whole, rather than for a specific mine, location, or company.

(Mountain Watershed Answer, p. 8-9.) In its reply, LCT disputes that the statutory interpretation surrounding the term "surface mining operations" is the only question in this appeal, but even if it

were, LCT argues that it nonetheless has a direct interest in this appeal since LCT's mining operations and pending permit applications are the subject of the UFM petition.

In evaluating the parties' filings, we find that both sides have set forth strong arguments in support of their respective positions. In particular, Mountain Watershed sets forth a well-articulated and compelling argument that the scope of this appeal is very limited: The Board has not been asked to review whether the UFM petition should be granted or denied, but simply whether the Department erred in failing to consider the petition at all pursuant to 25 Pa. Code § 86.124(a)(2). Mountain Watershed makes a strong argument that intervention by LCT at this stage of the process may be premature since the Board's decision will not result in an automatic UFM designation.

However, LCT sets forth an equally compelling argument that because its mining operation is the primary focus of the UFM petition, it has an interest in whether that petition is accepted for review by the Department. A close examination of the UFM petition reveals that it substantially focuses on LCT's operations at the Rustic Ridge #1 mine, the proposed expansion of the #1 mine, and the application for the Rustic Ridge #2 mine. It is clear that at least one goal of the petition is to address what Mountain Watershed believes are impacts from current and proposed mining operations at the Rustic Ridge mine. Indeed, a central question raised by this appeal is whether the Department is required to consider surface impacts incidental to underground mining operations in its evaluation of a UFM petition; Mountain Watershed's petition addresses not just surface impacts from underground mining in general, but specifically surface impacts from LCT's operations at the Rustic Ridge mine and the proposed Rustic Ridge #2 mine. In particular, this section of the UFM petition focuses on the surface facility that would be developed to provide

portal access for the proposed Rustic Ridge #2 mine. Numerous other sections of the UFM petition also focus extensively on the Rustic Ridge operations. [2]

Although we agree with Mountain Watershed that a ruling in its favor in this appeal may have no immediate impact (or any impact) on LCT's ability to conduct mining in the petition area, LCT nonetheless has a direct interest in this matter by virtue of its prominent role in the UFM petition. For one thing, if the UFM petition is accepted for review by the Department, LCT will undoubtedly participate in the review process as an intervenor. Because its mining operation and proposed expansion play a significant role in the UFM petition, it may be required to provide information to the Department as part of the review process. It will likely seek to counter Mountain Watershed's argument that surface impacts incidental to its underground mining operation should be evaluated as part of the UFM process. In other words, it does have an interest in whether the UFM petition moves forward for review.

Additionally, although 25 Pa. Code § 86.124(a)(6) no longer contains language requiring the Department to implement a permit bar upon receipt of a UFM petition, LCT raises a valid point that the acceptance of Mountain Watershed's UFM petition for review could result in a delay or suspension of the Department's review of the permit application for the Rustic Ridge #2 mine since it is a subject of the UFM petition. The Rustic Ridge #2 mine is also referenced in the notice of appeal. In Objection No. 1 of the notice of appeal, Mountain Watershed states as follows:

> DEP's determination was arbitrary and unreasonable because it relied on the incorrect claim that Appellant only provided evidence regarding impacts from underground mining activities. Appellant, in fact, provided legally sufficient evidence outlining the ways in which the surface activities incident to underground mining for the Rustic Ridge #2 mine would result in impacts that meet the criteria for unsuitability. Appellant's Petition provides legally sufficient

[2] In its reply, LCT notes that the words "LCT" and "Rustic Ridge" appear 80 times throughout the 78-page UFM petition, excluding abbreviations such as "RR #1" or "RR#2." (LCT Reply, n. 2.)

> evidence that creates a causal connection between the stated anticipated harm/impacts and surface mining activities, as statutorily defined.

(Notice of Appeal, p. 4, para. 1 of "Objections.") Thus, at least one goal of the UFM petition is to prevent or limit the development of the Rustic Ridge #2 mine in the proposed UFM area. LCT's interest in the potentially adverse impact the UFM petition may have on its ability to mine is sufficient to convey standing. *PA Waste, LLC v. DEP*, 2015 EHB 350, 355.

The Board has held that it is a relatively low burden to establish standing for intervention. *Barnside Farm Composting Facility v. DEP*, 2011 EHB 165, 166; *PA General Energy Co. v. DEP*, 2021 EHB 7, 12; *TJS Mining*, 2003 EHB at 508. The Commonwealth Court has instructed that all that is required to have standing in an administrative agency action is a direct interest. *Muth, supra*; *Food & Water Watch, supra*. The requirement of a direct interest ensures that the Board concerns itself with "material interests that are discrete to some person or limited class of persons" rather than "more diffuse ones that are common among the citizenry." *Muth*, *slip op*. at 19 (quoting *Citizens Against Gambling Subsidies*, 916 A.2d at 628). For the reasons set forth above, we believe that LCT has established a sufficiently direct interest in this appeal to meet the criteria for intervention.

In granting the petition to intervene, we are mindful that the question presented by this appeal is very narrow as set forth above. As such, LCT's intervention in this matter will not be permitted to expand the very limited scope of this appeal. 25 Pa. Code § 1021.81(f); *PA Waste*, 2015 EHB at 357 (citing *Multilee, Inc. v. DER*, 1994 EHB 989, 993).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **MOUNTAIN WATERSHED ASSOCIATION** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-077-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 18th day of July, 2024, it is hereby ordered:

1) LCT's Petition to Intervene is granted.

2) Henceforth the caption shall read as follows:

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| **MOUNTAIN WATERSHED ASSOCIATION** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-077-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LCT ENERGY, L.P., Intervenor** | : | |

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: July 18, 2024**

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

**For the Commonwealth of PA, DEP:**
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Richard Marcil, Esquire
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**For Appellant:**
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Jennifer Schiavoni, Esquire
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**For Intervenor:**
James V. Corbelli, Esquire
Stefanie Pitcavage Mekilo, Esquire
Sean M. McGovern, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LIBERTY TOWNSHIP and CEASRA, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-036-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee** | : | **Issued: July 29, 2024** |

**OPINION AND ORDER ON**
**MOTION IN LIMINE**

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

**Synopsis**

The Board grants in part a motion in limine and excludes as irrelevant some of the opinions listed in the Appellants' expert reports on hydrogeology.

**O P I N I O N**

Liberty Township and CEASRA, Inc. (the "Appellants") have appealed the Department of Environmental Protection's (the "Department's") issuance of NPDES Permit No. PA0263664 to Tri-County Landfill, Inc. ("Tri-County"). The permit establishes the terms and conditions that will need to be met relating to the surface water discharges from Tri-County's municipal waste landfill to an unnamed tributary to Black Run in Liberty Township, Mercer County. The NPDES permit authorizes three discharges, two of which involve the discharge of stormwater runoff from the construction of landfill cells and earthen berms from a sedimentation basin (Outfalls 004 and 005), and the other a discharge of treated wastewater from a future treatment plant (Outfall 006) that will treat landfill leachate, wastewater from Tri-County's waste transfer station, truck wash, any contaminated stormwater runoff, and sanitary wastewater. Tri-County has not yet obtained a

water quality management (Part II) permit for the construction of the plant that will treat the wastewater before it is discharged.[1]

The Tri-County landfill previously operated from approximately 1950 to 1990 but has been dormant ever since. In December 2020, the Department issued to Tri-County a major modification to Tri-County's solid waste management permit authorizing the municipal waste landfill to once again accept waste and to operate on an approximately 99-acre area. The same Appellants in this appeal filed an appeal of the major modification of the solid waste permit. On January 8, 2024, we issued an Adjudication dismissing the Appellants' appeal. *Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L (Adjudication, Jan. 8, 2024). The Appellants have appealed our Adjudication to the Commonwealth Court. *See* Cmwlth. Ct. Docket No. 107 C.D. 2024.

In this appeal, the Appellants argue that the NPDES permit should be rescinded for a variety reasons, including because, according to the Appellants, the Department lacked the authority to issue the permit, the permit authorizes discharges to an impaired waterbody, the discharges will harm threatened or endangered species, Tri-County's compliance history should have precluded the issuance of the permit, and the public notice of the permit issuance was incorrect. The Appellants also argue that the issuance of the permit was contrary to Article I, Section 27 of the Pennsylvania Constitution and violated the Appellants' right to equal protection.

The Appellants state in their pre-hearing memorandum that they intend to call Daniel S. Fisher, P.G. to testify as an expert in "geology and hydrogeology, including *inter alia* contaminant source identification (including the waste mass), aquifer characterization, groundwater flow

[1] Effluent limits are established in an NPDES permit, while treatment methods to meet those effluent limits are contained in a separate water quality management or Part II permit. *See City of Allentown v. DEP*, 2017 EHB 908, 917 n.3 (explaining difference between NPDES and water quality management permits); *University Area Joint Auth. v. DEP*, 2013 EHB 1, 1-2 (same).

modeling, and monitoring well systems." (Apps. Pre-Hearing Memo. at 83.) Mr. Fisher has submitted an expert report and a rebuttal expert report.

Tri-County has filed a motion in limine[2] asking us to preclude Mr. Fisher from testifying about most of the opinions listed in his expert reports.[3] Tri-County argues, with one exception,[4] that Mr. Fisher's opinions are irrelevant, constitute a collateral attack on a different permit, and are barred by the doctrine of collateral estoppel. The Appellants oppose the motion.

The scope of our review in any given appeal, and therefore what is relevant, is circumscribed by the action under appeal. *See Winegardner v. DEP*, 2002 EHB 790, 793. "Only issues relevant to the particular action being appealed are relevant." *PA Waste, LLC v. DEP*, 2010 EHB 98, 100 (citing *Winegardner*, 2002 EHB at 793). Although relevance can sometimes be quite broad in an appeal, *Bucks County Water & Sewer Authority v. DEP*, 2014 EHB 143, 152, the Board still generally follows the rules of evidence and will only consider evidence that is relevant to the issues before us, *Groce v. DEP*, 2006 EHB 335, 338. *See also* 25 Pa. Code § 1021.123(a) (Board generally applies the rules of evidence; relevant and material evidence of reasonable probative value is admissible). Accordingly, only relevant evidence is admissible and irrelevant evidence must be excluded. Pa.R.E. 402; *Kiskadden*, 2014 EHB at 635. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact

[2] A purpose of a motion in limine is to provide the Board with an opportunity to consider potentially inadmissible evidence and rule on the admissibility of that evidence before it is referenced or offered at the hearing on the merits. *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93 (citing *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635). *See also* 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine.").

[3] By letter, the Department has concurred in Tri-County's motion.

[4] Although somewhat unclear, Mr. Fisher's reports seem to indicate that he intends to offer opinions that appear to relate to radiological parameters in the surface water discharge at Outfall 006, which is the subject of the NPDES permit. (Fisher Main Report at 9, 14; Rebuttal Report at 7 (unnumbered).) Tri-County's motion does not seek to exclude those opinions.

is of consequence in determining the action. Pa.R.E. 401. Whether evidence has a tendency to make a given fact more of less probable is determined by the Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal. *R.R. Action and Advisory Comm. v. DEP*, 2009 EHB 472, 474 (citing Official Comment to Pa.R.E. 401).

This is an appeal from the NPDES permit, nothing else. It does not provide an occasion to rehash objections to Tri-County's solid waste permit. The NPDES permit contains terms and conditions that pertain to discharges from the landfill to *surface* waters. The purpose of the permit is to establish limitations and other requirements that will ensure that the designated and existing uses of the receiving surface waters will be protected in spite of those discharges. *Reed v. DEP*, EHB Docket No. 2022-095-B, slip op. at 20 (Adjudication, June 25, 2024) (quoting *O'Reilly v. DEP*, 2001 EHB 19, 32 ("The overriding purpose of NPDES permits is to ensure that pollutants in discharges are controlled in the interest of protecting the quality of receiving streams.")); *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740 (Department implements the Commonwealth's antidegradation requirements and makes a determination on how to protect existing and designated uses of a receiving stream in the context of taking a final action on an NPDES permit).

The difficulty we are having with the Appellants' response in opposition to the motion is that the response contains a lengthy list of objections to the permit, but it fails to explain how Mr. Fisher's opinions relate to those objections, instead claiming that the relation is "obvious." We disagree. Tellingly, Mr. Fisher never cites the NPDES permit in his reports. He never clearly relates *any* of his opinions to the permit. There is certainly nothing in his reports that is obviously relevant to the surface water discharges that are the subject of the NPDES permit.

While none of Mr. Fisher's opinions are obviously relevant, some of them are obviously irrelevant. Perhaps not surprisingly given his background as a Professional Geologist, Mr. Fisher's

opinions focus heavily—and arguably exclusively—on groundwater issues. Mr. Fisher's opinions numbered 1, 2, 3, 4, and 10 relate to groundwater flow direction and an alleged threat posed by that groundwater to water supply wells.[5] These opinions have no relevance to whether the terms and conditions of the NPDES permit, which govern discharges to surface waters, are adequately protective of the receiving stream.

The remaining opinions (5-9) might have some relevance. It is hard to say at this point. The Department seemed to rely in part on sample results from a groundwater monitoring well at the site to develop discharge limits and monitoring requirements for the NPDES permit. (*See, e.g.*, DEP Pre-Hearing Memo. at 4 (¶¶ 20, 21).) In other words, the Department apparently found that it was necessary or appropriate to characterize groundwater *quality* at the site in formulating the discharge limits relating to Outfall 006 in the NPDES permit. Therefore, to the extent Mr. Fisher opines that the groundwater quality at the site was not adequately characterized because, for example, the Department only relied upon one sampling location (Fisher Opinion No. 7), the

[5] Those opinions read as follows:

> 1. Groundwater beneath the landfill is a water table aquifer from the glacial deposits down through the highly fractured Homewood Formation.
>
> 2. The groundwater flow pattern in the unconfined aquifer beneath the landfill is radial, NE to SW from the landfill toward the nearest streams, Black Run to the west and Barmore Run to the east.
>
> 3. Most of the private water wells near the TCL [Tri-County Landfill] are less than 100 feet deep and draw from the Homewood Formation or the overlying glacial deposits. Any release from the landfill would adversely impact the potable water sources for these homes for the foreseeable future.
>
> 4. The Connoquenessing Formation is a separate aquifer below the Mercer Formation from which the Grove City public supply wells draw water.
>
> ….
>
> 10. The Tri-County Landfill lies at or hear [sic] the edge of the corrected 1993 Wellhead Protection Area (WHPA), which is more scientifically valid and more protective of human health than are the more recent WHPA delineations.

(Fisher Main Report at 2-3.)

opinions would seem to be at least potentially relevant. We will await further explanation at the hearing on how and why groundwater quality at the site factored into the formulation of NPDES permit terms and conditions.

To the extent that Mr. Fisher's opinions not otherwise irrelevant are carefully tied into the Appellants' challenge to the terms and conditions of the NPDES permit, as opposed to the solid waste permit, they are not necessarily barred by the doctrine of collateral estoppel. For example, if Mr. Fisher contends that old waste at the site should not be relocated because doing so could change the quality of leachate that needs to be treated and the NPDES permit does not account for that, that is a different slant on waste relocation that was not fully addressed in the solid waste permit appeal.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

**O R D E R**

AND NOW, this 29th day of July, 2024, it is hereby ordered that Tri-County's motion in limine is **granted** with respect to Opinion Nos. 1-4, and 10 in Daniel Fisher's expert report. The Board will rule on the admissibility of any remaining opinions offered by Mr. Fisher at the hearing on the merits.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: July 29, 2024**

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Brian Lipkin, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-025-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY LLC, Permittee** | : | **Issued: July 29, 2024** |

## OPINION AND ORDER ON OBJECTIONS TO PROPOSED SUBPOENA

**By MaryAnne Wesdock, Judge**

**Synopsis**

The permittee's objections to a subpoena for the production of records directed to an out-of-state non-party are overruled. The appellant has demonstrated that its requests are reasonably calculated to lead to the discovery of admissible evidence. Further, the Board finds that it has the authority to issue the subpoena.

## O P I N I O N

This matter involves an appeal filed by Protect PT challenging two unconventional gas well permits issued to Olympus Energy LLC (Olympus) in connection with the Metis Well Site in Penn Township, Westmoreland County. The Department of Environmental Protection (Department) issued the permits for the Metis 2M Well and the Metis 4M Well on February 9, 2023. Protect PT avers that the permit allows the introduction of PFAS, PFOA and other chemicals into the environment without properly regulating or limiting their use and fails to require full disclosure of those chemicals.

On June 12, 2024, Protect PT provided notice of its intent to serve a subpoena on Fluid Energy Industrial LLC for the production of documents pursuant to Pa. R.C.P. 4009.21(a), which states:

> A party seeking production from a person not a party to the action shall give written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service. A copy of the subpoena proposed to be served shall be attached to the notice.

Olympus filed objections to the subpoena pursuant to Pa. R.C.P. 4009.21(c). Protect PT filed a response to Olympus' objections, and this matter is ripe for disposition.[1]

Olympus previously filed objections to a subpoena directed to a separate entity, Fluid Energy Group Ltd. Those objections were substantively similar to the objections raised here. The Board overruled the previous objections by order dated April 25, 2024. However, Olympus states that it is raising similar objections to the subpoena that is currently pending because it continues to believe they are meritorious and in order to preserve the issue for appeal. Additionally, in this filing Olympus has addressed arguments made by Protect PT in its response to Olympus' prior objections.

Olympus' first objection relates to Protect PT's request for safety data sheets or similar documents for "chemicals, fluids, mixtures and/or products" sold to Olympus and two other companies or agents for use in hydraulically fracturing gas wells in Pennsylvania since 2020. Olympus objects on grounds of relevance. It points out the subject of this appeal very specifically concerns gas well permits for the Metis 2M and 4M gas wells in Penn Township, Westmoreland County, and it argues that Protect PT's request is not reasonably calculated to lead to the discovery of evidence that is admissible in this appeal.

[1] Olympus also filed objections in a related appeal at Docket No. 2023-077-W, and a separate Opinion has been issued in that matter.

In response, Protect PT asserts that in other cases Olympus and other gas drillers have responded that they do not know what chemicals they will be using for a particular well until that well is being drilled; in some cases their agents make those decisions. Protect PT states that it anticipates a similar response here. Given that anticipated response, Protect PT argues that finding out the chemicals that have been used to hydraulically fracture other Olympus wells throughout Pennsylvania is relevant to the chemicals that are likely to be used in this case. In reply, Olympus argues that Protect PT's response proves its point, i.e., that the information requested by the subpoena may not be relevant to the action on appeal since there is no guarantee that the chemicals that have been used in the past to hydraulically fracture other wells will be or have been used at the Metis site.

Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1. Because it may be difficult to tell early on in a case whether a matter is relevant, we interpret the relevancy requirement broadly and generally allow discovery into an area so long as there is a reasonable potential that it will lead to relevant information. *Cabot Oil and Gas Corp. v. DEP*, 2016 EHB 20, 24 (citing *Parks v. DEP*, 2007 EHB 57.)

To the extent that Olympus can provide specific information regarding the chemicals and other materials used in hydraulically fracturing the Metis 2M and 4M wells, it is possible that the subpoena request can be more narrowly focused.[2] However, if, as Protect PT predicts, that

[2] According to the motion to dismiss filed by Olympus last year, the 2M and 4M wells have been drilled and hydraulically fractured. *See Protect PT v. DEP and Olympus Energy LLC*, EHB Docket No. 2023-025-W (Opinion and Order denying motion to dismiss on grounds of mootness). Therefore, it is possible that information specific to these wells is available.

information is not available, then Protect PT makes a persuasive argument that the list of chemicals or other materials that have been used by Olympus and its related companies or agents in hydraulically fracturing other wells in Pennsylvania is a reasonable indicator of what may be used in the future. Protect PT makes a valid argument that this information is reasonably calculated to lead to the discovery of evidence that is admissible in this appeal. Pa. R.C.P. 4003.1. Therefore, this objection is overruled.

Olympus' second objection also relates to relevancy. Olympus challenges Protect PT's request for "[c]opies of any documentation submitted to the U.S. Customs and Border Protection, Pennsylvania Department of Transportation…the U.S. Department of Transportation, the U.S. Environmental Protection Agency, Pennsylvania Department of Environmental Protection for the creation, use, storage, or transport of the Products; any lists of the ingredients/content/makeup/composition of the Products."[3] (Ex. A to Motion.) Olympus argues that because the request focuses on the "creation, use, storage, or transportation" of chemicals and other materials, rather than focusing simply on the identity of the chemicals used in hydraulically fracturing the Metis 2M and 4M wells, it is seeking information that is not relevant.

In response, Protect PT explains that it is trying to obtain the names of chemicals used for hydraulic fracturing in Pennsylvania and for the wells at issue in this case,[4] but explains that the subpoena was drafted in this manner so that it could obtain information in a way that would not be objected to on the grounds that it requires the creation of a document. For instance, it states that its request for "lists of the ingredients/content/makeup/composition of the Products" will be fruitless if Fluid Energy Industrial responds that no such list exists. In drafting the subpoena request

[3] "Products" is defined in the subpoena as "chemicals, fluids, mixtures and/or products." (Ex. A to Motion.)

[4] Protect PT states that it is agreeable to a confidentiality order if necessary.

in the manner it did, it contends that its goal was to obtain documentation containing the requested information should a "list" of such information not be available. Olympus argues that if Protect PT simply wants the "names" of chemicals its request goes far beyond that.

Relevance for discovery purposes is to be construed broadly. *Parks v. DEP*, 2007 EHB 57, 58. As the Board held in *Khodara v. DEP*, 2001 EHB 855, 857, "it is enough that the evidence sought *might be* relevant." (Emphasis in original) (citing *City of Harrisburg v. DER*, 1992 EHB 170). The Board generally allows broad discovery. See *Solebury Township v. DEP*, 2007 EHB 325, 327) ("As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal"); *Sludge Free UMBT v. DEP*, 2014 EHB 933, 941 ("We allow broad discovery because one of the primary purposes of discovery is to avoid unfair surprise and trial by ambush") (citing *Kiskadden v. DEP*, 2013 EHB 21, 26 n.1; *PA Waste, LLC v. DEP,* 2009 EHB 317, 318). Quite simply, information is relevant if it can lead to the discovery of admissible evidence.

We are not persuaded that Protect PT's request is so broad as to go beyond the proper scope of discovery. The request, as drafted by Protect PT, appears to be a reasonable method of obtaining information that is relevant to this appeal, particularly if, as it claims, this information is absent in other formats. As we stated earlier, if Olympus is able to provide Protect PT with specific information regarding the hydraulic fracturing of the Metis 2M and 4M wells, it is possible that this subpoena request can be narrowed. In the absence of that information, Protect PT has sufficiently demonstrated that its subpoena request is drafted in such a manner as to reasonably lead to the discovery of admissible evidence, in compliance with Pa. R.C.P. 4003.1.

Olympus' final objection is that the Board does not have the authority to issue a subpoena that can be enforced across state lines. Here, the subpoena is directed to Fluid Energy Industrial LLC, which is located in the state of Delaware. The Delaware Uniform Interstate Depositions and Discovery Act (Delaware Interstate Discovery Act), 10 Del. Code § 4311, oversees the service of foreign subpoenas upon persons in the state of Delaware and provides as follows:

> (c) *Issuance of a subpoena.*
>
> (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to the prothonotary in the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this State.
>
> (2) When a party submits a foreign subpoena to a prothonotary in this State, the prothonotary, in accordance with the court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

10 Del. Code § 4311(c)(1) and (2). Thus, in order for Protect PT to request the issuance of a subpoena in Delaware it must first submit a foreign subpoena obtained within the Commonwealth of Pennsylvania.

Olympus asserts that the Board does not have the authority to issue a "foreign subpoena" which is defined in the Delaware Interstate Discovery Act as "a subpoena issued under authority of a *court of record* of a foreign jurisdiction." *Id*. at § 4311(b)(2) (emphasis added). It is Olympus' position that the Environmental Hearing Board may not issue a subpoena for purposes of the Delaware Interstate Discovery Act because it is not a "court of record." In support of this assertion, Olympus cites *L.E.A.D. Group of Berks v. Exide Corp*., 1999 U.S. Dist. LEXIS 2672, 1999 WL 124473 (E.D. Pa. February 19, 1999), which, in turn, relies on *Baughman v. Bradford Coal Co., Inc*., 592 F.2d 215, 218 (3d Cir. 1979). For the reasons that follow, we disagree with Olympus that

these decisions support its argument that the Board lacks the authority to issue a subpoena directed to Fluid Energy Industrial LLC.

In *Baughman* and *L.E.A.D.*, the Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania, respectively, addressed a very narrow question - whether the Environmental Hearing Board was "a court of…a State" for purposes of precluding a citizen suit under the Federal Clean Air Act at 42 U.S.C. § 7604(b)(1)(B).

Under the Clean Air Act, private citizens may bring an action in federal district court to enforce a State Implementation Plan against alleged violators. *Id*. at § 7604(a)(1). However, such an action is precluded "if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil action *in a court of* the United States or *a State* to require compliance..." *Id*. at § 7604(b)(1)(B) (emphasis added). In both *Baughman* and *L.E.A.D.*, the defendants had argued that a citizen suit was precluded by virtue of the fact that a civil penalty action had been brought before the Environmental Hearing Board. In examining this question, the Court of Appeals for the Third Circuit in *Baughman* determined that the Board was not "a court of…a State" for purposes of 25 Pa. Code § 7604(b)(1)(B). It is clear that, in reaching this conclusion, the Third Circuit limited its analysis to whether an action before the Board triggered the preclusion provision of § 7604(b)(1)(B). Recognizing that this issue was one of first impression, the Court analyzed the legislative history behind § 7604(b)(1)(B) and determined "that Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism." 592 F.2d at 218 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 2, 35-36 (1970) and the comments of Senator Muskie and Senator Boggs in 116 Cong. Rec. (1970) at pp. 32902, 32918, respectively). The Court stated:

> The preclusion of § 7604(b)(1)(B) and the constituent phrase "court of…a State", must be construed in light of those policies. Accordingly, for a State administrative board to be a "court" *under that sub-section*, that tribunal must be empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan.

*Id.* (emphasis added). The Court went on to state:

> It follows that to constitute a "court" in which proceedings by the State will preclude private enforcement actions *under § 7604*, a tribunal must have the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts under the Clean Air Act.

*Id.* at 219 (emphasis added).

Thus, the Court of Appeals did not address the general question of whether the Board is a "court;" rather, its holding was limited to the question of whether an action before the Board could preclude a citizen suit under § 7604(b)(1)(B).[5] Indeed, the Third Circuit pointed out that "an administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals. 592 F.2d at 217 (citing *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972). It further pointed out the Board has been held to be a "State Court" for purposes of at least one federal statute, i.e., the Federal Removal Statute, 28 U.S.C. § 1442. 592 F.2d at 217-18 (citing *United States v. Pennsylvania Environmental Hearing Board*, 377 F. Supp. 545, 553 (M.D. Pa. 1974)). The holdings in *Baughman* and subsequently in *L.E.A.D*. indicate an intention on the part of those courts to focus

[5] The Third Circuit concluded that the Board could not be considered "a court of…a State" under § 7604(b)(1)(B) for very narrow reasons: first, because the amount of penalty that the Board could assess under Pennsylvania's Air Pollution Control Act, 35 P.S. § 4009.1 et seq., was lower than that which could be assessed by the federal courts; second, the Board did not have the power to enjoin a violation of a State Implementation Plan; and third, the Board's rules did not allow intervention as of right.

on the very limited question before them, pertaining to § 7604(b)(1)(B), and not to circumscribe the Board's jurisdiction.

Moreover, the Delaware Interstate Discovery Act makes no mention of "a court of…a State." Rather, that Act simply states that a foreign subpoena must be issued by a "court of record." Olympus has provided no basis for arguing that the Board is not the "court of record" in this appeal. The Board is the statutorily created tribunal for hearing appeals of actions taken by the Department of Environmental Protection and has the power and duty to hold hearings and issue adjudications on orders, permits, licenses and decisions of the Department. 35 P.S. §§ 7513(a) and 7514(a). In fulfilling its statutorily mandated duty, the Board has the power to subpoena witnesses, records and papers. *Id.* at § 7514(f). This power was conferred upon the Board by the General Assembly when it enacted the Environmental Hearing Board Act. 35 P.S. §§ 7511-7516.

Former Chief Judge Thomas W. Renwand explained the role of the Environmental Hearing Board in *Hilcorp Energy Co. v. DEP*, 2013 EHB 701:

> [The Board] functions as a court not a regulatory agency…[T]he "public hearings" the Board holds are formal court hearings in one of its five court rooms situated across the Commonwealth. Parties present their cases before the Board just as they would in the state and federal trial courts of the Commonwealth. The Board hears the evidence according to the law and the testimony is transcribed by court reporters. As noted earlier, the parties file extensive Pre-Hearing and Post Hearing briefs. The Board then issues written Adjudications which contain detailed findings of fact, discussion, and conclusions of law. Appeals of Board decisions go directly to the Pennsylvania Commonwealth Court which can only reverse Board decisions if its decisions are not supported by substantial evidence, contrary to law, or violative of the Constitution.

*Id.* at 713.

Likewise, the Board follows the Pennsylvania Rules of Civil Procedure with regard to discovery and the issuance of subpoenas. 25 Pa. Code §§ 1021.102(a) and 1021.103(a). As Judge Renwand further explained in *Hilcorp*:

> The Board has not only adopted its own Rules of Practice and Procedure specific to the unique environmental litigation matters filed before the Board, but has adopted the Discovery Rules of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102 (a). Therefore, parties before the Board are assured that they will be afforded the right to conduct liberal discovery, partake in a robust motion practice, and participate in a detailed hearing process….The Board issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing.

*Id*. at 707.

Although cases before the Board are not "civil actions," the Commonwealth Court has recognized that the Board is charged with carrying out an important "adjudicative function" with respect to appeals of actions taken by the Department of Environmental Protection. *Cole v. Department of Environmental Protection*, 257 A.3d 805, 815 (Pa. Cmwlth. 2019). The Board has an "overarching obligation to ensure that we conduct the fair hearing that due process requires." *Big Spring Watershed Assn. v. DEP*, 2015 EHB 83, 88-89 (citing *In re Estate of Pedrick,* 482 A.2d 215 (Pa. 1984).

As Former Chief Judge Michael L. Krancer held in *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, 2005 EHB 123, "In our tri-partite system [governing environmental regulation in Pennsylvania], the Department is the executive branch which makes a decision and we are the separate and independent judicial branch which is open to review that decision with all the due process guarantees." *Id*. at 141-42 (citing *Department of Environmental Protection v. North American Refractories, Inc.,* 791 A.2d 461, 462 (Pa. Cmwlth. 2002) ("The EHB is the

judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act.") The Board is indeed the "court" of record for purposes of issuing a subpoena in this matter since our "powers and characteristics make such a classification necessary to achieve [the] statutory goals" of the Environmental Hearing Board Act. *Baughman,* 592 F.2d at 217.

The objections of Olympus are overruled.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-025-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 29th day of July, 2024, it is hereby ordered that Olympus Energy LLC's objections to Protect PT's proposed subpoena directed to Fluid Energy Industrial LLC are **overruled.**

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: July 29, 2024**

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

**For the Commonwealth of PA, DEP:**
Anna Zalewski, Esquire
Sharon R. Stritmatter, Esquire
*(via electronic filing system)*

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

**For Permittee:**
Craig P. Wilson, Esquire
Maureen O'Dea Brill, Esquire
Travis L. Brannon, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-077-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY LLC, Permittee** | : | **Issued: July 29, 2024** |

## OPINION AND ORDER ON OBJECTIONS TO PROPOSED SUBPOENA

**By MaryAnne Wesdock, Judge**

**Synopsis**

The permittee's objections to a subpoena for the production of records directed to an out-of-state non-party are overruled. The appellant has demonstrated that its requests are reasonably calculated to lead to the discovery of admissible evidence. Further, the Board finds that it has the authority to issue the subpoena.

## O P I N I O N

This matter involves an appeal filed by Protect PT challenging two unconventional gas well permits issued to Olympus Energy LLC (Olympus) in connection with the Metis Well Site in Penn Township, Westmoreland County. The Department of Environmental Protection (Department) issued the permits for the Metis 1U Well and the Metis 3U Well on or about August 17, 2023. Protect PT avers that the permit allows the introduction of PFAS, PFOA and other

chemicals into the environment without properly regulating or limiting their use and fails to require full disclosure of those chemicals.[1]

On June 12, 2024, Protect PT provided notice of its intent to serve a subpoena on Fluid Energy Industrial LLC for the production of documents pursuant to Pa. R.C.P. 4009.21(a), which states:

> A party seeking production from a person not a party to the action shall give written notice to every other party of the intent to serve a subpoena at least twenty days before the date of service. A copy of the subpoena proposed to be served shall be attached to the notice.

Olympus filed objections to the subpoena pursuant to Pa. R.C.P. 4009.21(c). Protect PT filed a response to Olympus' objections, and this matter is ripe for disposition.[2]

Olympus previously filed objections to a subpoena directed to a separate entity, Fluid Energy Group Ltd, in a related appeal at Docket No. 2023-025-W. Those objections were substantively similar to the objections raised here. The Board overruled the objections by order dated April 25, 2024. However, Olympus states that it is raising similar objections to the subpoena that is currently pending in this matter because it continues to believe they are meritorious and in order to preserve the issue for appeal. Additionally, in this filing Olympus has addressed arguments made by Protect PT in its response to Olympus' prior objections.

Olympus' first objection relates to Protect PT's request for safety data sheets or similar documents for "chemicals, fluids, mixtures and/or products" sold to Olympus and two other companies or agents for use in hydraulically fracturing gas wells in Pennsylvania since 2020. Olympus objects on grounds of relevance. It points out the subject of this appeal very specifically

[1] By Stipulation filed with the Board on July 29, 2024, Protect PT withdrew any objections related to the introduction of radiation into the environment. (EHB Docket 2023-077-W, Entry No. 21.)

[2] Olympus also filed objections in a related appeal at Docket No. 2023-025-W, and a separate Opinion has been issued in that matter.

concerns gas well permits for the Metis 1U and 3U gas wells in Penn Township, Westmoreland County, and it argues that Protect PT's request is not reasonably calculated to lead to the discovery of evidence that is admissible in this appeal.

In response, Protect PT asserts that in other cases Olympus and other gas drillers have responded that they do not know what chemicals they will be using for a particular well until that well is being drilled; in some cases their agents make those decisions. Protect PT states that it anticipates a similar response here. Given that anticipated response, Protect PT argues that finding out the chemicals that have been used to hydraulically fracture other Olympus wells throughout Pennsylvania is relevant to the chemicals that are likely to be used in this case. In reply, Olympus argues that Protect PT's response proves its point, i.e., that the information requested by the subpoena may not be relevant to the action on appeal since there is no guarantee that the chemicals that have been used in the past to hydraulically fracture other wells will be used to hydraulically fracture the Metis 1U and 3U wells.

Generally, a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action and appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1. Because it may be difficult to tell early on in a case whether a matter is relevant, we interpret the relevancy requirement broadly and generally allow discovery into an area so long as there is a reasonable potential that it will lead to relevant information. *Cabot Oil and Gas Corp. v. DEP*, 2016 EHB 20, 24 (citing *Parks v. DEP*, 2007 EHB 57.)

To the extent that Olympus can provide specific information regarding the chemicals and other materials that will be used in hydraulically fracturing the Metis 1U and 3U wells, it is possible that the subpoena request can be more narrowly focused. However, if, as Protect PT predicts, that

information is currently unknown or not available, then Protect PT makes a persuasive argument that the list of chemicals or other materials that have been used by Olympus and its related companies or agents in hydraulically fracturing other wells in Pennsylvania is a reasonable indicator of what may be used in the future. Protect PT makes a valid argument that this information is reasonably calculated to lead to the discovery of evidence that is admissible in this appeal. Pa. R.C.P. 4003.1. Therefore, this objection is overruled.

Olympus' second objection also relates to relevancy. Olympus challenges Protect PT's request for "[c]opies of any documentation submitted to the U.S. Customs and Border Protection, Pennsylvania Department of Transportation…the U.S. Department of Transportation, the U.S. Environmental Protection Agency, Pennsylvania Department of Environmental Protection for the creation, use, storage, or transport of the Products; any lists of the ingredients/content/makeup/composition of the Products."[3] (Ex. A to Motion.) Olympus argues that because the request focuses on the "creation, use, storage, or transportation" of chemicals and other materials, rather than focusing simply on the identity of the chemicals that will be used in hydraulically fracturing the Metis 1U and 3U wells, it is seeking information that is not relevant.

In response, Protect PT explains that it is trying to obtain the names of chemicals used for hydraulic fracturing in Pennsylvania and for the wells at issue in this case,[4] but explains that the subpoena was drafted in this manner so that it could obtain information in a way that would not be objected to on the grounds that it requires the creation of a document. For instance, it states that its request for "lists of the ingredients/content/makeup/composition of the Products" will be fruitless if Fluid Energy Industrial responds that no such list exists. In drafting the subpoena request

[3] "Products" is defined in the subpoena as "chemicals, fluids, mixtures and/or products." (Ex. A to Motion.)

[4] Protect PT states that it is agreeable to a confidentiality order if necessary.

in the manner it did, it contends that its goal was to obtain documentation containing the requested information should a "list" of such information not be available. Olympus argues that if Protect PT simply wants the "names" of chemicals its request goes far beyond that.

Relevance for discovery purposes is to be construed broadly. *Parks v. DEP*, 2007 EHB 57, 58. As the Board held in *Khodara v. DEP*, 2001 EHB 855, 857, "it is enough that the evidence sought *might be* relevant." (Emphasis in original) (citing *City of Harrisburg v. DER*, 1992 EHB 170). The Board generally allows broad discovery. See *Solebury Township v. DEP*, 2007 EHB 325, 327) ("As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal"); *Sludge Free UMBT v. DEP*, 2014 EHB 933, 941 ("We allow broad discovery because one of the primary purposes of discovery is to avoid unfair surprise and trial by ambush") (citing *Kiskadden v. DEP*, 2013 EHB 21, 26 n.1; *PA Waste, LLC v. DEP,* 2009 EHB 317, 318). Quite simply, information is relevant if it can lead to the discovery of admissible evidence.

We are not persuaded that Protect PT's request is so broad as to go beyond the proper scope of discovery. The request, as drafted by Protect PT, appears to be a reasonable method of obtaining information that is relevant to this appeal, particularly if, as it claims, this information is absent in other formats. As we stated earlier, if Olympus is able to provide Protect PT with specific information regarding the hydraulic fracturing of the Metis 1U and 3U wells, it is possible that this subpoena request can be narrowed. In the absence of that information, Protect PT has sufficiently demonstrated that its subpoena request is drafted in such a manner as to reasonably lead to the discovery of admissible evidence, in compliance with Pa. R.C.P. 4003.1.

Olympus' final objection is that the Board does not have the authority to issue a subpoena that can be enforced across state lines. Here, the subpoena is directed to Fluid Energy Industrial LLC, which is located in the state of Delaware. The Delaware Uniform Interstate Depositions and Discovery Act (Delaware Interstate Discovery Act), 10 Del. Code § 4311, oversees the service of foreign subpoenas upon persons in the state of Delaware and provides as follows:

> (c) *Issuance of a subpoena.*
>
> (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to the prothonotary in the county in which discovery is sought to be conducted in this State. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this State.
>
> (2) When a party submits a foreign subpoena to a prothonotary in this State, the prothonotary, in accordance with the court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

10 Del. Code § 4311(c)(1) and (2). Thus, in order for Protect PT to request the issuance of a subpoena in Delaware it must first submit a foreign subpoena obtained within the Commonwealth of Pennsylvania.

Olympus asserts that the Board does not have the authority to issue a "foreign subpoena" which is defined in the Delaware Interstate Discovery Act as "a subpoena issued under authority of a *court of record* of a foreign jurisdiction." *Id*. at § 4311(b)(2) (emphasis added). It is Olympus' position that the Environmental Hearing Board may not issue a subpoena for purposes of the Delaware Interstate Discovery Act because it is not a "court of record." In support of this assertion, Olympus cites *L.E.A.D. Group of Berks v. Exide Corp*., 1999 U.S. Dist. LEXIS 2672, 1999 WL 124473 (E.D. Pa. February 19, 1999), which, in turn, relies on *Baughman v. Bradford Coal Co., Inc*., 592 F.2d 215, 218 (3d Cir. 1979). For the reasons that follow, we disagree with Olympus that

these decisions support its argument that the Board lacks the authority to issue a subpoena directed to Fluid Energy Industrial LLC.

In *Baughman* and *L.E.A.D.*, the Court of Appeals for the Third Circuit and the District Court for the Eastern District of Pennsylvania, respectively, addressed a very narrow question - whether the Environmental Hearing Board was "a court of…a State" for purposes of precluding a citizen suit under the Federal Clean Air Act at 42 U.S.C. § 7604(b)(1)(B).

Under the Clean Air Act, private citizens may bring an action in federal district court to enforce a State Implementation Plan against alleged violators. *Id*. at § 7604(a)(1). However, such an action is precluded "if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil action *in a court of* the United States or *a State* to require compliance..." *Id*. at § 7604(b)(1)(B) (emphasis added). In both *Baughman* and *L.E.A.D.*, the defendants had argued that a citizen suit was precluded by virtue of the fact that a civil penalty action had been brought before the Environmental Hearing Board. In examining this question, the Court of Appeals for the Third Circuit in *Baughman* determined that the Board was not "a court of…a State" for purposes of 25 Pa. Code § 7604(b)(1)(B). It is clear that, in reaching this conclusion, the Third Circuit limited its analysis to whether an action before the Board triggered the preclusion provision of § 7604(b)(1)(B). Recognizing that this issue was one of first impression, the Court analyzed the legislative history behind § 7604(b)(1)(B) and determined "that Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism." 592 F.2d at 218 (citing S. Rep. No. 1196, 91st Cong., 2d Sess. 2, 35-36 (1970) and the comments of Senator Muskie and Senator Boggs in 116 Cong. Rec. (1970) at pp. 32902, 32918, respectively). The Court stated:

> The preclusion of § 7604(b)(1)(B) and the constituent phrase "court of…a State", must be construed in light of those policies. Accordingly, for a State administrative board to be a "court" *under that sub-section*, that tribunal must be empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan.

*Id.* (emphasis added). The Court went on to state:

> It follows that to constitute a "court" in which proceedings by the State will preclude private enforcement actions *under § 7604*, a tribunal must have the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts under the Clean Air Act.

*Id.* at 219 (emphasis added).

Thus, the Court of Appeals did not address the general question of whether the Board is a "court;" rather, its holding was limited to the question of whether an action before the Board could preclude a citizen suit under § 7604(b)(1)(B).[5] Indeed, the Third Circuit pointed out that "an administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals. 592 F.2d at 217 (citing *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972). It further pointed out the Board has been held to be a "State Court" for purposes of at least one federal statute, i.e., the Federal Removal Statute, 28 U.S.C. § 1442. 592 F.2d at 217-18 (citing *United States v. Pennsylvania Environmental Hearing Board*, 377 F. Supp. 545, 553 (M.D. Pa. 1974)). The holdings in *Baughman* and subsequently in *L.E.A.D*. indicate an intention on the part of those courts to focus

[5] The Third Circuit concluded that the Board could not be considered "a court of…a State" under § 7604(b)(1)(B) for very narrow reasons: first, because the amount of penalty that the Board could assess under Pennsylvania's Air Pollution Control Act, 35 P.S. § 4009.1 et seq., was lower than that which could be assessed by the federal courts; second, the Board did not have the power to enjoin a violation of a State Implementation Plan; and third, the Board's rules did not allow intervention as of right.

on the very limited question before them, pertaining to § 7604(b)(1)(B), and not to circumscribe the Board's jurisdiction.

Moreover, the Delaware Interstate Discovery Act makes no mention of "a court of…a State." Rather, that Act simply states that a foreign subpoena must be issued by a "court of record." Olympus has provided no basis for arguing that the Board is not the "court of record" in this appeal. The Board is the statutorily created tribunal for hearing appeals of actions taken by the Department of Environmental Protection and has the power and duty to hold hearings and issue adjudications on orders, permits, licenses and decisions of the Department. 35 P.S. §§ 7513(a) and 7514(a). In fulfilling its statutorily mandated duty, the Board has the power to subpoena witnesses, records and papers. *Id.* at § 7514(f). This power was conferred upon the Board by the General Assembly when it enacted the Environmental Hearing Board Act. 35 P.S. §§ 7511-7516.

Former Chief Judge Thomas W. Renwand explained the role of the Environmental Hearing Board in *Hilcorp Energy Co. v. DEP*, 2013 EHB 701:

> [The Board] functions as a court not a regulatory agency…[T]he "public hearings" the Board holds are formal court hearings in one of its five court rooms situated across the Commonwealth. Parties present their cases before the Board just as they would in the state and federal trial courts of the Commonwealth. The Board hears the evidence according to the law and the testimony is transcribed by court reporters. As noted earlier, the parties file extensive Pre-Hearing and Post Hearing briefs. The Board then issues written Adjudications which contain detailed findings of fact, discussion, and conclusions of law. Appeals of Board decisions go directly to the Pennsylvania Commonwealth Court which can only reverse Board decisions if its decisions are not supported by substantial evidence, contrary to law, or violative of the Constitution.

*Id*. at 713.

Likewise, the Board follows the Pennsylvania Rules of Civil Procedure with regard to discovery and the issuance of subpoenas. 25 Pa. Code §§ 1021.102(a) and 1021.103(a). As Judge Renwand further explained in *Hilcorp*:

> The Board has not only adopted its own Rules of Practice and Procedure specific to the unique environmental litigation matters filed before the Board, but has adopted the Discovery Rules of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102 (a). Therefore, parties before the Board are assured that they will be afforded the right to conduct liberal discovery, partake in a robust motion practice, and participate in a detailed hearing process….The Board issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing.

*Id*. at 707.

Although cases before the Board are not "civil actions," the Commonwealth Court has recognized that the Board is charged with carrying out an important "adjudicative function" with respect to appeals of actions taken by the Department of Environmental Protection. *Cole v. Department of Environmental Protection*, 257 A.3d 805, 815 (Pa. Cmwlth. 2019). The Board has an "overarching obligation to ensure that we conduct the fair hearing that due process requires." *Big Spring Watershed Assn. v. DEP*, 2015 EHB 83, 88-89 (citing *In re Estate of Pedrick,* 482 A.2d 215 (Pa. 1984).

As Former Chief Judge Michael L. Krancer held in *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, 2005 EHB 123, "In our tri-partite system [governing environmental regulation in Pennsylvania], the Department is the executive branch which makes a decision and we are the separate and independent judicial branch which is open to review that decision with all the due process guarantees." *Id*. at 141-42 (citing *Department of Environmental Protection v. North American Refractories, Inc.,* 791 A.2d 461, 462 (Pa. Cmwlth. 2002) ("The EHB is the

judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act.") The Board is indeed the "court" of record for purposes of issuing a subpoena in this matter since our "powers and characteristics make such a classification necessary to achieve [the] statutory goals" of the Environmental Hearing Board Act. *Baughman,* 592 F.2d at 217.

The objections of Olympus are overruled.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-077-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and OLYMPUS ENERGY LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 29th day of July, 2024, it is hereby ordered that Olympus Energy LLC's objections to Protect PT's proposed subpoena directed to Fluid Energy Industrial LLC are **overruled.**

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: July 29, 2024**

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

**For the Commonwealth of PA, DEP:**
Anna Zalewski, Esquire
Sharon R. Stritmatter, Esquire
*(via electronic filing system)*

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

**For Permittee:**
Craig P. Wilson, Esquire
Maureen O'Dea Brill, Esquire
Travis L. Brannon, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2022-038-CP-B** |
| **RANDY J. SPENCER** | : | **Issued: August 13, 2024** |

# ADJUDICATION

**By Steven C. Beckman, Chief Judge and Chairperson**

## Synopsis

The Board assesses a civil penalty of $65,766.68 against Randy J. Spencer for failing to comply with an Administrative Order that arose out of violations of the Dam Safety and Encroachments Act.

## Background

The present matter before the Environmental Hearing Board ("Board") is a Complaint filed by the Department of Environmental Protection ("the Department") requesting the Board to assess a civil penalty of $123,459.80 against the Defendant, Randy J. Spencer ("Mr. Spencer"). The Complaint follows our earlier resolution of Mr. Spencer's appeal of the Department's Administrative Order issued on September 30, 2019 ("September 2019 Order"). Mr. Spencer filed his notice of appeal of the September 2019 Order on October 31, 2019 and the appeal was docketed at EHB No. 2019-121-B ("2019 Appeal"). The Department's September 2019 Order alleged violations of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27 ("Act") and required Mr. Spencer to, among other things, cease placement of campers and vehicles in the floodway on two parcels he owns on Lower Twomile Run in Cranberry Township, Venango

County and, within 30 days, to remove all items, campers and vehicles within the floodway located on his property. The Board granted the Department's motion for summary judgment in the 2019 Appeal when Mr. Spencer failed to file a response to the motion and, in addition, found that there was no genuine dispute of material facts. *Spencer v. DEP*, 2020 EHB 416, 420. Mr. Spencer did not appeal the Board's ruling in the 2019 Appeal to the Commonwealth Court.

On June 7, 2022, the Department filed a Complaint for Civil Penalties ("Complaint") pursuant to Section 605 of the Clean Streams Law 35 P.S. § 691.605, 25 Pa Code § 1021.71 and Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21. The Complaint requested a civil penalty in the amount of $123,459.80. The Board received Mr. Spencer's Answer to the Complaint ("Answer") on July 12, 2022 and issued Prehearing Order No. 2, setting deadlines for discovery and dispositive motions. Discovery proceeded with minimal cooperation from Mr. Spencer which eventually resulted in the Department filing a Motion for Sanctions on October 13, 2023. In its Motion, the Department requested the Board to enter default judgment against Mr. Spencer as to liability and to assess the full amount of the requested civil penalty. After Mr. Spencer failed to respond to the Motion, the Board issued an Opinion and Order dated December 4, 2023 ("December 2023 Opinion") granting a default judgment as to Mr. Spencer's liability but denied the Department's request for a default judgment as to the amount of the civil penalty. Under the language of 25 Pa. Code § 1021.76a, the Board determined that it was appropriate to hold an evidentiary hearing to determine the amount of the civil penalty.

On January 11, 2024, the Board issued an order setting a hearing date for April 4, 2024 and scheduling deadlines for the filing of pre-hearing memorandum by the Department and Mr. Spencer. The Department timely filed its pre-hearing memorandum, but Mr. Spencer failed to file a pre-hearing memorandum as ordered by the Board. As a result of this failure, the Department

filed another motion for sanctions seeking to preclude Mr. Spencer from presenting his case-in-chief at the hearing. After receiving no response to this motion from Mr. Spencer, we granted the Department's second motion for sanctions, precluding Mr. Spencer from presenting a case-in-chief at the hearing. The evidentiary hearing proceeded on April 4, 2024, however, Mr. Spencer was neither present at the hearing nor did he participate in any manner. After receipt of the hearing transcript, we issued a schedule for the filing of post-hearing briefs. The Department filed its post-hearing brief ("DEP Brief") on May 15, 2024. Mr. Spencer did not file a post-hearing brief in response to the DEP Brief and the Department elected not to file a reply brief. With the deadlines for post-hearing filings now past, the matter is ripe for decision.

## FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27; 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. (Complaint at ¶ 1; Defendant's Answer at ¶ 1).

2. Mr. Spencer is an adult individual with a mailing address of 166 Garden Lane, Franklin, PA 16323. (Complaint at ¶ 2; Defendant's Answer at ¶ 2).

3. Mr. Spencer owns two parcels of real property located in Cranberry Township, Venango County bearing Tax Map Parcel Numbers 08-01-66 and 08-01-67 ("Property"). (Complaint at ¶ 4; Defendant's Answer at ¶ 4).

4. A portion of the Property is located to the east of Deep Hollow Road and is crossed by Lower Twomile Run, which empties into the Allegheny River approximately 0.17 mile

downstream of the Property (the "Site"). (Complaint at ¶ 5; Defendant's Answer at ¶ 5; Exhibit A; Notes of Testimony Page No. ("T.") 43, 46).

5. Five species of federal and/or state endangered species of mussels are known to inhabit the Allegheny River near the Site. (T. 14).

6. On April 30, 2015, the United States Fish and Wildlife Service designated a section of the Allegheny River, including the section near the confluence of Lower Twomile Run, as critical habitat for the rabbitsfoot mussel (*Quadrula cylindrical*). (T. 14).

7. On July 19-20, 2019, during an unprecedented rain event, campers, vehicles, and other objects (the "Debris") that had been located on the Site in the floodway of Lower Twomile Run, were washed downstream, were deposited in, and caused silt and sediment to enter Lower Twomile Run and the Allegheny River. (T. 17-18).

8. Approximately a month after the July 2019 rain event, Joseph Brancato ("Mr. Brancato"), an Aquatic Biologist Supervisor at the Department, led a mussel survey right below the confluence of Lower Twomile Run and the Allegheny River near the Site. (T. 6, 18-19).

9. At the confluence, Mr. Brancato observed chassis of vehicles/RVs and parts of RVs such as carpeting, blankets, refrigerators, glass, tires, etc. (T. 19).

10. Jay Gerber ("Mr. Gerber"), another Department Aquatic Biologist, investigated the area on August 23, 2019 and documented his findings, which included photographs of his observations, in an inspection report. (T. 20-21; Exhibit D).

11. Mr. Brancato and Mr. Gerber observed several species of dead freshwater mussels including riffleshell and clubshell mussels, which are on the federal and state endangered species lists. (T. 21-23; Exhibit D).

12. Mr. Brancato described the crushed state of the fresh dead mussels he observed in the Allegheny River as being consistent with items rolling along the river bottom and smothering the stream bottom substrate. (T. 24).

13. The damage to Lower Twomile Run and the Allegheny River and the deaths of the endangered freshwater mussel species were consistent with the Debris observed in the Allegheny River that had come from the Site. (T. 25-26).

**The Department's Administrative Order**

14. On September 30, 2019, the Department issued the September 2019 Order to Mr. Spencer, pursuant to the Act, 32 P.S. §§ 693.1-693.27, and The Clean Streams Law, 35 P.S. §§ 691.1-691.1001, directing him to, among other things, cease placement of campers and vehicles in the floodway at the Site; not place any material substance or object in the floodway that would diminish the course, cross-section, or current of the floodway without first obtaining the written approval of the Department; and within 30 days, remove from the floodway all of the Items, campers, and vehicles located at the Site. (T. 47-49; Exhibit F).

15. Mr. Spencer did not remove the Items, campers, and vehicles from the floodway within 30 days after the date of the September 2019 Order. (T. 49).

**EHB Appeal**

16. On October 31, 2019, Mr. Spencer filed a Notice of Appeal of the Department's 2019 Order with the Board and the appeal was docketed at number 2019-121. (T. 59-60; Exhibit G).

17. On December 4, 2019, Mr. Spencer filed a Petition for Supersedeas in the 2019 Appeal that the Board ultimately denied without a hearing. (T. 62-63).

18. On November 16, 2020, the Board issued an Opinion and Order granting summary judgment in favor of the Department and terminating the 2019 Appeal ("Board's Opinion and Order"). (T. 70; Exhibit U).

**Commonwealth Court Enforcement**

19. On November 20, 2019, the Department filed a Petition to Enforce the September 2019 Order against Mr. Spencer in the Commonwealth Court of Pennsylvania, which the Court granted on January 22, 2020, ordering Mr. Spencer to comply with the September 2019 Order by March 22, 2020. (T. 62, 64-65; Exhibits J and N).

20. After holding an evidentiary hearing, on February 9, 2021, the Commonwealth Court entered an order against Mr. Spencer, finding Mr. Spencer in contempt for his ongoing failure to remove the Items, campers, and vehicles from the floodway as required by the September 2019 Order and ordering him to attend a sentencing hearing on April 6, 2021. (Complaint at ¶¶ 36, 37; Defendant's Answer at ¶¶ 36, 37).

21. Mr. Spencer removed the Items, campers, and vehicles from the floodway of Lower Twomile Run on approximately April 4, 2021, and, on April 5, 2021, he filed a notice with the Commonwealth Court stating that all Items had been removed. (T. 73-74, 76, 83, 101-102).

22. The Commonwealth Court issued an Order on April 14, 2021 finding that Mr. Spencer had substantially complied with the September 2019 Order and held his sentencing on the contempt in abeyance. (T. 74; Exhibit Z).

23. In total, Mr. Spencer failed to comply with the Department's Order for 521 days—beginning on October 31, 2019 and continuing until April 4, 2021. (T. 79-84).

**Department's Proposed Civil Penalty**

24. Ron Lybrook, ("Mr. Lybrook"), an Environmental Program Manager for the Department's Waterways and Wetlands Program, calculated the civil penalty sought in the Complaint against Mr. Spencer. (T. 31, 50; Exhibit BB).

25. Mr. Lybrook has worked in the Waterways and Wetlands Program since 2005 and has calculated over 150 civil penalties pursuant to either the Clean Streams Law or the Act during his tenure with the program. (T. 32-34).

26. The civil penalty calculation was calculated for Mr. Spencer's violation of Section 20 of the Act for his unlawful conduct in failing to comply with the Department's Order. (T. 51; Exhibit BB).

27. Mr. Lybrook calculated the civil penalty using a Department guidance document and the factors outlined in Section 21 of the Act, 32 P.S. § 693.21. (T. 35-42, 51; Exhibits BB and CC).

28. Given the known damage that was caused by the rain event in July 2019, Mr. Lybrook determined that there was an environmental threat to Lower Twomile Run, the Allegheny River, and endangered freshwater mussel populations for the duration of time that Mr. Spencer failed to comply with the September 2019 Order. (T. 104-105).

29. Accordingly, Mr. Lybrook categorized Mr. Spencer's violation of Section 20 of the Act as a major violation and calculated a base penalty of $5,000 for that violation. (T. 52-53).

30. The base penalty of $5,000 is half of the maximum penalty of $10,000 that may be assessed pursuant to the Act. (T. 55).

31. When calculating the penalty amount to seek in the Complaint, Mr. Lybrook also considered Mr. Spencer's degree of cooperation. (T. 38-39, 42, 61, 76).

32. In addition to the base penalty of $5,000, the Complaint also seeks daily penalties for each day that Mr. Spencer's violation continued, in accordance with Section 21(a) of the Act, 32 P.S. § 693.21(a). (Complaint at ¶¶ 60-62; T. 77-85).

33. In calculating these daily penalties, Mr. Lybrook considered the willfulness of Mr. Spencer's violation throughout the time period in which Mr. Spencer failed to comply with the September 2019 Order. (T. 74-75, 77).

34. Mr. Lybrook calculated a penalty of $100 per day for the 46 days that he determined that Mr. Spencer negligently failed to comply with the September 2019 Order, for a total of $4,600. (T. 80).

35. Mr. Lybrook calculated a daily penalty of $200 per day for the 340 days that he determined that Mr. Spencer recklessly failed to comply with the September 2019 Order, for a total penalty of $68,000. (T. 82).

36. Mr. Lybrook calculated a daily penalty of $300 per day for the 135 days that he determined that Mr. Spencer intentionally failed to comply with the September 2019 Order, for a total penalty of $40,500. (T. 84).

37. The Complaint seeks a base penalty of $5,000 and daily penalties totaling $113,100, for a sum of $118,100 for Mr. Spencer's increasing degree of willfulness in failing to comply with the September 2019 Order. (T. 84-85).

38. The Complaint also seeks penalties for the Department costs totaling $5,359.80 that resulted from the staff time to conduct inspections, staff time to prepare enforcement proceedings, and staff time and travel for Commonwealth Court appearances. (Complaint at ¶¶ 63 – 64; T. 85).

39. The Department conducted 11 inspections of the Site from August 14, 2019 through April 1, 2021. The inspections took approximately six hours for each inspection for a total of 66 hours of Department time. (T. 86; Exhibits C, H, I, M, O, Q, S, U, W, X, and Y).

40. Mr. Lybrook calculated the inspection-related costs by multiplying the hours either Crispin Moran ("Mr. Moran"), a Department staff member, or Mr. Lybrook spent on the inspections by their respective individual, hourly rates of $32.05 for Mr. Moran and $45.73 for Mr. Lybrook. In total, the amount incurred by the Department for the 11 inspections was $2,195.05 for Mr. Lybrook's time and $576.90 for Mr. Moran's time. (T. 86-87).

41. The Department spent 31.5 hours on enforcement of the Department's Order, at an hourly rate of $45.73, for a total of $1,440.95. (T. 89).

42. This enforcement time includes the time the Department spent on the Notice of Violation, preparation of the Department's Order, witness time and preparation for several Commonwealth Court proceedings, and the preparation of the Complaint. (T. 88-89).

43. The Department provided no documentation supporting the time spent or the hourly rates it claimed for staff time. (T. 95-96).

44. The Department claimed an additional $1,696.12 in travel costs, including vehicle mileage, parking, meals, and lodging to attend enforcement hearings at the Commonwealth Court in Harrisburg. (T. 89-90).

45. The Department provided no documentation supporting its claim for travel costs. (T. 95).

46. In calculating the penalty amount to seek in the Complaint, Mr. Lybrook also considered Mr. Spencer's compliance history and his continuing, demonstrated disregard for the requirements of the Act. (T. 74-75).

47. Mr. Lybrook personally inspected the Site seven times between May 4, 2020 and April 1, 2021. (T. 65-73, 75; Exhibits O, Q, S, U, W, X, and Y).

48. During those inspections, Mr. Lybrook observed that Mr. Spencer had moved additional items into the floodway in violation of the September 2019 Order. During that timeframe, Mr. Spencer had also purchased another lot that was in the floodway and had placed additional materials in that area. (T. 75-76).

49. On April 3, 2024, the day prior to the hearing on the Complaint, Mr. Lybrook examined the Site and found that Mr. Spencer has placed new items in the floodway. (T. 91- 92).

50. The total civil penalty requested by the Department in the Complaint is $123,459.80. (T. 90; Exhibit BB).

## DISCUSSION

### Legal Standard

The Board's role in evaluating a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. *DEP v. Percora*, 2007 EHB 545. The Department has the burden of proof in a case where it files a complaint for civil penalty assessments. *DEP v. EQT Production Company,* 2017 EHB 435, *aff'd*, 193 A.3d 1137 (Pa. Cmwlth. 2018). The Department must show by a preponderance of the evidence that Mr. Spencer violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *Id*., (citing *DEP v. Seligman,* 2014 EHB 755, 763); *DEP v. Simmons*, 2010 EHB 262, 276. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Id.,* (citing *Seligman,* 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger,* 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007)). The guidance the Department uses in determining a suggested civil penalty is not

binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company,* 2017 EHB 435, 480 (citing *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

The Act provides that the Board, in an action brought by the Department, may assess a civil penalty upon any person for a violation or unlawful conduct. 32 P.S. § 693.21(a)(3). The civil penalty shall not exceed $10,000, plus $500 for each day of continued violation. 32 P.S. § 693.21(a). The Act also outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to the stream regime and downstream areas of the Commonwealth, the costs of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person and "other relevant factors." *Id*.

**Analysis**

The Department's Complaint sets forth one count against Mr. Spencer for unlawful conduct under Section 18 of the Act for his failure to comply with the Department's September 2019 Order in a timely manner. The September 2019 Order required Mr. Spencer to cease placing campers, vehicles and other materials into the floodway of Lower Twomile Run and to remove all of the existing campers, vehicles and identified items from the floodway within thirty days of the date of issuance of the September 2019 Order. In our December 2023 Opinion, the Board granted the Department's Motion for Sanctions and found Mr. Spencer liable for the violation set forth in Count One of the Department's Complaint. Specifically, Mr. Spencer is liable for failing to comply with the September 2019 Order from October 31, 2019 to April 4, 2021, a total of 521 days. Given our ruling establishing Mr. Spencer's liability, the only remaining issue for the Board is what, if any, civil penalty to asses for Mr. Spencer's noncompliance.

In the Complaint and at the evidentiary hearing, the Department argued for a civil penalty in the amount of $123,459.80. The requested amount is derived from three distinct categories: 1) a base penalty for the initial violation, 2) daily penalties based on Mr. Spencer's willfulness, and 3) the Department's costs. The Department first suggested a base amount of $5,000 for Mr. Spencer's initial failure to comply with the requirement to remove items from the floodway of Lower Twomile Creek within thirty days of the September 2019 Order. The requested amount is half of the $10,000 civil penalty amount permitted under the Act. The Act allows an additional civil penalty of up to $500 a day for each day that the violation continues to take place. The Department addressed Mr. Spencer's ongoing daily violation of the September 2019 Order by seeking an initial daily penalty of $100 a day and escalating the penalty to $200 a day and eventually $300 a day based on the Department's determination that the level of willfulness of the violation increased over time prior to Mr. Spencer's eventual compliance in April 2021.

The Department applied the $100 a day penalty for the initial 41 days of noncompliance during which time Mr. Spencer had filed his 2019 Appeal and had a pending petition for supersedeas. The Board denied Mr. Spencer's supersedeas petition without a hearing on December 16, 2019 finding that he had not shown that he had a strong likelihood of success on the merits or that he would suffer irreparable harm as a result of the September 2019 Order. The Department concluded that Mr. Spencer's failure to comply while his supersedeas petition was pending was negligent, the second level of willfulness in the Department's penalty guidance. Once the Board denied the petition, the Department characterized Mr. Spencer's ongoing noncompliance as reckless and raised the daily penalty to $200 a day. The Department viewed Mr. Spencer's continued noncompliance as reckless and assessed $200 a day until November 16, 2020, when the Board dismissed his 2019 Appeal. From that date on, the Department treated Mr. Spencer's

noncompliance as intentional and increased the penalty to $300 per day until April 4, 2021, when Mr. Spencer complied with the September 2019 Order. Overall, the Department's calculation for the daily portion of the requested civil penalty is as follows:

Negligent: 41 days x $100 = $4,100

Reckless: 340 days x $200 = $68,000

Intentional: 135 days x $300 = $40,500 Total: $113,100

The final portion of the Department's suggested civil penalty is based on personnel and travel costs it incurred pursuing this matter. The Department seeks to recover a total of $5,359.80 for costs associated with multiple inspections of the Property and for its efforts to enforce the September 2019 Order at the Commonwealth Court. The personnel costs include 18 hours of inspection related work carried out by Mr. Moran at a rate of $32.05 per hour and 52 hours of work that Mr. Lybrook dedicated to inspections and enforcement actions at a rate of $45.73 per hour. In addition to these personnel costs, the Department seeks $1,696.12 in travel costs.

As noted, under our caselaw, the amount suggested by the Department, $123,459.80, is purely advisory and the Board is responsible for conducting an independent determination of the appropriate amount for a civil penalty using the factors outlined in the Act. The factors listed in the Act are: 1) the willfulness of the violation, 2) the damage or injury to the stream regime and downstream areas of the Commonwealth, 3) the costs of restoration, 4) the cost to the Commonwealth of enforcing the provisions of the act against such person and 5) other relevant factors. We will address each of these factors.

**Willfulness**

The Department treated Mr. Spencer's willfulness regarding his noncompliance with the September 2019 Order as ranging from negligent to reckless to intentional based on the status of

its ongoing enforcement activities. We think that approach was generous on the part of the Department. The violation at issue in this case was Mr. Spencer's decision to ignore the Department's directive to cease placing new items, including campers and vehicles in the floodway and to remove the items, campers and vehicles that were already located in the floodway of Lower Twomile Run. This directive was in response to the impact from the flood event that took place in July 2019 that left debris strewn along Lower Twomile Run and the Allegheny River impacting important habitat for threatened and endangered mussels and clearly killing some number of the mussels. The need for the actions the Department requested was readily apparent and the evidence in this case makes it clear that Mr. Spencer was aware of the issue and simply decided not to address the problem. We understand the Department's desire to give him the benefit of the doubt and allow the legal process to play out, but we think his actions showed intentional disregard for his responsibilities and the need to act as directed by the Department.

The evidence also makes clear that the burden to comply that the September 2019 Order placed on Mr. Spencer was relatively minor. Mr. Lybrook testified that based on his personal observations at the Site, Mr. Spencer made no effort to comply and did not remove a single item during the 500 plus days that this matter worked its way through the legal system. Only when Mr. Spencer faced a contempt hearing in the Commonwealth Court did he remove the items and, moreover, he accomplished their removal in less than a week. Mr. Lybrook inspected the Site on April 1, 2021 and observed that the September 2019 Order had not been complied with and that motorhomes, campers, motor vehicles and other items were still located in the regulated floodway. (DEP Ex. Y). On April 5, 2021, Mr. Spencer filed a Notice of Compliance with the Commonwealth Court and, following a hearing on April 6, 2021, the Commonwealth Court held that Mr. Spencer had substantially complied by removing his items from the floodway. (DEP Ex.

Z). Mr. Spencer could have easily complied with the September 2019 Order and then, if he had prevailed in his legal challenge, he could have just as easily returned the items to the Site. Instead, he knowingly and intentionally chose noncompliance for an extended period of time and risked a repeat of the harm observed following the July 2019 flood event.

**Damage or Injury to the Stream Regime or Downstream**

In evaluating this factor, it is important to remember that the violation in this case is for noncompliance with the September 2019 Order. The Complaint does not seek a penalty for the harm to Lower Twomile Run and the Allegheny River as a result of the July 2019 flood event. (T. 99-100). The requested penalty is based on the failure to remove items from the floodway that risked further pollution and violated the Act's prohibition on unpermitted encroachments in a floodway. However, the Department did not present any evidence that demonstrated that actual environmental damage or injury occurred to either Lower Twomile Run or the Allegheny River as a result of Mr. Spencer's failure to comply with the September 2019 Order and Mr. Lybrook acknowledged in his testimony that no damage occurred as a result of the noncompliance. (T. 104). The material remaining in the floodway may have altered the flow regime if water in Lower Twomile Run reached the floodway during the time prior to Mr. Spencer removing it, but again, we were presented no evidence addressing this issue. We recognize that the lack of any damage or impact to the stream regime or downstream may largely be attributable to the sheer luck of favorable weather and it is not our intent to excuse Mr. Spencer's actions merely because he was fortunate that no further harm apparently occurred because of his noncompliance. However, we were presented no evidence of damage or injury to the stream regime or downstream during the period of noncompliance and none apparently occurred. As a result, when we consider this factor

in determining a reasonable penalty, we find that it mitigates the amount that is appropriate in this case.

**Costs of Restoration**

The Department made no claim for restoration costs as part of its proposed civil penalty. Further, the Department presented no evidence that the Commonwealth incurred any costs for restoration of the environment as a result of Mr. Spencer's noncompliance with the September 2019 Order. Therefore, we will not include any restoration costs as part of our civil penalty determination.

**Costs to the Commonwealth**

The Department's Complaint requested $5,359.80 in Commonwealth personnel and travel costs. The personnel costs include time to conduct inspections and complete inspection reports, as well as time spent on enforcement efforts. The personnel costs of the Department were based on 18 hours of inspection related work Mr. Moran conducted, at a rate of $32.05 per hour and 67.5 hours[1] for inspection and enforcement time for Ron Lybrook at a rate of $45.73 hours. Although we would prefer to see supporting documentation showing the hours spent and the hourly rates, we will award the Department's requested personnel costs of $3,666.68 because it appears reasonable given the testimony about the Department's efforts in this case.

However, we decline to award the Department any of its requested travel costs of $1,696.12. We have previously discussed with Department counsel who have appeared in front of the Board that for us to award travel costs, we would strongly prefer to see documentation

[1] Mr. Lybrook testified to a mistake in the calculations shown in the civil penalty worksheet found at DEP Ex. BB. He listed only 4 hours of his enforcement time when it should have listed 19.5 hours. The amount calculated and shown on the worksheet, $891.74, in fact reflects the amount of time, 19.5 hours, that Mr. Lybrook testified he actually spent on enforcement.

supporting the requested costs. We have set forth our concerns about proper documentation for costs in several prior opinions and adjudications. See *Keck v. DEP*, 2019 EHB 322, 343-44; *Schlafke v. DEP*, 2019 EHB 1, 43; *Whiting v. DEP*, 2015 EHB 799, 813-814. As fellow state employees, Board staff, including the judges, are keenly aware of the type of documentation and receipts that state employees must provide in order to receive travel reimbursement. We questioned Mr. Lybrook about whether he had to file expense reports that included documentation for hotel costs, food costs etc. Mr. Lybrook confirmed he did file expense reports and it was from those reports that he obtained the travel cost figures the Department sought in this case. (T. 95). Despite that, plus the fact that Department counsel were on notice about the importance the Board places on supporting documentation when reviewing costs, we once again have been asked to award travel costs without documentation to support the claim. We will not do so in this case.

**Other Relevant Factors**

A relevant factor we generally consider in a civil penalty case is the role of a penalty in deterrence of future violations both by Mr. Spencer and others who may decide to follow his example. See *EQT Production Company*, 2017 EHB at 480. In this case, the risk posed by Mr. Spencer's storage of campers, vehicles and other items in the floodway of Lower Twomile Run may not have necessarily been apparent prior to the July 2019 flood event. Mr. Lybrook testified that he was not aware of any action taken by the Department against Mr. Spencer for the storage of items in the floodway prior to the July 2019 flood. (T. 99). However, after the flood, there should have been no question in Mr. Spencer's mind that the continued storage of these items in the floodway posed a risk that needed to be promptly addressed. Instead, Mr. Spencer resisted multiple efforts by the Department to bring him into compliance. We fully recognize that Mr. Spencer had a legal right to challenge the September 2019 Order but, as we have often stated, the

filing of a notice of appeal with the Board does not pause a party's responsibility to comply with the Department's order unless the Board grants a supersedeas.[2] See, *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252-53. When Mr. Spencer sought a supersedeas from the Board, we denied it without a hearing because, in part, Mr. Spencer did not demonstrate that he was likely to prevail in his 2019 Appeal. At that point, even if he retained the belief that he would ultimately prevail, Mr. Spencer should have complied with the September 2019 Order. Instead, he continued to refuse to comply and the Department was forced to bring multiple enforcement efforts in Commonwealth Court. Mr. Spencer, finally, with just a few days of work on his part, removed the items from the floodway and came into compliance with the 2019 Order, but only under the threat of incarceration for contempt by the Commonwealth Court. Despite the long drawn out effort to bring Mr. Spencer into compliance, Mr. Lybrook testified that he drove by Mr. Spencer's property on the day before traveling to our hearing in this matter and observed a camper in the exact same spot in the floodway where the prior ones were previously located. (T. 92). In light of that testimony, we think that it is important that the civil penalty be sufficient to act as a deterrent to Mr. Spencer placing new items in the floodway of Lower Twomile Run and risking a repeat of the July 2019 flood event.

Another relevant factor we consider is whether there have been any costs savings to the violator. We have no evidence one way or another regarding any cost savings that Mr. Spencer may have had as a result of his noncompliance and none are readily apparent from the facts of the case. Therefore, we will not add any amount to the civil penalty for cost savings.

[2] Section 4(d)(1) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) provides, "No appeal shall act as an automatic supersedeas."

**Civil Penalty**

When we look at these factors, we conclude that the appropriate civil penalty in this case is $65,766.68. We determined the amount by assessing the $10,000 maximum penalty allowed under the Act plus a daily penalty as permitted under the Act of $100 per day for each of the 521 days that Mr. Spencer failed to comply with the Department's September 2019 Order. The penalty amount also includes $3,666.68 for the personnel costs the Department requested. Mr. Spencer's intentional failure to comply with the Department's September 2019 Order over an extended period of time warrants a significant penalty to act as a deterrent to himself and others who may choose to delay compliance and risk further harm to the environment. While our intent is in no way to condone Mr. Spencer's conduct by setting a lower penalty amount than that requested by the Department, the lesser amount reflects the fact that his noncompliance ultimately did not have a detrimental impact on the environment and that he eventually complied with the September 2019 Order to the Commonwealth Court's satisfaction.

In determining the penalty amount, we also reviewed other recent penalty cases before us to ensure that the amount was consistent with our prior rulings involving both the Act and other environmental laws.[3] We reviewed three relatively recent cases involving civil penalties arising from long term noncompliance with Department orders. In each of the cases, the actual environmental harm was limited or difficult to determine but the potential for harm existed as a result of the ongoing noncompliance. In *DEP v Keck*, 2019 EHB 322, the Board assessed a $5,000 penalty for the failure to comply with a Department order under the Clean Streams Law as part of an overall civil penalty of $42,500. The Department requested $34,500 for the counts involving

[3] Pennsylvania's environmental laws generally have similar civil penalty provisions to the one found in the Act and relied on in this case. See Clean Streams Law, 35 P.S. § 691.605(a); Storage Tank Act, 35 P.S. § 6021.1307; Solid Waste Management Act, 35 P.S. § 6018.605.

noncompliance with the order. Mr. Keck was directed by the order to ensure that remaining soil contamination was properly addressed and any further impact to waters of the Commonwealth was prevented. *Id*. at 338. Mr. Keck never fully complied with provisions of the order in his case but the impact of that noncompliance to the environment was indeterminate based on the testimony presented at the penalty hearing.

In *Rozum v. DEP*, 2018 EHB 843, the Board upheld an $18,000 civil penalty assessment by the Department. In the *Rozum* case, the Department issued an order under the Solid Waste Management Act to the Rozums in 2008 that required them to remove thousands of waste tires from their property. The Rozums contested the order in front of the Board and in the Venango County court system. Finally, four and a half years after the order and after the Rozums limited compliance with some of the requirements of the Department's order, the Department was required to hire a contractor to remove the tires. The Board found the Department's $18,000 penalty assessment reasonable under these facts.

In *Paul Lynch Investments, Inc. v. DEP*, 2017 EHB 891, the Board upheld the Department's assessment of a $4,500 penalty for failing to timely comply with a Department order as part of an overall $9,000 civil penalty under the Storage Tank Act. The violation involved the failure to empty product from an underground storage tank as required. There was no evidence that the failure to remove the product caused any environmental harm. Lynch Investment's noncompliance was deliberate and continued for almost 11 months, but the Department decided to treat it as only a single day of noncompliance in its penalty assessment. During the period of noncompliance, the Department went to Lawrence County Court seeking to enforce its order. Under these facts, the Board upheld the Department's assessment of a $4,500 penalty. See also *DEP v. Seligman*, 2014 EHB 755 (The Board rejected the Department's request for $14,000 and assessed $3,400 under

the Act and the Clean Streams Law against a defendant for conducting earth disturbance activities in a stream, within the floodways of streams and within a wetland without a permit.); *DEP v. Colombo d/b/a Glenburn Services*, 2013 EHB 635 (The Board rejected the Department's request for at least $19,560 and assessed $9,500 under the Act and the Clean Streams Law for unpermitted dredge and fill activities that had a significant impact on a creek.); *DEP v. Simmons*, 2010 EHB 262 (The Board agreed with the Department's requested amount and assessed $21,000 under the Clean Streams Law for earth disturbance activities that continued for 167 days after the defendant was told to correct the violations.) and; *DEP v. Sabot*, 2009 EHB 38 (The Board rejected the Department's request for $45,318.28 and assessed a $5,000 total penalty under the Act including $2,500 for failure to comply with a Department order where the Board determined that the area of wetlands impacted was minimal and could be repaired.).

As should be evident from our review of these cases, while the civil penalty we assessed against Mr. Spencer is lower than the penalty requested by the Department, it remains a substantial penalty when considering other past penalty amounts assessed by both the Department and the Board. The facts of this case warrant a substantial penalty, but the penalty amount we assess is mitigated by a key factor we are required to consider under the Act, namely, the impact to the environment resulting from the violation. This case is about the potential for harm given the events of July 2019 and the proximity of the Site to the Allegheny River and the critical mussel habitat, but that threat needs to be balanced against the fact that no actual harm took place due to Mr. Spencer's noncompliance. We also find that a substantial penalty is warranted because of the apparent need to deter Mr. Spencer from again placing items into the floodway of Lower Twomile Run. Despite the protracted legal proceedings that went against him at every turn, including the possibility that Mr. Spencer would be incarcerated by the Commonwealth Court for contempt, Mr.

Lybrook testified that Mr. Spencer has recently placed at least one item back into the floodway. (T.92). We conclude that a substantial civil penalty is required to convince Mr. Spencer that he should comply with the law. We believe that the amount we are assessing properly balances the issues in this case and is in line with our prior rulings.

## CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27; 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.

2. The Department must show by a preponderance of the evidence that Mr. Spencer violated the applicable statutes and regulations and that there is a lawful basis for the assessment of a civil penalty. *DEP v. EQT* Production Company, 2017 EHB 435 (citing *DEP v. Seligman*, 2014 EHB 755, 763); *DEP v. Simmons*, 2010 EHB 262, 276.

3. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *Seligman*, 2014 EHB at 763; *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Strubinger*, 2006 EHB 740, 748, *aff'd*, 2195 C.D. 2006 (Pa. Cmwlth. Jun. 13, 2007).

4. The Board's responsibility is to assess a penalty based upon applicable statutory criteria, any applicable regulatory criteria, and our own precedent. *DEP v. EQT Production Company*, 2017 EHB 435, 480 (citing, *DEP v. Perano* 2011 EHB 867, 878); *DEP v. Weiszer*, 2011 EHB 258, 381.

5. The Act outlines specific factors to consider in determining the amount of a civil penalty, including the willfulness of the violation, the damage or injury to stream regimen and

downstream areas of the Commonwealth, the costs of restoration, cost to the Commonwealth of enforcing the provisions of the Act, and other relevant factors. 32 P.S. § 693.21(a)(3).

6. Other relevant factors include the deterrent effect of the penalty. *EQT Production Company*, 2017 EHB at 480.

7. The filing of a notice of appeal with the Board does not pause a party's responsibility to comply with the Department's order unless the Board grants a supersedeas. See, *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252-53; 35 P.S. § 7514(d)(1).

8. Mr. Spencer's failure to respond to the Department's discovery requests, Board orders, and to the Department's Motion for Sanctions resulted in the entry of default judgment in favor of the Department with regards to Mr. Spencer's liability for the violations. 25 Pa. Code § 1021.161; 25 Pa. Code 1021.76a(d).

9. The Board assesses a civil penalty in the amount of $65,766.68 against Mr. Spencer for his violation of the Act.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2022-038-CP-B** |
| **RANDY J. SPENCER** | : | |

**O R D E R**

AND NOW, this 13th day of August, 2024, it is hereby ORDERED that Randy J. Spencer is assessed a civil penalty of $65,766.68.

**ENVIRONMENTAL HEARING BOARD**

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

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

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

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

**DATED: August 13, 2024**

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

**c:** **For the Commonwealth of PA, DEP:**
Carl D. Ballard, Esquire
Kayla A. Despenes, Esquire
Nicholas A. Maskery, Esquire
Jennifer N. McDonough, Esquire
*(via electronic filing system)*

**For Defendant, *Pro se*:**
Randy J. Spencer
166 Garden Lane
Franklin, PA 16323
*(via U.S. first class mail)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC** | : | |
| **v.** | : | **EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee** | : | **Issued: August 27, 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 denies consolidated appeals of a water obstruction and encroachment permit authorizing the demolition of an existing bridge and the construction of a new bridge. The existing bridge, which dates back to 1812, is causing environmental harm to the stream it traverses, and rehabilitating the bridge is not feasible. The new bridge will improve hydraulic conditions in the stream and be more consistent with the stream's natural regime.

## Background

This case involves two consolidated appeals, one filed by Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum (hereinafter "the Riverkeeper"), and one filed by Steven Gidumal and Virtus Capital Advisors, LLC ("Gidumal") (referred to collectively as the "Appellants"). The Riverkeeper and Gidumal are appealing Water Obstruction and Encroachment

Judge Sarah L. Clark is recused in this matter and did not participate in the decision.

Permit No. E0901120-026 issued by the Pennsylvania Department of Environmental Protection (the "Department") to the Pennsylvania Department of Transportation ("PennDOT") on September 29, 2021. The permit authorizes PennDOT to remove the Headquarters Road Bridge in Tinicum Township, Bucks County, and construct a new replacement bridge. The Headquarters Road Bridge spans Tinicum Creek, an exceptional value stream, and borders property owned by Mr. Gidumal. The bridge was constructed in 1812 and has been closed to vehicles and pedestrians since 2011 because of significant deterioration and resulting safety concerns.

We previously conducted extensive supersedeas proceedings in this appeal. Both the Riverkeeper and Gidumal filed petitions for supersedeas, with the Riverkeeper's petition being filed on the same day as its notice of appeal. During a conference call held with the parties in both appeals to discuss the supersedeas petitions, the parties asked to begin the supersedeas hearing more than three months later on March 2, 2022. Following the call, we issued an Order consolidating the two appeals at EHB Docket No. 2021-108-L. The parties then filed a joint proposed pre-hearing schedule for the supersedeas, which we adopted in an Order, that addressed responses to the petitions for supersedeas, discovery in advance of the supersedeas hearing, and the exchange of witness and exhibit lists.

The supersedeas hearing was held on four days: March 2, 3, 4, and 7, 2022. The parties agreed to brief the proceedings on the basis of expedited transcripts and filed simultaneous briefs on March 21, 2022. On April 1, 2022, we issued a 40-page Opinion and Order denying the Appellants' petitions for supersedeas, finding that the existing bridge was causing environmental harm to Tinicum Creek and that the Appellants were unlikely to succeed on the merits of their claims that the Department acted unlawfully or unreasonably in issuing the permit for the replacement bridge. *Del. Riverkeeper Network v. DEP*, 2022 EHB 113. The merits hearing was

conducted on November 1, 2, 3, and 6, 2023. During the merits hearing, the parties stipulated to the inclusion of the record from the supersedeas hearing into the record on the merits. The Board conducted a site view with the parties on November 7, 2023.

## FINDINGS OF FACT

1. Delaware Riverkeeper Network is an organization with a mission to protect and restore the Delaware River, its tributaries, and the ecosystem within the Delaware River watershed, which includes Tinicum Creek. (Transcript of Supersedeas Hearing Testimony Page No. ("S.T.") 181-83.)

2. The Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, (collectively "the Riverkeeper") have advocated for the protection of Tinicum Creek for many years. (S.T. 196-203.)

3. Steven Gidumal and Virtus Capital Advisors, LLC (collectively "Gidumal") own 47 acres of property around the bridge upstream and downstream, including a house dating to 1741, a barn, horse stables, and pastures. (S.T. 30-32; Gidumal Supersedeas Exhibit No. ("G. S. Ex.")[1] 002.)

4. Gidumal purchased the property out of foreclosure on June 30, 2020. (S.T. 34-35, 44-45; Transcript of Merits Hearing Testimony Page No. ("M.T.") 27; G. S. Ex. 002.)

5. A significant portion of Gidumal's pastures are within the existing 100-year floodplain of Tinicum Creek. (S.T. 954; M.T. 103-04, 469-70; Department Exhibit No. ("DEP Ex.")[2] 55.)

[1] Gidumal restyled his exhibits for the merits hearing, calling them "Tabs" and providing a table that linked the Tabs to the exhibit numbers from the supersedeas hearing. We will refer to his exhibits as they were originally numbered at the supersedeas hearing.

[2] The Department's exhibits from the supersedeas hearing and the merits hearing are the same.

6. The Pennsylvania Department of Environmental Protection ("the Department") is the agency of the Commonwealth with the duty and responsibility to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; 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.

7. The Pennsylvania Department of Transportation ("PennDOT") is an agency of the Commonwealth that applied for a water obstruction and encroachment permit from the Department for the replacement of the Headquarters Road Bridge in Tinicum Township, Bucks County. (PennDOT Exhibit No. ("DOT Ex.")[3] 14.)

8. The Department issued Water Obstruction and Encroachment Permit No. E0901120-026 to PennDOT on September 29, 2021, authorizing the removal of the existing Headquarters Road Bridge and the construction of a replacement bridge. (DOT Ex. 14.)

9. The existing Headquarters Road Bridge was built in 1812 and has since undergone various repairs, including the replacement of the superstructure in 1919, which remains there today. (S.T. 261, 736; M.T. 594; DOT Ex. 15.)

10. The superstructure of a bridge is the portion of the bridge that carries the deck and roadway surface that sits on top of the abutments and piers of the supporting substructure. (S.T. 261, 573-74, 599-600.)

11. The Headquarters Road Bridge is part of a state highway. (M.T. 454.)

[3] PennDOT's exhibits maintained the same numbering in both the supersedeas hearing and the merits hearing, with additional exhibits for the merits hearing continuing with sequential numbering.

12. The bridge spans Tinicum Creek, an exceptional value water of the Commonwealth, at a point about five-and-a-half miles upstream of Tinicum Creek's confluence with the Delaware River. (S.T. 121, 260, 262; DOT Ex. 14.)

13. Tinicum Creek has also been designated as a Wild and Scenic River by the National Park Service. (S.T. 185-87; M.T. 116; DOT Ex. 15.)

14. The existing bridge is a contributing resource to the Ridge Valley Rural Historic District. (M.T. 489-90, 546; DOT Ex. 15.)

15. The existing bridge is approximately 78 feet long from its eastern abutment to its western abutment and it has a 16-foot-wide roadway. (S.T. 262, 571-72.)

16. The existing bridge's substructure is comprised of two masonry abutments at either end and two masonry support piers within Tinicum Creek. (S.T. 571.)

17. The existing bridge is a three-span structure, with each span being the distance between an abutment or a pier. (S.T. 571.)

18. The Headquarters Road Bridge has been closed to vehicles and pedestrians since 2011 because of safety concerns with the bridge's overall structural integrity and because of a large, four-foot-wide hole in the bridge deck discovered during an inspection. (S.T. 572-73, 728; M.T. 303, 537, 812.)

19. Efforts to cover the hole with a steel plate were unsuccessful because there was not any sound concrete in which to anchor the plate. (S.T. 573, 735-36; M.T. 538, 594.)

20. The bridge was determined to be unsafe for use by the public because of the risk of imminent failure of the bridge and its structural inability to safely carry vehicular traffic. (S.T. 573, 887.)

21. The closure of the existing bridge in 2011 has necessitated a 15.6-mile detour to be in place. (S.T. 639.)

22. Although the existing bridge is also theoretically closed to pedestrians, there has been concern of pedestrians, cyclists, and motorcycles going around the closure barriers and continuing to use the bridge, so stone was placed on the bridge to cordon off any gaps. (S.T. 664-65, 674-75.)

23. PennDOT started thinking about possibly replacing the Headquarters Road Bridge in 2002, with design for a new bridge beginning in 2005. (S.T. 611; DOT Ex. 10.)

24. Extensive discussions with, among others, the Department, the National Park Service, the U.S. Army Corps of Engineers, the Pennsylvania Historical and Museum Commission, and various consultants led PennDOT to pursue a replacement bridge consisting of two spans with shifted abutments to span the natural waterway of Tinicum Creek and align with the flow of the stream. (S.T. 611-17, 844-45, 850; DOT Ex. 10.)

25. The abutments for the replacement bridge will be shifted approximately 15 feet to the west, with the western abutment shifted out of Tinicum Creek and into the stream bank and the eastern abutment being shifted closer to the stream channel. (S.T. 280, 282, 575-76; M.T. 416-17, 457.)

26. The new bridge is essentially the same length as the existing bridge. (S.T. 280.)

27. It will have a two-lane superstructure sitting on top of reinforced concrete abutments and a single reinforced concrete pier. (S.T. 573-74; M.T. 416; DOT Ex. 9.)

28. The width of the replacement bridge will be 24 feet to match the width of the approach roadway and consist of two ten-foot travel lanes with two-foot shoulders. (S.T. 574; DOT Ex. 15.)

29. The concrete faces of the structure of the new bridge will be faced with stone salvaged from the existing bridge, to the extent that enough competent stone can be salvaged. (S.T. 574, 605, 740-41; M.T. 780-81; DEP Ex. 32; DOT Ex. 49.)

30. Although at the time of the supersedeas hearing PennDOT had selected a contractor and estimated that the new bridge would be completed in April or May 2023, the project has been delayed and there is no longer a contractor lined up for the project. (S.T. 643, 646-47, 684-85; M.T. 521-22, 568, 570-74.)

31. The existing Headquarters Road Bridge is in an advanced state of deterioration and lacks structural integrity. (S.T. 828, 921; M.T. 303-04, 311-12, 320-21, 337, 422, 425-26, 443, 484-85, 487-88; DOT Ex. 7 (at 47), 10 (at 2), 26, 28; G. S. Ex. 911, 913.)

32. As far back as 2006, every component of the structural condition of the existing bridge had evidence of deterioration, sometimes severe deterioration in certain areas. (S.T. 829; M.T. 487-88; DOT Ex. 26.)

33. In the intervening years the deterioration has only worsened. (S.T. 887.)

34. During an inspection in September 2021, following widespread flooding caused by the remnants of Hurricane Ida, PennDOT's consultant noted that the stone at the top of the western abutment supporting the superstructure is completely fractured and "a hundred percent crushed in certain areas." (S.T. 835-36; M.T. 428, 432-33; DOT Ex. 70.)

35. There is a large void or localized collapse in the eastern pier that could compromise the entire bridge structure. (S.T. 830-31; DOT Ex. 70.)

36. One of the wing walls of the bridge (an extension of the abutment going back into the approach roadway) exhibits step cracking, a sign of failure, and a section of the wing wall has fallen into the creek bed, failing along the step cracking line. (S.T. 836; DOT Ex. 70.)

37. There is a large void in the western pier close to five feet in width, two to three feet high, and a foot deep. (S.T. 836-37; DOT Ex. 70.)

38. There is evidence of the foundation of the abutments being undermined, with water getting underneath the base stones. (S.T. 842.)

39. The condition of the stone of the piers is cracked and crushed and even the high-quality stone toward the base of the pillars is completely fractured, indicating that loading is now concentrated in certain areas, which could precipitate further failure. (S.T. 829-30; M.T. 428-30, 431.)

40. During core drilling of the bridge piers, PennDOT's consultant found that some of the base stone was in fairly good condition, but other areas had large voids and more than a foot of unsupported area from material loss over time. (S.T. 834; M.T. 424-26; DOT Ex. 65.)

41. The interior of the piers and abutments of the existing bridge are composed of dry stacked stone without any mortar holding the stone together. (M.T. 335-36, 338, 386, 425-26; DOT Ex. 65.)

42. Some of the piers and abutments are filled with crushed stone or soil after decades of deterioration. (M.T. 306-08, 503; DOT Ex. 65.)

43. The lime mortar holding the masonry together is in poor condition and the grout joints in the masonry have deteriorated. (S.T. 834-35, 858; DOT Ex. 28.)

44. The superstructure of the bridge has holes in the deck, including the four-foot hole that brought about the bridge's closure, and the frame is in very poor condition. (S.T. 829; M.T. 538.)

45. Stone from the bridge is already falling into the stream and other areas of stone and stream bank are continuing to erode. (S.T. 862-63.)

46. The collapse of stone near the tops of the supports could result in the loss of support in the western span, which would likely mean the superstructure would fall into the creek. (S.T. 887.)

47. In its alternatives analysis submitted as part of the permit application, PennDOT evaluated two different options for possibly rehabilitating the existing bridge: (1) a one-lane superstructure with the replacement of the existing abutments with reinforced concrete abutments and a partial rehabilitation of the existing piers; and (2) a two-lane superstructure with the same work on the substructure. (S.T. 601; DOT Ex. 7, 64.)

48. Both options were rejected because they were not feasible due to the significant deterioration of the Headquarters Road Bridge's substructure. (S.T. 921; DOT Ex. 7, 64.)

49. No one disputes that in any rehabilitation effort the entire superstructure of the existing bridge would need to be replaced because of its deterioration. (M.T. 298-99, 342.)

50. "Rehabilitating" the existing bridge would involve reconstructing nearly the entire bridge. (M.T. 310, 312-13, 370-71, 372, 443, 445-46, 493-94, 496-97, 510.)

51. Rehabilitation of the existing bridge is not feasible because it would leave two large piers and an abutment within the stream channel that will continue to collect debris and impact water quality, it would not be able to accommodate emergency vehicles, and there is not enough stone that can be saved from the existing structure. (S.T. 921; M.T. 455-57, 550-51.)

52. The existing bridge has exceeded its intended life, poses a safety risk, and a full replacement is warranted. (S.T. 921; DOT Ex. 7 (at 47), 10 (at 2).)

53. Tinicum Creek currently experiences significant erosion and scour, at some points down to bedrock on the western side near the bridge, likely brought on by the existing bridge. (S.T. 329-32, 339, 856.)

54. The existing western abutment is within the banks of Tinicum Creek. (S.T. 576, 1181, 1205; DEP Ex. 55.)

55. The water of Tinicum Creek flows directly into the wing wall of the western abutment, and the stream then bends around that abutment. (S.T. 838, 855, 861, 886-87, 942; DOT Ex. 27 (at 8), 28.)

56. The western abutment is taking the full force of the stream, which is directing energy downward and causing scour. (S.T. 1141, 1147-48, 1152, 1170-72; M.T. 460-61, 844-45.)

57. Although areas of the stream near the bridge are only a few inches deep to the stream bottom, a scour hole near the western abutment is at least five feet deep and has heavily eroded the stream bank. (S.T. 161-62, 455, 841; DOT Ex. 15.)

58. The scour has continued to get worse, (S.T. 858; DOT Ex. 28), and more scour holes are developing in the middle span of the bridge, (S.T. 953).

59. Erosion at the bridge has exposed the roots of trees in the stream banks, at least one tree has already fallen, and it is likely only a matter of time before more trees fall into the stream. (S.T. 631-32, 858-59, 863-64, 883-84; DOT Ex. 13, 28, 36.)

60. There is a significant amount of sediment deposition forming a point bar on the eastern side of the stream that has become vegetated and projects far into the watercourse. (S.T. 797, 855, 863, 938, 1142-43; DOT Ex. 9, 27 (at 8), 28.)

61. The new bridge will be better for the natural regime of the stream than if the existing bridge were to remain in place. (S.T. 1037, 1040-41; M.T. 472, 582-83, 688-90.)

62. Removing the old bridge and replacing it with the new bridge will improve the condition of the stream, and hydraulics will improve both within the stream channel and in the floodplain. (S.T. 1041, 1468-69, 1480; 690-91.)

63. The new bridge project will result in the removal of the existing wide pier within the stream, which is substantially interfering with natural flow right in the middle of the stream channel. (S.T. 1037.)

64. The new bridge will utilize a single three-and-a-half feet wide pier within the stream that will be smaller than the existing piers, which will lessen the potential for debris accumulation during flood events. (S.T. 845, 852; M.T. 432-34, 459, 582-83.)

65. By only having a single obstruction in the stream channel, the hydraulic capacity of the channel will increase by 18-20 percent. (S.T. 1040; M.T. 461, 698-91.)

66. The potential for debris accumulation, erosion, and scour are all reduced by having fewer obstructions and an increased hydraulic area. (S.T. 887-90; M.T. 582-83, 867-68.)

67. The replacement bridge will have improved and more natural free flow characteristics and conveyance capacity and less potential for the displacement of stream bed material during flood events that could create new gravel bars and downstream sediment deposits. (S.T. 167-68, 469, 846, 850, 852, 888-89; M.T. 463-64, 688-90.)

68. Installing the new bridge will reduce scour and erosion and return Tinicum Creek to a more natural free-flowing state. (S.T. 1468-72, 1479-80, 1500.)

69. PennDOT within the bridge structure proposes to angle rip rap up along the sides of the western abutment and western stream bank to absorb the flow energy coming into the area exposed by the western abutment shift, slow down water velocity, prevent bank erosion, protect the riparian buffer, and direct water toward the center of the channel, which will help improve downstream conditions. (S.T. 850-51, 865-66, 868, 1468; M.T. 462; DOT Ex. 29.)

70. Approximately 15-20 feet of the western bank downstream of the bridge will be armored with rip rap. (M.T. 511, 882-83.)

71. The rip rap will be depressed into the bank two feet deep, backfilled with stream bed material, and covered with soil. (M.T. 578-80, 919-20, 932; DOT Ex. 30.)

72. The rip rap will be able to withstand water velocities greater than 10 feet per second and will protect against erosion. (M.T. 697-98.)

73. The new bridge will not result in significant erosion of the stream channel and the western bank near the bridge. (M.T. 462, 471-72, 663, 684.)

74. At some places along the bank, soil cover is only six inches deep before encountering bedrock. (M.T. 513-15; DOT Ex. 30a.)

75. Gidumal experiences significant flooding of his property in its current condition with the existing bridge in place. (M.T. 81; G. S. Ex. 601, 610.)

76. The new bridge will not increase the risk of flooding or the damage caused by inevitable flooding within the area around the bridge. (S.T. 1461, 1472, 1473, 1480, 1493; M.T. 643, 661, 732-35, 738-41.)

77. There will be no significant increase in stream velocities, even in the area along the downstream western bank. (S.T. 992-97, 1001-14, 1035-36, 1037, 1040-41; M.T. 646-49, 654-56, 660; DOT Ex. 38, 39, 57.)

78. The permit requires PennDOT to conduct a pre-construction assessment of the project area and monitor conditions for five years after the project is completed. (M.T. 573, 862-63, 873; DEP Ex. 39; DOT Ex. 14.)

79. PennDOT used a one-dimensional ("1D") model in its permit application for its hydrologic and hydraulic (H&H) analysis after consulting with an outside firm on whether its 1D analysis was appropriate for this project as opposed to a two-dimensional ("2D") analysis. (S.T. 853-54; DOT Ex. 27.)

80. PennDOT's 1D analysis showed no real appreciable increase in flow velocity from what is happening now in Tinicum Creek. (S.T. 879-80, 890-91; DOT Ex. 32, 33.)

81. During the course of this appeal, PennDOT engaged an expert to perform 2D modeling, which confirmed the conclusion of the 1D modeling that the bridge replacement would overall slightly reduce flow velocity, or at most result in a negligible increase at some points during some storm events. (M.T. 660; DOT Ex. 38, 39.)

82. Given the relatively straight section of Tinicum Creek where the Headquarters Road Bridge is located, and the relatively small bridge, a 2D study was not necessary for the project. (S.T. 982-83, 1090-91, 1103-04; M.T. 649-50.)

83. The new bridge comports with modern safety standards for motorists, improving site distances and the ability to see oncoming traffic as a driver approaches the bridge. (S.T. 881-82; DOT Ex. 34.)

84. PennDOT entered into a Memorandum of Agreement with the Federal Highway Administration, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation to ensure that the project's impacts to the historic resources of the area were mitigated to the greatest extent possible. (DOT Ex. 49.)

85. The Memorandum of Agreement also established a nine-member Design Advisory Committee consisting of people from the National Park Service, the Advisory Council on Historic Preservation, the Pennsylvania State Historic Preservation Office, Bucks County officials, and Tinicum Township supervisors, who would be involved during project development and also engaged towards the beginning of the construction process. (DOT Ex. 49.)

86. One of the permit's special conditions requires PennDOT to abide by the Memorandum of Agreement. (DOT Ex. 14 (at 4).)

87. One of the conditions of the permit provides that it does not grant any property rights:

> This permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to, or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, nor any infringement of Federal, State, or Local laws or regulations; nor does it obviate the necessity of obtaining Federal assent when necessary.

(DOT Ex. 14.)

## DISCUSSION

At the outset we must emphasize that very little has changed in this case since we issued our Opinion and Order denying the Appellants' petitions for supersedeas in April 2022. The parties' arguments in their post-hearing briefs on the merits are essentially the same as their arguments in their post-hearing briefs on the supersedeas. The Appellants still argue that the new bridge will cause an increase in water velocities near the bridge that will result in too much erosion in the stream and that will worsen flooding on Mr. Gidumal's property. They still say that the Department did not appropriately consider the existing bridge as a valuable historic resource that should be preserved and rehabilitated instead of replaced. They argue that the Department failed in its duties as a trustee under Article I, Section 27 of the Pennsylvania Constitution to conserve and maintain the existing bridge. Mr. Gidumal continues to claim that certain disputes over temporary easements and rights-of-way on his property should have prevented the Department from ever issuing the permit to PennDOT. None of these arguments were successful at the supersedeas stage.

An additional problem for the Appellants is that, from an evidentiary perspective, this case is basically the same as it was after the supersedeas hearing. Gidumal's hydraulics and hydrology expert, Dr. Clay Emerson, did not testify at the merits hearing. This is somewhat surprising given

that Dr. Emerson, at the time of the supersedeas hearing, testified that he did not review the two-dimensional ("2D") model of PennDOT's hydraulics expert, Benjamin Israel-Devadason, P.E. (S.T. 140-41.) Accordingly, Gidumal presented no expert testimony at either hearing to directly contest PennDOT's expert's 2D modeling.

Among the witnesses who did testify at the merits hearing, much of it covered the same ground in the same ways as during the supersedeas hearing. The Riverkeeper's hydraulics expert, Mary Paist-Goldman, used her testimony at the merits hearing largely as an attempt to rebut our findings from our supersedeas Opinion, but she did not conduct any new analysis, update her previous analysis, or rerun her model in advance of the merits hearing. (M.T. 247, 260.) To the extent there was new testimony, it tended to only bolster our findings from the supersedeas hearing. For instance, while Mr. Israel-Devadason did not conduct any new study, he did review Dr. Emerson's model, which he did not have access to at the time of the supersedeas hearing, and he did take a closer look at the 2D model of Ms. Paist-Goldman following the supersedeas hearing, finding fault in each of their models. The only witness to testify at the merits hearing who did not testify during the four-day supersedeas hearing was Douglas Bond, P.E., who the Riverkeeper called to address the prospect of rehabilitating the existing bridge instead of demolishing and replacing it.

During the merits hearing, the parties stipulated to the inclusion of the entire record from the supersedeas hearing into the record on the merits. (M.T. 128, 283.) Perhaps this is not entirely surprising since, although it was nominally a supersedeas hearing, in reality the supersedeas hearing was closer to an expedited hearing on the merits. The supersedeas hearing was conducted more than three and a half months after the appeals were filed, with discovery conducted among the parties pursuant to a joint case management order proposed by the parties and accepted by the

Board. It is actually somewhat unusual for an appeal to continue to the merits stage after supersedeas proceedings, especially when supersedeas proceedings function more as an expedited merits hearing as they did here.

Although a ruling on a petition for supersedeas is typically just a prediction about which party is likely to eventually prevail on the merits, *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 839-40, nothing since the supersedeas has caused us to change our view of the case or alter the conclusions we made at the supersedeas stage. We have kept an open mind during the remainder of the proceedings and at the merits hearing, but the Appellants have not presented any evidence to change the conclusion we reached after the supersedeas hearing: that the existing bridge is causing environmental harm to Tinicum Creek and its natural regime and the Appellants have not shown that the permit for the replacement bridge is unlawful or unreasonable in any way.

As third parties appealing a Department permitting decision, the Appellants bear the burden of proof in this appeal. 25 Pa. Code § 1021.122(c)(2). The Appellants must show by a preponderance of the evidence that the Department acted unreasonably, contrary to the law, that its decision to issue the permit is not supported by the facts, or that its actions are inconsistent with the Department's obligations under the Pennsylvania Constitution. *Reed v. DEP*, EHB Docket No. 2022-095-B, slip op. at 10 (Adjudication, June 25, 2024) (citing *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 822; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Solebury School v. DEP*, 2014 EHB 482, 519; *Gadinski v. DEP*, 2013 EHB 246, 269). For the reasons explained below and for largely the same reasons as we explained in our Opinion and Order on the supersedeas petitions, the Appellants have not met their burden.

**Rehabilitating the Existing Bridge**

Beginning with the only substantially new ground covered at the merits hearing, the Riverkeeper largely hangs its hat on the prospect of what they call rehabilitating the existing Headquarters Road Bridge instead of demolishing it and building a new one as proposed by PennDOT and permitted by the Department.[4] The Riverkeeper contends that rehabilitating the existing bridge is necessary to preserve the historic values of the bridge and the surrounding Ridge Valley Rural Historic District.

Under the regulations, a permit applicant must include in its application an alternatives analysis, which consists of "[a] detailed analysis of alternatives to the proposed action, including alternative locations, routings or designs to avoid or minimize adverse environmental impacts." 25 Pa. Code § 105.13(e)(1)(viii). *See also* 25 Pa. Code § 105.14(b)(7) (project's water dependency "must be based on the demonstrated unavailability of any alternative location, route or design and the use of location, route or design to avoid or minimize the adverse impact of the dam, water obstruction or encroachment upon the environment and protect the public natural resources of this Commonwealth"). The Riverkeeper believes that rehabilitating the existing bridge is the alternative that should have won out over PennDOT's chosen project of replacing the bridge.

The Riverkeeper repeatedly accuses PennDOT of failing to evaluate rehabilitation as an option as part of its alternatives analysis submitted with the permit application, or somehow

[4] The Department argues that the Appellants have waived the ability to argue for rehabilitation because they did not include a challenge to the alternatives analysis in their notices of appeal. *See Morrison v. DEP*, 2021 EHB 211, 219 (issues not raised in a notice of appeal are generally waived). We find that the Appellants have done enough to raise this issue in general terms in their notices of appeal to avoid waiver. *See Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637 ("notices of appeal are to be read broadly and we will be reluctant to find waiver so long as an objection falls within the 'genre of the issue' contained in the notice of appeal"). The Appellants' entire appeals contest the demolition of the existing bridge and its chosen replacement. If the Appellants do not want the existing bridge to be demolished then there is little else left than an attempted rehabilitation.

stacking the deck against rehabilitation in the analysis, but that is just factually untrue. PennDOT's alternatives analysis included six options in addition to a "no build" alternative, and two of the six alternatives were rehabilitation options. (DOT Ex. 64.) The first rehabilitation option was a one-lane superstructure with the replacement of the existing abutments with reinforced concrete abutments and a partial rehabilitation of the existing piers. (S.T. 601.) The second was a two-lane superstructure with the same work on the substructure. Rehabilitating the bridge was dismissed by PennDOT in the alternatives analysis for the project because it was determined that rehabilitation was not feasible and it did not satisfy the overall project purpose. (M.T. 455-56; DOT Ex. 7, 64 (at 7-13).) Rehabilitation would have left two piers within the stream that would impact its free-flowing nature, continue to cause debris accumulation, and continue to cause scouring at the piers and abutments and negatively impact water quality. (DOT Ex. 64 (at 12, 16).) Rehabilitation was also rejected because of the structural deficiency of the existing bridge, and rehabilitation would not accommodate two lanes of traffic, would not be able to support the weight of heavier emergency vehicles, and would not accommodate the turning radius requirements for emergency vehicles. (M.T. 456-57.) PennDOT's contracted engineering firm actually reviewed an earlier rehabilitation proposal by Douglas Bond, P.E., the Riverkeeper's expert who specializes in rehabilitating historic bridges, when PennDOT was preparing the alternatives analysis for the project. (M.T. 436.)

Mr. Bond's current rehabilitation proposal as presented at the merits hearing is basically that a new, one-lane bridge deck can be placed on rehabilitated piers and abutments. It would have to remain a one-lane bridge because, in Mr. Bond's opinion, a two-lane bridge would require significant strengthening and reinforcement of the piers and abutments to support the additional width. (M.T. 333-34, 342.) PennDOT's position, as articulated by Michael McAtee, P.E.,

PennDOT's engineering project manager and expert on this issue, is that the existing bridge would require complete reconstruction because of its structural deterioration and that this is simply not a feasible option

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)).

To the extent we must weigh the opinions of Mr. Bond against Mr. McAtee, we credit the testimony of Mr. McAtee. Mr. McAtee is among the experts most tenured with this project. He has worked on the project for more than 18 years, with 17 of those being the engineering project manager. (M.T. 413, 492.) He has been to the site more than 30 times and overseen structural investigations of the existing bridge. (M.T. 413, 424-25; DOT Ex. 65.) We also found his testimony to be honest, sincere, and straightforward. His opinions are supported by all of the credible evidence in this case that shows that rehabilitation of the existing bridge is not feasible.

What Mr. Bond calls "rehabilitating" the bridge is a bit of a misnomer. Instead, what he calls rehabilitation is more like a significant reconstruction. First, all parties agree that the bridge's

1919-era deck and superstructure that carry the roadway would need to be completely replaced, so there is already a significant portion of the bridge that cannot be rehabilitated in the normal sense of the word. Mr. Bond testified that the bridge deck is completely deteriorated and there is "no question" that the bridge deck needs to be replaced. (M.T. 298-99, 342.) Beyond the bridge deck, under Mr. Bond's proposal, the top two feet of masonry on the piers and abutments would need to be removed and replaced with a two-foot thick concrete cap to more evenly distribute the load of the deck over the stone. (M.T. 310, 312-13.) Mr. Bond acknowledged that a 12-foot by 7-foot bulge in the west pier would need to be taken down and rebuilt, approximately 45-50% of the pier. (M.T. 370-71.) Significant defects in the east pier would need to be reconstructed, including a 3-foot by 5-foot outward bulge in the stone. (M.T. 372.) The west abutment has a 3-foot by 4-foot stone that would need to be completely replaced. (M.T. 374.)

Mr. McAtee thinks even more of the piers and abutments would need to be entirely reconstructed. For instance, in Mr. McAtee's view, the west abutment would need to be entirely reconstructed for Mr. Bond's proposal, or at least have the base incased in concrete if those stones were to remain. (M.T. 445-46.) Mr. McAtee agreed that there is a 12-foot by 7-foot bulge in the west pier, but instead opined that the entire pier would need to be taken apart and rebuilt, a process he (more accurately in our view) labeled reconstruction. (M.T. 443.) Mr. McAtee also opined that the wingwalls would need to be replaced and splayed out in Bond's proposal. (M.T. 496-97.)

We credit Mr. McAtee that nearly the entire bridge would need to be rebuilt stone by stone under the so-called rehabilitation proposal. As Mr. Bond recognizes, some of the stones that make up the crucial support structure are very damaged, to the point that they have "fallen apart" and would need to be replaced. (M.T. 303-04, 311-12, 320-21, 337.) Some of the piers and abutments are severely deteriorated. Indeed, the interior of the piers and abutments, one of the primary load-

bearing features of the bridge, is composed of dry-stacked stone—just stones piled on top of each other without any mortar or grout holding them together. (M.T. 335-36, 338, 386, 425-26.) We credit Mr. McAtee who opined that dry-stacked stone has a greater chance of being displaced, which could cause bulging or uneven load distribution, which could cause stones to fracture or crack and cause further displacement. (M.T. 426-27.) Mr. Bond accompanied PennDOT on a core drilling investigation, drilling into the piers to assess their composition, and the internal parts of the piers were severely deteriorated with the insides of some being made up of *soil* instead of rock. (M.T. 306-07.) Mr. McAtee, who oversaw the study, discovered that the stone face was only 4-6 inches deep followed by a 20-inch void within one of the piers. (M.T. 424-25.) In other words, the interior of the piers and abutments does not contain any competent stone that has any load-bearing properties.

We credit Mr. McAtee's opinion that rehabilitation is not feasible due to the significant deterioration of the Headquarters Road Bridge's substructure. (S.T. 921.) He credibly opined that the bridge has exceeded its intended life, poses a safety risk, and a full replacement of the bridge is warranted. Simply put, the existing bridge is too far gone for any "rehabilitation" to make sense. As Mr. McAtee put it rather succinctly, if a structure has deteriorated to a point that it needs to be entirely reconstructed to such an extent that it is not the original structure anymore, it might not be feasible and prudent. (M.T. 484-85.) Mr. McAtee said his firm looked at the amount of reconstruction that would be required and the decision was made that there would not be enough of the original structure remaining after the needed reconstruction was undertaken to justify it remaining in place because it would not be the original bridge anymore. (M.T. 493.) (*See also* DOT Ex. 7 (at 47) ("The presence of significant structural deficiencies (base sliding, bulging, cracked stone courses) indicates internal distress within the substructures and overstress of the

stone courses. The displacement of stone courses and cracking of stones introduces new voids, allowing for water to infiltrate into the pier section further advancing deterioration as a result of freeze-thaw cycles. Without entire reconstruction of the substructure, it is not possible to determine the exact service life due to the condition and continued deterioration."), DOT Ex. 10 (at 2) ("Urban [Engineers] performed a detailed evaluation of the structure to evaluate the feasibility of its rehabilitation as part of the alternative analysis and found that the masonry structure has experienced significant distortion and localized failure which would be nearly impossible to remedy.").) Even as far back as 2006 when PennDOT first considered the possibility of rehabilitating the bridge, PennDOT rejected that possibility because it thought the bridge was too deteriorated. (M.T. 487-88.) The condition of the bridge has only worsened in the intervening years.

With all of the reconstruction required under the Riverkeeper's proposal, we are left wondering what of the original bridge would be left. Sailing on a Ship of Theseus, the Riverkeeper appears to concede in its reply brief that the rehabilitated bridge would not so much preserve the existing structure as be a "replica" of the old bridge. (*See* DRN Reply Brief at 10-11 ("There is nothing unlawful about replacing a component that has failed with a 'replica' and doing so does not rob the 1812 bridge of its historic integrity, nor does that practice adversely impact the historic, scenic and esthetic values of the Ridge Valley Historic District….") (footnote omitted).) What the Riverkeeper really seems to want under the guise of "rehabilitation" is a one-lane bridge that has abutments and piers in the same locations as they are now, regardless of how much of the original structure or its stone can be salvaged.

The rehabilitated bridge, as proposed by Mr. Bond, would also have operational limitations that are not an issue with PennDOT's proposed bridge. For instance, Mr. Bond testified that his

rehabilitated bridge would need to be weight restricted if the support structure was not reinforced, only supporting vehicles weighing at most 36,000 pounds. (M.T. 345-46, 452, 480.) This means the rehabilitated bridge would not be able to carry one of the local fire trucks, and it would be unlikely to support a school bus full of passengers. (M.T. 342-43, 345; 453; DOT Ex. 69.) Mr. Bond opined that the rehabilitated bridge might be able to support a pumper truck—a smaller fire truck—but the bridge may still need to be strengthened to support even that vehicle. (M.T. 381-82.) PennDOT's replacement bridge, by contrast, was designed to handle the Ottsville Fire Department's largest vehicle, weighing approximately 70,000 lbs. (M.T. 454.)

The rehabilitated bridge would also be unlikely support the turning radius needed for emergency vehicles. Although Mr. Bond testified that the turning radius for school buses and emergency vehicles could be achieved through some modifications to wingwalls and taking away some of the east bank, he also testified that it was not unusual for historic bridges to be unable to accommodate the turning radius needed for modern emergency vehicles and that one may need to compromise on things like turning radius and site distance in order to preserve the historic structure. (M.T. 321-23, 327, 338.) Considering the operational limitations of the rehabilitated bridge, and the questionable feasibility of reconstructing the bridge, PennDOT and the Department appropriately rejected rehabilitation as an option for this project.[5]

Even if the so-called rehabilitation were feasible from a structural and operational perspective, that does not necessarily mean that the permit under appeal for a new bridge is unreasonable, contrary to law, or inconsistent with the Department's responsibilities under the

[5] The U.S. District Court previously upheld the rejection of the rehabilitation option for the Headquarters Road Bridge. Although the Court was conducting a different review, it is worth noting that the Court found that PennDOT did not act arbitrarily or capriciously in determining that the rehabilitation alternatives were not prudent under Section 4(f) of the United States Department of Transportation Act of 1966 requiring the use of historic sites to be avoided or minimized. *Del. Riverkeeper Network v. Pa. Dep't of Transp.*, No. 18-4508, 2020 U.S. Dist. LEXIS 154233 (E.D. Pa. Aug. 20, 2020). (DOT Ex. 8 (at 67-73).)

Pennsylvania Constitution. We do not believe that it is necessarily the Department's role to be dictating to a permit applicant the design for a bridge, or whether a bridge should be rehabilitated or replaced. As the Department's aquatic biologist and environmental reviewer of the permit, Christian Vlot, appropriately testified, the design and engineering choices for a bridge are not what the Department is focused on in its review. Instead, the Department is focused, particularly in the alternatives analysis, on minimizing and avoiding impacts to natural resources. Only if a permit applicant's design choices increase environmental impacts will the Department consider the design and engineering aspects of a project. (M.T. 108, 118-19.) In other words, the Department may care whether someone proposes a two-span or three-span bridge since the regulations require limiting the number of obstructions in a watercourse, 25 Pa. Code § 105.163(a), but the Department does not care whether a bridge is concrete or stone or whether it is brown or blue.

To that end, there does not appear to be any sound environmental justification for the rehabilitation option. As explained below, the existing bridge is causing environmental harm to the natural regime of Tinicum Creek. Rehabilitating/reconstructing the existing bridge would merely perpetuate that harm.

**Environmental Degradation from the Existing Bridge**

The existing bridge is causing significant adverse environmental impacts to Tinicum Creek. The bridge is interfering with the natural regime of the stream, and it is causing excess erosion and sedimentation (E&S) of the stream and excessive scour. With respect to the bridge's infringement of the stream's natural regime, there can be no question that the goal of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 – 693.27, and the operative regulations is to preserve and protect the natural regime of watercourses. Indeed, the Dam Safety and Encroachments Act says exactly that, with one of its stated purposes being to "[p]rotect the natural

resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses." 32 P.S. § 693.2(3). The regulations echo this point:

> The purposes of this chapter are to:
> ….
> (4) Protect the natural resources, environmental rights and values secured by PA. CONST. art. I, § 27 and conserve and protect the water quality, natural regime and carrying capacity of watercourses.

25 Pa. Code § 105.2(4). Other examples in the regulations include Section 105.16(d), which provides: "In reviewing permit applications, it will be the policy of the Department to encourage activities that protect the natural condition of the watercourses or other body of water." 25 Pa. Code § 105.16(d). Section 105.161(a)(3) then provides that:

> (a) Bridges and culverts shall be designed and constructed in accordance with the following criteria:
> ….
> (3) The structure may not materially alter the natural regimen of the stream.

25 Pa. Code § 105.161(a)(3).[6]

The Department reasonably interprets the "natural regime" of the stream to mean its equilibrium state, a stable state without excessive erosive force. (S.T. 1275, 1298.) It is a kind of neutral energy state. (*Id.*) It is not about how the stream looked 10 years ago or 100 years ago or 200 years ago. (S.T. 1274-76.) There is no particular time in history that necessarily represents what the stream would look like in its natural state. (S.T. 1335.) It is a state of what the stream would be like without any human intervention or man-made obstructions. (M.T. 828.)

Much attention has been devoted to comparing the environmental impact of the existing bridge with the environmental impact of the new bridge. We have searched the regulations in vain

[6] The Dam Safety and Encroachments Act and the regulations use the terms "regime," "regimen," and "condition" interchangeably, but we do not detect any difference in the meaning of the terms.

for any indication that this is the pertinent inquiry. The pertinent inquiry centers on the project as a whole's impact on the stream and its natural regime, not the bridge's impact on an unnatural regime being artificially perpetuated by previously installed man-made obstructions. The Commonwealth is crammed with old dams, millraces, bridges, and other obstructions that have outlived their usefulness and may even be causing environmental harm. When these features are removed or replaced, the goal is to return the impacted watercourse to natural conditions to the extent possible. 25 Pa. Code §§ 105.2(4), 105.16(d), 105.161(a)(3). The goal is *not* to merely install a new obstruction that may be slightly less unsafe or may be slightly less environmentally harmful than the obstruction being replaced.

The standard in this case is not which obstruction is worse, the old bridge or the new bridge. The question that must be answered is whether removing the old bridge and installing the new bridge will materially alter the natural regime of the stream (in addition to the other relevant regulatory criteria).[7] What constitutes the natural regime of the stream is a matter that the experts can help us define, and here, the preponderance of the testimony is that the existing bridge is interfering with the natural regime of the stream, and the replacement project will ensure that the stream is restored to a more natural free-flowing condition. We reject the unsupported legal argument that it is not necessary to strive to return a stream to a natural free-flowing condition simply because an existing obstruction has been there a long time.[8]

Tinicum Creek currently experiences significant erosion, at some points down to bedrock on the western side near the bridge. This is perhaps nowhere as evident as in the scour hole at the

[7] To the extent that we are wrong and comparing the two bridges is the appropriate standard, the stream with the new bridge will be better than the stream with the old bridge.

[8] Indeed, if the Department determines that an existing obstruction or encroachment is unsafe or adversely affecting property or the environment, the regulations authorize the Department to require the owner to repair or remove the offending obstruction. 25 Pa. Code § 105.62(a).

western abutment. The water of Tinicum Creek flows directly into the wing wall of the western abutment, and the stream then bends around that abutment. We credit the testimony of Christian Vlot that the western abutment is taking the full force of the stream, which is directing energy downward and causing the scour. (S.T. 1141, 1147-48, 1152, 1170-72.) There are areas near the bridge where the depth of water is only a few inches deep to the stream bottom, yet the scour hole near the western abutment is at least five feet deep and has heavily eroded the stream bank. The Riverkeeper's hydrology expert, Mary Paist-Goldman, conceded that the scour hole could be as much as six or seven feet deep. (S.T. 455.) Gidumal's expert, Dr. Clay Emerson, acknowledged that the scour hole is deep and has likely eroded down to bedrock. (S.T. 161-62.) The scour has continued to get worse, and more scour holes are developing in the middle span of the bridge.

Ms. Paist-Goldman all but conceded that the existing bridge was having a negative impact on Tinicum Creek when she testified at the supersedeas hearing that she did not believe the same scouring would occur if the bridge had never been built. (S.T. 329-32, 339.) We do not credit her suggestion that the scour may simply be due to poor maintenance of the existing bridge structure, (S.T. 489, 516-17; M.T. 157-58, 176, 193-94), which nevertheless implicitly concedes that the structure is having an adverse impact on the stream.

In addition to the scour, erosion at the bridge has exposed the roots of trees in the banks, at least one tree has already fallen, and it is likely only a matter of time before more trees fall into the stream and create downstream obstructions. There is a significant amount of sediment deposition forming a point bar on the eastern side of the stream that has become vegetated and projects far into the watercourse, nearly obstructing the eastern span of the bridge.

The existing bridge is a man-made obstruction that is not part of the stream's natural condition. Gidumal's expert acknowledged that the bridge is an unnatural alteration of Tinicum

Creek's natural regime. (S.T. 150-52.) The stream is not flowing freely. (S.T. 149-55.) The Riverkeeper's expert similarly acknowledged that the western abutment cannot be considered part of the stream's natural regime. (S.T. 304.) It is also clear that the existing bridge is preventing Tinicum Creek from reaching its equilibrium state, i.e. its natural condition, largely because of the western abutment protruding directly into the stream channel. Rehabilitating/reconstructing the old bridge or otherwise leaving it in its current injurious location or perpetuating the problem by installing a new bridge in the same impeding location would not be consistent with the natural condition of the stream.

The western abutment that is sitting in Tinicum Creek is creating a shadow effect for a short distance on the western bank downstream of the bridge, meaning its projection into the stream channel is artificially protecting the western bank from the natural erosion it would otherwise experience in its unaltered state.[9] This is the area where the Appellants have expressed their greatest concern about potential erosion. The shadow effect is not natural; it is caused by the man-made structure that is the existing bridge. It is preventing Tinicum Creek from reestablishing a natural condition.

Much of the dispute in this appeal focuses on the extent to which removing the old bridge will adversely affect the western shoreline below where the existing western abutment currently is located, and whether that will result in excess sedimentation of the stream or will increase water velocity or direct flow in a manner which results in erosion of stream beds and banks over and above what occurs when the stream is flowing in accordance with its natural regime. 25 Pa. Code § 105.161(a)(3) and (4). There might be some effect; the question is how much. This turns on an analysis of the hydraulics and hydrology (H&H) of Tinicum Creek.

[9] We do not find the Riverkeeper's expert's contention that the effect extends for several hundred to 1,000 feet to be credible.

Several highly qualified experts provided their opinions in this case regarding hydrology and hydraulics, with the Appellants' experts opining that the bridge will increase excess sedimentation from erosion in the stream and the agencies' experts saying the exact opposite. For the most part, these experts have utilized various H&H models and we heard an abundance of testimony at both the supersedeas and merits hearings on model results. However, as we stated in *New Hanover Twp. v. DEP*, 2020 EHB 124, 179, *rev'd*, 258 A.3d 572 (Pa. Cmwlth. 2021), *vacated and remanded*, 286 A.3d 713 (Pa. 2022), *aff'd*, 316 A.3d 668 (Pa. Cmwlth. 2024), the importance of modeling should not be exaggerated. "Modeling is obviously a valuable tool, but as a computer-generated prediction based on many input decisions, there is plenty of opportunity for manipulation designed to achieve a desired result. Proper calibration of the model with actual field measurements…operates as a check on manipulation, but it cannot eliminate the possibility for mischief entirely." 2020 EHB at 179. Despite the use of sophisticated modeling, we must leave room for some common sense in the analysis. *Id.* at 182. *See also Solebury School v. DEP*, 2014 EHB 482 (model results not credited because model predicted wildly crenellated contour lines and lines that depicted "crazy flow paths" of groundwater); *M & M Stone Co. v. DEP*, 2008 EHB 24, *aff'd*, No. 383 C.D. 2008 (Pa. Cmwlth. Oct. 17, 2008) (model results rejected because they did not calibrate well with field results). As PennDOT's 2D modeling expert, Benjamin Israel-Devadason, cogently testified, a model is a good tool, but a modeler needs to constantly ask whether the model's results can happen in reality. (M.T. 722.)

Along those lines, we tend to agree with the testimony of Dr. Emerson at the supersedeas hearing that one does not need a "fancy model" to predict how removing the old bridge will affect flow. (S.T. 141-42.) We did not necessarily need a modeling expert to tell us that moving the western abutment out of the stream channel where it is now will eliminate the unnatural shadow

effect it has been having on the western bank downstream of the current bridge. We credit the testimony of Christian Vlot that, based on his valuable and extensive real world experience in evaluating encroachments (as opposed to computer simulations), the removal of the western abutment is not going to result in any significant increased erosion of the downstream western bank over and above what would occur in the stream's natural condition. (S.T. 1323.)

Of course, modeling is helpful, especially where, as here, it confirms predictions based on real world experience. Although we do not doubt the sincerity of all of the experts and we appreciate their contributions, we find the opinions of Mr. Israel-Devadason, both at the supersedeas hearing and the merits hearing, to be by far the most credible. Without intending to minimize the excellent qualifications of the other experts, we find Mr. Israel-Devadason to be exceptionally well qualified and by far the most knowledgeable and experienced expert. He is recognized as a national authority on the precise issues that are the subject of our inquiries in this case. (S.T. 971-80, 1041; M.T. 628; DOT Ex. 37.) He has conducted more than 500 2D H&H analyses, as compared to the Riverkeeper's expert's ten. (S.T. 974-76; M.T. 140, 622.) Mr. Israel-Devadason is a Professional Engineer and a Certified Floodplain Manager and a recognized and award-winning expert in hydraulic and hydrologic engineering, including H&H modeling.

Mr. Israel-Devadason brought his outstanding qualifications to bear in presenting clear, well-organized opinions based on extensive preparation and state-of-the-art tools. We found his opinions to be coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case. We detected no tendency toward exaggeration, alarmism, or result-oriented conclusions in his presentation. And having viewed dozens of photographs, videos, and drawings of the site in various flow conditions, and having visited the site ourselves (which, although not independent

evidence, helped us better understand the evidence presented at both hearings), his opinions make the most sense.

Mr. Israel-Devadason's bottom line, which we fully credit, is that the new bridge will be better for the natural regime of the stream than if the existing bridge were to remain in place. (S.T. 1037, 1040-41; M.T. 582-83, 688-90.) Removing the old bridge and replacing it with the new bridge is going to improve the condition of the stream. (S.T. 1041.) Hydraulics will improve both within the stream channel and in the floodplain as well. (S.T. 1041; M.T. 690-91.) Mr. Israel-Devadason's analysis was consistent with Mr. Vlot's opinion that, even in the area along the downstream western bank that is of the greatest concern to the Appellants, there will be no significant increase in water velocities. (S.T. 992-97, 1001-14, 1035-36, 1037, 1040-41; M.T. 654-56, 661-62; DOT Ex. 38, 57.) Indeed, Mr. Israel-Devadason predicted based on his model that stream velocities on the west bank would slightly decrease with the new bridge during both the 25-year and 100-year flood events. (M.T. 660; DOT Ex. 39.) This means that there will be no new increase or excess sedimentation of the stream as a result of erosive forces. *See* 25 Pa. Code § 105.161(a)(4).

There has been a great deal of debate in this case about whether a 2D model as opposed to a 1D model was necessary and appropriate for the project for the hydrologic and hydraulics analysis. Indeed, it was a primary, if not the primary, focus of the Appellants' cases at the supersedeas, with Gidumal's expert testifying extensively on why he thought a 2D model was necessary for this project. A 1D model measures stream flow in a single direction as the water moves downstream. It relies on cross-sections taken at various points along the stream, running from bank to bank, that are intended to be representative of the geometry of the local terrain and the model averages the recorded flow velocity across the cross-section. In contrast, in a 2D model

the modeler lays out a mesh of cells that account for the elevation and topography of the stream channel and surrounding features. (S.T. 981-82.)

In its permit application, PennDOT used a 1D model for its H&H analysis after consulting with an outside firm on whether its 1D analysis was appropriate for this project as opposed to a 2D analysis. PennDOT's 1D analysis showed no real appreciable increase in flow velocity from what is happening now in Tinicum Creek. (S.T. 879-80, 890-91; DOT Ex. 32, 33.)

The debate whether a 2D model was necessary for this project seems largely academic because PennDOT, in an apparent response to the appeals, hired Mr. Israel-Devadason to perform a 2D analysis to see whether or not its 1D modeling held up.[10] Mr. Israel-Devadason confirmed the conclusion of the 1D modeling that the bridge replacement would overall slightly reduce flow velocity, or at most result in a negligible increase at some points during some storm events. (M.T. 660; DOT Ex. 38, 39.) There is no evidence that E&S over and above what occurs under natural conditions is threatened. Our review is *de novo*, "and we can 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). The record that forms the basis of *our* analysis includes the 2D analysis performed by PennDOT's highly credible expert.[11]

[10] To the extent that the debate remains something other than academic, we credit the expert opinions of Mr. Israel-Devadason and Tiffany Landis of the Department that a 2D study was not necessary for the project. (S.T. 982-83, 1090-91, 1103-04; M.T. 631-32, 649-50.)

[11] The experts tell us that 1D models are used in 95 percent of the cases. There is nothing particularly unique about the project in this case from an H&H perspective, a relatively small bridge in a relatively straight stream with a generous floodplain nearby. The high regulatory protection afforded to Tinicum Creek as an exceptional value stream does not in and of itself suggest that 2D modeling is necessary when 1D modeling accurately predicts flow.

The Appellants offer little critique of Mr. Israel-Devadason's work, other than saying he used a different 2D model than their own experts used. Gidumal in his post-hearing brief rarely addresses Mr. Israel-Devadason's testimony, either from the supersedeas hearing or the merits hearing. We credit Mr. Israel-Devadason's opinion that he used a model (the SRH-2D model) that is preferred over the ones used by the Appellants' experts because it is approved by the Federal Highway Administration and it was developed more than 20 years ago by a company that has been a pioneer in the 2D modeling industry. (S.T. 983-85; M.T. 632-34, 660-61.) Gidumal faults PennDOT and Israel-Devadason for not including the guardrails in their modeling that will be added to a relatively limited part of Headquarters Road as it raises toward the new bridge. Gidumal contends that guardrails can collect debris during flood events and impede the downstream flow of water. He makes a strained argument that the accumulated debris will act as a dam, and therefore the Department should have permitted this bridge, or perhaps the guardrails individually, as a dam under the regulations. Gidumal says, if the guardrails had been permitted as a dam, PennDOT would have been required to obtain a flowage easement for the land subject to inundation and include it with its permit application. *See* 25 Pa. Code § 105.81(a)(10). The evidence simply does not support this. Separately permitting a guardrail along a roadway as a dam borders on nonsense.

Gidumal also argues that the project should have been subject to 25 Pa. Code § 105.231, which imposes additional requirements for projects that will involve construction or modification of channel changes or dredging for facility construction and maintenance. Gidumal does not identify what elements of the project involve channel change or dredging. Moving the western abutment out of the stream is not a modification of the stream channel; it is removing an obstruction from the channel. Gidumal seems to be only interested in the requirement in Section

105.231 that requires proof of title or flowage easements as part of the permit application, *see* 25 Pa. Code § 105.231(a)(1)(vii), but that only applies if there is a stream channel change to begin with.

Although Gidumal's expert modeled the guardrails as impenetrable obstructions that redirect flow back into the stream channel at increased velocities, (S.T. 124-28, 131-32; G. Ex. 104), we credit Mr. Israel-Devadason's testimony that it was not necessary or appropriate to include the guardrails in order to accurately predict flow conditions. (S.T. 986-87, 1096-98.) He said there is no standard way to model them right now, and in most cases water can still pass through. (S.T. 986-87.) Nevertheless, he credibly contended that the conservative coefficients used in PennDOT's model accounted for uncertainties such as guardrails accumulating debris. (M.T. 635-40; DOT Ex. 74.) Independent of modeling, he credibly opined that the guardrails are at least as likely to be a good thing, slowing down velocities and thereby reducing erosion. (S.T. 1100; M.T. 640-41.) We are struggling to see why the altered flow paths modeled by Dr. Emerson as a result of the guardrails, even if they come to pass, would increase flooding or cause excess E&S.

We likewise credit the testimony of Mr. McAtee, who, based on his real world experience at the site, also did not believe the guardrails needed to be modeled. Mr. McAtee has been to the site during flood conditions and he has not observed any extensive drift accumulating outside of the banks of the stream. (S.T. 877-78, 901, 902-03; M.T. 466-67, 517-18.) He has also seen water flowing through the posts of the fencing along the banks, which have a narrower opening than the proposed guardrails. (S.T. 901.) We also credit Mr. McAtee's opinion that, even if the guardrails did accumulate debris, it would not increase any contraction scouring around the bridge supports because the water would be conveyed to the floodplain. (S.T. 893-93.) The Appellants did not

present any evidence that the guardrails would extend the limits of flooding beyond the existing floodplain or any convincing evidence that we are able to credit that the guardrails or any other activities associated with Headquarters Road itself will increase damage to the floodplain.

It is possible that there could be slightly more inundation of Mr. Gidumal's property due to the lowered road profile, but we credit Mr. Israel-Devadason's testimony that any increase in velocity in the floodplain of Mr. Gidumal's property is miniscule, one- to two-tenths of a foot per second, and will be of an extremely low level of hydraulic force unlikely to cause any damage in and of itself. (M.T. 732-35.) Mr. Israel-Devadason credibly opined that any flooding or damage to Mr. Gidumal's property would happen anyway, not because of the new bridge. (M.T. 738-41.) Indeed, at the risk of sounding overly glib, the simple fact is much of Gidumal's property exists in a floodplain, (DEP Ex. 55), as acknowledged by his own counsel's questioning, (M.T. 103-04). His property floods with the existing bridge there. Indeed, Gidumal produced dozens of pictures showing extensive flooding on his property with the existing bridge there. (G. Ex. 601, 610.) His property is likely to flood irrespective of any bridge at the present location. Floodplains are designed to flood. As we said in our Opinion and Order on the Appellants' Petitions for Supersedeas: "It is important not to lose sight of the fact that floodplains by definition are supposed to flood during high flow periods. They are an invaluable part of a stream's natural regime." *Del. Riverkeeper*, 2022 EHB at 137. The regulations define the floodplain as "[t]he lands adjoining a river or stream that have been or may be expected to be inundated by flood waters in a 100-year frequency flood." 25 Pa. Code § 105.1. The regulatory definition of "floodway"—defined as "[t]he channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood"—presumes, absent evidence to the contrary established by FEMA flood maps or insurance studies, that the floodway extends out 50

feet from the top of a stream bank. 25 Pa. Code § 105.1. *See also Rural Area Concerned Citizens v. DEP*, 2014 EHB 391, 426. However wise or unwise it may be to purchase land immediately adjacent to a stream and within a floodplain is not for us to speculate, but the complaints of flooding ring somewhat hollow when the evidence at the hearing shows substantial flooding already occurring. Indeed, although we do not think it requires an expert to make this observation, Mr. Israel-Devadason opined that flooding is to be expected in this location due to it being a lower area right next to a stream. (M.T. 741.)

We also credit Mr. Israel-Devadason's opinion that the modeling results of the Appellants' experts had several serious telltale signs of anomalies that should have raised questions that were not adequately addressed. (S.T. 1015-21; M.T. 669-77.) These anomalies are not unlike the anomalies that we found in *New Hanover Township*, *Solebury School*, and *M & M Stone*, that reduced the credibility of the sponsoring expert's opinions. Among other things, the Riverkeeper's expert's results showed an abrupt flow velocity change in the channel that simply cannot occur in nature. (S.T. 1015-21; M.T. 673-75; DOT Ex. 40.) In both Gidumal's and the Riverkeeper's models there were unnatural boundaries indicative of improperly constricted modeling, which can introduce errors into the model. (S.T. 1020, 1023, 1073-75; M.T. 670-71, 673-75, 719-20; DOT Ex. 40.) There were also unexplained increases in velocity that do not make sense. (S.T. 1022-23; M.T. 672.) The analysis inaccurately predicted that the roadway would be overtopped in a two-year storm. (S.T. 1024.) Further, the Riverkeeper's expert's velocity *trends* also do not hold up to close review. Water cannot behave in the ways shown, which were like a rollercoaster, rapidly increasing from 6-7 feet per second to 15 feet per second. (S.T. 1030-32, 1084; M.T. 673-75, 722-23; DOT Ex. 58.) Mr. Israel-Devadason credibly testified that these model results were an anomaly that simply cannot happen. (M.T. 722-23.)

Mr. Israel-Devadason's model used 5-by-5-foot cells, close to Pennsylvania's existing LiDAR data of 4.5 feet and allowing for a small margin of error. (M.T. 677-78.) In contrast, the Riverkeeper's expert used 15-by-15-foot cells, and in some critical areas actually used 40-by-40-foot cells, which Mr. Israel-Devadason discovered following the supersedeas hearing when he looked more closely at the Riverkeeper's model's inputs. (S.T. 1025-27; M.T. 677, 692-93; DOT Ex. 74 (at 2-3).) Gidumal's expert also used 40-by-40-foot cells, which is a major departure from the original resolution of the LiDAR data. (M.T. 668-69.) Using the larger cells effectively dumbs down the data, meaning the modeler loses details that otherwise can be captured through the model. (S.T. 1026.) Smaller cells allow for better resolution and less error. (M.T. 678.) These are all serious problems that distort the whole analysis conducted by the Appellants' experts.

Putting these difficulties with the Appellants' experts' work product aside, even taking the Riverkeeper's model at face value, Mr. Israel-Devadason credibly opined that it does not show that velocities in the stream will materially increase with the construction of the new bridge. (S.T. 1027-29; M.T. 680-82, 683-84.) The velocities involved are not cause for concern vis-à-vis erosion and excessive sedimentation. (S.T. 1032-35, 1037; M.T. 680-82, 683-84, 696-97; DOT Ex. 56-58.)

We were also impressed with the expert testimony of Tiffany Landis, P.E., which, although brief, fully corroborated many of the credible opinions of Mr. Israel-Devadason. Ms. Landis credibly opined to a reasonable degree of professional certainty that, based on her independent review of Mr. Israel-Devadason's model results, as well as the results of the previous 1D studies and her own observations, installing the new bridge will actually reduce scour and erosion and return Tinicum Creek to a more natural free-flowing state. (T. 1468-72, 1479-80, 1500.) Among other things, the new bridge will not have the western abutment that is currently interfering with

natural flow, and it will have a larger waterway opening, which will convey the flow a lot smoother. (T. 1468-69, 1480.) The western abutment constitutes an obstruction that is interfering with stream flow. (T. 1484.) Minimizing interference by piers in the stream to the extent possible is very important in mimicking natural conditions and preventing debris and ice jams. (T. 1478.)

Ms. Landis also corroborated Mr. Israel-Devadason's testimony that including the guardrails on a limited portion of Headquarters Road in the modeling inputs was unnecessary. (T. 1469-70, 1494, 1497-98.) This issue amounts to a red herring. The majority of flow is contained within the stream channel and the flow that goes into the floodplain is relatively insignificant. (1497-98.) Ms. Landis's testimony shows that, despite any new points raised by the Appellants, the Department remains satisfied that the regulatory criteria for the replacement project have been met.

Even assuming that all of the compelling evidence above is wrong and there will be some additional significant erosion of the western bank as a result of the bridge removal, we would still uphold the Department's issuance of the permit. First, we have no convincing evidence that any sedimentation caused by such erosion will result in any degradation of the stream over and above the erosion that naturally occurs to stream banks. Indeed, some erosion is part of the natural condition of a stream. (S.T. 149-50, 164, 488, 1080, 1170, 1227, 1236-37; M.T. 885-86.) There is simply no convincing evidence that any E&S that might occur is inconsistent with the natural condition of Tinicum Creek. The assumed erosion is what would have been occurring all along had there not been a man-made impediment in place creating unnatural flow conditions, so the assumed erosion is a necessary short-term correction that will allow a return to the equilibrium state reflective of a natural regime.

**The Replacement Bridge**

A person may not construct, operate, maintain, modify, enlarge, or abandon a dam, water obstruction, or encroachment without first obtaining a permit. 32 P.S. § 693.6(a); 25 Pa. Code § 105.11(a). A water obstruction is a structure located in, along, across, or projecting into a watercourse, floodway, or body of water. 32 P.S. § 693.3; 25 Pa. Code § 105.1. An encroachment is any structure or activity that changes, expands, or diminishes the course, current, or cross section of a watercourse, floodway, or body of water. *Id.* A watercourse is a channel or conveyance of surface water having a defined bed and banks. *Id.*

Ordinarily the location of a watercourse's regulatory bed and banks comes up if there is a dispute over whether a particular structure or activity is an "encroachment" that needs a permit, *see, e.g.*, *DEP v. Seligman*, 2014 EHB 755, or whether a particular feature is a regulated watercourse at all, *see, e.g.*, *Becker v. DEP*, 2017 EHB 227. Here, there is obviously no question that PennDOT needed a permit. However, the issue still has relevance because, for example, 25 Pa. Code § 105.161 refers to the natural regimen of the "stream" and a stream is a watercourse, 32 P.S. § 693.3; 25 Pa. Code § 105.1, and a watercourse is defined by its bed and banks, *id.*

The regulations require that a bridge's abutments be aligned with the flow of the stream channel and that they be well set into the stream banks in such a manner as to assure minimal increase in flood elevations. 25 Pa. Code § 105.164. The new bridge will shift both the east and west abutments 15 feet to the west. The Riverkeeper argues unsuccessfully that the 15-foot shift of the eastern abutment will put it within the regulated stream banks of Tinicum Creek and act as a realignment of the stream channel. The Department reasonably interprets the "banks" of the stream channel to be the ordinary high water line of a watercourse. (S.T. 1179-81, 1183; M.T. 852, 908; DEP Ex. 55.) The ordinary high water line tends to be where the vegetation lines the banks

of a stream. (S.T. 1180, 1183-84, 1325; M.T. 853.) The Riverkeeper's expert appears to have incorrectly delineated the stream banks as that term is used in the regulations. (S.T. 1182.) Among other things, there is a relatively large tree growing on the dry land within the eastern banks as mistakenly identified by the Riverkeeper. (DOT Ex. 13, 28.) Thus, we credit the testimony of Christian Vlot and PennDOT's Ryan Whittington, P.E. that the shifted eastern abutment will remain outside of the regulated stream. (S.T. 751-52, 761-64, 1209; DOT Ex. 13, 28; Riverkeeper Supersedeas Exhibit No. ("DRN S. Ex.") 3.)[12]

We do not credit the Riverkeeper's expert Ms. Paist-Goldman's assertion that 25 feet of the stream bank, measured from the bank inward into Mr. Gidumal's pastures, will be eroded away as a result of the new bridge's 15-foot shift in the western abutment within the first five years, causing the loss of 100 trees, and then be subject to perpetual erosion thereafter. (M.T. 198-201, 220-21, 231.) Nor do we credit her assertion that the 25 feet of bank erosion will continue for several hundred to 1,000 feet downstream of the bridge. (M.T. 201-02.) For one thing, Ms. Paist-Goldman admitted that she had not done any analysis on stream bank erosion and merely offered her opinion as an "off the cuff" "gut feeling" based on her professional experience and judgment. (M.T. 275-76, 280.) Second, we question why we have not seen that level of erosion already upstream of the bridge. If the soils are as highly erodible as Ms. Paist-Goldman posits, then it seems that substantial portions of the banks would have eroded away during recent significant storm events like Hurricane Ida.

Mr. McAtee testified that he has been out to the site during flood conditions and the downstream western bank that Ms. Paist-Goldman is concerned about is exposed to heavy flows

[12] Assuming *arguendo* that the abutment will extend past the stream's east bank, there was no convincing evidence showing that the new location would interfere with stream flow or the stream's return to a natural condition.

now with the existing bridge. (M.T. 462, 471-72; DOT Ex. 71.) He testified that the slope wall in front of the proposed shifted abutment is designed to absorb any impact from the velocity of the flow and redirect that energy back into the middle of the stream channel. (S.T. 850-51, 865-66, 868; M.T. 462.) The project will also include embedded rip rap armoring on the downstream western bank for around 15-20 feet beyond the bridge. (M.T. 511, 882-83.) The rip rap will be depressed two feet into the bank, choked with natural stream bed material, then backfilled with two feet of soil to secure it. (M.T. 578-80, 919-20, 932; DOT Ex. 30.) Mr. Israel-Devadason credibly testified that the rip rap will be able to withstand velocities much greater than 10 feet per second. (M.T. 697-98.) Further, and crucially, Mr. McAtee conducted soil borings at the site and found that in some places there was only 6 inches of soil cover before hitting bedrock. (M.T. 513-15; DOT Ex. 30a.) Mr. Israel-Devadason credibly opined that, with the anticipated velocities, he does not expect there to be anything close to 25 feet of bank erosion because the flow simply does not have enough energy to cause that degree of erosion. (M.T. 663, 684.)

In any event, we find that the new bridge needs to be shifted exactly as proposed by PennDOT and approved by the Department. To have left the new bridge in the same location as the existing bridge would have failed to satisfy the regulatory criteria because the western abutment would have remained within the stream channel. As discussed above, the existing western abutment is clearly within the banks of Tinicum Creek, and currently takes the full force of the stream. (S.T. 576, 1181, 1205; M.T. 853-54; DEP Ex. 55.) This is obvious in some of the Riverkeeper's own photographs, where the western abutment is surrounded by the flow of the stream. (DRN Super. Ex. 6.) The western abutment of the replacement bridge will be shifted back 15 feet west to better align with the channel of Tinicum Creek as it exists now. (S.T. 575-76.) Moving the eastern abutment over is necessary in order to move the offending western abutment

and keep the support pier in the same location as the existing western pier, (DOT Ex. 7 (at 61, 63)), and still keep the abutment as far as possible outside the eastern side of the stream. With the stream in its current condition, the existing bridge is very poorly placed not only from an engineering perspective but relative to environmental degradation as well. Leaving the western abutment where it is now would leave an obstruction within the stream and leave a source of scour in place. (M.T. 844-45.) The new bridge will eliminate this serious ongoing problem by aligning the bridge structure to where the stream is now.[13]

The regulations require bridges to be designed with the minimum number of piers and obstructions as possible. 25 Pa. Code § 105.163. The new bridge accomplishes that by utilizing only one pier within Tinicum Creek, as opposed to two piers with the existing bridge, or any so-called rehabilitation of the existing bridge. PennDOT evaluated the option of constructing a bridge with a single span, meaning no support piers within Tinicum Creek, but it was determined to be unfeasible. (S.T. 766-67, 852.) A single span bridge would have required a deeper superstructure, the roadway would need to be elevated, and greater portions of the western floodplain would need to be filled in. (S.T. 955-57, 963-64.) The single pier within the stream will be smaller than the existing piers, approximately three-and-a-half feet wide at the base instead of six feet wide, which will lessen the potential for debris accumulation during flood events. (S.T. 845, 852; M.T. 432-34, 459, 582-83.) By only having a single obstruction, the bridge will have improved flow characteristics during flood events and less potential for the displacement of stream bed material that could create new gravel bars and downstream sediment deposits. (S.T. 846.) Removing the pier will increase flow conveyance in the channel by 18-20%. (S.T. 1040; M.T. 461, 689-91.) The

[13] The shifted western abutment also has the ancillary benefit of accommodating the turning radius of emergency vehicles at the intersection of Headquarters Road and Sheep Hole road. (S.T. 848-49; M.T. 416-17.)

new bridge is designed to improve the flow characteristics of Tinicum Creek and more closely mimic its natural free flow. (S.T. 850, 852, 888-89; M.T. 463-64, 688-90.) By having an increased hydraulic area and fewer obstructions, the potential for debris accumulation, erosion, and scour are all reduced, which naturally reduces impacts to Tinicum Creek. (S.T. 887-90; M.T. 582-83, 867-68.) Gidumal's expert agreed that the removal of one of the piers would create a more natural flow regime, (S.T. 167-68), and the Riverkeeper's expert said it would improve the conveyance capacity of water through the bridge, (S.T. 469).

A permit application will not be approved by the Department for an exceptional value stream or designated Wild and Scenic River like Tinicum Creek unless the applicant demonstrates and the Department finds that the project will not have an adverse impact upon the public natural resources. 25 Pa. Code § 105.16(c). The Department correctly analyzed the effect of the water obstructions of the replacement bridge on the natural regime and ecology of Tinicum Creek. (S.T. 1301.) The National Park Service determined that there would be no direct and adverse effect on Wild and Scenic Rivers provided that the project is constructed in accordance with PennDOT's plans. (M.T. 859-61, 871; DEP Ex. 40.) The Department reasonably concluded that the project would have very little impact on the public natural resources. To the contrary, this project is highly beneficial to the public natural resources and will not itself cause any environmental harm. The new bridge has been designed to meet the regulatory criteria relative to Tinicum Creek in terms of preserving the natural regime, controlling flow velocity with respect to erosion of the stream bed and banks, reducing the number of piers within the stream, and aligning the abutments with the flow of the stream channel. The new bridge also comports with modern safety standards for motorists, improving site distances and the ability to see oncoming traffic as a driver approaches the bridge. (S.T. 881-82; DOT Ex. 34.)

**Historical Values and Article I, Section 27**

The Headquarters Road Bridge is within the Ridge Valley Rural Historic District, and it has been designated as a contributing element to the historic district. The Appellants assert in general terms that removing the existing bridge will harm the historic value of the area. There are portions of the regulations that require the Department to assess an obstruction or encroachment's impact on cultural, archaeological, and historical landmarks. *See* 25 Pa. Code § 105.14(b)(5) (Department required to assess impacts of a project on, *inter alia*, cultural, archaeological, and historical landmarks, and state and local historical sites). *See also* 25 Pa. Code § 105.13(x) (impacts on areas or structures of historic significance). The Appellants in their briefs never really say that the Department violated the law in issuing the permit due to the historic nature of the bridge. That may be because the issue has truly been exhaustively evaluated. The Department's environmental assessment documented that several alternatives were evaluated to avoid or minimize the impact to the historic district, but the chosen replacement bridge was determined to cause the least overall harm. (DOT Ex. 15 (at 3).) (*See also* DOT Ex. 7, 10.) Further, although it is not binding on us, in *Delaware Riverkeeper Network v. Pa. Department of Transportation, supra*, the federal district court extensively discussed the effects of the project on the area's historic resources, including the bridge itself, the historic district as a whole, and Tinicum Creek as it relates to the historic district, and concluded that PennDOT had demonstrated appropriate sensitivity to historical values. (DOT Ex. 8 (at 50-60).)

PennDOT entered into a Memorandum of Agreement with the Federal Highway Administration, the Pennsylvania State Historic Preservation Officer, and the Advisory Council on Historic Preservation to ensure that the project's impacts to the historic resources of the area were mitigated to the greatest extent possible. (M.T. 856-57, 858; DEP Ex. 32; DOT Ex. 49.) The

Memorandum also established a nine-member Design Advisory Committee consisting of people from the National Park Service, the Advisory Council on Historic Preservation, the Pennsylvania State Historic Preservation Office, Bucks County officials, and Tinicum Township supervisors, who would be involved during project development and also engaged towards the beginning of the construction process. (*Id.*) The Memorandum also requires PennDOT to salvage stone during the demolition of the existing bridge to reuse as stone facing on the abutments, wingwalls, and approach roadway barriers for the new bridge. (*Id.*) One of the permit's special conditions requires PennDOT to abide by the Memorandum. (M.T. 864, 873; DOT Ex. 14 (at 4).)

Having seen all of the photographs of the bridge in its highly dilapidated state, it is hard to understand how the bridge is still meaningfully contributing to the historic value of the area. Indeed, no one has argued that keeping the bridge in its current condition is an option.

The permit includes special conditions that demonstrate the Department went beyond the strict bounds of the regulatory requirements of Chapter 105 and included provisions requiring compliance with the Memorandum of Agreement, as well as monitoring requirements set forth by the National Park Service. All of these provisions are designed with an eye toward preserving and maintaining the historic values of the existing bridge and the surrounding historical district. Clearly, the historic significance of the structure must be factored into the analysis. *See* 25 Pa. Code §§ 105.14(b)(5), 105.16(a). By the same token, harm to the stream should not be ignored when considering the historic value of the obstruction. To the extent the Department had a duty to consider the historical resources of the project in issuing the permit, it appears to have done just that. The record shows that the Department performed the proper balancing here.

The Riverkeeper also argues that the Department violated its duties under Article I, Section 27 of the Pennsylvania Constitution by authorizing the removal of the Headquarters Road Bridge

and thus the removal of its historic and esthetic values. Article I, Section 27 of the Pennsylvania Constitution provides:

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

PA. CONST. art I, § 27. The Board has articulated its standard for assessing Article I, Section 27 challenges as follows:

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

*Stocker v. DEP*, 2022 EHB 351, 371 (quoting *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493 (citing *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 858-59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1163)). "The burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan v. DEP*, 2018 EHB 71, 115 (citing *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 250, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016)).

Initially, as discussed above, there is ample evidence that the existing bridge presents a safety and environmental hazard. Further, both the Department and PennDOT considered the historic and esthetic values of the existing bridge in the design of the new bridge, which preserves stone from the existing bridge. It is also difficult to imagine what historic and esthetic value the Headquarters Road Bridge is currently contributing in its closed and severely deteriorated state.

The Riverkeeper elevates form over substance when it criticizes the Department for not performing some sort of separate constitutional environmental review of the permit application.

Conducting a separate "constitutional analysis" might be warranted in some instances, but more important is actually considering the constitutional values espoused by Article I, Section 27 and reaching a decision that is consistent with the preservation of those values. *See Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L, slip op. at 105-07 (Adjudication, Jan. 8, 2024). Indeed, the Riverkeeper makes clear in its briefing that its challenges are all about the *process* that the Department followed in evaluating PennDOT's permit application. (*See* DRN Reply Brief at 2 ("DRN's challenge is to the process that PADEP followed in not considering, evaluating and balancing, itself, whether and how to preserve the scenic, historic and esthetic values of the Ridge Valley Historic District…and the exceptional water quality of Tinicum Creek…." (emphasis in original)); DRN Brief at 54 ("insufficiency of the agencies' compliance procedures used to execute their Constitutional duty…").) First, we detect nothing improper about the process the Department followed in evaluating PennDOT's permit application. Second, the Riverkeeper has failed to explain how any alleged deficiency in the process should have resulted in a different outcome. Even if we assume for purposes of argument only that there was some defect in the Department's review process, our *de novo* review reveals nothing wrong about the Department's ultimate decision to issue the permit. The Riverkeeper complains about the process, but it has not come forward with the evidence to show why the decision made at the end of the process was wrong.[14]

The Riverkeeper also criticizes the Department for what it calls deferring to other Commonwealth agencies to conduct certain aspects of the review relative to the historic values of the bridge. For instance, the Department relied on the Pennsylvania Historical and Museum Commission to help determine that demolishing the existing bridge would not negatively impact

[14] The Riverkeeper says that the Department could not have carried out its constitutional duties without evaluating the possibility of bridge rehabilitation as an alternative to taking down the existing bridge and building a new one, claiming that PennDOT did not present the Department with the rehabilitation alternative. But as discussed *supra*, this is factually incorrect.

the scenic, esthetic, and historic values of the area. (M.T. 120-21, 123.) The Riverkeeper asserts that the Department violated Article I, Section 27 by relying on a separate agency and not conducting its own review. However, the evidence does not suggest the Department blindly relied upon determinations made by other agencies. The Department testified that it took into account the findings and recommendations of the Historical Commission and then made an assessment of whether or not the project meets the requirements of the Chapter 105 regulations with respect to historic properties. (M.T. 120-21, 123-24.) This seems perfectly reasonable.

We see nothing inappropriate in enlisting the expertise of other agencies as part of a permit review. There is nothing inherently improper about the Department consulting with other state agencies, such as the Pennsylvania Historical and Museum Commission. In *Montgomery Township v. DER*, 1995 EHB 483, the Department had a similar regulatory obligation under 25 Pa. Code § 71.21(a)(5)(i)(K) to ensure that the selected alternative in a sewage facilities plan revision was consistent with the objectives and policies of Section 7 of the Historic Preservation Act, 37 Pa.C.S. § 507, which requires Commonwealth agencies to cooperate fully with the Pennsylvania Historical and Museum Commission in the preservation, protection, and investigation of archaeological resources. The appellant in that case also argued that the Department violated Article I, Section 27 because it did not conduct an independent review of the effects of a spray irrigation facility on the scenic, esthetic, and historic resources of the surrounding area. Instead, the appellant alleged that the Department simply relied upon the findings of the Historical Commission. There, we found nothing improper about the Department "deferring to the judgment of another Commonwealth agency with superior expertise in the field of historical and archaeological resources." *Id.* at 538.

Nowhere in Article I, Section 27 does it say that the Department must exclusively carry out each and every duty listed. Every part of government has its role to play in upholding those values, including, presumably, the Historical Commission. *Liberty Twp., supra*, slip op. at 108 (quoting *Peifer v. Colerain Twp. Zoning Hearing Bd.*, 302 A.3d 811, 816 (Pa. Cmwlth. 2023) ("Article I, Section 27 'imposes fiduciary duties on the Commonwealth and all state, county and local agencies….'")). We think that the Department may very well act consistently with its duties under the Constitution when it acknowledges areas outside of its expertise and utilizes other agencies of the Commonwealth for support. The record in this case reflects that the Department undertook specific consideration of the historic and esthetic value of the area in its review of the project. By coordinating with the National Park Service and the Pennsylvania Historical and Museum Commission, and by including permit conditions that require compliance with the Memorandum of Agreement with those agencies, the Department effectuated a review consistent with its obligations under the Pennsylvania Constitution.

It is worth noting that Article I, Section 27 speaks in terms of the "preservation of the natural, scenic, historic, and esthetic values **of the environment**," and the "public **natural** resources." (Emphasis added.) *See also* 25 Pa. Code § 105.16(a). It is not clear to us that a man-made bridge is the type of *natural* resource with a historic *environmental* value that Article I, Section 27 is designed to safeguard. We question the approach of the Appellants that seeks to construe the Constitution in a way that vests a right in the people of the Commonwealth in the preservation of values from a human-built structure instead of a natural environment. Certainly there is historic and esthetic value in old growth forests and waterways that have existed for centuries. But we struggle to find a rationale that Article I, Section 27 vests a constitutional right to the preservation of a historic bridge that is falling apart.

To the extent the Riverkeeper is correct and Article I, Section 27 does include a historic man-made bridge among the public *natural* resources to be conserved and maintained, and to the extent that the Department had to balance the preservation of the scenic and historic value of the man-made bridge with the threat to environmental values due to a collapse of the existing bridge, and the ongoing environmental harm presented by the unnatural intrusion of the existing bridge on Tinicum Creek, the evidence fully supports the Department's decision to issue the permit. The current bridge is causing an unreasonable degradation of the natural resources of the Commonwealth. While the Appellants appear to desire to perpetuate this damage, the new bridge design will alleviate that damage. When considering the environmental harm that is being caused by the existing bridge and the fact that the rehabilitated bridge would simply continue that harm, it is hard to see any coherent argument under Article I, Section 27 for perpetuating that environmental harm as the Riverkeeper wants to do.

**Property Issues**

Gidumal's primary argument with respect to property issues is that PennDOT does not own or have the right to occupy the land needed to complete the demolition of the old bridge and the construction of the new bridge, which would be part of his property. Therefore, he argues, the Department never should have issued the permit to PennDOT. Through a somewhat long and tortured process, in January 2020 PennDOT apparently purchased a temporary easement on Mr. Gidumal's property from the prior owner to facilitate the demolition and construction work for the project. However, PennDOT apparently did not record the easement until after Mr. Gidumal purchased the property and recorded his deed in August 2020. Various litigation in the courts of common pleas and before the Commonwealth Board of Property commenced. At some point, PennDOT decided to condemn the land that was subject to the easement. Recently, the

Commonwealth Court appeared to resolve these issues. *See Gidumal and Virtus Capital Advisors, LLC v. Dep't of Transp. (State Board of Property)*, No. 518 C.D. 2023 (Pa. Cmwlth. July 19, 2024), *app. for recon./rearg. denied*; *In Re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right-of-Way for State Route 1012, Section BRC, in the Township of Tinicum (Appeal of: Virtus Capital Advisors, LLC)*, No. 1284 C.D. 2023 (Pa. Cmwlth. July 19, 2024), *app. for recon./rearg. denied*.

The details of this litigation are not particularly important for our current purposes in reviewing the permit under appeal. As the Commonwealth Court made clear in its recent Opinion, the property disputes between Gidumal and PennDOT are immaterial to our review of the water obstruction and encroachment permit:

> The litigation before the Environmental Hearing Board does not implicate the mootness analysis. As PennDOT observes, the Department of Environmental Protection "does not review property issues during its analysis of a permit application for a bridge." Environmental Hearing Board Opinion and Order on Supersedeas, 4/1/2022, at 36; S.R.R. Exhibit A. Rather, the Department is concerned with the environmental impact of the bridge replacement project and "not with any property disputes" that may arise out of that project. *Id.* Accordingly, **whether PennDOT's claim to own easements on the permit applications was false has no relevance to the merits of the permits issued by the Department of Environmental Protection to PennDOT**. Gidumal, along with the Delaware Riverkeeper Network, can continue to challenge the environmental merits of whether PennDOT's bridge replacement project was properly permitted.

*Gidumal and Virtus Capital Advisors, LLC v. Dep't of Transp. (State Board of Property)*, No. 518 C.D. 2023, slip op. at 9 (Pa. Cmwlth. July 19, 2024) (emphasis added). Thus, we have focused our review in this Adjudication on the environmental impacts of the project and not on any irrelevant property disputes.

Nevertheless, Gidumal also makes some arguments regarding his property that are couched in the Chapter 105 regulations. For instance, Gidumal cites 25 Pa. Code § 105.161(a)(2), which provides that bridges shall be designed or constructed so as not to "create or constitute a hazard to

life or property…." He also argues that the Department did not properly evaluate the impacts of the project on his property under 25 Pa. Code § 105.14(b)(1), (3), (5), and (12). However, as discussed extensively above, there is no credible evidence that the new bridge is likely to create any threat or hazard to life or property.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 32 P.S. §§ 693.24; 35 P.S. § 7514.

2. The Board reviews Department actions *de novo*, meaning we decide the case anew on the record developed before us. *Solebury School v. DEP*, 2014 EHB 482, 519; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't Envtl Res*., 341 A.2d 556 (Pa. Cmwlth. 1975).

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

4. The appellants must show by a preponderance of the evidence that the Department'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.

5. 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 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)).

6. 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).

7. The replacement of Headquarters Road Bridge is consistent with the protection of the natural regime of Tinicum Creek. 32 P.S. § 693.2(3); 25 Pa. Code § 105.2(4); 25 Pa. Code § 105.16(d); 25 Pa. Code § 105.161(a)(3).

8. The new bridge will not create a threat or hazard to life or property. 25 Pa. Code § 105.161(a)(2).

9. The new bridge will not result in excess sedimentation of the stream or increase water velocity or direct flow in a manner that results in erosion of stream beds and banks over and above what occurs when the stream is flowing in accordance with its natural regime. 25 Pa. Code § 105.161(a)(3) and (4).

10. The project does not involve the construction or modification of a channel change in Tinicum Creek. 25 Pa. Code § 105.231.

11. The new bridge's abutments will be aligned with the flow of the stream channel of Tinicum Creek and they be well set into the stream banks in such a manner as to assure minimal increase in flood elevations. 25 Pa. Code § 105.164.

12. The project will not have an adverse impact on Tinicum Creek as an exceptional value stream and a Wild and Scenic River. 25 Pa. Code § 105.16(c).

13. The Department and PennDOT appropriately considered the impact of removing the existing bridge in terms of historic resources. 25 Pa. Code § 105.13(x); 25 Pa. Code § 105.14(b)(5); 25 Pa. Code § 105.16(a).

14. The Department did not err in relying on the expertise of the Pennsylvania Historical and Museum Commission to assess the project's impact on historic and cultural resources. *Montgomery Twp. v. DER*, 1995 EHB 483, 538.

15. It is not the responsibility of the Department or this Board to assess private property disputes in the context of reviewing an application for, or hearing an appeal of, a water obstruction and encroachment permit issued under the Dam Safety and Encroachments Act. *Gidumal and Virtus Capital Advisors, LLC v. Dep't of Transp. (State Board of Property)*, No. 518 C.D. 2023, slip op. at 9 (Pa. Cmwlth. July 19, 2024).

16. The Appellants have not shown that the Department acted contrary to its duties and obligations under Article I, Section 27 of the Pennsylvania Constitution in issuing the permit. PA. CONST. art. 1, § 27; *Stocker*, 2022 EHB 351, 371; *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493; *Logan v. DEP*, 2018 EHB 71, 115; *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 858-59, 862; *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 250, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016).

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **DELAWARE RIVERKEEPER NETWORK AND THE DELAWARE RIVERKEEPER, MAYA VAN ROSSUM and STEVEN GIDUMAL AND VIRTUS CAPITAL ADVISORS, LLC** | : | |
| **v.** | : | **EHB Docket No. 2021-108-L (Consolidated with 2021-109-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee** | : | |

**O R D E R**

AND NOW, this 27th day of August, 2024, it is hereby ordered that the Appellants' appeals are **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/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Board Member and Judge**

s/ Paul J. Bruder, Jr.
**PAUL J. BRUDER, JR.**
**Board Member and Judge**

*** Judge Sarah L. Clark is recused in this matter and did not participate in the decision.**

**DATED: August 27, 2024**

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

**For the Commonwealth of PA, DEP:**
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**For Appellants, Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum:**
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**For Appellants, Steven Gidumal and Virtus Capital Advisors, LLC:**
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Bianca Valcarce, Esquire
(*via electronic filing system*)

**For Permittee:**
Kenda Jo M. Gardner, Esquire
(*via electronic filing system*)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
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| **LAURA DENGEL** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2022-092-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW SEWICKLEY MUNICIPAL AUTHORITY, Permittee** | : | **Issued: August 29, 2024** |

**OPINION AND ORDER ON**
**DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

**By Steven C. Beckman, Chief Judge and Chairperson**

**Synopsis**

The Board grants the Department's Motion for Summary Judgment where the nature of Appellant's objections stem from alleged violations of the Sunshine Act which the Board lacks jurisdiction to hear. Additionally, the Appellant lacks standing to challenge a water allocation permit and has failed to establish a prima facie case.

**O P I N I O N**

**Introduction**

This matter involves an appeal filed with the Environmental Hearing Board ("Board") by Laura Dengel ("Ms. Dengel") challenging the Department of Environmental Protection's ("Department's") issuance of a water allocation permit to New Sewickley Township Municipal Authority ("Authority"). The Authority submitted an application for a water allocation permit ("Application") on July 8, 2022. The Authority's Application proposed replacing one of its two water supplies, specifically it requested to replace the part of the water supply it received from the Ambridge Water Authority ("AWA") with water from the West View Water Authority

("WVWA"). In its Application, the Authority explained it wished to replace the water from the AWA "due to ongoing water quality issues with the current water supply, and increased demand for public water throughout the Township." (Department's Exhibit B, p. B004). The Application was signed and notarized on June 21, 2022 and was subsequently voted on at an Authority meeting open to the public on July 7, 2022. On September 12, 2022, the Department approved the Application and issued Water Allocation Permit WA04-1019A ("Original Permit"). To correct a typographical error in the Special Conditions section and to include the Department's responses to public comments after the issuance of the Original Permit, the Department reissued it as Water Allocation Permit No. WA04-1019A-1 ("Permit") on September 23, 2022.

On October 21, 2022, Ms. Dengel filed her Notice of Appeal. In her Notice of Appeal, Ms. Dengel stated her objection as follows: "I am objecting to the Department's actions for granting the issuance of a New Water Allocation Permit to New Sewickley Township Municipal Authority." (Notice of Appeal ("NOA"), Dkt Entry No. 1). On November 14, 2022, Ms. Dengel filed an Amended Notice of Appeal ("Amended Appeal") and expanded on her previously stated objection by adding the following:

> Signed, dated and notarized 06-21-2022; however, this application (Reference No. 62504) was voted on July 7th, 2022. Therefore, the entire application package is null and void because it was illegitimate from the moment it was created. Such application never comes into effect with submission of the Water Allocation Permit Application package to the Department because it misses essential elements of a legal application and violates Federal and State laws.

(Amended Appeal, Dkt Entry No. 7).

Throughout this proceeding, the Board has granted several requests to stay proceedings and for extensions of the pre-hearing deadlines. The time for discovery ultimately concluded on December 22, 2023. On March 1, 2024, the deadline for filing dispositive motions, the Department

filed its Motion for Summary Judgment ("Motion").[1] Following the Motion, the Authority timely filed a memorandum of law in support thereto and Ms. Dengel filed her Response in Opposition to the Department's Motion ("Response") on April 1, 2024. In her Response, Ms. Dengel incorporated her own request for summary judgment. Following Ms. Dengel's Response, the Department and the Authority quickly filed a Joint Motion to Stay Filing Deadlines ("Motion to Stay") and to Strike ("Motion to Strike") (collectively, the "Joint Motions"). The Joint Motions requested the Board to strike Ms. Dengel's request for summary judgment in her favor as untimely and for raising issues outside the scope of the Amended Appeal, and further requested that the Board stay the deadline to respond to Ms. Dengel's summary judgment motion until the Board ruled on the Motion to Strike. On May 9, 2024, Ms. Dengel filed her response to the Joint Motions and concurrently filed a motion to amend her appeal. Shortly thereafter, the Department filed a Motion to Stay Proceedings Pending Ruling on its Summary Judgment Motion ("Motion to Stay").

On May 17, 2024, following a conference call with the parties, the Board issued two orders. The first order granted the Department's Motion to Strike Ms. Dengel's request for summary judgment after Ms. Dengel stated on the conference call that she did not oppose the Motion to Strike. Additionally, the first order stayed all other deadlines until the Board ruled on Ms. Dengel's verbal request to supplement her motion to amend that she made during the conference call. The Board's second order denied the Department's Motion to Stay. The Board issued an Order on May 20, 2024, permitting Ms. Dengel to supplement her motion to amend and staying the deadline for replies to Ms. Dengel's Response to the Motion. On May 24, 2024, Ms. Dengel filed her Motion for Leave to Amend Appeal ("Motion to Amend") and the Department and the Authority

[1] The Board set the deadline for dispositive motions on January 31, 2024 in its Order dated October 13, 2023. However, the Board granted the Department's motion to extend the dispositive motion deadline after receiving no response to this motion from either Ms. Dengel or the Authority.

subsequently filed their Joint Response to the Motion to Amend. On July 15, 2024, the Board issued an Opinion and Order denying Ms. Dengel's Motion to Amend on the basis that it was procedurally defective and that allowing Ms. Dengel to amend her appeal so late in the proceedings would prejudice the Department and the Authority. That same day, the Board issued an order establishing the deadline for the Department and the Authority to submit reply briefs to Ms. Dengel's Response. The Department filed its Reply Brief on July 31, 2024. The Authority did not file a reply. The briefing is complete, and the matter is ripe for decision.

**Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *Stedge v. DEP*, 2015 EHB 31, 33. All doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is also available:

> [I]f after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.Civ.P. 1035.2(2); *Whitehall Twp. v. DEP*, 2017 EHB 160, 163. In other words, the party bearing the burden of proof must make out a prima facie case for its claims. *Longenecker v. DEP*, 2016 EHB 552, 554. Summary judgment may only be granted in cases where the right to summary

judgment is clear and free from doubt. *Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 352 (citing *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217).

**Discussion**

In its Motion, the Department sets forth three lines of argument in support of its request for summary judgment. First, the Department argues that Ms. Dengel's objection is based on alleged violations of the Sunshine Act that the Board does not have jurisdiction to hear. In its second argument, the Department asserts that Ms. Dengel lacks standing to bring her appeal. Specifically, the Department argues that Ms. Dengel has not demonstrated that her interests have been harmed by the Department's approval of the Application. Lastly, the Department contends that Ms. Dengel has failed to establish a prima facie case demonstrating that the Department erred in approving the Permit. Ms. Dengel disputes the Department's assertions and argues that while the alleged Sunshine Act violation is part of her appeal, it is not the sole basis of her appeal. She further disputes the Department's contention that the permitted activity will not personally affect her and denies that she has not established a prima facie case. Following review of the filings, we hold that Ms. Dengel has failed to preserve a claim that we have jurisdiction to hear, does not have standing, and has failed to establish a prima facie case. Therefore, we grant the Department's Motion and dismiss the appeal.

We begin our analysis by addressing the Department's first claim for summary judgment arguing that Ms. Dengel's objection is a Sunshine Act issue that this Board does not have jurisdiction over. The Sunshine Act's[2] main purpose is to create government transparency by affording citizens an opportunity to observe the decision-making process of public agencies. *PG Publ. Co. v. Governor's Office of Admin*., 120 A.3d 456, 462-63 (Pa. Cmwlth. 2015). To

[2] Act of October 15, 1998, P.L. 729, 65 Pa.C.S.A. §§ 701 - 715.

accomplish these aims, the Sunshine Act requires that formal action be taken at public meetings and requires that public notice of such meetings is provided. *Baribault v. Zoning Hearing Bd. of Haverford*, 236 A.3d 112, 118 (Pa. Cmwlth 2020). In her Response, Ms. Dengel does not directly dispute that her claim arises from the Sunshine Act. In fact, she embraces that legal theory stating that the sole objection of her appeal is that the Department failed to follow basic due process because "[U]nder 65 Pa.C.S. §713 of the PA Sunshine Act, business conducted at a municipal meeting in violation of the PA Sunshine Act is void." (Dengel Response Memorandum at 1). Her appeal rests on her factual objection that the Authority signed and notarized the Application prior to voting which, she argues, violated the Sunshine Act. She asserts that due to the alleged violation, the Application was rendered "null and void" and, as such, the Department erred in issuing the Permit.

In her Response, Ms. Dengel attempts to argue the legal merits of her objection, but she never addresses the Department's argument that the Board lacks jurisdiction over Sunshine Act claims. In support of its position, the Department cites *Com., Dep't of Env't Res. v. Steward*, 357 A.2d 255, 257 (1976). In *Steward*, the Commonwealth Court upheld our ruling, concluding that the Board does not have jurisdiction over claims arising from the Sunshine Act. In *Steward*, the Commonwealth Court examined the Sunshine Act's language pertaining to jurisdiction and venue which provides as follows:

> The Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or to enforce this chapter by injunction or other remedy deemed appropriate by the court. The action may be brought by any person where the agency whose act is complained of is located or where the act complained of occurred.

65 Pa.C.S.A. § 715.[3] The Court described the Act's language as "unequivocal" and held that the Board properly concluded that it lacked jurisdiction to resolve issues arising out of the Sunshine Act. *Steward*, 357 A.2d at 257. See also, *O'Hare v. Cnty. of Northampton*, 782 A.2d 7, 14 (Pa. Cmwlth. 2001) (reiterating its holding that the Board lacks jurisdiction to resolve allegations of violations of the Sunshine Act).[4]

Upon review of these cases and the language of the Act itself, it is clear that the Board is without jurisdiction to hear claims arising from the Sunshine Act. The Department asserts that "Ms. Dengel's sole objection in this appeal is a Sunshine Act issue […]" (Motion at 2). However, it is unclear to us whether Ms. Dengel's objection is indeed purely and singularly a Sunshine Act claim. While Ms. Dengel insists throughout her Response Memorandum that the Authority violated the Sunshine Act, she does not explicitly state and/or argue that the Department violated the Act as well. In her Response Memorandum, she states that her "sole objection is failure of the Department to follow basic due process" when it approved the Application. (Response Memorandum at 1). She goes on to argue that the Department violated her due process because it did not reject the Application when it became aware of the fact that the Application was signed and notarized prior to the public meeting in which it was voted on.

Whether Ms. Dengel's claim originates from either a Sunshine Act violation or a due process argument, it fails either way. To the extent her claim arises from the Sunshine Act, we are without jurisdiction to hear it. Additionally, even if her objection invokes due process, we would

[3] In *Steward*, the Commonwealth Court cited 65 P.S. § 269 which is now codified as 65 Pa.C.S.A. § 715.

[4] In *Ziviello et al. v. State Conservation Commission et al.*, 2001 EHB 1177, the Board did address a Sunshine Act claim but it does not appear that any party raised an issue regarding the Board's jurisdiction to do so. We read *Steward,* as well the language of the Sunshine Act, as clearly holding that the Board lacks jurisdiction to hear Sunshine Act claims and would not follow *Ziviello* if faced with that issue in future cases.

not reach that question because in order to answer the question of whether the Department violated her due process by approving the "null and void" Application, we would first need to determine if the Authority's approval process actually constituted a violation of the Sunshine Act at all, which we are without jurisdiction to decide.[5] Additionally, as we explained in our Opinion and Order denying her request for leave to amend her appeal, Ms. Dengel failed to preserve a due process objection. While we are not required to address the due process claim since it was not preserved, we will briefly discuss it in order to be complete in our analysis. Ms. Dengel claims that the failure of the Department to reject the Application due to its alleged defects, deprived her of procedural due process. To comport with due process, states must provide persons with a meaningful opportunity to be heard before depriving them of life, liberty or property. *Jake v. DEP, et al.* 2014 EHB 38, 50, citing *Pa. Coal Mining Ass'n v. Ins. Dep't*, 370 A.2d 685, 692-93 (Pa. 1977) ("Notice should be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections."). An individual alleging a deprivation of procedural due process rights must demonstrate that actual harm or prejudice resulted therefrom. *Jake*, 2014 EHB at 51, citing *State Dental Council and Examining Bd. v. Pollock*, 318 A.2d 910, 916 (Pa. 1974).

Here, the Department's action does not strike us as a due process violation. Ms. Dengel does not claim that the Department somehow issued a defective notice regarding the Application and/or Permit. To the contrary, Ms. Dengel provided the Board with exhibits of the public comment letter she sent to the Department regarding the Application and the email she received

[5] Ms. Dengel contends that the Authority admitted to Sunshine Act violations. To support her assertion, she cites to her Exhibit D in her Counterstatement of Undisputed Material Facts, which is the Authority's Answer to Ms. Dengel's Complaint filed in the Beaver County Court of Common Pleas. Specifically, she cites to paragraphs 1, 2 and 8 of the Authority's Answer as proof of its Sunshine Act violations. However, she failed to produce the Complaint itself, making it impossible to know what facts the Authority admitted to.

from the Department responding to her letter. (See Dkt. Entry No. 1, NOA, Exhibits A, B). This in of itself evidences she had notice and/or actual knowledge of the Department's review and approval of the Application and had the opportunity to voice her concerns. In the email responding to Ms. Dengel's comment concerning the Authority's alleged Sunshine Act violation, the Department stated that "[t]his matter should be addressed directly with the Authority, as the Department does not oversee their governing procedure." (Dkt. Entry No. 1, NOA, Exhibit B). Hence, although the Department was aware of the allegation that the Authority may have violated the Sunshine Act through Ms. Dengel's public comments, the Department nonetheless went forward and approved the Application. In addition to submitting public comments, Ms. Dengel was also present during the meeting that the Application was voted on and provided comments there as well. (Dengel Exhibit D, ¶¶ 14, 15). Furthermore, she filed an appeal with this Board, affording her yet another opportunity to be heard. We cannot discern where in this saga Ms. Dengel has not been afforded due process. It seems to us that her true objection is not one of due process but simply that she disagrees with the Department's approval of the Application which is not a basis to overturn the Department's decision to issue the Permit. The facts presented do not convince us that the Department violated her due process.

Concerning the Sunshine Act, even if, *arguendo*, Ms. Dengel's issue was properly before us, she still would not prevail. Ms. Dengel asserts that the Department violated its own internal policy concerning the "completeness review" stage of the Application and argues that the Department should have returned the Application to the Authority as "incomplete" due to the signature date.[6] Even if this was an error on part of the Department, it was at most harmless error.

[6] Although Ms. Dengel does not cite to any caselaw or legal authority to substantiate her assertion that the manner in which the Application was signed violated the Sunshine Act, it is our understanding of the case law that any violation that may have arisen by the timing of the signing was cured by the subsequent vote at the public meeting ratifying the action. The Commonwealth Court has "repeatedly held that official

"A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance." *O'Reilly v. DEP*, 2001 EHB 19, 51. See also *Shuey v. DEP*, 2005 EHB 657, 712 (holding that revocation or remand of a permit must be based on material error in the permitting process). Parties who complain that the Department should have considered something in its review of a project need to "tell us how that consideration would have made any difference." *Sludge Free UMBT v. DEP*, 2015 EHB 469, 484. Additionally, the Commonwealth Court has stated that if "there was a procedural error during the processing of a permit application, it does not provide a basis for remand if it was harmless." *Berks County v. Department of Environmental Protection, et al*., 894 A.2d 183, 193 (Cmwlth. Ct. 2006). Other than her bald assertion that the Department should have denied the Application because of the signature date, Ms. Dengel does not provide any further reasoning as to how any of the material information in the Authority's Application should have prompted a different result with respect to the approval of the Permit or how the signature date has any continuing relevance. Moreover, she has failed to put forth evidence that any foreseeable harm will result from the Permit's approval. As the Department stated in its response to Ms. Dengel's public comments, it is not the Department's role to oversee the Authority's governing procedures, and Commonwealth Court precedent makes clear that the Board lacks the jurisdiction to hear a direct Sunshine Act claim. In sum, Ms. Dengel did not preserve a due process objection and further, we see no evidence demonstrating the Department violated her due process regardless of how one views the Sunshine Act issue.

While Ms. Dengel's appeal can be dismissed for the above reasons, we will discuss the other two grounds the Department relies on in support of its Motion. The Department asserts that

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action taken at a later, open meeting cures a prior violation of the Sunshine Act." *Ass'n of Cmty. Organizations for Reform Now v. Se. Pennsylvania Transp. Auth*., 789 A.2d 811, 813 (Pa. Commw. Ct. 2002).

Ms. Dengel lacks standing to bring this appeal. In order to have standing to appeal an administrative decision, persons must have a direct interest in the subject matter of the case. *Mountain Watershed Assn. v. DEP*, EHB Docket No. 2024-077-W (Opinion and Order on Petition to Intervene issued July 18, 2024, slip op. at 4), citing *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). See also, *Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); and *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Id.* (citing *Muth,* 315 A.3d 185, 204 (Pa. Cmwlth. 2024). In order for a person to have a direct interest, their material interests must be discrete to them or a limited class of persons from more diffuse interests common among the citizenry. *Muth*, 315 A.3d at 196 (Pa. Cmwlth. 2024) (citing *Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). 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. *Id.* "Bold, unsupported assertions of conclusory accusations cannot create genuine issues of material fact." *Id.,* citing, *Brecher v. Cutler*, 396 Pa. Super. 211, 578 A.2d 481 (Pa. Super. 1990).

In third-party permit appeals, as is the case here, the Board has held that a party can meet the requisite interest for standing based on where they reside and/or where they recreate. *Food and Water Watch v. DEP*, 2020 EHB at 247. An appellant has standing when the they come forward with specific facts to credibly aver that they use the affected area and that there is a realistic

potential that their use and enjoyment of the area will be adversely affected by the permitted activity. *Muth v. DEP, et al*., 2022 EHB 411, 415 (citing *Friends of Lackawanna v. DEP*, 2016 EHB 641, 643). In an effort to show how the Permit has impacted her personally, Ms. Dengel directs the Board to her Affidavit included with her Response. Aside from her Affidavit, Ms. Dengel has provided no other evidence demonstrating how the Permit harms her interests and she also does not offer any further explanation in her Response regarding her aggrievement or standing. Ms. Dengel's Affidavit does not include any statements pertaining to her use of the affected area or the harms the Permit may have on her use and enjoyment of it. Instead, her claims generally fall into the following three categories: 1) Personal injury she has suffered as a result of pursuing this appeal; 2) Concerns regarding future service lines and additional permits that will flow from the issuance of the Permit and; 3) Allegations that she has been threatened, intimidated and retaliated against because of the filing of this appeal.

Upon review of the Affidavit, there is nothing stated within it that supports Ms. Dengel's claim of standing. She describes in her affidavit the types of personal injury she has endured as a consequence of pursuing this litigation. She states that the appeal has "taken a toll on my personal physical, mental and emotional well-being" and the time involved in pursuing her appeal has "put my education and livelihood on hold." (Dengel Exhibit J, Affidavit, ¶ 7). However, these harms that Ms. Dengel complains of are a result of her own personal decision to file the present appeal and are not a direct result of the activity authorized by the Permit. In other words, Ms. Dengel has explained the impacts due to the time demands and effort she has spent in pursuit of her appeal, but she has not provided any explanation as to how the actual Permit at issue has affected her material interests. The pains and stressors that come from pursuing litigation of a Department

action are not the types of harms necessary to confer standing. For an environmental appellant, the aggrievement suffered must, to some degree, connect to the permitted activity.

The next harm Ms. Dengel alleges concerns potential future waterlines and permits. In paragraph eight of her Affidavit, Ms. Dengel asserts that the Permit "will service a waterline extension and further waterline expansion project that will run past the Dengel Property." (Dengel Exhibit J, Affidavit, ¶ 8). First, Ms. Dengel provides no citation to the record for this statement. Moreover, the Permit does not authorize extensions or expansions of waterlines as Ms. Dengel contends, but merely authorizes the Authority to acquire an additional source of water from the WVWA. In that same paragraph, Ms. Dengel also asserts that the Department will issue additional permits as a result of issuing the Authority its Permit that she states will "[s]pecifically, and directly, [impact] the Dengel Property as my parents are adjacent landowners to the proposed project development." *Id*. Again, Ms. Dengel failed to cite anything in the record to support this statement, but more importantly for our purposes, any future permits the Department may issue are not the subject of the current appeal. Concern for the possibility of future development and issuance of additional permits is sheer speculation and does not establish the direct interest necessary for standing.

Finally, in paragraphs 9, 10, and 11 of her Affidavit, Ms. Dengel alleges that she has in various ways been intimidated, threatened and retaliated against for, at least in part, the filing of this appeal. As troubling as Ms. Dengel's allegations may be if true, these statements again are not the type of harm that constitutes standing for the matter under appeal. When the Department challenged Ms. Dengel's standing in its Motion, it was incumbent on Ms. Dengel to come forward with specific facts to show that she would in some way be harmed by the permitted activity such as having reasonable concerns that her use and enjoyment of the area would be adversely affected.

The harms Ms. Dengel alleges of personal and economic injury in pursuing her appeal, concern for future development and future permits, and bald allegations of harassment do nothing to show that she will be adversely affected by the Permit.

The Department relies on the verified depositional testimony of Ms. Dengel to demonstrate she does not have a direct interest in this appeal. While Ms. Dengel resides at her parents' home which falls within the Authority's coverage area, her testimony reveals that neither she nor her parents are customers of the Authority as her parents' property is served by a private drinking well. (Dengel Exhibit J Affidavit, ¶ 2; DEP Ex. E-1, 52-54). Therefore, Ms. Dengel will not be using the water from the new WVWA source and her water supply will remain unchanged. It is difficult to conceive how Ms. Dengel, who is not a customer of the Authority and whose residence does not receive water from the Authority or WVWA will suffer injury as a result of the Permit.

During her deposition, the Department inquired into her recreational activities in and around the Authority's service coverage area. Ms. Dengel testified that she engages in boating, fishing, paddle boarding, kayaking, and wake boarding and does so "all over the world" but could not identify which hobbies or how often she did them in the Authority's coverage area. (Department's Exhibit E-2 at 343-44). Further, when asked how the Permit could affect her recreational uses of the local waterways, she was unable to articulate any realistic concern of how she could be impacted. (*Id.*, at 341-42, 346). At most, Ms. Dengel's testimony demonstrates that she occasionally recreates in a number of local waters. The lack of detail and supporting evidence as to her recreational use falls far short of the evidence in cases where the Board has found individual standing based on recreational use of a given area. See *Citizens for Pennsylvania's Future v. DEP*, 2015 EHB 750, 754 (the Board denied a motion for summary judgment and found the appellant had standing where appellant-member testified that he hiked in the affected area,

detailed the time he spent there, took photographs, birdwatched, and had an aesthetic appreciation for the area); *Food & Water Watch v. DEP*, 2019 EHB 459, (the Board found a third-party appellant had representational standing where appellant's members had individual standing based on a record that detailed their recreational activities such as kayaking, birdwatching, wading and walking along the creek); *Blose v. DEP*, 1998 EHB 635, 638 (the Board held that appellant had standing where his deposition, answers to interrogatories and affidavit all demonstrated that he used the site for swimming, boating, fishing and canoeing on a regular basis for the past 40 years). The evidence we have before us fails to convince us that Ms. Dengel has the requisite contact to demonstrate that she has a direct interest in the outcome of the appeal and, therefore, lacks the standing to pursue it.

The last point we will make regarding Ms. Dengel's standing pertains to her generalized interest in this matter. As stated above, in order for a person to possess standing, their interest must be greater than those common amongst the citizenry. Ms. Dengel's material interests in this appeal must be discrete to her or to a limited class of persons. Her depositional testimony makes clear that this is not the case. When asked how she could be affected by the New Sewickley Permit, she stated that "I haven't thought about it. I haven't thought about myself in any of this. This isn't – I'm not here for myself." (Department's Exhibit E-1 at 128). She went onto state that "It would take me quite some time to think about how I personally am impacted by this because this is not about me. This appeal is not about I, Laura Dengel. My appeal description does not say my name anywhere in it or the impacts that it has on me." (*Id*., at 130). Regardless of Ms. Dengel's motives, these statements do not support standing to pursue her appeal. As we have stated before "concern alone does not equate to standing and an appellant […] must make credible averments of her use of an affected area and show that the challenged activity has the realistic potential to affect her and

her use of the resource in order to maintain an appeal in front of the Board." *Muth* v. DEP, 2022 EHB 411, 422. Without pointing to evidence in the record that supports a finding that she has a direct interest in her third-party permit appeal, Ms. Dengel has failed to demonstrate she has the requisite standing to maintain her appeal.

Finally, we turn to the Department's argument that Ms. Dengel has not established a prima facie case. In order to establish a prima facie case, Ms. Dengel is required to produce evidence of facts essential to her cause of action. 25 Pa. Code § 1025.2(2). This criterion is satisfied if Ms. Dengel, who has the burden of proof in this instance, has put forward evidence sufficient to allow a trier of fact to find in her favor. Here, her single allegation is that the Department erred in approving the Authority's Application and issuing the Permit because, according to Ms. Dengel, the Application was null and void due to it being signed prior to being voted on. There does not appear to be any dispute amongst the parties of the material facts that make up Ms. Dengel's claim: 1) the Application was signed on June 22, 2022, prior to the vote; 2) the Application was voted on and approved at a public meeting on July 7, 2022; and 3) despite the fact that the Application was signed prior to the vote, the Department approved the Application and issued the Permit. The filings before us do not establish a prima facie case that the Department erred in issuing the Permit. Ms. Dengel failed to develop a plausible cause of action based on the material facts of her claim. Even if her objection was broader in scope, Ms. Dengel has not provided any evidence that suggests any environmental harm would result from the Permit and she has not proffered anything that demonstrates either that the Authority did not comply with the statutory requirements relevant to the Application or that the Department failed to adhere to the statutory requirements pertinent to their review.[7]

[7] Section 6 of the Water Rights Act, 32 P.S. § 636, sets forth the requirements for the Authority's permit application, requiring the authority to provide the following information: 1) The river or stream the supply

**Conclusion**

Ms. Dengel's claim in this appeal arises from an alleged Sunshine Act violation that we are without jurisdiction to hear. Furthermore, Ms. Dengel has not come forward with sufficient evidence to show that she has the direct interest necessary to confer standing and has failed to establish a prima facie case. In viewing the record in the light most favorable to Ms. Dengel, we discern no genuine issue of material fact, therefore, the Department is entitled to judgment as a matter of law. Accordingly, we issue the following Order:

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would be taken and the necessity for either new water rights, new source, or additional quantity; 2) the amount of water proposed for present and future needs; 3) the locality and its population requiring the supply and the necessity of the acquisition; 4) the plan for development or use of the water; and 5) any additional information the Department requires. Section 7 of the Water Rights Act, 32 P.S. §637, sets forth the requirements for the Department's review of the application which requires the Department to consider the proposed water to be acquired is reasonably necessary for the present and future needs; and 2) the taking of the proposed water will not either interfere with navigation, jeopardize public safety or cause the Commonwealth substantial injury.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LAURA DENGEL** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2022-092-B** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NEW SEWICKLEY MUNICIPAL AUTHORITY, Permittee** | : | |

**O R D E R**

AND NOW, this 29th day of August, 2024, it is hereby ORDERED that the Department's Motion for Summary Judgment is **granted** and the Appellant's appeal is hereby **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

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

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

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

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

**DATED: August 29, 2024**

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

**For the Commonwealth of PA, DEP:**
Christopher R. Ryder, Esquire
*(via electronic filing system)*

**For Appellant, *Pro se*:**
Laura Dengel
*(via electronic filing system)*

**For Permittee:**
Paul A. Steff, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **CITIZENS FOR PENNSYLVANIA'S FUTURE, MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER AND DELAWARE RIVERKEEPER NETWORK** | : | |
| **v.** | : | **EHB Docket No. 2023-026-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee** | : | **Issued: September 3, 2024** |

**OPINION AND ORDER ON**
**MOTION IN LIMINE**

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

**Synopsis**

The Board denies a motion in limine asking the Board to exclude evidence on some of the issues in the case as moot. The status of the project is unclear. Regardless of its status, relief remains potentially available in connection with the issues. In addition, two exceptions to the mootness doctrine apply because the allegedly moot issues are capable of repetition yet are likely to evade review, and the issues involve matters of great public importance. The Board also finds that certain issues raised in the appellants' pre-hearing memorandum do not go beyond the scope of the objections raised in the notice of appeal.

**O P I N I O N**

Citizens for Pennsylvania's Future, Maya van Rossum, the Delaware Riverkeeper, and Delaware Riverkeeper Network (the "Appellants") have filed an appeal of the Department of Environmental Protection's (the "Department's") issuance of Erosion and Sediment Control Permit No. ESG830021002-00 and Water Obstruction and Encroachment Permit Nos. E4083221-

006 and E4583221-002 to Transcontinental Gas Pipe Line Company, LLC ("Transco") for work associated with Transco's Regional Energy Access Expansion Project in Luzerne, Monroe, Northampton, Bucks, and Chester counties. The parties have filed their pre-hearing memoranda and the merits hearing is scheduled to begin on September 16, 2024.

Transco has filed a motion in limine seeking to preclude the Appellants from offering evidence on certain issues raised in the Appellants' pre-hearing memorandum. Transco says that its pipeline has already been built, that it completed construction and stabilization work in October 2023 and restoration work in November 2023, and that the pipeline was put into full service on August 1, 2024. Accordingly, Transco argues that many arguments related to Transco's construction work that have been raised by the Appellants are now moot. Transco also seeks to preclude the Appellants from offering any evidence regarding a claim that "cumulative impacts" were not properly evaluated during the permitting process because Transco asserts the issue was not raised in the Appellants' notice of appeal and is therefore now waived.

The Appellants oppose the motion. The Department has not filed a separate response to the motion. Instead, it has filed a letter indicating that it "does not object to Transco's Motion, but does not otherwise take or express a position on the Motion."

A purpose of a motion in limine is to provide the Board with an opportunity to consider potentially inadmissible evidence and rule on the admissibility of that evidence before it is referenced or offered at the hearing on the merits. *Liberty Twp. v. DEP*, EHB Docket No. 2023-036-L, slip op. at 3 n.2 (Opinion and Order, July 29, 2024) (citing *Liberty Twp. v. DEP*, 2023 EHB 92, 92-93; *Penn Twp. Mun. Auth. v. DEP*, 2021 EHB 72, 73; *Kiskadden v. DEP*, 2014 EHB 634, 635). *See also* 25 Pa. Code § 1021.121 ("A party may obtain a ruling on evidentiary issues by filing a motion in limine.").

**Mootness**

Transco does not contend that *all* of the issues raised in this appeal are moot. For example, Transco does not argue that the Appellants' cannot pursue their issues regarding the alleged lack of thermal measurements and macroinvertebrate data in the permit applications, or the claim that wetlands were not accurately identified and characterized, or the argument that what the Department and Transco classify as temporary impacts to wetlands are actually permanent impacts. Rather, Transco only asks us to dismiss as moot issues related to Transco's "completed construction activities," such as the evaluation of non-discharge alternatives for the project, the use of certain pipeline construction methods and erosion and sediment control BMPs, and the alleged failure to sample for toxic substances before construction commenced.

We recently discussed the basic principles regarding the mootness doctrine in *Protect PT v. DEP*, EHB Docket No. 2023-025-W (Opinion and Order, Jan. 10, 2024):

> A matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *Center for Coalfield Justice v. DEP*, 2018 EHB 758, 762; *Klesic v. DEP*, 2016 EHB 142, 144; *Sludge Free UMBT v. DEP*, 2015 EHB 888, 890; *Consol*, 2015 EHB at 55 (citing *Horsehead Resource Development Co. v. DEP*, 1998 EHB 1101, 1103, *aff'd*, 780 A.2d 856 (Pa. Cmwlth. 2001)); *Solebury Township v. DEP*, 2004 EHB 23, 28-29. There are exceptions to mootness, including the following: (1) where the action complained of is capable of repetition but likely to evade review, (2) where issues of great public importance are involved, or (3) where a party will suffer a detriment without a decision by the Board. *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 133 (Pa. 1999); *Center for Coalfield Justice v. DEP*, 2017 EHB 713, 718; *Klesic*, 2016 EHB at 144; *Solebury Township*, 2004 EHB at 29. Any one of those circumstances may justify retaining jurisdiction. *Sludge Free*, 2015 EHB at 891 (citing *Ehmann*, 2008 EHB 386, 390). It is important to note that "[m]ootness does not deprive this Board of jurisdiction; rather, where an appeal is moot the Board has the authority based upon its own measure of prudence to proceed." *Id.* (citing *Robinson Coal Co. v. DEP*, 2011 EHB 895, 900 (quoting *Ehmann*, 2008 EHB at 388)).

Slip op. at 4-5. We added that the Board should "exercise restraint in dismissing appeals as moot if the circumstance is not entirely free from doubt." *Id.*, slip op. at 9 (quoting *Sludge Free UMBT v. DEP*, 2015 EHB 888, 897).

We will exercise such restraint here because we are not convinced that the issues raised are moot. Initially, although Transco tells us the pipeline is in full service, we are told that the United States Court of Appeals for the District of Columbia recently vacated FERC's certification of the project. We are not sure what that means exactly, but at a minimum it would seem to cloud the mootness issue.

Secondly, while an appeal to the Board from a permit does not in itself act as a supersedeas, 35 P.S. § 7514(d)(1), it is important to remember that a permittee who proceeds with a project while an appeal is pending before the Board does so at its own risk. *Liberty Twp. v. DEP*, 2023 EHB 108, 114 n.6; *Concerned Citizens Against Sludge v. DER*, 1983 EHB 282, 289. While construction prior to the Board's decision may as a practical matter limit what relief the Board can reasonably mandate, it does not *necessarily* circumscribe the Board's options if it finds that an error has been committed. So, for example, a particular BMP that is determined to have been faulty by design may need to be redone. Indeed, while barely imaginable, reconstruction of an improvidently designed or located pipeline is not precluded as an option as a matter of law. *Contrast Alice Water Protection Association v. DEP*, 1997 EHB 447 (coal cannot be unmined). *See also Rakoci v. DEP*, 2002 EHB 590, 591 (distinguishing *Alice Water* and denying a motion to dismiss as moot an appeal of an oil and gas well permit). Although we suspect relocating a pipeline could do more harm than good in the majority of cases, that might not *always* be the case. Once relocation is required, all of the construction activities would then seem to come into play again.

Transco relies on our decision in *Lancaster Against Pipelines v. DEP*, 2019 EHB 134, *recon. denied*, 2019 EHB 163, for the proposition that this appeal is moot. That case and this one are nearly identical on the facts, yet we find no support for Transco's arguments in this case in the *Lancaster Against Pipelines* case. The appellants in *Lancaster Against Pipelines* filed appeals from the water quality certification and water encroachment permits issued for the construction of a pipeline. Before the matter could proceed to a hearing, Transco completed its construction activities and placed the project in service. Transco filed a motion to dismiss arguing that the Board lacked jurisdiction and that the matter was moot. Inexplicably, the appellants failed to address the mootness argument until much too late in a reply brief in support of their petition for reconsideration. The essence of our holding in *Lancaster Against Pipelines* was that we were "unable to independently divine why these appeals are not moot, nor should we try to do so." *Id.*, 2019 EHB at 136. We did not address the merits of the mootness issue.

Even assuming *arguendo* that some of the issues raised in this appeal are moot, as in *Protect PT, supra*, we believe this case also falls within two of the exceptions to the mootness doctrine, namely, cases that involve conduct that is capable of repetition yet likely to evade review, and cases that involve issues of great public importance. In *Protect PT*, we considered a motion to dismiss as moot an appeal of two permits for the development of unconventional gas wells. The permittee argued that the appeal was moot because it had already drilled, hydraulically fractured, and completed the two wells. We denied the motion, holding that the situation fell, first, under an exception to the mootness doctrine where the conduct at issue is capable of repetition but likely to evade review due to the short period of time in which the gas wells could be drilled, slip op. at 5-6, and second, that the appeal raised issues of great public importance, slip op. at 9.

In *Protect PT*, the permits evaded review because the wells were being drilled too fast. Here, the permits have evaded review because Transco and the pipeline industry in general, with the strong support of the Department, has mounted jurisdictional disputes in court and before this Board that have delayed and complicated virtually every appeal of the state permits issued by the Department for these projects. Although the disputes do not appear to be going the pipeline companies' and the Department's way lately, *see Transcontinental Gas Pipe Line Co. v. Pa. Env't Hearing Bd.*, 108 F.4th 144 (3d Cir. 2024), *aff'g* 2023 U.S. Dist. LEXIS 97642 (M.D. Pa. 2023), *rehearing denied*, (3d Cir. Aug. 8, 2024), they nevertheless distract and delay the third-party appellants from litigating the merits of their permit challenges. In the meantime, the pipelines are built and the merits issues never see the light of day.

We do not fault Transco or the Department for mounting such jurisdictional attacks. Indeed, the industry has raised legitimate questions regarding the Board's jurisdiction that have resulted in inconsistent holdings from several federal and state courts that are difficult to reconcile. Nevertheless, it cannot be gainsaid that all of the jurisdictional wrangling has meant that the issues on the merits rarely if ever seem to get litigated. While the parties argue incessantly whether the federal courts or this Board should review the facts, all too often neither the courts nor this Board ever do. The merits of the case evade review. The adequacy of BMPs and other permitting questions at issue here are similar for many pipeline projects and are obviously capable of repetition. Accordingly, we conclude that the evading-review exception to the mootness doctrine applies here.

Transco points out that the Appellants did not seek a supersedeas. However, the merits have evaded review here more because of the jurisdictional wrangling than the absence of a

supersedeas, or dilatory litigation for that matter. In any event, seeking a supersedeas is not a prerequisite for defeating a mootness claim. *Protect PT, supra*, slip op. at 7-9.

In addition, here as in *Protect PT*, we believe this appeal raises questions of great public importance that exempt it from the mootness doctrine. The construction of pipelines and their impact on the waters of the Commonwealth are objects of intense public interest and scrutiny. There is no reason to believe this interest will subside anytime soon. The interest is justified because pipelines, while necessary, inevitably impact multiple waterways, including High Quality and Exceptional Value streams.

"[T]he issue of mootness is a prudential question for the Board, not one of jurisdiction. Therefore, we need to determine based on our own measure of prudence whether we should proceed with this case." *Protect PT*, slip op. at 9 (quoting *Center for Coalfield Justice v. DEP*, 2017 EHB 713, 720). For the reasons discussed above, we do not believe it would be prudent to limit the Appellants from presenting evidence on the issues in question.

**Waiver**

Allegations and issues that are not raised in a notice of appeal are generally waived. *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 637; *Clean Air Council v. DEP*, 2019 EHB 417, 420. However, objections raised in general terms are typically sufficient to avoid waiver. *Clean Air Council v. DEP*, 2022 EHB 291, 294 (citing *Croner, Inc. v. Dep't of Envtl. Prot.*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991)). Notices of appeal are to be read broadly. "So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver." *GSP Mgmt. Co. v. DEP*, 2011 EHB 203, 207 (quoting *Rhodes v. DEP*, 2009 EHB 325, 327). Nevertheless, "there are limits and an appellant runs a risk that it might suffer waiver

of issues if it fails to specify its objections in its notice of appeal." *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 367.

Transco complains that the Appellants' notice of appeal objected that the pipeline construction will harm waters of the Commonwealth, but it did not specifically say that the construction—together with other impacts—will "cumulatively" harm the waters. Therefore, according to Transco, the Appellants waived any objection to cumulative impacts. We disagree that such specificity is required. Use of the term "cumulative" is not a talisman. There is no question that deciding whether a resource will be degraded must be answered in its proper, real world context, which includes an evaluation of any other impacts to the same resource. We expect that any attempt to isolate the impact of the pipeline construction from other impacts, if any, on a particular resource would be artificial. While we had no difficulty earlier in this appeal concluding that testimony on impacts to bats and their roosting habitats were well outside the general water quality objections in the notice of appeal, *Citizens for Pa.'s Future v. DEP*, EHB Docket No. 2023-026-L (Opinion and Order, Feb. 21, 2024), we see no such waiver here.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

**O R D E R**

AND NOW, this 3rd day of September, 2024, it is hereby ordered that Transcontinental Gas Pipe Line Company's motion in limine is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: September 3, 2024**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **SALVATORE PILEGGI** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2022-068-BP** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: October 2, 2024** |
| | : | |

# ADJUDICATION

**By Paul J. Bruder, Jr., Judge**

**Synopsis**

The Board dismisses an appeal of a Department administrative order directing Appellant to cease earth disturbance activities, implement Best Management Practices, submit a written Erosion and Sedimentation control plan, and apply for an NPDES permit. The Department met its burden of proof demonstrating that the order that it issued to Pileggi was lawful, reasonable and supported by the facts.

## BACKGROUND

Appellant Salvatore Pileggi ("Mr. Pileggi") has appealed an administrative order issued to him by the Department of Environmental Protection ("Department") on August 11, 2022 following several inspections conducted by the Lackawanna County Conservation District (the "Conservation District" or "District") in 2021 and 2022 of property owned by Mr. Pileggi in Newtown Township, Lackawanna County. The order alleges that Mr. Pileggi conducted earth disturbance activities in excess of one acre, and pursuant to a common plan of development or sale on his property, without first obtaining an NPDES permit, without implementing appropriate best management practices ("BMPs") or stabilizing the site, and without developing an erosion and

sedimentation ("E&S") control plan. The order requires Mr. Pileggi to cease any earth disturbance activity, implement appropriate BMPs, and submit an E&S control plan and an NPDES permit application to the Conservation District.

Mr. Pileggi argues that the order was improperly issued because any earth disturbance activities he performed fall within the regulatory definition of "road maintenance activities" and thus are exempt from NPDES permitting requirements. He contends that the Department, which bears the burden of proof in this appeal, has not produced sufficient evidence to show otherwise. Additionally, Mr. Pileggi argues that his earth disturbance activities were not taken pursuant to a common plan of development or sale and, such activities having since ceased, are all in the past and therefore there is no "proposed" earth disturbance within the meaning of the regulations requiring an NPDES permit or an E&S plan. Finally, Mr. Pileggi contends that the Department has not sufficiently controverted his assertion that he did use BMPs while engaging in the earth disturbance.

On September 15, 2022, the Appellant appealed the Order to the Pennsylvania Environmental Hearing Board ("Board"). On July 28, 2023, Appellant filed a Motion for Summary Judgement, which was denied by Order of then-presiding Judge Labuskes on September 28, 2023. On February 21 and 22, 2024, the Board held a hearing in this appeal in Harrisburg. The parties have filed their Post-Hearing Briefs, and the Board is now in the position to resolve this appeal.

## FINDINGS OF FACT

1. The Department of Environmental Protection ("Department") is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1- 691.1001 ("The Clean Streams Law"); Section 1917-A

of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder, including the Department's Chapter 102 Regulations governing Erosion and Sediment Control at 25 Pa. Code §§ 102.1 – 102.51.

2. The Appellant, Salvatore Pileggi is an adult individual who resides at 9156 Valley View Drive, Clarks Summit, PA 18411. He has lived at this location for over 30 years. (Hearing Transcript ("T.") at page 348; Department Exhibit ("DEP Ex.") 25.)

3. Mr. Pileggi owns approximately 60 acres spanning between Forest Acre Drive and Valley View Drive in Newton Township, Lackawanna County. (the "Property"). (T.288.)

4. Mr. Pileggi bought the Property in 1999 from K.W.F. Inc. (T. 488; DEP Ex. 25.)

5. Prior to Mr. Pileggi purchasing the property, the previous owner, K.W.F., Inc., developed plans to subdivide the Property in the 1970s, which included a 10-lot subdivision referred to as the Wooded Lane Subdivision (the "Subdivision") (T. 488; DEP Ex. 30, p. DEP-400).

6. Mr. Pileggi is the owner of lots 3-10 in the Wooded Lane Subdivision located on the Property in Newton Township, Clarks Summit, PA. (Joint Stipulation).

7. Wooded Lane begins at its intersection with Forest Acres Drive, a PennDOT highway, and extends into the Property. (Appellant's Statement of Undisputed Facts, Summary Judgment pleadings.)

8. Wooded Lane runs northeast to southwest through the Pileggi Property, coming off of Forest Acres Drive up to Valley View Drive and Mr. Pileggi's residence. (T. 354; 361; 398-399; App. Ex. 16).

9. Bonnie Circle runs east and west and is perpendicular to Wooded Lane

approximately 350-400 feet from the Wooded Lane entrance from Forest Acres Drive. (DEP Ex. 18(a)).

10. Brian Mackowski serves as the Department's Waterways and Wetlands Program Chief of Compliance. (T. 217)

11. Mr. Mackowski routinely makes road maintenance determinations in his work on behalf of the Department. (T. 219-220)

12. When making road maintenance and construction determinations, Mr. Mackowski evaluates the road's characteristics prior to changes and whether parties are maintaining the road's original grade and cross-section. (T. 264)

13. Jerry Stiles is a life-long resident of Clarks Summit, PA in Lackawanna County. (T. 21)

14. Mr. Stiles has worked for the Lackawanna County Conservation District for approximately 30 years and currently serves as the District Manager there. (T. 19, 21)

15. Mr. Stiles first inspected Mr. Pileggi's Property on April 19, 2021, after having received complaints from the public. (T. 22-24, 26; Inspection Report No. 1.)

16. A significant but indeterminate amount of earth disturbance work had been performed on the Property as of the April 19, 2021 inspection. (T. 25-26, 32-33)

17. At the time of the April 2021 inspection Mr. Stiles had not definitively determined that an NPDES permit was required, so he requested further information from Mr. Pileggi regarding the estimated earth disturbance over the life of the project in order to make that determination. (T. 37-38.)

18. Mr. Pileggi responded that the project would include approximately 1,000 linear feet of trenching for utilities not exceeding two feet in width, approximating 2,000 linear feet, in

addition to work to widen the shoulder of an existing road cross-section. (T. 43; DEP Ex. 4.)

19. Mr. Pileggi further estimated that the entire project would not exceed 12,800 square feet of earth disturbance. (T. 41-45; DEP Ex. 4.)

20. Mr. Stiles did not agree with these estimates, based on the work proposed and already completed on the roadways, as well as the planned utility trenching, all of which indicated to Mr. Stiles that there were plans underway for a residential subdivision. (T. 41-45.)

21. In 2019, Mr. Pileggi cut and sprayed the field west of Wooded Lane to carve out Bonnie Circle. (T. 413)

22. The conditions on the Property on April 19, 2021 differed from the Property's prior appearance. (T. 28-30, 47, 150; DEP Ex. 18(a), pages DEP 137(a), and 138(a))

23. About 600 linear feet of Wooded Lane, which had previously been a "farm lane" on the Property, had been graded and covered with a stone aggregate as of April 19, 2021. (T. 28)

24. About 250 linear feet of roadway, which had formerly been a grass field perpendicular to the 600-linear-foot stretch of roadway, had been mowed and graded but had not been covered with stone aggregate as of April 19, 2021; it was bare earth. (T. 29-30; T. 128-129)

25. In 2021, Mr. Pileggi put down modified and gravel on Wooded Lane and Bonnie Circle. The modified and gravel was hauled to the site by the truckload and spread by Mr. Pileggi. (T. 419-420)

26. The total amount of graded roadway on the Property exceeded 5,000 square feet and did not show evidence of the E&S plan and BMPs required for that amount of roadway as of April 19, 2021. (T. 30, 55-57)

27. After the April 19, 2021 inspection, Mr. Pileggi received four more inspection reports, a Compliance Notice, a Notice of Violation, and an Administrative Order. (T. 66, 76, 89,

99, 105, 118, 123.)

28. Mr. Mackowski accompanied Mr. Stiles for the fifth inspection on December 6, 2022. (T. 119-121.)

29. The fifth inspection report notes 1.48 acres of earth disturbance at the Property. (T. 120, 242.)

30. Mr. Mackowski calculated the 1.48-acre figure using Google Earth in conjunction with his and Mr. Stiles' visual inspections on the ground. (T. 119-120, 226-227, 229-232.)

31. When making a road maintenance determination, Mr. Mackowski looks at the original condition of the area in question and whether an individual is maintaining the original grade and cross-section. (T. 264.)

32. "Road maintenance" does not include expanding upon what was already there, such as making shoulders, making ditches, making channels, or laying back the embankment to cut or fill it on one side or the other. (T. 264.)

33. Mr. Pileggi testified that he did the road work at issue to repair flood damage to the Property and his neighbor's property following a severe rainstorm, and that he did so in conjunction with his regular activities to maintain the road. (T. 384-385, 482.)

34. Mr. Pileggi widened the shoulder of an existing road cross-section on the Property. (T. 43)

35. Wooded Lane has existed since before the original subdivision plans were drawn up in the 1970s and had been an unimproved "farm lane" consisting of two dirt tracks on either side of a grassy strip, just wide enough for one vehicle, until Mr. Pileggi's work to expand the road cross-section. (T. 60, 150, 212)

36. As of September 16, 2019, Bonnie Circle had been created on the ground, as

evidenced by the road being mowed into the shape of a cul-de-sac. (DEP Ex. 18(a) page 138(a))

37. As of April 19, 2021, Bonnie Circle had been graded and improved with stone aggregate. (T. 151)

38. Mr. Pileggi conducted over one acre of earth disturbance, which primarily involved work on Wooded Lane and Bonnie Circle and adjacent support areas. (T. 56-57, 227, 229, 265-266; DEP Ex. 18(a), page DEP 139(a))

39. During the fifth inspection December 6, 2022, there were survey markers for several lots in the Subdivision and at least one real estate sign indicating the lots were for sale. (T. 231-232)

40. Online listings advertised Lot 5 of the Subdivision for sale. (T. 249-250)

41. Online records showed an easement agreement between Mr. Pileggi and PPL Electric Utilities that extended over Bonnie Circle from an existing pole on Wooded Lane. (T. 246-248, 475)

42. At the time of the hearing, Lot 5 was still available for sale. (T. 367, 459)

43. Mr. Pileggi submitted a private request for sewage on the Property over a decade ago. (T. 209)

44. Mr. Pileggi also submitted a sewage planning module to the Department in 2002. (T. 287, 365)

45. The Department denied both the private request for sewage planning, and his sewage planning module submission, between the years 2002 and 2015. (T. 287, 365-366)

46. Mr. Pileggi testified that he only listed Lot 5 for sale because a potential buyer approached him seeking to purchase it. (T. 368-369)

47. Newton Township informed the buyer that building permits would not be issued

for the lot, so the buyer decided not to proceed. (T. 368-369)

48. After learning that permits would not be issued for Lot 5, Mr. Pileggi has not proposed to build on the Property, applied for other permits, or listed other lots for sale. (T. 287-288, 366-367, 370)

## DISCUSSION

The Department's Order to the Appellant alleges that he violated various regulatory requirements of Chapter 102 of the Department's regulations when he performed earth disturbance work on his property in violation of the Clean Streams Law, Act of June 22, l937 P. L. 1987 as amended, 35 P S §§ 691.1 – 691. 1001 and the Department's Chapter 102 Regulations governing Erosion and Sediment Control, 25 Pa. Code §§ 102.1 – 102.51 ("Chapter 102 Regulations").

Specifically, the Department's Order alleges that the Appellant:

1. Violated Section 402 of the Clean Streams Law and Chapter 102.5(a) by conducting earth disturbance of more than one acre without an NPDES permit, or conducting earth disturbance on a portion of a larger common plan of development over one acre without an NPDES permit;
2. Violated Section 402 of the Clean Streams Law and Chapter 102.4 for failing to implement proper Best Management Practices ("BMPs");
3. Violated Section 402 of the Clean Streams Law and Chapter 102.4(b)(2) by failing to develop and implement an Erosion and Sedimentation ("E&S") control plan for earth disturbance of 5,000 acres or more; and
4. Violated Section 402 of the Clean Streams Law and Chapter 102.22(b) for failing

to temporarily stabilize the site.[1]

To correct the listed violations, the Department directed the Appellant to:

1. Immediately cease earth disturbance activities until the required permits and plans are approved by the County Conservation District;
2. Within seven days, implement BMPs in accordance with the Department's regulations and the Erosion and Sediment Pollution Control Manual, Commonwealth of Pennsylvania, Department of Environmental Protection No. 363-2134-008 (April 2000) as amended and updated.
3. Within thirty days, submit an adequate E&S control plan that complies with Section 102.4(b)(5)(i)-(xv) of the Department's regulations, 23 Pa. Code § 102.4(b)(5)(i)-(xv); and
4. Within one hundred twenty days, submit an adequate NPDES permit application as per Section 102.5 of the Department's regulations, 25 Pa. Code § 102.5.

**Burden of Proof and Standard of Review**

In matters before the Board, the burden of proof rests with the party asserting the affirmative of the issue, and the party with the burden of proof is required to have presented a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(a)-(b). The Department has the burden of proof in this matter. Under the Board's rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Corsnitz v. DEP*, 2018 EHB 174; *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3. Here, the Department issued an order and must show

[1] It appears that the Department later dropped this alleged violation after subsequent inspections. Inspection Report Nos. 4 and 5 (DEP Exhibits 16 and 18) do not note this as a current violation.

by a preponderance of the evidence that its actions were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32. The Board can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

The Department has the burden of proof when it issues orders. In this case, the burden it held was: 1. to establish that the Appellant disturbed more than one acre of earth in his activities on his property; 2. that any earth disturbance less than an acre was pursuant to a common plan of development greater than one acre, requiring an NPDES permit; and 3. that he disturbed more than 5,000 square feet, requiring an E&S Control Plan and proper BMPs.

**Purpose of NPDES Permitting, E&S Planning and BMPs**

The Pennsylvania Clean Streams Law, Act of June 22, l937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.101 ("Clean Streams Law") empowers the Department to regulate activities that may cause pollution to waters of the Commonwealth:

> Whenever the department finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the department may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the department

> pursuant to this section shall give the persons a reasonable period of time to apply for and obtain any permits required by such rules and regulations.

35 P.S. § 691.402(a).[2] The Clean Streams Law also states that the prevention and elimination of water pollution is directly related to the economic future of the Commonwealth. 35 P.S. § 691.4. Pollution under the Clean Streams Law includes sediment pollution. See *Leeward Construction v. Department of Environmental Protection*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003) ("Sediment laden runoff is defined as pollution in Section 1 of The Clean Streams Law....").

To allow the Department to address and prevent sediment pollution, the Erosion and Sediment Control regulations in 25 Pa. Code Chapter 102 have been promulgated under the Clean Streams Law. The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 600. Accelerated erosion is defined as "[t]he removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone." 25 Pa. Code § 102.1.

As the Board held in *O'Rielly v. DEP*:

> The pollutant of primary concern for construction projects is sediment. 25 Pa. Code § 102.2. On a large project, hundreds or even millions of cubic yards of earthen materials are disturbed. When they are disturbed, they are exposed to the elements. When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless

[2] Mr. Pileggi argues that the statute does not grant the Department authority to issue orders to individuals requiring those individuals to apply for an NPDES permit, and instead may only enact such a requirement via rules and regulations and further argues that the phrase "the department may issue an order to a person or municipality regulating a particular activity" does not extend to the issuing of an order to apply for a permit. We disagree. The Department, by and through approval from the Environmental Quality Board, has and will continue to promulgate rules and regulations requiring that activities that create a danger of pollution only be conducted pursuant to a permit. Examples of these rules and regulations can indeed be found among those that Mr. Pileggi has fun afoul of with his particular earth disturbance activities that led to this appeal. Because Mr. Pileggi's particular activities fall under the kind that are – by regulation – required to be permitted, the Department may also, pursuant to those regulations and authorized by the statute, issue orders requiring that those engaged in such activities apply for the required permits.

> precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a deleterious effect on Pennsylvania's streams.
>
> In order to control the discharge of sediment while earthen materials are exposed during construction projects, federal law requires that runoff from construction activity be treated as a point source requiring an NPDES permit. 40 C.F.R. § 122.26; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. *See also* 35 P.S. § 691.402 (Department may require permits for activities that create a danger of water pollution). The permits are designed almost exclusively to control the discharge of sediment because that is what has been proven to be the potential pollutant at construction sites. *See* 25 Pa. Code Chapter 102 (program is designed to minimize the potential for accelerated erosion and sedimentation).

2001 EHB 19, 33.

In *DEP v. Steven R. Simmons*, we said "Chapter 102 requires a person to install erosion and sedimentation ("E&S") BMP controls 'to minimize the potential for accelerated erosion and sedimentation.' 25 Pa. Code § 1024(b)(1), *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589. BMPs are essentially aimed at keeping the soil on the Site and preventing sedimentation runoff pollution. *Blue Mountain Preservation Association*, 2006 EHB at 600." 2010 EHB 262, 277.

Suffice it to say then that erosion and sedimentation control from construction activities is of paramount importance to the Department, and the Board has recognized on more than one occasion the significance of, and importance to, the Department with respect to these regulations.

**Road Maintenance Exemption**

Mr. Pileggi claims that his activities do not require NPDES permitting or E&S planning because his activities are exempt as "road maintenance" activities, and repairs due to flood damage, and because he is not "proposing" to do any further work.

> An NPDES permit is required by anyone proposing an earth disturbance:
>
> b) **Other than** agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or **road maintenance activities**, a person proposing an

> earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a) (emphasis added).

The regulatory definition of "road maintenance activities" states that such activities must occur within the existing road cross-section and enumerates the specific activities that fall under the exception:

> (i) Earth disturbance activities within the existing road cross-section or railroad right-of-way including the following:
> (A) Shaping or restabilizing unpaved roads.
> (B) Shoulder grading.
> (C) Slope stabilization.
> (D) Cutting of existing cut slopes.
> (E) Inlet and endwall cleaning.
> (F) Reshaping and cleaning drainage ditches and swales.
> (G) Pipe cleaning.
> (H) Pipe replacement.
> (I) Support activities incidental to resurfacing activities such as minor vertical adjustments to meet grade of resurfaced area.
> (J) Ballast cleaning.
> (K) Laying additional ballast.
> (L) Replacing ballast, ties and rails.
> (M) Other similar activities.
> (ii) The existing road cross-section consists of the original graded area between the existing toes of fill slopes and tops of cut slopes on either side of the road and any associated drainage features.

25 Pa. Code § 102.1.

Department witness Brian Mackowski, Chief of Compliance for the Waterways and Wetlands Program, testified that when making a road maintenance determination, he looks at the original condition of the area in question and whether an individual is maintaining the original grade and cross-section. "If something was never actually constructed, then that's not

maintenance. That is construction." Mr. Mackowski further testified that "road maintenance" does not include expanding upon what was already there, such as making shoulders, making ditches, making channels, or laying back the embankment to cut or fill it on one side or the other.

In the course of his first inspection of the Pileggi Property on April 19, 2021, following the receipt of complaints, Department witness Jerry Stiles, District Manager of the Lackawanna County Conservation District, observed that there was earth disturbance work performed "somewhere in the area or neighborhood [of] an acre."[3] Mr. Stiles, who is familiar with the area from both his life-long residency therein as well as his thirty-year career with the Conservation District and with confirmation from historical Google Earth images, noted that the conditions he observed during this inspection differed from the prior appearance of the site. He also observed approximately 600 linear feet of roadway (Wooded Lane) that appeared to have been recently graded and covered with a stone aggregate. Additionally, Mr. Stiles documented about 250 linear feet of roadway (Bonnie Circle) perpendicular to the 600 linear feet of roadway that also appeared to have been recently graded, though no stone aggregate had been installed as of that time. In his inspection report, Mr. Stiles noted that those two sections of roadway together exceeded 5,000 square feet, thus requiring erosion and sediment control practices, including development of an E&S plan and the implementation of BMPs, of which Mr. Stiles observed no evidence. (T. 29-30, 55-57, 79.)

At the time of the April 2021 inspection, Mr. Stiles had not definitively determined that an NPDES permit was required, so he requested further information from Mr. Pileggi regarding the estimated earth disturbance over the life of the project in order to make that determination. Mr.

[3] At this point in time, Mr. Stiles had not conclusively determined how much actual disturbance had already occurred or would be generated during the life of the project. (T. 32-33.)

Pileggi responded that the project would include approximately 1,000 linear feet of trenching for utilities not exceeding two feet in width, approximating 2,000 linear feet, in addition to work to widen the shoulder of an existing road cross-section. Mr. Pileggi further opined that the entire project would not exceed 12,800 square feet of earth disturbance, an estimation that Mr. Stiles did not agree with based on the work proposed and already completed on the roadways, as well as the planned utility trenching, all of which reasonably indicated to Mr. Stiles that there were plans underway for a residential subdivision.

Four more inspections followed the original April 19, 2021 inspection, and Mr. Pileggi was also issued a Compliance Notice, a Notice of Violation, and the Administrative Order at issue here. Mr. Mackowski accompanied Mr. Stiles on the fifth and final inspection on December 6, 2022. Inspection Report No. 5 from the December 6, 2022 inspection describes the amount of earth disturbance at the site as 1.48 acres, which Mr. Mackowski arrived at using Google Earth[4], a tool he uses almost daily in his work for the Department, coupled with his and Mr. Stiles' observations.

Mr. Pileggi testified that the work that is the subject of the Department's order was done to repair flood damage to his property and a neighbor's property following a large rainstorm, in combination with the typical maintenance he does regularly to maintain the various roads on his property. While we find Mr. Pileggi's testimony with respect to the flood damage and repairs

[4] At the hearing, Mr. Pileggi objected to the use of Google Earth to determine the size of the area of disturbance, arguing that the use of Google Earth constituted hearsay. The Presiding Judge heard the testimony over that objection. We now overrule that objection. In *Commonwealth v. Wallace*, the Pennsylvania Supreme Court addressed the question of whether machine generated GPS data records constitute hearsay in this jurisdiction and held that such records do not. 289 A.3d 894, 908 (Pa. 2023) ("In conclusion, we hold that GPS data does not constitute hearsay under the plain language of Rule 801 because it does not constitute a statement as defined therein. We leave for another day whether, and under what circumstances, such evidence may be challenged on reliability, authentication, or other grounds."). Google Earth is a program that determines the size of an area based on plotted GPS coordinates. Mr. Mackowski testified that he inputs the GPS coordinates and that Google Earth provides an area size. He testified credibly that Google Earth is 98% accurate based on his experience using the program. T. 340-341.

along Wooded Lane and his neighbor's property and typical farm maintenance to be credible, that does not change the fact that if that the road work does not fit within the definition of road maintenance, for purposes of an exception to the NPDES permitting requirements, then he must submit a permit application.

It seems that some of the conflict in this appeal arises from the differences between common parlance and regulatory language and the ways in which they are used and applied to the issues in this appeal. While we credit Mr. Pileggi's testimony that he routinely maintains the roads on his property, and we agree that that maintenance might often fall under the regulatory definition of road maintenance, under the circumstances at play when this particular round of maintenance was conducted – including any repairs necessitated by flood damage – the Department has submitted credible evidence that the work done to maintain the roads and clean up after the flooding exceeded the regulatory definition of road maintenance because it went beyond the original cross-section of the roads. Indeed, by his own email to Mr. Stiles, Mr. Pileggi admits that part of the work done included widening the shoulder of an existing road cross-section. While grading the shoulder of an existing road-cross section does fall within the definition of road maintenance, expanding the shoulder does not. 25 Pa. Code § 102.1(i)(B).

Likewise, while in common parlance the term "road construction" could reasonably be understood to mean the construction of new roads, in this context "road construction" simply means work done to and upon existing roads that falls out of the definition of "road maintenance," such as allowing the work to extend outside of the existing cross-section of the road at issue; it is not necessary that a new road be constructed from scratch for the term "road construction" to apply to an activity. Thus, because Wooded Lane has existed at least since the original subdivision plans were drawn up in the 1970s, and there has always been something of a "farm lane" there, the work

done by Mr. Pileggi in response to the flood damage, or for any other reason, falls out of the definition of road maintenance since that work expanded the cross-section of the road.

Regardless of whether Mr. Pileggi was simply being a good neighbor by cleaning up after a flood, the fact remains that earth disturbance activities totaling more than one acre require an NPDES permit, E&S planning and BMPs, unless some exception is met. The reason the work became necessary is immaterial; rather, the material issue is whether the extent of the earth disturbance activities was sufficient to require an NPDES permit and E&S controls to protect waters of the Commonwealth from potential adverse impacts caused by the earth disturbance activities. We find that the work done by Mr. Pileggi – in response to flood damage or otherwise – falls outside of the definition of road maintenance, thus requiring an NPDES permit and E&S controls.

Appellant also claims that the regulations at issue do not apply in this instance, because he is not "proposing" any further earth moving activity. 25 Pa. Code § 102.5(a) states:

> a) Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

Similarly, 25 Pa. Code § 102.4(b)(2) provides:

> (b) For earth disturbance activities other than agricultural plowing or tilling or animal heavy use areas, the following erosion and sediment control requirements apply: …
>
> (2) A person proposing earth disturbance activities shall develop and implement a written E&S Plan under this chapter if one or more of the following criteria apply: (i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more. (ii) The person proposing the earth

> disturbance activities is required to develop an E&S Plan under this chapter or under other Department regulations.

As Mr. Pileggi points out, the regulation at issue here is addressed to anyone "proposing" earth disturbance activities rather than those who have already undertaken and completed a project involving earth disturbance activities. Mr. Pileggi argues vehemently that there is no work being proposed, and thus the regulation cannot apply to him or the work already undertaken and completed. *See* Appellant's Post-Hearing Brief, page 40. He supports this position by pointing to the inclusion of only the word "proposing," where elsewhere the regulations describe what a person "conducting or proposing to conduct" earth disturbance shall do. *Id*. at page 41.

The Department, of course, argues that Mr. Pileggi is proposing earth disturbance activities based on the factual circumstances which it used to come to the determination that the work already performed by Mr. Pileggi was done pursuant to a common plan for development or sale, which, of course, Mr. Pileggi denies.

Thus, one simple way to answer the question of whether Mr. Pileggi is *proposing* earth disturbance activity is by asking another question: is the work that Mr. Pileggi undertook pursuant to a common plan for development or sale? If the answer to that question is yes, then we can conclude that he is indeed "proposing" earth disturbance activity within the meaning of the regulation, because further work will be performed at some future time to complete the subdivision. We answer that question infra.

It would also be reasonable to say that the regulations at issue presume that one will apply for the required permits and plan approvals for the work being proposed, and not that one will perform earthmoving activities in violation of the regulations by doing regulated work without proper approvals. In other words, all such work is "proposed" because the permits and approvals are required to be obtained before the work is done.

Mr. Pileggi's argument, if accepted, would give credence to the idea that one can violate a regulation and then ask for forgiveness rather than first seeking permission, yielding an absurd result that this Board does not accept. Therefore, even if Mr. Pileggi is not proposing further work at this time, the regulatory requirements remain applicable to the earthmoving activities already undertaken.

**Common Plan of Development or Sale**

There is no definition for a common plan of development or sale in Pennsylvania[5], but the term is defined in Appendix A of the Environmental Protection Agency's General Permit for Discharges from Construction Activities as:

> A contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one common plan. The "common plan" of development of sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot.

EPA's General Permit for Discharges from Construction Activities, effective February 17, 2022, Appendix A – Definitions.

[5] At least one other jurisdiction, Connecticut, utilizes a four-factor test to help determine if a grantor has the intent to develop a common plan of development:

> "(1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor."

*DaSilva v. Barone*, 849 A.2d 902, 907 (Conn. App. Ct. 2004). There are also three factors considered that, if present, indicate there is no common plan of development:

> "(1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots."

*Id.*; Powell, Real Property (1999) § 60.03 [7], p. 60-31.

According to the Department of Environmental Protection's (DEP's) regulations:

> [A] person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under a general NPDES permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity[.]

25 Pa. Code § 102.5.

Essentially, Section 102.5 states that if a person is found to have a common plan of development, then an NPDES permit is required for any earth disturbances that is greater than one acre.

In determining whether a particular project should be considered a common plan of development or sale, the Department and Conservation District employees making such a determination will often consult a guidance document entitled *Common Plan of Development or Sale National Pollutant Discharge Elimination System (NPDES) Permits for Stormwater Associated with Construction Activities Frequently Asked Questions (FAQ)* ("Guidance Document" or "Common Plan FAQ") in addition to the applicable regulations. (T. 146-147, 209, 236.)[6]

The Department argues that several different activities performed on Mr. Pileggi's property indicate that he was intending on carrying out a common plan of development, whether in the near future or at some time in the more distant future. Mr. Pileggi conducted over one acre of earth disturbance, which primarily involved work done on Wooded Lane and Bonnie Circle. Mr.

[6] This Board has held on many occasions that Department guidance documents do not have the weight of properly promulgated regulations, and the Board is under no duty to follow them. *PQ Corp. v DEP*, 2016 EHB 826, 837; *Winner v. DEP*, 2014 EHB 1023, 1035. *United Refining Co. v. DEP*, 2006 EHB 846. Department witnesses also testified that these guidance documents are not binding on the Department in the same manner as regulations; rather, they are merely for guidance in interpreting statutes or regulations. (T. 344-345)

Mackowski observed survey markers for several different lots in the Wooded Lane Subdivision, as well as at least one real estate sign that indicated lots were for sale. It is undisputed that plans for the Wooded Lane Subdivision came into existence in 1977, long before Mr. Pileggi bought the property it resided on. No evidence was presented that Mr. Pileggi sought to undo the recorded subdivision plans to eliminate the existence of the subdivision. Mr. Mackowski carried out further research into Mr. Pileggi's property and found records of online listings of Lot 5 for sale, as well as an easement agreement between Mr. Pileggi and PPL Electric Utilities. This easement was from an existing pole on Wooded Lane that extended over to Bonnie Circle. At the time of the hearing, Lot 5 was still for sale.

Considering 25 Pa. Code §102.5 and the Common Plan of Development FAQ document, it does seem reasonable to conclude, based on the observations of Mr. Stiles and Mr. Mackowski, that plans were being set in motion to begin building a subdivision, and thus an NPDES permit would be needed at the times of Conservation District and Department observation.

Mr. Pileggi offered many answers in response to the observations of the Department. He noted that any work on Wooded Lane and Bonnie Circle was not done to start building the Wooded Lane Subdivision, but instead as flood repair work. He testified that on those prior occasions when he has taken steps to begin construction of the Wooded Lane Subdivision, he has correctly reached out to the DEP for various approvals, i.e. he submitted a private request for sewage on the property over a decade ago, as well as a sewage planning module to the Department in 2002; both were denied, and he claims that the Property was not touched beyond his regular maintenance of his land.

Mr. Pileggi further testified that Lot 5 was listed for sale not at his sole request, but because a potential buyer approached him regarding purchasing it. However, Newton Township informed

the buyer that building permits would not be issued for the lot, so the buyer backed out. Since Mr. Pileggi learned that permits would not be issued for Lot 5, he has not proposed building anything else on the property, he has not applied for any other permits, and he has not listed any other lots for sale.

While many of these things may be accurate and even done in good faith, we concur with the Department that these earth disturbance actions by Mr. Pileggi indicate that Mr. Pileggi must have an NPDES permit for earth moving activities done in accordance with a common plan of development.

The verbal testimony and documentary evidence notwithstanding, perhaps the most compelling evidence are the aerial photographs and Google Earth images produced by the Department. The Department submitted a series of exhibits which tend to show a timeline of activities. Sometimes a picture really is worth a thousand words, and that is certainly the case here.

The Department's trial Exhibit 18(a) consists of three (3) separate images labeled DEP 137(a), DEP 138(a), and DEP139(a). DEP 137(a) is dated September 30, 2017. It is an aerial Google Earth image that shows the area in question on the Property in a generally undisturbed state. Wooded Lane is nearly impossible to make out due to extensive tree cover, and there is no indication that Bonnie Circle even exists; the area is just a grassy field.

By contrast, DEP 138(a) is a Google Earth image of the same area taken two years later, on September 16, 2019. Wooded Lane appears to still be a two-lane dirt farm track with tree cover. However, in the field to the west of Wooded Lane, an area had been mowed into the shape of a typical residential cul-de-sac. Not only that, but there appear to be additional side roads that had been mowed through the field, which would indicate additional roads intended to be laid out for a

subdivision. DEP 139(a) is a Google Earth image of the same area taken another three years later, on May 9, 2022. That image clearly shows that Wooded Lane had been widened and improved with stone aggregate, many trees removed, and Bonnie Circle had also been similarly improved. There are additional support areas that show earth disturbance and compacted soils in and around Wooded Lane and Bonnie Circle.[7]

These images clearly show that in 2017, Wooded Lane was barely identifiable, and Bonnie Circle did not exist, except maybe on paper, the proverbial twinkle in a mother's eye. By 2019, the evidence shows that the field in which Bonnie Circle existed on paper had been mowed into the shape of a typical residential cul-de-sac, and not long after that, it had been improved with stone aggregate. There would simply be no logical, reasonable explanation for this action, and Mr. Pileggi did not offer one, other than it was done with the intent to construct a subdivision on the Property. Mr. Pileggi's explanation that it was done to repair flood damage, and that the aggregate was put down on Wooded Lane by a prior owner (which would have had to have been prior to his taking ownership in 1999), is simply not credible.

The Department contends that Mr. Pileggi failed to implement BMPs, failed to develop and implement an E&S Control plan, and failed to obtain an individual NPDES permit and/or a NPDES Permit for Stormwater Discharges Associated with Construction Activities. There is no doubt that Mr. Pileggi was required to obtain the aforementioned materials in regard to the road construction, and that a NPDES permit was needed in connection with a common plan of development or sale.

We therefore agree with the Department that Mr. Pileggi should have obtained an NPDES

[7] Department trial exhibit 23(a) is a wider shot from 2022, which also shows the construction of Wooded Lane and Bonnie Circle and other disturbed areas.

permit for earth disturbance of over one acre for earth disturbance work was part of a common plan of development. While we question the logic behind the Department's order requiring him to apply for a permit for this particular work, we do not disturb the remedies in the order. There may be policy reasons that we are unaware of, or perhaps post-construction stormwater management issues that would be part of the permit. Mr. Pileggi is also obligated by law to comply with Department regulation 25 Pa. Code §102.5 if he eventually intends on further developing the Wooded Lane Subdivision.

For the reasons set forth herein, we affirm the Department's order and dismiss the appeal in its entirety.

## CONCLUSIONS OF LAW

1. Environmental Hearing Board has jurisdiction over this matter. 32 P.S. §§693.24; 35 P.S. §7514.

2. The Board reviews appeals *de novo*. *Borough of Kutztown v. DEP*, 2016 EHB 80, 91 n.2; *Stedge v. DEP*, 2015 EHB 577, 593; *Dirian v. DEP*, 2013 EHB 224, 232; *Smedley v. DEP*, 2001 EHB 131, 156; *O'Reilly v. DEP*, 2001 EHB 19, 32.

3. The Board can consider evidence that was not presented to the Department when it made the decision currently under appeal. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004).

4. The Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4); *Corsnitz v. DEP*, 2018 EHB 174; *Becker v. DEP*, 2017 EHB 227; *DEP v. Francis Schultz, Jr., and David Friend, d/b/a Shorty and Dave's Used Truck Parts*, 2015 EHB 1, 3.

5. The Department must show by a preponderance of the evidence that its actions

were lawful, reasonable, and supported by the facts. *Bryan Whiting and Whiting Roll-Off, LLC v. DEP*, 2015 EHB 799; *Robinson Coal Co. v. DEP*, 2015 EHB 130, 153; *Wean v. DEP*, 2014 EHB 219, 251; *Dirian v. DEP*, 2013 EHB 224, 231; *Perano v. DEP*, 2011 EHB 623, 633; *GSP Management Co. v. DEP*, 2010 EHB 456, 474-75.

6. The Pennsylvania Clean Streams Law empowers the Department to regulate activities that may cause pollution to waters of the Commonwealth. Act of June 22, l937, P.L. 1987, as amended, 35 P S §§691.1-691.101.1.

7. The Clean Streams Law states that the prevention and elimination of water pollution is directly related to the economic future of the Commonwealth. 35 P.S. §691.4.

8. Pollution under the Clean Streams Law includes sediment pollution. See *Leeward Construction v. Department of Environmental Protection*, 821 A.2d 145, 147 (Pa. Cmwlth. 2003).

9. 25 Pa. Code Chapter 102 was promulgated under the Clean Streams Law.

10. The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 600.

11. Accelerated erosion is defined as "[t]he removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone." 25 Pa. Code §102.1.

12. Chapter 102 requires erosion and sedimentation ("E&S") Best Management Practices ("BMP") controls 'to minimize the potential for accelerated erosion and sedimentation.' 25 Pa. Code §1024(b)(1); *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589.

13. BMPs are aimed at keeping the soil on the Site and preventing sedimentation runoff pollution. *Blue Mountain Preservation Association*, 2006 EHB at 600. 2010 EHB 262, 277.

14. GPS data does not constitute hearsay under the plain language of Rule of Evidence 801. *Commonwealth v. Wallace*, 289 A.3d 894, 908 (Pa. 2023).

15. Grading the shoulder of an existing road-cross section falls within the definition of road maintenance but expanding the shoulder does not. 25 Pa. Code §102.1(i)(B).

16. If a person is found to have a common plan of development, then an NPDES permit is required for any earth disturbances that is greater than one acre. 25 Pa. Code §102.5.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

## O R D E R

AND NOW, this 2nd day of October, 2024, it is **ordered** that the 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.**
**Judge**

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

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

**DATED: October 3, 2024**

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

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

**For Appellant:**
David Romaine, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **BRENT KELOSKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-055-BP** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and EUROVIA ATLANTIC COAST, LLC d/b/a NORTHEAST PAVING, Intervenor** | : | **Issued: October 18, 2024** |

**OPINION AND ORDER ON**
**INTERVENOR'S MOTION TO DISMISS**

**By Paul J. Bruder, Jr., Judge**

**Synopsis**

The Board denies Intervenor Eurovia Atlantic Coast, LLC d/b/a Northeast Paving's Motion to Dismiss an appeal of an Order issued by the Department of Environmental Protection ("Department"). The record is not yet complete, and dismissal is not appropriate for the reasons stated below. Upon further development of the record after discovery, a dispositive motion on the same or similar grounds may be more appropriate.

**O P I N I O N**

**Introduction**

This third-party appeal centers around a Department order issued on June 8, 2023 ("Order") to Eurovia Atlantic Coast, LLC ("Eurovia") d/b/a Northeast Paving, a construction and maintenance company operating a fill storage area. According to the Order, since at least 2018, Eurovia has been the operator of a fill site located at 1793 Hartzel School Road in New Sewickley Township, Beaver County, Pennsylvania ("Fill Site"). Eurovia utilized the Fill Site for disposal of

fill materials, including sand, gravel, asphalt, and sediment ("Fill Material") generated from a Pennsylvania Turnpike Project located in Beaver County and/or other locations. On February 23, 2018, the Beaver County Conservation District ("BCCD") approved an Erosion and Sediment Control Plan ("E&S Plan") for the Site. According to the approved E&S Plan, approximately 7,200 cubic yards of Fill Material were to be placed at the Fill Site on a steep slope.

According to the Order, from November 8, 2018 to April 6, 2023, the Department and the BCCD, either solely or jointly, conducted at least eighteen (18) inspections at the Fill Site to determine compliance with the Clean Streams Law and associated regulations. During this time period, the Order states that the Department identified a number of violations of the E&S plan, and Eurovia began implementation of a corrective action plan. On June 24, 2022, the Department approved Eurovia's updated Steam Restoration Plan and E&S Plan. During the June 27, 2022 and March 10, 2023 inspections by the Department at the Fill Site, no violations were found. However, on or around March 16, 2023, the Order states that the Department found Eurovia's pump had failed, creating sediment pollution to the unnamed tributary ("UNT") to Connoquenessing Creek that impacted a downstream pond. Thereafter, the Department conducted at least three additional follow-up inspections at the Fill Site where it determined that Eurovia "failed to fully and properly implement the approved E&S plan." *See* June 8, 2023 Order, ¶¶ AC-AE. As a result, the Department issued the subject June 8, 2023 Order requiring Eurovia, among other things, to "submit for review and approval a full and complete amendment to the approved Steam Restoration Plan and E&S Plan" that included "a long-term stabilization of disturbed areas in the stream channel" and "removal of the Fill Materials present within the upper reaches of the UNT to Connoquenessing Creek." *Id.* at ¶ 1.

With respect to Mr. Kelosky, the Order states: "The Department is continuing its

investigation into the deposition of Fill Material into a wetland and pond located on property owned by Brent Kelosky." *See* June 8, 2023 Order, ¶ AH. Mr. Kelosky's Notice of Appeal ("NOA") contends that the "Order is arbitrary, capricious, unreasonable, and inconsistent with the requirements of the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27, and the regulations promulgated pursuant to these statutes, in that the Order does not include any requirement that Eurovia address the Fill Material that has come to be located on the Kelosky Property." *See* NOA, Exhibit 3 at ¶¶ C-D.

**Standard of Review**

A motion to dismiss is appropriate where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *Telford Borough Auth. v. DEP*, 2009 EHB 333, 335; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Latkanich v. DEP*, 2023 EHB 299, 302; *Ongaco v. DEP*, 2023 EHB 239, 241; *Scott v. DEP*, 2023 EHB 138, 139-40; *Hopkins v. DEP*, 2022 EHB 143, 144; *Consol*, 2015 EHB at 54; *Winner v. DEP*, 2014 EHB 135, 136-37. Thus, when resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Scott*, 2023 EHB at 140.

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern. *Consol Pennsylvania Coal Co. v. DEP*, 2015 EHB 48, 54, *aff'd*, 129 A.3d 28 (Pa. Cmwlth. 2015). A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant's claims; rather, the "operative question is: even assuming everything the

non-moving party states is true, can – or should – the Board hear the appeal." *Protect PT v. DEP*, 2023 EHB 191, 198 (*citing Consol*, 2015 EHB at 5). A motion to dismiss "is ordinarily decided based solely upon the facts stated or otherwise apparent in the notice of appeal itself." *Mayer vs. DEP*, 2012 EHB 400, 401. "We have specifically held on multiple occasions that an appellant is not required to aver facts sufficient to show that it has standing in a notice of appeal." *Id*. (*citing Hendryx v. DEP*, 2011 EHB 127, 130; *Riddle v. DEP*, 2001 EHB 417, 419*; Ziviello v. State Conservation Commission*, 2000 EHB 999, 1003, *et. al*). Therefore, with these principals in mind, we evaluate Intervenor Eurovia's Motion to Dismiss.

**Discussion**

**Jurisdiction of the Board**

The Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530, as amended, 35 P.S. §§ 7511–7516 ("EHB Act") empowers the Board to hear appeals of final Department actions. The Pennsylvania Code defines "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person." 25 Pa. Code § 1021.2(a).

Through its present Motion to Dismiss, Eurovia would ask the Board to differentiate the appealability of final Department actions; thus, limiting the jurisdiction of the Board to hear appeals of final actions depending upon *who* files an appeal. We not aware of controlling precedent whereby an order is final as to one party but not as to another, and we decline to make such a differentiation in this matter. The Order at issue is undeniably a final, appealable enforcement action. Anyone who perceives to be aggrieved by that action is permitted by the Environmental Hearing Board Act to file an appeal. *See* 35 P.S. § 7514; 2 Pa. C.S. § 702; Section 7(a) of The Clean Streams Law, 35 P.S. § 691.7(a); *Muth v. Department of Environmental Protection*, 315

A.3d 185, 195 (Pa. Cmwlth. 2024).

What we believe Eurovia is in fact arguing in its Motion to Dismiss is that Mr. Kelosky is not *aggrieved* by the action. In other words, Eurovia is saying that Mr. Kelosky has no *standing* to appeal because he is not impacted by the Order under appeal. There is abundant Board and appellate caselaw which lays out the test for determining the standing of an appellant, and the factors that are to be considered and balanced before one can say that an appellant does or does not have a direct interest in the action.

We need not do an analysis of Mr. Kelosky's standing at this time, mainly because Eurovia has not argued his lack of standing or provided any facts or argument relating thereto. The Board does not typically raise dispositive issues *sua sponte*, and we decline to do so here. Even if the Board did entertain the standing argument, we would be limited in reviewing the notice of appeal itself, which does not require standing be addressed.[1] *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. The record in this matter is not fully developed, and at this stage of

[1] Under current law, in order to have standing to appeal an administrative decision, persons must have a "direct interest" in the subject matter of the case. *Muth v. Department of Environmental Protection*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024) (*citing Citizens Against Gambling Subsidies, Inc. v. Pennsylvania Gaming Control Board*, 916 A.2d 624, 628 (Pa. 2007)). *See also, Food & Water Watch v. Department of Environmental Protection*, 2021 Pa. Commw. Unpub. LEXIS 191 (Pa. Cmwlth. 2021); *Clean Air Council v. Department of Environmental Protection*, 245 A.3d 1207, 1212-13 (Pa. Cmwlth. 2021). A direct interest requires a showing that the matter complained of caused harm to the person's interest. *Muth*, 315 A.3d 185, 204 (Pa. Cmwlth. 2024).

For purposes of standing questions, the appropriate evidentiary standard for reviewing a challenge to standing depends on when standing is challenged. A motion to dismiss generally is not the proper vehicle for raising a challenge to standing. *Orenco Systems, Inc. v. DEP*, 2016 EHB 432, 434 (*citing Mayer v. DEP*, 2012 EHB 400, 401). A motion to dismiss is the "rough equivalent of a motion for judgment on the pleadings" in that the motion is decided based upon the facts stated or otherwise in the notice of appeal itself. *Mayer*, 2012 EHB at 401 (*citing Hendryx v. DEP*, 2011 EHB 127, 129; *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 421 n.7). The limited exception to this rule is when the Board's jurisdiction is at issue, and Pennsylvania law has made clear that standing is not a jurisdictional issue. *Hendryx*, 2011 EHB at 129*; See Beers v. Unemployment Compensation Board of 129 Review*, 633 A.2d 1158, 1160 fn. 6 (Pa. 1993) (Whether a party has standing to maintain an action is not a jurisdictional issue.)

litigation, the Board would need additional discovery and evidentiary support to aid in its consideration of any issues of standing. Therefore, determining whether Appellant has standing to bring this action needs further development.

**Estoppel**

Eurovia's second argument in favor of dismissal centers upon the resolution of a private, civil case litigated in the Court of Common Pleas of Butler County. Mr. Kelosky initiated civil proceedings against Eurovia and other defendants in the Beaver County Court of Common Pleas in October 2019. *Kelosky v. Eurovia Atlantic Coast LLC, et al*., No. 11374-2019. Pursuant to that civil litigation's resolution, Mr. Kelosky signed a Confidential Settlement Agreement and Release ("Release").

In the current matter, Eurovia contends that the Release estops Mr. Kelosky from bringing the subject appeal against the Department. Eurovia makes no reference to which theory of estoppel it is asserting; therefore, the Board is reluctant to speculate on the matter. Additionally, whether Mr. Kelosky is estopped in any way from bringing his appeal of the Department's Order based upon a signed Release appears to be a question of material fact regarding, among other things, the scope of the Release, the parties involved and subject to that Release, whether the Board is the appropriate forum to adjudicate a dispute regarding a private Release agreement, and what relief Mr. Kelosky is seeking in his appeal. At this stage of litigation, we must accept Mr. Kelosky's version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155; *Consol Pa. Coal Co. v. DEP*, 2015 EHB 48, 54 (*citing Ehmann v. DEP*, 2008 EHB 286, 390); *Lawson v. DEP*, 2018 EHB 513, 514-515. The claim that Mr. Kelosky is estopped from bringing this appeal is hardly free from doubt and requires further development. *See Borough of St. Clair v. DEP*, 2015 EHB 290, 310-11.

**Conclusion**

Therefore, for the above stated reasons, we must deny Intervenor Eurovia's Motion to Dismiss. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BRENT KELOSKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-055-BP** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and EUROVIA ATLANTIC COAST, LLC d/b/a NORTHEAST PAVING, Intervenor** | : | |

**O R D E R**

AND NOW, this 18th day of October, 2024, it is hereby order that Intervenor Eurovia Atlantic Coast, LLC d/b/a Northeast Paving's Motion to Dismiss is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: October 18, 2024**

**c:** **For the Commonwealth of PA, DEP:**
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Melanie Seigel, Esquire
Christopher L. Ryder, Esquire
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*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | **Issued: October 29, 2024** |

**OPINION AND ORDER ON**
**APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

**By MaryAnne Wesdock, Judge**

**Synopsis**

Summary judgment may be granted only when there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. Here, there are a number of facts in dispute. Additionally, where complex questions of law and fact are raised, they are generally not appropriate for disposition by summary judgment.

**O P I N I O N**

**Background**

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) for the drilling of the Drakulic 1H and 7H wells (the permits) in Penn Township, Westmoreland County. The permits were appealed by Protect PT, a grassroots nonprofit organization formed "to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development." (Notice of Appeal, Docket No. 2022-072-W, para. 7.) That appeal is docketed at EHB Docket No. 2022-072-W (the Initial Appeal). Apex elected not to drill the Drakulic wells while the appeal

was pending, and instead sought a two-year renewal of the permits,[1] which was granted on August 15, 2023.[2] On September 14, 2023, Protect PT appealed the renewal of the permits. That appeal is docketed at EHB Docket No. 2023-074-W (the Renewal Appeal). On September 19, 2023, the Initial Appeal and the Renewal Appeal were consolidated.

Pending before the Board are Motions for Partial Summary Judgment filed by the Department and Apex and a Motion for Summary Judgment filed by Protect PT. This Opinion addresses Protect PT's motion.

**Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 351–52. Summary judgment may also be available:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

*Pileggi v. DEP,* 2023 EHB 288, 290 (citing Pa. R.C.P. No. 1035.2(2)).

In other words, the party bearing the burden of proof must make out a prima facie case. *Dengel v. DEP*, EHB Docket No. 2022-092-B, *slip op*. at 4 (Opinion and Order on Motion for Summary Judgment issued Aug. 29, 2024). In third-party appeals of the Department's issuance of

[1] Apex Statement of Undisputed Material Facts, para. 5.

[2] A well permit expires one year after issuance if drilling has not commenced. 58 Pa. C.S. § 3211(i); 25 Pa. Code 78a.17(a). An operator may request a two-year renewal accompanied by a fee, a surcharge and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b).

a permit, the party protesting the issuance of the permit bears the burden of proof to show that the Department erred in issuing the permit. *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 224 (citing 25 Pa. Code § 1021.122(2)).

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, EHB Docket No. 2022-075-W, *slip op*. at 2 (Opinion and Order on Motions for Summary Judgment issued April 29, 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).

**Discussion**

Protect PT asserts that the issuance and renewal of the permits was unlawful because 1) they violated 25 Pa. Code §78a.55; 2) will cause serious detrimental health effects; 3) will allow degradation to Turtle Creek and other waters of the Commonwealth; 4) were issued without the Department identifying the impact on public resources; 5) they failed to take into account Apex's compliance history; 6) they permit a public nuisance; 7) they fail to require proper disclosure of chemicals; and 8) they violate Pennsylvania's Climate Change Plan. Protect PT also asserts that it is entitled to summary judgment because the Department failed to perform its duties under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. We examine these issues below:

**Issues regarding 25 Pa. Code § 78.55 and Climate Change**

In response to the Department's and Apex's Motions for Partial Summary Judgment, Protect PT acknowledged that its claims brought pursuant to 25 Pa. Code § 78a.55 were barred by

the doctrines of *res judicata* and collateral estoppel. Therefore, it has withdrawn its objections brought under Section 78a.55. (Protect PT Brief in Opposition to Apex Motion, p. 6.)

Additionally, Protect PT's claims regarding climate change have been dismissed as being outside the scope of the appeal. *See Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W, *slip op.* at 10–12 (Opinion and Order on Department's and Permittee's Motions for Partial Summary Judgment issued October 29, 2024). As such, Appellant's Motion for Summary Judgment on these claims is denied.

**Health Effects**

Protect PT alleges that the permits will cause serious detrimental health effects to residents in the area of the operation. It cites health studies performed by the University of Pittsburgh and Pennsylvania Department of Health with regard to fracking operations in southwestern Pennsylvania. Protect PT asserts that the Department should have implemented recommendations included in a Grand Jury Report that were designed to be protective of human health in relation to oil and gas operations. The Department and Apex dispute the evidence cited by Protect PT, assert it is hearsay and argue that Protect PT has failed to show causation between the alleged facts and the likelihood of harm to human health. Apex asserts that proving these claims will require expert testimony at a hearing.

We agree that this matter is not easily addressed through a motion for summary judgment. As we have noted, summary judgment may be granted only in the clearest of cases, where there are no material facts in dispute and the right to summary judgment is clear and free from doubt. *Scott, supra.* Claims involving complex questions of fact and law are often best addressed through the development of a record at hearing. *Clean Air Council v. DEP*, 2013 EHB 346, 360.

**Degradation to Waters of the Commonwealth**

Protect PT also asserts that the Department's permitting actions were unlawful because it allowed impacts and degradation to Turtle Creek which it states is designated as a navigable waterway, trout stream and warm water fishery. Specifically, Protect PT argues that the Department did not have the authority to issue the permits without providing for the public trust of Turtle Creek as a navigable waterway, and that the Department was required to coordinate with the Department of Conservation and Natural Resources (DCNR) in reviewing the application materials. Protect PT also discusses the TMDL in place for Turtle Creek under the Clean Water Act. The Department responds that its review of the permits included a subsurface hydrogeologic review, and it disputes that there will be degradation to Turtle Creek. Apex disputes that it will negatively impact any water of the Commonwealth and asserts that the argument that the Department was required to consult with DCNR lacks support in existing law. Apex also argues that this is the first time Protect PT has raised any claims with regard to Turtle Creek and, therefore, it cannot win summary judgment on claims it has waived.

The creation of impacts to or degradation of Turtle Creek is a material fact in dispute. Protect PT states it has established that Apex will bore under Turtle Creek as part of its operations at the site and alleges that simply by virtue of operating the well in close proximity, Turtle Creek will be impacted and degraded. Apex denies the assertion that any of its operations will negatively impact any water resource. Given the material facts in dispute regarding the degradation of Turtle Creek, summary judgment is not appropriate.

Similar to the argument regarding Turtle Creek, Protect PT argues that the permits will cause impacts to and degrade the surrounding waters of the Commonwealth. Protect PT states that the surrounding waters of the site are already impaired and that the environmental changes that the

operations under the permits will cause will be incremental and thus will compound and last for generations to come. The Department disputes that there will be harms, what those harms are, or how the permits would compound with any other existing impairments. Apex likewise disputes that it will negatively impact any water of the Commonwealth.

While Protect PT alleges that the surrounding waters of the site will be degraded, it provides little detail on how this will occur. Its brief merely states that because Apex is authorized to drill under a navigable waterway, the surrounding waters could be impacted. Considering that further information is needed, we do not feel that the standard for summary judgment has been met here.

**Public Resources**

Protect PT next alleges that the Department's issuance and renewal of the permits violated the Environmental Rights Amendment because the Department did not consider the potential impacts on public resources. The Department counters this argument and states that it considered a variety of public resources in its consideration of the permits, including publicly owned parks, game lands and wildlife areas, National or State scenic rivers, and habitats of rare and endangered flora and fauna and other critical communities. Apex denies that its operations will unreasonably degrade the environment or that the Department failed to appropriately consider the impacts of its operations.

In asserting that the Department failed to consider the environmental effects of its permitting action, Protect PT references 58 Pa. C.S. § 3215(c), which outlines a number of public resources that the Department is to consider in making a determination on a well permit. Protect PT does not indicate which public resources it believes the Department failed to account for. Rather, it generally states that the Department failed to consider the environmental effects of its

permitting action. Without specific claims or arguments as to how the Department failed to consider environmental effects on public resources, the Board is unable to grant summary judgment on this claim.

**Compliance History**

Protect PT asserts that the permitting action was unlawful because the Department failed to properly consider Apex's compliance history pursuant to the Clean Streams Law and its duties as a trustee under the Environmental Rights Amendment. The Department responds that it did consider Apex's compliance history in both its issuance and renewal of the permits. The Department further asserts that Protect PT simply disagrees with the Department's decision to issue and renew the permits after its consideration of the compliance history. Apex responds that the Department did consider its compliance history, that Protect PT has failed to prove a pattern of noncompliance, and that Protect PT failed to prove that the Department improperly applied its discretion.

Protect PT has established that Apex was subject to a number of notices of violation (NOVs) at the time of the permits' issuance and renewal. The Department asserts in response that Apex was not in continuing violation of any final action by the Department. The Department also states that the NOVs referenced by Appellant were not separate violations but were continuing violations where NOVs were issued on multiple occasions while corrective actions were being taken. Whether the NOVs were continuing violations and whether those violations justify denial of the permits involve disputed questions of material facts such that summary judgment is not appropriate on these issues.

**Public Nuisance**

Protect PT claims that the issuance and renewal of the permits was unlawful because they allow a public nuisance. The Department responds that because the well site has not been constructed, any harms that Protect PT identified as constituting a public nuisance are speculative. The Department also argues that Protect PT failed to show how the alleged harms will occur. It highlights a Consent Judgment applicable to the permits that includes mitigation measures for concerns such as noise and dust. Similar to the Department, the Permittee argues that the harms outlined by Protect PT are speculative and unsupported.

Protect PT alleges that noise, dust, truck traffic, and the volatilization and leaching of chemicals into storm and groundwater are all impacts that the Department knew or should have known would happen if it were to issue and renew the permits. Protect PT argues that these issues are "inevitable." The Department and Apex, however, have provided evidence that specific mitigation measures are required to be in place regarding potential nuisance-inducing concerns such as noise and dust, per the Consent Judgment. Summary judgment should only be granted where a limited set of material facts are truly undisputed, and that is not the case here. Because the creation of a public nuisance is a material fact in dispute, summary judgment with respect to this claim is denied.

**Chemical Disclosure**

In support of its motion, Protect PT alleges that the Department's permitting action was unlawful because it did not require Apex to fully disclose the chemicals to be used at the site. With respect to its claims made pursuant to 25 Pa. Code § 78a.55, as we have noted earlier, Protect PT has since withdrawn them. Protect PT does, however, maintain its claim that the Department's alleged failure to require certain information, such as chemical disclosure, to be contained in Apex's PPC Plan and emergency response plan as part of its permit application violates the

Environmental Rights Amendment. The Department disagrees with Protect PT's assessment and points out that Pennsylvania's oil and gas regulations contain specific requirements regarding site containment and emergency response, as well as requirements for management of products used on site.

There are questions of law and fact surrounding Protect PT's claim that the Environmental Rights Amendment obligates the Department to obtain a list of the chemicals that oil and gas operators use in their operations. These questions need to be more fully developed and are not appropriate for resolution in the context of the parties' summary judgment motions.

**Article I, Section 27**

Protect PT asserts generally that it is entitled to summary judgment because the Department violated the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution by failing to consider all environmental effects prior to issuing and renewing the permits and because there is no benefit to the beneficiaries under Article I, Section 27.

The Board has articulated its standard for assessing Article I, Section 27 challenges as follows:

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

*Stocker v. DEP*, 2022 EHB 425, 445 (quoting *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493 (citing *Center for Coalfield Justice v. DEP*, 2017 EHB 799, 858-59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1163)). "The burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan v. DEP*, 2018 EHB 71, 115 (citing

*Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 250).

This is a complex case with a multitude of issues and a voluminous summary judgment record. In cases involving complex issues of fact and law, as is the case here, the Board has found that summary judgment may be inappropriate and has held that such matters are often best decided on a fully developed record at a merits hearing. *Three Rivers Waterkeeper v. DEP*, 2020 EHB 87, 89; *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347.

We have reviewed the arguments set out by the parties in their briefs, as well as the voluminous facts and exhibits presented for our consideration. Viewing that information in the light most favorable to the Department and Apex, as the non-moving parties, and resolving all doubt as to the existence of a genuine issue of material fact against Protect PT, as the moving party, we find that Protect PT has not demonstrated that it is entitled to summary judgment in this matter because the right to summary judgment is not clear and free from doubt. The issues raised in Protect PT's motion involve mixed questions of fact and law that make a grant of summary judgment inappropriate. As the Board has held, "issues of this type are best decided following a full hearing that allows all sides in the case to present their evidence so that the law can be applied to a fully developed factual record." *Center for Coalfield Justice v. DEP*, 2016 EHB 341, 347 (citing *National Fuel Gas Midstream Corp. v. DEP*, 2014 EHB 914; *DEP v. Sunoco Logistics Partners L.P*, 2014 EHB 791). *See also, Clean Air Council v. DEP*, 2013 EHB 346, 360 ("In order to properly address the complex issues that are involved in this appeal, cross examination and the development of factual issues in context are often necessary in order to ensure due process.")

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 29th day of October, 2024, it is hereby ordered that Protect PT's Motion for Summary Judgment is denied for the reasons set forth herein.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: October 29, 2024**

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | **Issued: October 29, 2024** |

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

**By MaryAnne Wesdock, Judge**

**Synopsis**

Motions for Partial Summary Judgment filed by the Department and Permittee are granted in part. An Appellant may not use an appeal of the renewal of two unconventional gas well permits to challenge the issuance of the permits. Objections that go beyond the limited scope of the renewal appeal are dismissed. Additionally, where the evidence in the record does not indicate that PFAS will be used at the well site in question, summary judgment on this issue is granted to the Department and Permittee pursuant to Pa. R.C.P. 1035.2(2).

**O P I N I O N**

**Background**

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) for the drilling of the Drakulic 1H and 7H wells (the permits) in Penn Township, Westmoreland County. The permits were appealed by Protect PT, a grassroots nonprofit organization formed "to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development."

(Notice of Appeal, Docket No. 2022-072-W, para. 7.) That appeal is docketed at EHB Docket No. 2022-072-W (the Initial Appeal). Apex elected not to drill the Drakulic wells while the appeal was pending, and instead sought a two-year renewal of the permits,[1] which was granted on August 15, 2023.[2] On September 14, 2023, Protect PT appealed the renewal of the permits. That appeal is docketed at EHB Docket No. 2023-074-W (the Renewal Appeal). On September 19, 2023, the Initial Appeal and the Renewal Appeal were consolidated.

Pending before the Board are Motions for Partial Summary Judgment filed by the Department and Apex and a Motion for Summary Judgment filed by Protect PT. This Opinion addresses the Motions for Partial Summary Judgment filed by Apex and the Department.

**Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1–1035.2; *Amerikohl Mining Inc. v. DEP*, 2023 EHB 348, 351–52. Summary judgment may also be available:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

*Pileggi v. DEP,* 2023 EHB 288, 290 (citing Pa. R.C.P. No. 1035.2(2)).

[1] Apex Statement of Undisputed Material Facts, para. 5.

[2] A well permit expires one year after issuance if drilling has not commenced. 58 Pa. C.S. § 3211(i); 25 Pa. Code 78a.17(a). An operator may request a two-year renewal accompanied by a fee, a surcharge and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b).

In other words, the party bearing the burden of proof must make out a prima facie case. *Dengel v. DEP*, EHB Docket No. 2022-092-B, *slip op*. at 4 (Opinion and Order on Motion for Summary Judgment issued Aug. 29, 2024). In third-party appeals of the Department's issuance of a permit, the party protesting the issuance of the permit bears the burden of proof to show that the Department erred in issuing the permit. *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 224 (citing 25 Pa. Code § 1021.122(2)).

Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Scott v. DEP*, EHB Docket No. 2022-075-W, *slip op*. at 2 (Opinion and Order on Motions for Summary Judgment issued April 29, 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).

**Discussion**

Apex and the Department have moved for partial summary judgment on the grounds that 1) certain objections raised in the Renewal Appeal are beyond the scope of that appeal and 2) there is no evidence in the record to support Protect PT's claims that per- and polyfluoroalkyl substances and related chemicals (referred to collectively as PFAS) will be used and released at the Drakulic site.[3] We examine each of these arguments below:

**Objections Beyond the Scope of the Renewal Appeal**

[3] Additionally, Apex sought summary judgment on Protect PT's claims alleging that Apex's PPC plan and emergency response plans violate 25 Pa. Code § 78a.55. In its response to Apex's motion, Protect PT acknowledged that those claims were barred by the doctrines of *res judicata* and collateral estoppel and it has withdrawn its objections brought under Section 78a.55. (Protect PT Brief in Opposition to Apex Motion, p. 6.)

Before turning to Apex's and the Department's motions for partial summary judgment, it is helpful to review the Board's earlier opinion in this matter. In October 2023, Apex filed a Motion for Partial Dismissal, seeking to dismiss several objections that it asserted were beyond the scope of the Renewal Appeal. In considering Apex's motion, the Board discussed the scope of the Renewal Appeal and explained that although the Initial Appeal and Renewal Appeal were consolidated for the sake of judicial economy and the convenience of the parties "when determining the proper scope of review, we view each appeal separately. Therefore, in determining what objections are properly part of the Renewal Appeal, the question is . . . whether they relate to the *renewal* of the permits." *Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W (Consolidated with 2022-072-W), *slip op.* at 12 (Opinion and Order on Motion for Partial Dismissal issued February 7, 2024) (hereinafter February 7, 2024 Opinion) (emphasis added). The Board explained:

> The question to be considered in an appeal of a permit renewal is whether it is appropriate for the permit to continue in place for the term of the permit renewal. *Wheatland Tube [v. DEP]*, 2004 EHB [131] at 135-36. The Board "review[s] the Department's action based upon up-to-date information to decide whether it was lawful and reasonable." *PQ Corporation v. DEP*, 2017 EHB 870, 874. . . Where a renewal makes no changes to the permit, but simply extends the term of the permit, that fact alone does not necessarily limit the scope of the renewal appeal. *PQ Corporation*, 2017 EHB at 875. *See also Friends of Lackawanna*, 2017 EHB at 1166 ("[W]hether or not permit conditions have changed is not the sole or even primary focus of our inquiry.") However, it is a factor that may be considered, particularly where, as here, there has been no activity undertaken under the permits and the renewal occurred only one year after the issuance of the permits. *Under those circumstances, what may be considered within the scope of the appeal of the permit renewal is commensurately limited.*

*Id.* at 4–5 (emphasis added). In short, "the scope of review of an appeal of a permit renewal is limited to considering *matters pertaining to the renewal*; it may not be used as an attack on whether

the permit should have been issued in the first place." *Id*. at 8 (emphasis added). As the Board explained in *Tinicum Township v. DEP*, 2002 EHB 822, 835: "An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place." Rather, it "require[s] the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information." *Id.* (emphasis in original).

The Board granted Apex's Motion for Partial Dismissal in part and dismissed objections in the Renewal Appeal that were clearly an attack on the initial issuance of the permits.[4] With regard to the remaining objections, the Board concluded that it did not have sufficient information to make a determination on whether those objections were outside the scope of the renewal appeal. The Board stated:

> The record of decision [regarding the applications to renew the permits] indicates that the Department required more than simply the submission of affidavits and that additional information was considered as part of its decision-making process. While the scope of the renewal application appears to have been limited, it clearly involved more than simply checking a box stating that the original applications remained accurate and complete. The Board is reluctant to grant a motion for partial dismissal where there are facts in dispute. Without documentation in the record attesting to what the Department considered in its review of the renewal applications, we can only surmise which, if any, of the Renewal Objections should be dismissed. As we have stated, the Board will only grant a motion to dismiss objections when a matter is free of doubt. *Bartholomew*, 2019 EHB at 517. Where the matter is not clear, the motion must be denied. *Thomas v. DEP*, 1998 EHB 93, 98. We believe it would be more prudent for these questions to be considered in the context of a motion for summary judgment.

[4] The Board dismissed the following Objections in the Renewal Appeal: Paragraphs 27, 29, 32, 36, 37, 38, 70, 71, 74, 81, 86, 103 and portions of paragraphs 52, 67 and 96.

*Protect PT, slip op.* at 13. Thus, the Board left open the possibility that additional objections in the Renewal Appeal could be evaluated in the context of a motion for summary judgment where further information was provided.

Apex and the Department now seek, through summary judgment, to dismiss those remaining objections that the Board declined to dismiss in its February 7, 2024 Opinion. Apex and the Department assert that the record demonstrates that the Department's review of Apex's application to renew its permits was very limited and that many of the objections raised by Protect PT in the Renewal Appeal go well beyond the scope of that review.

We begin our analysis by reviewing what the Department considered when it made the decision to renew the Drakulic 1H and 7H well permits. *Protect PT, slip op*. at 12 (citing *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1165 ("Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.")

Section 78a.17(b) of the regulations sets forth the application requirements for the renewal of an unconventional gas well permit. It states as follows:

> (b) An operator may request a single 2-year renewal of an unexpired well permit. The request shall be accompanied by a permit fee, the surcharge required under section 3271 of the act (relating to well plugging funds) and an affidavit affirming that the information on the original application is still accurate and complete, that the well location restrictions are still met and that the entities required to be notified under section 3211(b)(2) of the act (relating to well permits) have been notified of this request for renewal. If new water wells or buildings are constructed that are not indicated on the plat as originally submitted, the attestation shall be updated as part of the renewal request.

25 Pa. Code § 78a.17(b).

According to the Department's record of decision and the deposition testimony of the permit reviewer, Andrea Mullen, the Department considered the following in its review of Apex's renewal request:

- Confirmation that there was no change in the location, construction and coal/noncoal status of the proposed wells.
- Review of a Pennsylvania Natural Diversity Inventory (PNDI) search submitted by Apex identifying no endangered or threatened species.
- A review of Apex's compliance history showing no violations at the proposed site at the time of the review.
- Review of the site location with regard to schools and playgrounds.
- Examination of the list of interested parties and water supplies.

(DEP Motion, Exhibit B; Apex Motion, Exhibit B, p. 10-11; Apex Motion, Exhibit A, p. 12–15.) Based on its review, the Department concluded, "the requirements for renewal set forth in 25 Pa. Code § 78a.17 are met, including consistency with the prior permit . . . ."[5] (DEP Motion, Exhibit B, p. 4.)

The Board has recognized that the renewal of a permit is an opportunity to assess whether the permit should remain in place based on up-to-date information. *PQ Corporation v. DEP*, 2017 EHB 870, 874. Thus, we take into consideration any updated information or changes that have occurred between the time of the permit issuance and the time of the permit renewal in determining whether the activity covered by the permit should be allowed to continue. As we pointed out in our February 7, 2024 Opinion, this is particularly important when the permit has been in place for

[5] The Department's record of decision goes on to state that Apex's submissions had identified a new water supply; this was later determined to be an existing water supply whose location had been misidentified. (Apex Motion, Exhibit B, p. 10–11.)

several years or even decades. *See, e.g., Friends of Lackawanna*, 2017 EHB at 1128 (at the time of the permit renewal the landfill had been in operation for more than 30 years); *Sierra Club v. DEP*, 2017 EHB 685 (landfill had been in operation for decades at the time of its permit renewal). Here, however, the renewal of the permits occurred only *one year* after the issuance of the initial permits. Little changed during that one-year period, as reflected in the Department's record of decision. Indeed, Protect PT acknowledges that the renewal applications contained no substantive changes from the initial applications for the well permits.[6] The only changes that occurred were an update to Apex's compliance history and the correction of a location of a water well[7] which was not challenged by Protect PT. Moreover, there is no ongoing operation to assess for the purpose of determining whether it should be permitted to continue: At the time of the permit renewals and as recently as the filing of the summary judgment motions in August 2024, the wells had not been drilled and no operations were ongoing.[8]

As we stated in our February 7, 2024 Opinion, the scope of the Renewal Appeal is narrow. *Protect PT*, *slip op*. at 12. It is limited to the requirements of 25 Pa. Code § 78a.17(b) and the Department's review pursuant to that section, as well as any updated information. As we have stated, the only update pertains to Apex's compliance history. We now turn to the specific objections of the Renewal Appeal on which Apex and the Department seek summary judgment:[9]

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[6] DEP Statement of Undisputed Material Facts, para. 5, and Protect PT's response thereto.

[7] According to the Department's Andrea Mullen, Professional Geologist Manager, who reviewed both the initial permit applications and the renewal applications, the Department's record of decision on the renewal applications indicated the discovery of a new water supply identified in the renewal applications. However, upon further review, it was discovered that the longitude coordinate for the well had been misidentified in the initial permit application. This matter has not been challenged by Protect PT.

[8] DEP Statement of Undisputed Material Facts, para. 7, and Protect PT's response thereto.

[9] It should be noted that this section of Apex's and the Department's motions focuses solely on objections raised in the Renewal Appeal which they contend go beyond the scope of that appeal. A few of those objections were also raised in the Initial Appeal, and they are not dismissed by this Opinion unless so stated.

Objections that challenge the initial issuance of the permit

A number of objections in the Renewal Appeal either explicitly or implicitly challenge whether the permits should have been issued in the first place. Those objections may be summarized as follows:

> Objections 25, 26, 28 — the permits[10] allow the use, generation, discharge and emission of hazardous chemicals, including PFAS, into the air, water or soil in violation of the Environmental Rights Amendment, Art. I, § 27 of the Pennsylvania Constitution.[11]
>
> Objections 30–31, 33–35, 39–41 — the permits allow the generation, storage, transportation and disposal of radioactive waste (TENORM) and do not provide for proper management of such waste in violation of the Environmental Rights Amendment, Art. I, 27 of the Pennsylvania Constitution.
>
> Objection 42 — the Department violated the Environmental Rights Amendment by not requiring Apex to test its "fresh water" for hazardous chemicals, including PFAS, before being used in its operations.[12]
>
> Objection 64 — the Department violated the Environmental Rights Amendment because it did not determine the cumulative impact of the activities authorized under the permits.
>
> Objection 65 — Pennsylvania's oil and gas permitting scheme discriminates against people with disabilities.
>
> Objection 75 — the permits do not place limits on or require a permit for air emissions of hazardous chemicals or TENORM in violation of the Environmental Rights Amendment.

[10] These objections raise challenges to "the permits" which the Renewal Appeal identifies as the initial permits for the 1H and 7H wells. (Renewal Appeal, para. 8.)

[11] This claim is also made in Objection 67 of the Initial Appeal with regard to PFAS. The PFAS claims of the Initial Appeal are addressed later in this Opinion.

[12] This objection is also challenged by Apex and the Department on the grounds that Protect PT has failed to support its PFAS claims in the record. Additionally, both Apex and the Department provided evidence in the record that the fresh water that Apex uses in its hydraulic fracturing operations is tested and the sampling results are non-detect for PFAS. (Apex Motion, Exhibits F and G; DEP Motion, Exhibits D and O.)

> Objections 76–85, 125 — the PPC plans and emergency response plans submitted with the initial permit applications were insufficient.[13]
>
> Objection 119 — the Department violated the Environmental Rights Amendment by issuing and renewing permits that will harm Pennsylvania's climate and the public's right to clean air and water.[14]
>
> Objection 120 — the permits do not limit and allow the introduction of Hazardous Chemicals, including PFAS, PFOA, and related chemicals into the environment through hydraulic fracturing in violation of the Department's responsibilities under the Environmental Rights Amendment.[15]

With the exception of a portion of Objection 119, the aforesaid objections challenge the issuance of the permits in the first place and allege failures on the part of the Department in approving the permits. In its response to Apex's and the Department's motions, Protect PT does not assert that these objections fall within the narrow scope of the Renewal Appeal discussed above. Rather, it quotes from a portion of its brief in support of its Motion for Summary Judgment which discusses why it believes the Department erred in issuing the permits. The Board's case law is clear that an appellant may not use the occasion of a permit renewal to challenge whether the original permit should have been issued in the first place. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134. *See also*, *Friends of Lackawanna*, 2017 EHB at 1163–64; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 248, *aff'd,* 131 A.3d 578 (Pa. Cmwlth. 2016); *Love*

[13] Some of these claims may be encompassed within Objection 73 of the Initial Appeal which alleges that the emergency response plan is insufficient to ensure the protection of health and safety of residents within close proximity of the well site in the event of a well blowout or other emergency event. Apex and the Department have not moved for summary judgment on Objection 73 of the Initial Appeal.

[14] This claim is similar to Objection 6 of the Initial Appeal which states that "the Department violated . . . Article I, Section 27 of the Pennsylvania Constitution by granting permits that will harm the public's right to clean air and water." (Initial Appeal, para. 6.) Neither Apex nor the Department have moved for summary judgment on Objection 6 of the Initial Appeal.

[15] A similar claim is made in Objection 67 of the Initial Appeal. The PFAS claims made in the Initial Appeal are addressed later in this Opinion.

*v. DEP*, 2010 EHB 523, 525; *Angela Cres Trust v. DEP*, 2009 EHB 342, 359. As we explained in our February 7, 2024 Opinion, the question presented in an appeal of a permit renewal is not whether the permit was appropriate in the first place, but whether it should continue in place. We are not saying that Protect PT could not have raised the aforesaid objections to the permits, only that they should have been made at the time the permits were issued, not at the time of their renewal. The Renewal Appeal may not be used as an occasion to challenge errors Protect PT believes the Department made in issuing the permits or to raise matters that it believes the Department should have considered before authorizing the permits in the first place.

To the extent that Objection 119 contends generally that the renewal of the permits violates the Environmental Rights Amendment and the public's right to clean air and water, that portion of Objection 119 is not dismissed. Because the remainder of the objections fall outside the very limited scope of the Renewal Appeal which we have outlined above, partial summary judgment is granted to the Department and Apex and those objections are dismissed from the Renewal Appeal.[16]

Additional Objections that go beyond the scope of the Renewal Appeal

Apex and the Department also challenge the following objections as going beyond the scope of the Renewal Appeal:

> Objections 43–52 — the Department's renewal of the permits contributes to climate destabilization in violation of the Environmental Rights Amendment.

[16] Objections 25, 26, 28, 30, 31, 33, 34, 35, 39–42, 64, 65, 75–85, 120, 125 and part of 119 are dismissed from the Renewal Appeal. However, as noted earlier, where similar or identical claims have been raised in the Initial Appeal, and not challenged in Apex and the Department's motions, they remain viable.

> Objections 67–68 — the Department violated the Environmental Rights Amendment and 25 Pa. Code § 78(g)[17] by not engaging in a harms/benefits analysis.
>
> Objection 72 — the Department violated the Environmental Rights Amendment because it did not consider public comments or perform a holistic review of the effects the renewals of the permits would have, nor take into account the cumulative effect of all the surrounding sources of pollution.

As we have explained, the scope of the Renewal Appeal in this instance is limited to the information required by 25 Pa. Code § 78a.17(b), the Department's review of the renewal applications, and any changes that occurred between the initial issuance of the permits and the applications for renewal, which, as we have explained, includes only Apex's updated compliance history. Claims regarding climate destabilization and the need for a harms/benefits analysis and a holistic review fall outside the very limited scope of the renewal. Protect PT's response does not explain how these particular objections fall within the scope of the Renewal Appeal that we have outlined above; rather, it argues that the scope of the Department's review when it renewed the permits should have been broader. It quotes from its brief in support of its Motion for Summary Judgment in which it asserts that the Department should have considered a variety of factors before issuing the permits.

As support for its assertion that the Department should have conducted a harms/benefits analysis, Protect PT relies on the Pennsylvania Supreme Court's Opinion in *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921 (Pa. 2023). Protect PT describes this decision as suggesting that the Department should perform a harms/benefits analysis

[17] Objection 67 states that the Department violated "25 Pa. Code § 78(g)." This section does not exist in the regulations. We believe Protect PT may have intended to cite to 25 Pa. Code § 78a.15(g). Section 78a.15 deals generally with applications for permits for unconventional oil and gas wells. Subsection (g) sets forth factors the Department must consider prior to conditioning a well permit based on impacts to public resources.

similar to the permitting process under the Solid Waste Management Act. (Protect PT Brief in Opposition to Apex, p. 6.) However, the Board is not persuaded that this is what the Opinion was in fact suggesting. In *Marcellus Shale*, the Court was presented with an issue concerning the authority of the Department and Environmental Quality Board to promulgate certain regulations under the Oil and Gas Act. Specifically, the Court assessed whether the agencies had the authority to consider various public resources in the review of applications for well permits. The Court did not state that a harms/benefits analysis should be conducted with respect to public resources; it simply compared the agency's authority to conduct a harms/benefits analysis with the agency's authority to consider public resources under the respective enabling statutes. Moreover, the Opinion does not address section 78a.17(b) which governs the renewal of permits and is the section under which the Department conducted its review of Apex's request to renew its permits. Finally, and significantly, *Marcellus Shale* is a plurality opinion and the section of the Opinion upon which Protect PT appears to rely, discussing the harms/benefits test, was not joined by a majority of the Justices. Accordingly, *Marcellus Shale* does not support the assertion that a harms/benefits analysis should have been conducted here.

In Objection 72, Protect PT argues that the Department should have conducted a "holistic review" and taken into account the cumulative effect of all surrounding sources of pollution. It does not explain what it means by "holistic review." We can only surmise that Protect PT believes that an overall assessment of the environmental impact of the permits should have been undertaken as part of the Department's review of the renewal applications. As we have stated, the scope of the Renewal Appeal is limited to those matters that are required to be reviewed as part of the renewal request. If we were being asked to consider the renewal of a permit that had been issued a number of years – or even decades – in the past, it might be appropriate to take a broader look at

the overall environmental impact of the renewal. But where the renewal occurred only one year after the Department's initial review and issuance of the permits, such a broad assessment is clearly outside the scope of the very limited action being reviewed.

However, that portion of Objection 72 claiming that the Department failed to consider public comments in its review of the renewal applications may proceed since it is not clear from the record of decision whether public comments were received or considered by the Department. (DEP Motion, Exhibit B.)

For the aforesaid reasons, we find that Objections 43–52, 67–68 and that portion of Objection 72 stating that a holistic review was required go beyond the scope of the Renewal Appeal. Partial summary judgment is granted to the Department and Apex, and these objections are dismissed.

Compliance History

Apex seeks summary judgment on Objections 96–106 which may be summarized as follows:

> Objections 96–106 — Apex's compliance history required a denial of the permit renewals under the Environmental Rights Amendment and the permit block provision of the Clean Streams Law.[18]

Apex's updated compliance history was considered by the Department as part of its review of the permit renewal applications. The Department's record of decision indicates that Apex had no violations at the proposed site at the time of the review. However, Protect PT asserts that Apex accrued notices of violations from the time of the issuance of the permits until their renewal and following the renewal of the permits. One of Protect PT's arguments in this case is that Apex has

[18] The Department seeks summary judgment on Objection 126 which also relates to compliance history.

a "pattern of noncompliance" that "renders the Department's issuance and renewal of the Permits clearly erroneous . . . ." (Protect PT Brief in Opposition to Apex Motion, p. 5.)

Apex's compliance history was clearly part of the Department's review of the renewal applications. (DEP Motion, Exhibit B, p. 2.) Moreover, the parties do not dispute that the compliance history has changed since the initial issuance of the permits, although the parties differ in their description of the violations. Therefore, it is properly within the scope of the Renewal Appeal. Summary judgment is denied on these objections.

Public Resources

Both Apex and the Department seek summary judgment on Objection 66 which may be summarized as follows:

> Objection 66 — the Department violated the Environmental Rights Amendment and 25 Pa. Code § 78(g)[19] and abused its discretion by failing to consider the potential impacts on public resources, citing *Marcellus Shale Coalition, supra*.

The Oil and Gas Act defines "public resource" to mean a number of resources, including "habitats of rare and endangered flora and fauna." 58 Pa. C.S. § 3215(c)(4). As we noted earlier, one part of the Department's review of the renewal applications was the consideration of an updated PNDI search submitted by Apex. Because the PNDI search includes a review of threatened or endangered plants, we find that Objection 66 may be considered to fall within the scope of the Renewal Appeal.

However, we do find that portion of the Objection referencing "25 Pa. Code § 78(g)" to be beyond the scope of the appeal. As we explained in footnote 17, there is no section "78(g)" of the unconventional oil and gas regulations. We understand Protect PT to be referring to "25 Pa. Code

[19] *See supra* note 17.

§ 78a.15(g)." Section 78a.15 deals with applications for well permits, not renewals. As noted earlier, challenges to the initial issuance of the permits are outside the scope of the Renewal Appeal.

"Partiality to Permittee"

The Department seeks summary judgment on Objection 73, which states as follows:

> The Department violated the [Environmental Rights Amendment] by showing partiality to Permittee over the beneficiaries under the [Environmental Rights Amendment], including Appellant.

(Renewal Appeal, para. 73.)

It is unclear what Protect PT means by this assertion. To the extent Protect PT is asserting that the Department failed to conduct a harms/benefits analysis in its review of the renewal applications, we have already stated that is outside the scope of the Renewal Appeal. However, because it is not clear what Protect PT is objecting to, and because summary judgment may only be granted when the right to it is clear and free of doubt, we decline to grant summary judgment as to this objection. *Thomas*, 1998 EHB at 98.

Impact to Public Resources, Endangerment to Human Health, Risk to Certain Populations

Apex and the Department seek summary judgment on Objections 53–63 and 69 which may be summarized as follows:

> Objections 53–63 — the location and operations of the Drakulic well site in relation to water supplies, residential areas, a school and vulnerable populations will impact public resources and endanger human health and pose a risk to certain populations.
>
> Objection 69 — citation to health studies published by the Pennsylvania Department of Health and the University of Pittsburgh.

Objections 59, 60 and 62 of the Renewal Appeal deal with water supplies and a school within a certain proximity of the well site. Because the Department's review of the renewal

applications included a review of water supplies and location of schools, we find these objections to be within the scope of the Renewal Appeal.

The remaining objections allege risks associated with the site's proximity to a residential area and vulnerable populations. While arguably outside the scope of the Renewal Appeal, they appear to relate to Objection 3 of the Initial Appeal which states that the Department's issuance of the well permits, with knowledge that the well development would occur in close proximity to sensitive receptors, residential homes and a school, was a violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution. Rather than parse through what is covered under the Initial Appeal and what is covered under the Renewal Appeal, we decline to dismiss these objections. As we have stated, summary judgment may be granted only where the right to it is clear and free of doubt. *Thomas*, 1998 EHB at 98.

Summary

For the reasons set forth above, partial summary judgment is granted to Apex and the Department and the following objections are dismissed: Objections 25, 26, 28, 30, 31, 33–35, 39–42, 43–52, 64, 65, 67–68, 75–80, 82–85, 120, 125 and portions of Objections 66, 72 and 119 of the Renewal Appeal.

**PFAS-Related Claims**

In both the Initial Appeal and Renewal Appeal, Appellant raised claims regarding the use and release of PFAS, PFOA and related chemicals (herein collectively referred to as "PFAS") at the Drakulic site.[20] We have already determined that the objections raised in the Renewal Appeal

[20] PFAS are per- and polyfluoroalkyl substances. *PFAS Explained*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/pfas/pfas-explained (last updated Oct. 3, 2024). According to EPA, "PFAS are widely used, long lasting chemicals, components of which break down very slowly over time . . . There are thousands of PFAS chemicals, and they are found in many different consumer, commercial, and industrial products." *Id.* PFOA is generally considered a subset of PFAS. *Fact Sheet: EPA's Proposal to*

related to PFAS are outside the scope of the Renewal appeal.[21] We turn to the following objections relating to PFAS raised in the Initial Appeal:

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

Apex had previously moved to dismiss these objections on a number of grounds including that the claims were speculative. Because discovery was still ongoing, the Board denied the motion. *Protect PT v. DEP*, 2023 EHB 191, 198. Now that discovery has been completed, both Apex and the Department seek summary judgment on Protect PT's PFAS objections pursuant to Pa. R.C.P. 1035.2(2) which provides:

> [I]f, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

As the party bearing the burden of proof, Protect PT must come forward with sufficient evidence to make out a *prima facie* case with regard to its PFAS claims. *Dengel*, *slip op*. at 4. Apex and the Department assert that Protect PT has failed to do so.

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*Limit PFAS in Drinking Water,* U.S. ENVIRONMENTAL PROTECTION AGENCY (March 2023), https://www.epa.gov/system/files/documents/2023-04/Fact%20Sheet_PFAS_NPWDR_Final_4.4.23.pdf

[21] Specifically, Objections 25, 42 and 120 of the Renewal Appeal, related to PFAS, were determined to be outside the scope of the Renewal Appeal.

Protect PT's PFAS objections assert that 1) the permits allow the release of PFAS through hydraulic fracturing and 2) the Department violated its duty under the Environmental Rights Amendment of the Pennsylvania Constitution, Article I, Section 27, when it issued the permits. The Board has articulated its standard for assessing Article I, Section 27 challenges as follows:

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

*Stocker v. DEP*, 2022 EHB 425, 445 (quoting *Del. Riverkeeper Network v. DEP*, 2018 EHB 447, 493 (citing *Ctr. for Coalfield Justice v. DEP*, 2017 EHB 799, 858–59, 862; *Friends of Lackawanna v. DEP*, 2017 EHB at 1163)). "The burden of showing that the Department acted unconstitutionally rests with the third-party appellant." *Logan v. DEP*, 2018 EHB 71, 115 (citing *Stedge v. DEP*, 2015 EHB 577, 617; *Brockway Borough Municipal Authority v. DEP*, 2015 EHB 221, 250).

Thus, Protect PT's burden is to produce evidence of facts essential to proving that the Department did not consider the environmental effects of its permitting action and that the issuance of the permits is likely to cause unreasonable degradation or deterioration of the public natural resources of the Commonwealth through the introduction and release of PFAS through the hydraulic fracturing process. Then, the Board will assess whether the Department acted with prudence, impartiality, and loyalty in carrying out its permitting actions.

Apex and the Department argue that discovery is now closed and Protect PT has failed to produce or obtain any record evidence that PFAS will be used or released at the Drakulic well site or that the Department is aware of any such usage. Protect PT relies on the reports of three experts: Dr. Carla Ng, Mr. Dusty Horwitt and Mr. Marc Glass. Dr. Carla Ng is an Associate Professor with

the University of Pittsburgh's Department of Civil and Environmental Engineering. Her expert report details the general background and chemistry of PFAS, common uses of PFAS and ways in which people can be exposed, impacts of PFAS on the human body, and a short section on PFAS use generally in the oil and gas industry. (DEP Motion, Exhibit Q.) There is no specific mention of Apex's operations nor the well permits at issue in this appeal.

Mr. Dusty Horwitt is an attorney and a consultant with Physicians for Social Responsibility. According to his expert report, he has spent nearly 20 years researching the health and environmental impacts of oil and gas drilling and hydraulic fracturing, including the past two years studying the use of PFAS in oil and gas extraction. His report provides an extensive discussion about PFAS. He states that data shows that at least one type of PFAS was used in fracking operations at eight wells in Beaver, Lawrence and Washington Counties. He believes that PFAS use in the oil and gas industry in Pennsylvania is likely under-reported due to a lack of reporting and disclosure requirements under Pennsylvania law. (DEP Motion, Exhibit P.) Mr. Horwitt's report does not discuss Apex or any of its well sites or the permits at issue in this appeal.

In responding to Apex and the Department's motions, Protect PT relies primarily on the report of Marc Glass. Mr. Glass is a principal and senior scientist with the environmental consulting firm of Downstream Strategies. In his report, Mr. Glass states, in his professional opinion, contaminants generated by unconventional oil and gas wells, including PFAS, are insufficiently monitored. He recommends that the Board order the Department to amend the permits to require the applicant to prepare:

> a conceptual site model that considers the environmental fate and transport of contaminants including PFAS compounds, where applicable, all undisclosed contaminants concealed as "trade secrets," radon and its radioactive progeny, and potentially complete exposure pathways; necessary measurements or estimates of emissions from each of these contaminant sources; appropriate

> analysis by a qualified, independent third-party air modeler(s) with experience in modeling; and dose estimates to receptors for any complete or potentially complete exposure pathways.

(Protect PT Response to DEP Motion, Exhibit E, p. 1.)

Mr. Glass' report primarily focuses on the radiological components of oil and gas production. However, in one section of his report he does mention PFAS and the Drakulic well site, stating his opinion as follows: "Unmonitored air emissions from the Drakulic well pad, to a reasonable degree of scientific certainty, will include PFAS, undisclosed contaminants concealed as 'trade secrets,' and Radon and its progeny." (Protect PT Response to Apex Motion, Exhibit G, p. 5; Protect PT Response to DEP Motion, Exhibit E, p. 5.) The basis for his conclusion regarding PFAS emissions at the Drakulic site is that "Pennsylvania's system of ambient air quality monitoring stations does not monitor for Radon or its progeny, or Per- and polyfluorakyl substances (PFAS) know[n] to be used at *some* [unconventional oil and gas] well sites in Pennsylvania," citing a report coauthored by Mr. Horwitt. (*Id*. at p. 6) (emphasis added). As noted earlier, Mr. Horwitt found evidence of use of PFAS at some oil and gas operations in Pennsylvania but there is no indication that any of those sites were operated by Apex. There is also no evidence that Mr. Glass conducted his own independent evaluation of PFAS use by Apex.

While the expert reports produced by Protect PT provide information regarding PFAS chemicals and their use in some oil and gas operations, none support its assertion that it has provided "expert opinion regarding Apex's other operations and the use of PFAS in hydraulic fracturing operations." (Protect PT Brief in Opposition to DEP Motion, p. 14; Protect PT Brief in Opposition to Apex Motion, p. 11.) The reports are fairly general to the oil and gas industry. While they indicate a possibility for PFAS to be used in oil and gas operations, none of the expert reports are specific to Apex nor do they provide any evidence that PFAS will be used at the

Drakulic site. None of the reports address Apex's past operations, its alleged use of PFAS chemicals or its plans for the Drakulic site.

The speculative nature of Protect PT's claims is further demonstrated by the deposition testimony of Protect PT's Executive Director, Gillian Graber. Ms. Graber could not identify any specific evidence that Apex would use or release PFAS at the Drakulic site. When asked in deposition, "what's Protect PT's basis that PFAS are going to be used at the Drakulic site?" Ms. Graber responded as follows:

> Well, we have no indication that it's not going to be used. We know that it is used in oil and gas operations broadly. We know that some of the chemicals are -- that are used are proprietary. And so that proprietary nature we have no way of knowing whether that's PFAS or not.

(Apex Motion, Exhibit I, p. 130.)

In contrast, Apex and the Department provided evidence that PFAS are *not* likely to be used by Apex at the Drakulic site. Safety data sheets produced by Apex from a recently constructed well site (the Graham site) identify no PFAS. (Apex Motion, Exhibit E; Apex Statement of Undisputed Material Facts, para. 13.) Likewise, water sampling results from the municipal water supply that Apex is required to use for the Drakulic site have not shown the presence of PFAS. (Apex Motion, Exhibits F and G.)

Protect PT, however, directs us to the deposition testimony of Apex's corporate designee, Christopher Hess, General Counsel and Executive Vice President. Counsel for Protect PT asked Mr. Hess about the company's use of PFAS or PFOA. Mr. Hess repeatedly responded that he did not think there was a "standard definition," that the term was "defined broadly by different groups," and that Apex could not guarantee the use or nonuse of PFAS without "an agreed upon clear definition of what a PFAS is." (Protect PT Response to Apex Motion, Exhibit C, p. 46, 95–

96.)[22] However, while acknowledging that the term PFAS was "poorly defined" or "defined broadly by different groups," he testified that, to his knowledge, Apex does not use PFAS or PFOA in its operation. (*Id.* at p. 46:13–21.) Taken as a whole, Mr. Hess's testimony does not support Protect PT's claim that PFAS will be used by Apex in its hydraulic fracturing of the wells at issue in this appeal. We read his testimony as saying that Apex does not intend to use PFAS at the Drakulic site, but because the definition of the term may vary, he could not guarantee it.

Protect PT also points to the testimony of the Department's corporate designee, Thomas Donahue, Environmental Program Manager in the Office of Oil and Gas Management, who testified that, when considering a well permit application, the Department does not review whether the applicant uses or has used PFAS in its operations; rather, that information is contained in the completion report which is prepared after the well is completed. (Protect PT Motion, Exhibit 15,

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[22] An excerpt of Mr. Hess's deposition testimony is as follows:

> Q: …Is it Apex's position without a comprehensive list of each PFAS compound, Apex is unable to confirm whether or not they have or they will be using PFAS?
>
> A: I think it's Apex's position that not with respect to each particular compound, but with respect to a -- an agreed upon clear definition of what a PFAS is. Without that, we can't make a guarantee one way or the other.
>
> *****
>
> Q: So based upon your reading of the definition of a PFAS from the Department or from the EPA, would Apex -- or have they used or will they will using PFAS based on the definitions of either DEP or EPA?
>
> A: I couldn't say one way or the other. I think it is -- to my knowledge, we are not planning on using any chemical compounds that would constitute a PFAS, but that answer is subject to, I think, a clear definition that we could hold against the chemical compounds and -- and -- you know, and make that representation.

(Protect PT Response to Apex Motion, Exhibit C, p. 95–96.)

p. 105) When asked whether the Department has discovered the use of PFAS in completion reports, Mr. Donahue responded that he did not know. (*Id.* at p. 106.)

At most, the evidence in the record indicates that PFAS may be used or released in some oil and gas operations, and while they could be used by Apex at the Drakulic site there is nothing in the record to suggest that they will be used; on the contrary, there is evidence to suggest they will not be used. On that basis, both the Department and Apex ask us to dismiss Protect PT's PFAS claims as speculative. *See, e.g., Stocker*, 2022 EHB at 444; *Liberty Township v. DEP*, 2022 EHB 398, 402; *Heasley v. DEP*, 1991 EHB 1758, 1761–62.

Protect PT argues that it is unable to provide more specific information for a variety of reasons. First, it reminds us that there are no ongoing operations at the Drakulic site from which to gather information since the wells have not been drilled. It argues that third-party appellants who are challenging development that has not yet occurred are adversely affected by the Board's standard that harm may not be speculative. Second, as set forth in the expert reports of Mr. Horwitt and Mr. Glass, Protect PT argues that PFAS use among the oil and gas industry is under-reported due to the lack of sufficient monitoring, measurement and documentation, and further due to certain constituents being classified as trade secrets. Finally, it argues that it was unable to obtain information regarding PFAS usage at the Drakulic site because Apex and the Department provided insufficient responses to its discovery requests related to PFAS.

Protect PT argues that the Board should reevaluate what constitutes "speculative evidence" and cites the Pennsylvania Supreme Court's opinion in *EQT Production Co. v. Borough of Jefferson Hills,* 208 A.3d 1010 (Pa. 2018) in support of this position. *Jefferson Hills* involved a zoning matter in which the issue presented was whether a municipality, in considering a natural gas company's conditional use application for the construction and operation of a well site, could

consider the testimony of residents of another municipality regarding impacts to their health, quality of life and property, which they attributed to a similar facility operated by the same company in their municipality. The trial court found the testimony to be speculative and the Commonwealth Court affirmed. On appeal, the Supreme Court reversed and held that testimonial evidence from the residents of the other municipality was properly admitted and received by the borough in considering the zoning application. Because the testimony of the residents established that the operation for which EQT was seeking approval was of a similar nature to the operation in their municipality, the Court found their testimony to the zoning hearing board to be relevant and probative.

In *Jefferson Hills*, firsthand accounts of similarly-affected residents were found to be relevant when considering a zoning application. Here, however, Protect PT has not produced any firsthand experiential evidence, such as the use of PFAS by Apex at its other drilling sites. While Mr. Horwitt's reports discusses the use of PFAS at other oil and gas sites in Pennsylvania, he mentions its use at only eight wells in Pennsylvania, none of which is identified as an Apex site. Protect PT has presented no evidence in the record indicating that PFAS chemicals will be used at the Drakulic site; it can only speculate as to their usage based on what it has found at a small number of other sites in Pennsylvania. We do not believe *Jefferson Hills* changes the standard for what constitutes "speculative evidence" before the Board. We agree with the position articulated by the Department in its reply to Protect PT:

> [T]he Pennsylvania Supreme Court did not allow for "speculative evidence" but simply disagreed with the Commonwealth Court regarding the probative value of the testimonial evidence, reasoning that it was not speculative, but probative in the specific context of the zoning board decision.

(DEP Reply, p. 9) (citing *Jefferson Hills*, 208 A.3d at 1028). Here, Protect PT has not come forward with relevant and probative evidence demonstrating the likelihood of PFAS use at the Drakulic site.

Protect PT contends that it attempted to obtain this information but did not receive sufficient answers to its requests for interrogatories served upon Apex and the Department. In particular, it directs us to the following responses provided by Apex and the Department's in response to interrogatories:

> INTERROGATORY 32 [directed to Apex]: Identify all PFAS identified in the 1,173 "hydraulic fracturing-related chemicals" identified by the Environmental Protection Agency and which specific PFAS chemical compounds will be used by Permittee at the Drakulic well site.
>
> ANSWER [by Apex]: In addition to the General Objections, Apex objects to this Interrogatory as vague and ambiguous. Apex also objects to this Interrogatory as seeking irrelevant information. Apex objects to this Interrogatory as seeking to impose discovery obligations which do not exist under applicable law. Apex objects to this Interrogatory to the extent it seeks expert opinions and conclusions. Subject to and without waiving the foregoing objections, this Interrogatory is not capable of a meaningful response. Apex does not know what is meant by the "1,173 'hydraulic fracturing-related chemicals' identified by the Environmental Protection Agency" and is unaware of any list formulated by [sic] purporting to be a list of chemicals used in hydraulic fracturing. By way of further response, Apex refers Appellant to EPA's website which indicates that a list of "Chemicals Identified in Hydraulic Fracturing Fluids and Wastewater" "contains tables of chemicals reported to be used… and detected…" (emphasis supplied). https://www.epa.gov/hfstudy/appendix-chemicals- 09/23/2024 - 13 - identified-hydraulic-fracturing-fluids-and-wastewater-excel-file. Additionally, as Apex has repeatedly advised Appellant, Apex has not yet selected vendors and, therefore, the products it may use at the Drakulic site have not been identified. However, Apex has also provided representative SDS for its drilling and completions operations. Based upon those SDS, Apex has no knowledge that its operations will utilize PFAS compounds.

(Protect PT Response to Apex Motion, Exhibit B, p. 12–13.)

> INTERROGATORY 34 [directed to the Department]: [Does] the Department have knowledge that the Permittee has used PFAS chemicals at any well sites in Pennsylvania.
>
> ANSWER [by the Department]: Because the interrogatory is not specific to the permit renewals at issue in this case, the Department objects to the interrogatory as overly burdensome. The Department objects to the extent this interrogatory requires expert analysis or discovery or seeks a legal conclusion to which no response is required. The Department further objects to the terms "used," "PFAS chemicals," and "any well sites in Pennsylvania" as vague, ambiguous, and overly broad. The Department objects to the extent this definition exceeds the requirements of the Pennsylvania Rules of Civil Procedure, and further objects to this definition as overbroad as it inquires into all well sites in Pennsylvania that Permittee operates. The Department objects to this interrogatory because it assumes PFAS use on an Apex well site. Furthermore, the Department objects as this question is improper in that it assumes a fact without any basis or foundation and does not necessitate a further response. Subject to the foregoing, based on its knowledge and understanding, the Department is not aware that Apex has utilized "PFAS chemicals" on its well sites.

(Protect PT Response to Apex Motion, Exhibit A, p. 27–28.)

However, Protect PT did not seek to address these alleged deficiencies by filing a motion to compel with the Board. The Board's role is to oversee the exchange of information through the process of discovery. Where a party requests information in discovery and believes that the responding party has failed to provide complete and sufficient answers, our rules allow for the requesting party to petition the Board to compel more complete answers. 25 Pa. Code § 1021.102(d). That was not done here, and, therefore, the Board did not have the opportunity to consider whether Apex and the Department needed to provide more complete answers and, if so, order them to comply.

Protect PT argues that it is reasonable to infer that Apex will use PFAS at the site at issue in this appeal. It relies on what it deems to be insufficient reporting requirements discussed in its

expert reports and the allegedly deficient responses to interrogatories discussed above. It also directs us to a violation issued by the Department to Apex for failure to report fracking chemicals for 37 wells in Westmoreland County over the course of six years as evidence of Apex withholding information. On September 9, 2024, the Department issued a Notice of Violation (NOV) to Apex for failure to comply with 25 Pa. Code § 87a.122(b)(6)(iv), which requires the company to provide a list of the chemicals it intentionally adds to its stimulation fluid. (Protect PT Response to Apex Motion, Exhibit F.) While Apex did submit the required completion reports for the wells at issue in the NOV letter, the company provided "Proprietary" or "Trade Secret," rather than actually including the chemical information.

On the basis of the NOV, the allegedly deficient discovery responses discussed above, and the alleged lack of adequate reporting, Protect PT states that it intends to move for an adverse inference against Apex and the Department with regard to the use of PFAS chemicals at the Drakulic site. The decision as to whether to grant a sanction such as an adverse inference is within the discretion of the trial court. *Kiskadden v. DEP*, 2014 EHB 380, 386 (citing *Magette v. Goodman*, 771 A.2d 775, 779 (Pa. Super. 2001)). The Board has the authority to impose sanctions, including those permitted under Pa. R.C.P. 4019, upon a party for failure to adhere to a Board order or Board rule of practice and procedure. 25 Pa. Code § 1021.161. "The general rule regarding adverse inferences is that where evidence that would properly be part of a case is within the control of the party in whose interest it would be to produce it, and the party fails to produce it without satisfactory explanation, an adverse inference may be drawn that the evidence would be unfavorable to him." *Kiskadden,* 2014 EHB at 386 (quoting *Magette*, 771 A.2d at 779).

Here, no motion for an adverse inference has been made, but even if it were, it is not clear that the requirements for an adverse inference have been met. There is no indication that either

the Department or Apex has failed to abide by a Board order or rule of practice and procedure. As we stated earlier, no motion to compel was filed against Apex or the Department; therefore, there is no Board order directing Apex or the Department to provide more complete answers in discovery. Moreover, there is no indication as to whether the information sought by Protect PT is within the control of the parties or a third-party such as a chemical manufacturer or vendor.

The Board addressed the use of adverse inference in *Kiskadden*. That case involved a landowner who claimed that gas operations had contaminated his water supply. In discovery, the landowner sought information regarding the chemicals used at the well site, and the permittee claimed that the information was either not available or it was proprietary. The landowner filed a motion to compel which the Board ultimately granted. After several unsuccessful attempts at obtaining the information, the landowner asked for an adverse inference that would have precluded both the permittee and the Department from arguing that products used at the well site did not contaminate the landowner's water supply and would have further declared the Department's finding of no impact to the landowner's water supply null and void.

The Board declined to grant the adverse inference requested by the landowner. However, it did grant the landowner a rebuttable presumption that contaminants found in his water supply may have been used at the permittee's site. Unlike the present case, in *Kiskadden* a motion to compel had been filed and a Board order granting the motion had been issued. Here, without a motion to compel having been filed, the Board had no opportunity to determine whether Apex and the Department's answers to interrogatories were deficient and no opportunity to order one or both of those parties to produce more complete information, if warranted.

Moreover, additional tools were available to Protect PT in discovery to attempt to obtain information regarding the identity of product constituents. Based on our review of the record, it

does not appear that Protect PT issued discovery requests seeking information on "proprietary" chemicals or copies of completion reports for Apex's other sites, did not serve a subpoena on any of Apex's chemical suppliers,[23] nor did it purport to offer a definition of PFAS to Apex's corporate designee when he indicated he needed one to answer the deposition questions fully. We understand that some of this information may not have been available through discovery,[24] and we are not so naïve as to believe that Protect PT would have been flooded with information had it asked for it. But, it was incumbent upon Protect PT to exhaust all other avenues before seeking further remedies.

Moreover, in this case, Apex has provided some information indicating that PFAS will not be used at the site. As noted earlier, it provided safety data sheets for products used at another site and those materials did not show PFAS as a constituent. Additionally, Apex and the Department provided sampling results for the public water supply that Apex is required to use at the Drakulic site and those results have not identified PFAS. Finally, Apex's corporate designee, Mr. Hess, stated that to his knowledge Apex did not use PFAS in its operations, albeit with some wrangling over the definition.

At this stage of the proceeding—where discovery has concluded and the case is proceeding to a hearing[25]—Protect PT does not have evidence to support its claims that PFAS will be used or released to the environment through the hydraulic fracturing process at the Drakulic well site.

[23] We recognize that Apex's response to Protect PT Interrogatory no. 32 stated that it had not yet selected vendors for the Drakulic site. However, as we have stated, there was no motion filed to compel further information, and the record does not indicate that any further attempt was made to obtain this information.

[24] *See, e.g.,* 58 Pa. C.S. § 3222.1, which addresses hydraulic fracturing chemical disclosure requirements. *But see, Kiskadden*, 2014 EHB at 385 (holding that the operator "as the party that used the products in question, bears some responsibility for producing information regarding the chemical composition of the products.")

[25] A hearing in this matter has been scheduled to begin January 15, 2025.

While its experts have provided substantive reports on the risks associated with PFAS and the general use of PFAS chemicals in the oil and gas industry, there is nothing it can point to that shows that PFAS will be used at the Drakulic site. On the contrary, Apex and the Department have produced evidence that PFAS will not be used.

The question to be answered in determining whether summary judgment is warranted under 1035.2(2) is whether there is a genuine issue for trial. *Casey v. DEP*, 2014 EHB 439, 443 (citing *Kleinberg v. SEPTA*, 765 A.2d 405, 408 (Pa. Cmwlth. 2000) ("[W]here a motion for summary judgment has been made and properly supported, parties seeking to avoid imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.") In order to overcome a motion filed pursuant to Pa. R.C.P. 1035.2(2), the adverse party must be able to demonstrate evidence in the record establishing the facts essential to the cause of action. Pa. R.C.P. 1035.3. In other words, a party must identify evidence in the record which indicates that it can prove its claim. *Casey,* 2014 EHB at 444 (citing *Jackson v. DEP*, 2005 EHB 496, 498–99). We do not believe that Protect PT has pointed to sufficient evidence in the record indicating that it can prove its PFAS claims.

Therefore, summary judgment is granted to Apex and the Department on Objections 27 and 67 of the Initial Appeal.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | |

## O R D E R

AND NOW, this 29th day of October, 2024, it is hereby ordered as follows:

1) Apex's and the Department's Motions for Partial Summary Judgment are granted in part.

2) Paragraphs 25, 26, 28, 30, 31, 33–35, 39–42, 43–52, 64, 65, 67–68, 75–80, 82–85, 120, 125 and portions of Objections 66, 72 and 119 of the Renewal Appeal are dismissed, as set forth herein.

3) Paragraphs 27 and 67 of the Initial Appeal are dismissed.

**ENVIRONMENTAL HEARING BOARD**

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

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

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

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

**DATED: October 29, 2024**

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

**For the Commonwealth of PA, DEP:**
Forrest M. Smith, Esquire
Kathleen Anne Ryan, Esquire
*(via electronic filing system)*

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

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

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** |

# ADJUDICATION

**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.

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.)

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

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.)

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*.

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

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.

> 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.

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

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.

**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*

*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.

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.

*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

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.

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.

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.

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.)

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)).

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.

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.

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.

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.

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.

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.

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

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

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.

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.

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** | : | |

**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.**

**DATED: November 15, 2024**

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

**For the Commonwealth of PA, DEP:**
Alicia R. Duke, Esquire
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**For Appellant:**
William J. Cluck, Esquire
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**For Permittee:**
Robert D. Fox, Esquire
Carol F. McCabe, Esquire
Jessica D. Hunt, Esquire
Brielle A. Brown, Esquire
(*via electronic filing system*)

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**
**APPELLANTS' MOTION FOR SUMMARY JUDGMENT**

**By Steven C. Beckman, Chief Judge and Chairperson**

**Synopsis**

The Board denies a motion for summary judgment in a third-party appeal from a consent order and agreement entered into between the Department and permittee where the case involves genuine issues of material facts and complex questions of law that make it inappropriate for resolution on summary judgment.

**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 the 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 and replies. The briefing is complete in this matter. This Opinion addresses the Motion for Summary Judgment filed by Appellants.

**Standard of Review**

Summary judgment is appropriate when the record, including pleadings, depositions, answers to interrogatories, and other related documents, shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n. v. DEP*, 2023 EHB 221, 223. In

evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party. *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). Summary judgment may only be granted in cases where the right to summary judgment is clear and free from doubt. *Amerikohl Mining Inc. v DEP*, 2023 EHB 348, 352 (citing *Tri-Realty Co. v. DEP*, 2016 EHB 214, 217).

**Discussion**

The Appellants believe that they are entitled to summary judgment because, according to them, the undisputed facts show that the CO&A "is unreasonable, inappropriate and not in conformance with Pennsylvania law." (Appellants' Brief in Support at 10). The Appellants request that the Board:

> [E]nter an Order (1) finding that the CO&A is unreasonable, inappropriate, and not in conformance with the law; (2) vacating and remanding the CO&A; (3) requiring the immediate removal of the excess waste coal ash in accordance with all applicable regulations; (4) requiring compliance with all applicable regulations pending removal of the excess waste coal ash; and (5) providing other relief as appropriate.

(Appellants' Motion at 2). In their Brief, the Appellants set forth several lines of argument in support of their motion and the requested relief. At times in their Brief, the arguments blend into and overlap one another. Following review of their motion, we understand their arguments as generally falling into the following categories: 1) The four-year removal schedule is unreasonable; 2) the excess coal ash is subject to Solid Waste Management Act regulations and the federal coal combustion residual ("CCR") regulations and, therefore, the Department acted unreasonably and erred as a matter of law by failing to include those regulatory measures in the CO&A; 3) it is unreasonable and contrary to law for the CO&A to lack any protective measures and monitoring

provisions concerning the excess coal ash; and 4) the Department failed to provide proper notice of the CO&A. We will address each of these arguments in turn.

**Removal Schedule**

A primary concern for the Appellants is the timeline the CO&A established for the removal of the excess coal ash. Paragraph 3 of the CO&A is entitled "Corrective Action" and lays out Scubgrass' obligations regarding the excess ash.[1] Subsection "a" of this paragraph sets forth a four-year timeframe for Scrubgrass to remove the excess ash ("Removal Schedule"). It provides as follows:

> **a. Excess Waste Coal Ash Removal Schedule**. Scrubgrass shall remove the large open pile of Excess Waste Coal Ash in accordance with the following schedule:
>
> i. Within one year of the date of this Consent Order and Agreement, Scrubgrass shall remove a minimum of 80,000 tons of the Excess Waste Coal Ash.
>
> ii. Within two years of the date of this Consent Order and Agreement, Scrubgrass shall remove a minimum of 160,000 tons of the Excess Waste Coal Ash.
>
> iii. Within three years of the date of this Consent Order and Agreement, Scrubgrass shall remove a minimum of 220,000 tons of the Excess Waste Coal Ash.
>
> iv. Within four years of the date of this Consent Order and Agreement, Scrubgrass shall remove all of the remaining Excess Waste Coal Ash until the Ash Conditioning Area is consistent with the specifications that were accepted by the Department on September 12, 2007, and as described in Paragraphs F and G, above.

[1] In addition to the removal schedule, the CO&A's corrective action section also requires that Scrubgrass: 1) ensure that each site that the coal ash is transported to is permitted to receive it; 2) submit quarterly progress reports regarding its progress in removing the excess ash; and 3) refrain from conducting any earth disturbance activities associated with a location at the Plant designated the Solar Project Area until obtaining coverage under the PAG-02 NPDES Permit or unless the Department authorizes the activity in writing.

(Appellants' Ex. 6 at 8-9). The Removal Schedule began to run on November 9, 2023, the date the CO&A was signed by Scrubgrass and the Department. The Appellants claim the Department was unreasonable in allowing a four-year timeframe for the removal of the excess coal ash. They stress that this timeframe is especially inappropriate because the excess ash had already been accumulating at the Plant the four-years prior to the CO&A going into effect. The Appellants state that Scrubgrass has been placing ash outside the Ash Conditioning Area since at least since 2020. Appellants do not claim that the Department knew of these violations in 2020, but rather, that the Department was informed in 2022 that the ash pile began growing in 2020. The Appellants argue that because the Department was made aware that Scrubgrass began committing violations in 2020, it should have demanded a more aggressive removal schedule. According to the Appellants, it was unreasonable for the Department to grant Scrubgrass an additional four-years to remove the excess ash once it was in possession of the knowledge that Scrubgrass had been committing violations for some time.

Additionally, the Appellants cite to documents produced during discovery and depositions to support its position that the Removal Schedule is unreasonable. They argue that the Department itself questioned the reasonability of the Removal Schedule, citing an email from a Department inspector. In the email, after noting the rate at which Scrubgrass could remove the excess ash, the inspector asked, "[w]hy are we giving [Scrubgrass] 3 years to remove it from the Site?" (Appellants' Ex. 20). The Appellants also rely on a draft consent agreement the Department wrote that sets forth a two-year removal schedule which, they say, shows the Department could have ordered a hastier removal. (Appellants' Ex. 8 at 135-140). The Appellants also point to a plan for the removal of the excess ash that Scrubgrass submitted to the Department. The plan represented that Scrubgrass had the capacity to remove 1,700 – 1,800 tons of coal ash per day.

(Appellants' Ex. 22). According to the Appellants, had the Department required Scrubgrass to remove the excess coal ash at the capacity-rate outlined in the plan, the removal of the ash would have been greatly accelerated and the waste pile removed in its entirety much sooner than the four-years provided for in the CO&A.

One further argument set forth by the Appellants is the contention that the CO&A does not prohibit Scrubgrass from adding additional waste to the Ash Conditioning Area. Again, they point to the draft consent agreement that stated, in reference to the quantity of removed excess coal, that "[t]his amount shall be in addition to what is generated on a daily basis throughout this timeframe." (Appellants' Ex. 14 at 6). To bolster this point, the Appellants' quote their expert who states that the CO&A "does not call for specific reductions in the net volume of ash placed on the site. It only specifies the amount of waste that must be removed from the area off the footprint of the permitted [Ash Conditioning Area] and does not cap the volume of waste that can be placed on the [Ash Conditioning Area] footprint." (Appellants' Ex. 5, Expert Report at 7). The Appellants argue that "even as the CO&A requires the removal of the Excess Waste Coal Ash in specific quantities, it allows for the placement of new ash in unrestricted quantities, which unreasonably extends the time for removal." (Appellants' Brief at 17). The Appellants assert that the above evidence, when taken together, demonstrates that there is no issue of material fact that removal of the excess ash could have been achieved in a shorter time period than that prescribed by the CO&A and, as such, the Department was unreasonable in establishing the four-year Removal Schedule.

In their responses, the Department and Scrubgrass counter the Appellants' assertion that the Removal Schedule is unreasonable, presenting additional facts and offering further explanation of the decision-making process. Essentially, the Department and Scrubgrass argue that the Appellants misrepresent the review and negotiation process the Department completed. In

response to the Department email and draft consent agreement cited by Appellants, the Department states that both documents only illustrate preliminary ideas and thoughts that occurred early on in its evaluation and do not reflect the full assessment and negotiations that lead to the CO&A. The Department also states that when it considered Scrubgrass' capacity to remove 1,700-1,800 tons of material per day, it also had to take into account the new coal ash that the Plant continues to generate that also needs hauled away along with the excess ash. The Department also remarks that the purpose of the CO&A is to bring Scrubgrass into compliance with the SWMA, and while it is true that Scrubgrass continues adding new ash to the Ash Conditioning area, Scrubgrass still must continue to comply with its obligations when handling new coal ash. Scrubgrass presents additional facts that were taken into consideration when establishing a four-year timeline for removal. It says in 2022, "a severe and unexpected lack of adequate trucking capacity" made it difficult to transport the ash. (Scrubgrass' Response to Appellants' SUMF at 4). It also asserts that "the CO&A provides a reasonable timeline for removal of the excess waste coal ash as it accounts for the complex task of transporting coal ash for beneficial use to permitted locations in light of weather and other concerns." (*Id*. (citations omitted)).

Despite the additional considerations the Department and Scrubgrass raise, the Appellants insist that the evidence they presented clearly shows that a quicker timeline existed to remove the access ash and, as such, the Department erred in enacting the four-year Removal Schedule. At the least, these different representations of the process the Department conducted that resulted in selecting a four-year Removal Schedule, raises a question of fact concerning what exactly the Department considered and reviewed in developing the CO&A and how it accounted for the various issues presented by the situation. The question of the reasonableness of certain terms in a negotiated CO&A strikes us as the type of issue not easily decided on a summary judgment motion.

The parties must further develop the record for us to decide if the Removal Schedule is unreasonable.

**SWMA and Residual Waste Landfill Regulations**

The Appellants next claim that "the CO&A is unreasonable as a matter of law because it does not, by its terms, require compliance with all applicable laws and regulations. Nor does the CO&A require compliance with the Department's own regulations such as those governing water quality protection (25 Pa. Code §§ 288.241-245) or water quality monitoring (25 Pa. Code §§ 288.251- 258), among other requirements in 25 Pa. Code Chapter 288." (Appellants' Reply Brief at 5). Specifically, Appellants point out that the CO&A shows that the Department determined Scrubgrass was violating multiple sections of the SWMA under its Residual Waste provisions.[2] (Appellants' Ex. 6, at FF-JJ). They argue that the Removal Schedule alone is inadequate to resolve these violations and the Department failed to require corrective measures to ensure compliance with the laws and regulations violated by Scrubgrass.[3]

Scrubgrass disputes that the excess ash should be classified as a solid waste and/or a residual waste. Under the SWMA, coal ash that is beneficially used is exempt from being classified as a solid waste. See 35 P.S. § 6018.103. Coal ash, depending on if it is solid waste or is beneficially used, is subject to different regulatory requirements. Scrubgrass maintains that its excess coal ash is beneficially used and is properly regulated under the Chapter 290 Regulations,

[2] The SWMA violations listed in the CO&A include 35 P.S. §§ 6018.301, 6018.302(a), 6018.302(b)(3), 6018.501(a) and 6018.610(1).

[3] In their Brief in Support of their Motion for Summary Judgment, the Appellants also argued that the Department was unreasonable by not including measures in the CO&A equivalent to the minimum protections required in the federal Coal Combustion Residual ("CCR") regulations. The Appellants' do not raise this line of argument in their Reply Brief, so it is unclear whether they intend to pursue it moving forward. To the extent they are, we also find this issue raises complex questions of law and we decline to grant summary judgment on that basis.

the regulatory program for beneficially used coal ash. See generally 25 Pa. Code §§ 290.1 – 290.415. The Appellants counter that there is no dispute that the excess ash: 1) meets the definition of solid/residual waste; 2) its placement on the ground constitutes disposal under the SWMA; and 3) it constitutes a residual waste as it is not being beneficially used. As such, they argue that under the SWMA, the excess ash is subject to the regulations applicable to residual waste, such as Chapter 288 which regulates residual waste landfills. The Department disputes that the Ash Conditioning Area is a landfill subject to residual waste landfill regulations. It says that even though Scrubgrass did unlawfully store coal ash in the Ash Conditioning Area, the Department never authorized such disposal. Hence, the Department reasons, that Scrubgrass' unlawful conduct did not convert the Ash Conditioning Area into a landfill. Determining whether it was reasonable for the Department to refrain from incorporating residual waste landfill regulations into the CO&A is a complex question of fact and law and requires further arguments from the parties.

It is clear that the parties view the proper classification of the excess ash very differently based on what appear to us to be, at a minimum, factual and legal issues regarding its beneficial use. These different positions raise a complex issue of fact and law as to the proper classification of the excess coal ash and the regulatory framework it is subject to, making it inappropriate to resolve in a motion for summary judgment.

**Monitoring and Protective Measures**

The CO&A does not directly impose any monitoring requirements or protective measures regarding the excess ash. The Appellants assert that the absence of leachate control, monitoring of groundwater and surface water, runoff prevention, and/or measures to control fugitive dust emissions in the CO&A, especially because it will take four years to remove the ash, is patently

unreasonable because it fails to mitigate potential harm to human health and the environment.[4] To support this assertion, the Appellants direct us to their expert's report that described both his observations of the Plant during a site visit, and his conclusions about the harms associated with the excess ash pile. Additionally, in a footnote, they cite to federal regulations that describe the type of contaminants found in coal ash and the health risks associated with them.

Both the Department and Scrubgrass acknowledge that the CO&A's language does not include monitoring requirements or other safeguards raised by the Appellants. In response to the expert opinion the Appellants presented in support of their argument, the Department first cautions that "[t]he Board should refrain from granting summary judgment before weighing [the Appellants' expert's] credibility. (Department's Response Brief at 9). Additionally, in an effort to address the lack of monitoring requirements, the Department asserts that "Scrubgrass must comply with The Clean Streams Law, and all other laws and regulations that apply to their operations including the Ash Conditioning Area, regardless of whether the COA specifically addresses it." (*Id*., at 10). Lastly, the Department says that the CO&A concerns only the *removal* of the excess ash and that the Appellants have failed to demonstrate that the process of removing it requires additional safeguards.

Scrubgrass argues that while the CO&A itself does not contain protective measures, there are protective measures that are already in place to monitor the excess coal ash because Scrubgrass has to comply with inspection, monitoring, and reporting requirements that are conditions in both its Title V air permit and NPDES permit. It is Scrubgrass' position that the conditions it must comply with in these two permits, offer sufficient protection against any threats the excess ash

[4] This line of arguments is closely tied to the Appellants' claim that the excess coal ash should be subject to residual waste regulations which prescribe specific safeguards to address the operation of residual waste landfills.

may pose. Scrubgrass also takes issue with the Appellants reliance on their expert's report to support their motion. Scrubgrass argues that Appellants' expert did not conduct any sampling or scientific analysis of the Plant and presents no factual basis for his findings. Appellants assert that their expert provides a detailed explanation as to how he came to his conclusions. Moreover, Appellants say that by failing to introduce any contrary evidence, the Department and Scrubgrass offer no issue of fact regarding their expert's opinions.

We understand the Appellant's desire to rely on their expert's report, but we hesitate to do so in this context. One of the key considerations the Board makes in ruling on cases involving expert testimony is an evaluation of the expert's credibility. In the absence of live testimony and cross-examination, we have not had an opportunity to assess his credibility. Resting on the Appellants' expert's opinions and conclusions without further scrutiny, particularly in light of the fact, as Scrubgrass points out, the report does not contain any sampling data, seems problematic at this point in the case. Further, all of the above discussion by the Department, Scrubgrass and the Appellants only strengthen our conclusion that there are disputed material facts in this case. To resolve the issue of monitoring and safeguards, the Board will need a greater understanding of Scrubgrass' permits and how they relate to the excess coal ash, the basis for the Department's decision that no additional safety measures were necessary, and the nature and potential risks posed by the excess coal ash. Ultimately, the information before us presents a dispute of material fact and issues of law as to whether it was reasonable for the Department to exclude interim measures in the CO&A. Therefore, this issue is not appropriate for resolution through summary judgment.

**Notice**

Finally, the Appellants argue that the Department failed to comply with the law because it did not provide notice of the CO&A prior to its execution. According to Appellants, the CO&A

is subject to the notice requirements set forth in Section 616 of the SWMA. Section 616, entitled "Notice of proposed settlement" provides:

> If a settlement is proposed in any action brought pursuant to section 604 or 605, the terms of such settlement shall be published in a newspaper of general circulation in the area where the violations are alleged to have occurred at least 30 days prior to the time when such settlement is to take effect. The publication shall contain a solicitation for public comments concerning such settlement which shall be directed to the government agency bringing the action.

35 P.S. § 6018.616. The Appellants argue that the CO&A is a settlement under Section 605 which concerns civil penalties. See 35 P.S. § 6018.605. To substantiate this claim, the Appellants point to paragraph OO of the CO&A's findings which states "[t]he violations described in Paragraphs FF and HH above, constitute unlawful conduct […] and subject Scrubgrass to civil penalty liability under Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605." (Appellants' Ex. 6, at 7).

There is no dispute that the Department and Scrubgrass executed the CO&A on November 9, 2023 and provided actual notice to the Appellants on November 15, 2023. The Appellants claim that the failure to provide notice 30 days in advance materially impacted them, asserting that "if the Department had provided notice and engaged with citizen concerns about the harmful impacts from the ash pile, it would have had the opportunity to prepare a more protective CO&A, with a timely remedy and interim monitoring and mitigation measures, addressing these concerns instead of defending its weak and slow CO&A in litigation before the Board." (Appellants' Reply at 12). In other words, the Appellants issue with the lack of public notice is grounded in the concern that the public was deprived of a meaningful opportunity to provide input. Further, they allege that had the Department received input from the public, it would have (or should have) on that basis integrated more protective measures and a faster removal schedule into the CO&A.

Both the Department and Scrubgrass contend that the notice requirements in Section 616 are inapplicable to the CO&A and, therefore, the Department was not required to provide public notice of the CO&A. It is the Department's position that Section 616 only applies when there is a final Department action and then a subsequent settlement which, it argues, is not the case here as the CO&A was not a settlement of an action as that term is defined in Section 102.2 of the Board's rules. 25 Pa. Code § 1021.2. Scrubgrass agrees with the Department's position, adding that Section 605 requires the Department to assess and issue a civil penalty which it did not do here. Scrubgrass also says that the CO&A is not a settlement under Section 616 because it does not resolve a disputed civil penalty assessment.

It is not clear to us, as a matter of law, whether notice of the CO&A was required or not. The Board would benefit from hearing more detail on the positions of the parties. Furthermore, even if *arguendo* Section 616 applies to the CO&A and the Department erred by failing to provide the required public notice, the Board would normally want to consider the impact of that error. Under Board case law, if the Department commits an inconsequential error, meaning that correcting the error is unlikely to result in any practical relief, the Board considers that a "harmless error." See *Morrison v. DEP*, 2021 EHB 211, 227 (holding that appellant was not deprived of due process where the Department did not publish a permit amendment in the Pa Bulletin but provided appellant with actual notice); *Gadinski v. DEP*, 2013 EHB 246, 276 (holding that Department's admitted failure to provide appellant with timely notice of its decision to approve permit revision was harmless error because appellant through his own diligence learned of Department's permit decision and was not prevented from pursuing his appeal); *Paul Lynch Investments, Inc. v. DEP*, 2012 EHB 191, 209 n.14 (finding that Department's misaddressed Notice of Violation ("NOV") was harmless error where prior owner of appellant's property was also sole officer of appellant,

thereby implicating full knowledge to appellant of Department's issuance of NOV at the time it was issued). This is the position the Department takes in its response. It argues that even if it was required to publish the notice, the Appellants cannot prevail on their motion for summary judgment because they received actual notice and, as a result, suffered no harm. Therefore, the Department alleges that at most, its failure to publish the CO&A was merely harmless error.

The Appellants do not raise the issue of public notice as a mere complaint about the Department failing to follow the law. Instead, they articulate that the Department's failure to properly notify them before the CO&A became effective deprived them of the opportunity to provide input pertaining to their concerns about the excess ash. Moreover, they assert their belief that the Department would have ultimately included greater protective measures in the CO&A and fashioned a quicker removal schedule if they had had the opportunity to provide input.

The issue of whether the notice provisions found at Section 616 of the SWMA apply or not presents a complex question of law that requires better developed arguments to resolve. Further, based on the facts before us, we cannot conclude if the Department's error was harmless at this stage. Because it is not clear at this point how to resolve these questions, we find that summary judgment is not appropriate on this issue.

**Conclusion**

Summary judgment should only be granted in the clearest of cases. The reasonableness and legality of the CO&A entered into by the Department and Scrubgrass is not the type of case that lends itself to resolution at the summary judgment stage. The Board will benefit from testimony setting forth the basis on which the Department reached agreement with Scrubgrass to resolve the identified issues and why the Department believes that the CO&A fully complied with the law. Further, we look forward to hearing the testimony of the Appellants' witnesses as to why

they concluded that the approach taken by the Department was unreasonable, inappropriate and not in conformance with the law. This is the type of case involving complex issues of fact and law that the Board finds is best resolved at a hearing at which each party can present their witnesses and set forth their arguments.

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 that the Appellants' Motion for Summary Judgment is **denied**.

**ENVIRONMENTAL HEARING BOARD**

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

**DATED: November 26, 2024**

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

**For the Commonwealth of PA, DEP:**
Kayla Despenes, Esquire
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Paul Strobel, Esquire
Angela Erde, Esquire
*(via electronic filing system)*

**For Appellants:**
Charles McPhedran, Esquire
Gilbert Zelaya, Esquire

Mandy DeRoche, Esquire
*(via electronic filing system)*

**For Permittee:**
David Raphael, Esquire
Kevin Garber, Esquire
Samuel Boden, Esquire
Christina Puhnaty, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **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

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| **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**

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

**For the Commonwealth of PA, DEP:**
Kayla Despenes, Esquire
David Hull, Esquire
Paul Strobel, Esquire
Angela Erde, Esquire

*(via electronic filing system)*

**For Appellants:**
Charles McPhedran, Esquire
Gilbert Zelaya, Esquire
Mandy DeRoche, Esquire
*(via electronic filing system)*

**For Permittee:**
David Raphael, Esquire
Kevin Garber, Esquire
Samuel Boden, Esquire
Christina Puhnaty, Esquire
*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LIZABELLA MINING, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-091-CS** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: December 16, 2024** |
| | : | |

**OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS**

**By Sarah L. Clark, Judge**

**Synopsis**

The Board grants a motion to dismiss where the appellant limited liability company is not an individual appearing on its own behalf and has failed to obtain counsel in accordance with the Board's Rules and Orders.

**O P I N I O N**

**Background**

On March 7, 2024, the Department of Environmental Protection issued an Assessment of Civil Penalty ("Assessment") in the amount of $3,990 to Lizabella Mining, LLC ("Lizabella") – a Pennsylvania limited liability corporation with a mailing address listed as 47 Grudevich Road, Canonsburg, PA 15317 – for violations of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act. Specifically, the Department alleged that Lizabella conducted earthmoving activities adjacent to and within the Fly Ash and Municipal Waste Area of Phoenix

Reclamation Park in violation of the terms and conditions of Surface Mining Permit No. 63070202 (Phoenix Reclamation Park).

Dennis C. Sluciak, the sole owner of Lizabella, mailed a Notice of Appeal of the Assessment on April 6, 2024, which the Board docketed on April 15, 2024. On the same day, the Board issued its standard Prehearing Order No. 1. On April 26, 2024, the Board issued an Order Changing Caption to reflect the party to which the Department's assessment was directed: Lizabella.

On May 6, 2024, the Board issued an Order to Obtain Counsel requiring Lizabella to have an attorney enter an appearance in the appeal or file a statement addressing its progress toward obtaining counsel by June 7, 2024. On June 7, 2024, Lizabella docketed a letter requesting an extension of the deadline to obtain counsel. The Board issued an order on June 13, 2024 granting the request for additional time and requiring Lizabella to obtain counsel or file a statement addressing its progress on or before July 15, 2024. On July 16, 2024, Lizabella docketed another letter describing its unsuccessful efforts to obtain counsel. Lizabella did not request additional time to obtain counsel in its letter and, to date, no counsel has entered an appearance on behalf of the appellant.

The Department filed a motion to dismiss the appeal on July 18, 2024 on the grounds that Lizabella failed to prepay the civil penalty as required by the Clean Streams Law and Surface Mining Conservation and Reclamation Act, and failed to obtain counsel as required by the Board's regulations. Lizabella filed its Response on August 23, 2024, alleging that it is financially unable to prepay the assessed civil penalty, in addition to arguing that there is no need to obtain counsel, and that its impecuniousness would prevent it from doing so. The Department filed its Reply in

support of its Motion to Dismiss the appeal on September 6, 2024. The Motion to Dismiss is now ripe for discussion.

**Standard**

The Board evaluates a motion to dismiss in the light most favorable to the non-moving party and only grants the motion where the moving party is entitled to judgment as a matter of law. *Protect PT v. DEP*, EHB Docket No. 2023-025-W, slip op. at 2 (Opinion and Order on Motion to Dismiss Jan. 10, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. When resolving a motion to dismiss, the Board accepts the non-moving party's version of events as true. *Clean Air Council v. DEP*, 2023 EHB 203, 206 (citing *Pa. Fish and Boat Comm'n v. DEP*, 2019 EHB 740, 741); *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155.

**Discussion**

By its Motion and in Reply to the appellant's Response, the Department argues that this appeal must be dismissed for two reasons: first, because the appellant failed to prepay the assessed civil penalty or file a verified statement claiming an inability to do so along with its Notice of Appeal, and second, because Lizabella, an LLC, has failed to obtain counsel as required by our Rules, which state that "parties, except individuals appearing on their own behalf, shall be represented by an attorney in good standing at all stages of the proceedings subsequent to the filing of the notice of appeal or complaint." 25 Pa. Code § 1021.21(a). As a limited liability company, Lizabella is not an individual appearing on its own behalf[1] and, therefore, must be represented by

[1] While Dennis Sluciak, the Sole Member and Manager of Lizabella, did initiate this appeal under his own name, the Department's action was addressed to Lizabella Mining, LLC only, and so this Board properly issued an Order changing the caption to reflect Lizabella, rather than Sluciak, as the appellant.

counsel.[2] As the Department points out, the Board has repeatedly held that a limited liability company's failure to obtain counsel will result in dismissal of an appeal. *Earth First Recycling, LLC v. DEP*, 2018 EHB 819; *Waroquier Coal Co. v. DEP*., EHB Docket No. 2024-007-BP, *slip op.* (Opinion and Order on Failure to Obtain Counsel issued May 17, 2024); *Mann Realty v. DEP*, 2015 EHB 110; *Falcon Coal & Construction Co. v. DEP*, 2009 EHB 209.

In *Earth First*, as here, the appeal was filed *pro se* and signed by an individual member of the LLC at issue. 2018 EHB 819-20. There, as here, the Board gave the appellant LLC three opportunities to obtain counsel prior to receiving a Motion to Dismiss from the Department. *Id.* at 820. Although Earth First was not responsive to the Board's orders, whereas Lizabella has been, Lizabella's responsiveness cannot overcome a regulatory requirement that contains no exception and is in place to prevent the unauthorized practice of law.

While the Board appreciates Mr. Sluciak's continued engagement with the appeal process and Board Orders, the fact of the matter is that Lizabella is a limited liability company that is required by Board regulations to be represented by counsel in order to continue with its appeal. The Board gave Lizabella several opportunities over many months to comply with the Board's Rules and it has failed to do so. Further, in its most recent filing to the Board, Lizabella indicated that it did not intend to obtain counsel, stating that "there is no need for [c]ounsel." (Response at

[2] A corporation or limited liability company must be represented by legal counsel in judicial proceedings and may not appear *pro se*. *The Spirit of the Avenger Ministries v. Commonwealth*, 767 A.2d 1130 (Pa. Cmwlth. 2001; *Walacavage v. Excell,* 480 A.2d 281 (Pa. Super. 1984) ("a corporation may appear in court only through an attorney at law admitted to practice before the court. The reasoning behind the rule is that a corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control. . . . [T]he purpose of the rule was not the protection of stockholders but the protection of the courts and the administration of justice. . . . [A] person who accepts the advantages of incorporation for his or her business must also bear the burdens, including the need to hire counsel to sue or defend in court.")

15.) Consequently, the Board grants the Department's Motion to Dismiss for failure to obtain counsel.

Because we dismiss on these grounds, the Board need not address the Department's endeavor to claim that an appellant's failure to prepay the assessed civil penalty or raise its alleged inability to prepay within the 30-day appeal period deprives the Board of jurisdiction to hear the appeal.

Therefore, we issue the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LIZABELLA MINING, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-091-CS** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 16th day of December, 2024, it is **ordered** that Lizabella Mining, LLC'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.**
**Judge**

s/ Sarah L. Clark
**SARAH L. CLARK**
**Judge**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

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

**DATED: December 16, 2024**

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

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

**For Appellant:**
Lizabella Mining, LLC
47 Grudevich Road
Cannonsburg, PA 15317
*(via first class U.S. mail)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **LIBERTY TOWNSHIP and CEASRA, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-036-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-COUNTY LANDFILL, Permittee** | : | **Issued: December 19, 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 of an NPDES permit issued to a municipal waste landfill authorizing the discharge of stormwater from the construction of the landfill and treated leachate from a future on-site wastewater treatment plant. The Board revises the permit to correct a typographical error listing the parameter radium-226 twice in the monitoring requirements for one of the outfalls instead of including a monitoring requirement for the parameter radium-228. The permit is otherwise upheld. The appellants have not met their burden of proof to establish that any of the effluent limitations or requirements in the permit were unlawful or unreasonable or that the permit should contain requirements for any additional parameters.

## FINDINGS OF FACT

The parties stipulated to the following facts:

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

1. CEASRA Inc. ("CEASRA") is a Pennsylvania non-profit corporation. (Parties' Stipulation of Facts No. ("Stip.") 1.)

2. Liberty Township is a township in Mercer County, Pennsylvania. (Stip. 2.)

3. CEASRA and Liberty Township are the Appellants. (Stip. 3.)

4. Tri-County Landfill, Inc. ("Tri-County") is a Pennsylvania corporation. (Stip. 4.)

5. The Department of Environmental Protection (the "Department") is the agency authorized to issue National Pollutant Discharge Elimination System ("NPDES") permits of discharges of industrial and other wastewaters in the Commonwealth under the Pennsylvania Clean Streams Law, 35 P.S. §§ 691.1 – 1001, including 35 §§ 691.5(b)(1) and 402. (Stip. 5.)

6. On September 9, 2019, Tri-County sent letters to Liberty Township, Pine Township, and Mercer County, advising that Tri-County would be submitting an NPDES Permit application to the Department, and advising that under Act 14, they would have 30 days to submit comments to the Department. Liberty Township received this letter on September 11, 2019 at 10:32 a.m. (Stip. 6.)

7. On September 18, 2019, Tri-County submitted to the Department an initial Application for NPDES Permit No. PA0263664 (the "NPDES Permit"), which contained: a. Narrative; b. Forms; c. Figures; and d. Appendices. (Stip. 7; Parties' Joint Exhibit No. ("J. Ex.") 2.)

8. On September 22, 2019, September 29, 2019, October 6, 2019, and October 13, 2019, notice of the NPDES Permit application was published in The Sharon Herald. (Stip. 8.)

9. On April 17, 2020, Tri-County submitted to the Department additional information, including sample analyses. (Stip. 9.)

10. On May 4, 2020, the Department requested that Tri-County collect three additional effluent samples. (Stip. 10.)

11. On August 24, 2020, Tri-County responded to the Department's May 4, 2020 request and provided analytical results of the additional requested sampling. (Stip. 11.)

12. The Department prepared a Fact Sheet regarding the NPDES Permit application. On October 30, 2020, Adam Pesek signed the Fact Sheet on behalf of the Department. On November 2, 2020, Justin Dickey signed the Fact Sheet on behalf of the Department. (Stip. 12; J. Ex. 3.)

13. On November 9, 2020, the Department sent the draft NPDES Permit, Fact Sheet with attachments, and draft public notice to Tri-County. (Stip. 13.)

14. On November 28, 2020, a draft of the NPDES Permit was published in the *Pennsylvania Bulletin* for public comment. (Stip. 14; J. Ex. 4.)

15. On December 23, 2020, the Department granted a 15-day extension to the public comment period, which was the maximum allowed under 25 Pa. Code § 92a.82(d). (Stip. 15.)

16. Liberty Township and CEASRA submitted comments on the NPDES Permit application. (Stip. 16.)

17. On December 28, 2020, the Department issued Tri-County Solid Waste Permit No. 101678 (the "Solid Waste Permit") for a solid waste facility located in Liberty Township and Pine Township. The Solid Waste Permit was based upon the application entitled "Major Permit Modification – Replacement Application." The Solid Waste Permit has a 10-year term from December 28, 2020 through December 28, 2030. (Stip. 17.)

18. On April 15, 2021, the Department held a virtual public hearing on the NPDES Permit application, where members of the public were permitted to provide testimony and

comment on the application. The Department issued public notice of this hearing in The Sharon Herald and the *Pennsylvania Bulletin*. (Stip. 18.)

19. On February 21, 2023, the Department provided Tri-County with the proposed final NPDES Permit, which included changes from the draft NPDES Permit. (Stip. 19.)

20. In response to the public comments, one of the changes made in the final NPDES Permit was to add quarterly monitoring for radium-226 and radium-228 at Outfall 006. However, radium-226 is listed twice in Part A, Section I.C on page 7 of the NPDES Permit, and radium-228 is not listed on that page, and both radium-226 and radium-228 are identified in Part C, Section VI on page 31 of the NPDES Permit. (Stip. 20.)

21. On February 23, 2023, Tri-County advised the Department that it had no comments on the draft final NPDES Permit. (Stip. 21.)

22. On March 6, 2023, the Department issued a Comment and Response Document stating that: "Many of the comments received were similar and concentrated on a few major issues: radiological concerns related to the acceptance of oil and gas waste at the landfill, flooding concerns, impact from the industrial waste discharges to groundwater and water wells, human health, wildlife health, proposed permittee's compliance history, and submitted application data and information." (Stip. 22; J. Ex. 6.)

23. On March 10, 2023, the Department issued the NPDES Permit to Tri-County. The NPDES Permit has a five-year term, from April 1, 2023 through March 31, 2028. Justin Dickey signed the NPDES Permit on behalf of the Department. (Stip. 23; J. Ex. 1, 8.)

24. On March 10, 2023, the Department provided a copy of the NPDES Permit to Liberty Township and CEASRA. (Stip. 24.)

25. Notice of the Department's issuance of the NPDES Permit was published in the *Pennsylvania Bulletin* and The Sharon Herald. (Stip. 25; J. Ex. 9.)

26. The NPDES Permit authorizes discharges of the following types of effluent to an Unnamed Tributary (UNT) of Black Run:

> Outfall 004: "Stormwater runoff from construction of landfill cells and from earth berms."
>
> Outfall 005: "Stormwater runoff from construction of landfill cells and from earth berms."
>
> Outfall 006: "Landfill leachate, transfer station wastewater, truck wash, contaminated stormwater runoff, and sanitary wastewater."

(Stip. 26; J. Ex. 1.)

27. The NPDES Permit sets forth effluent limitations and monitoring requirements for each Outfall on pages 2-7. (Stip. 27; J. Ex. 1.)

28. The NPDES Permit contains in Part A, beginning on page 8, additional requirements, footnotes, and supplemental information. (Stip. 28; J. Ex. 1.)

29. Part A, Section III of the NPDES Permit contains requirements for self-monitoring, reporting, and recordkeeping. (Stip. 29; J. Ex. 1.)

30. Part A, Section III.D of the NPDES Permit contains specific toxic pollutant notification levels under 40 CFR 122.42(a). (Stip. 30; J. Ex. 1.)

31. Part C, Section III of the NPDS Permit addresses chemical additives. (Stip. 31; J. Ex. 1.)

32. Part C, Section IV of the NPDES Permit addresses requirements applicable to stormwater outfalls. (Stip. 32; J. Ex. 1.)

33. Part C, Section V of the NPDES Permit addresses requirements for landfill leachate discharge. (Stip. 33; J. Ex. 1.)

34. Part C, Section VI of the NPDES Permit addresses the United States Environmental Protection Agency's ("EPA's") analytical methods to test for radium-226 and radium-228. (Stip. 34; J. Ex. 1.)

**Additional Findings of Fact**

35. The narrative portion of the NPDES Permit application contained the following sections:

a. 1.0 Introduction, which included a brief description of the new landfill cells to be constructed pursuant to the solid waste permit, including the deposit of the relocated excavated waste therein, and noted that the proposed discharge would be from a proposed wastewater treatment plant primarily treating landfill leachate.

b. 2.0 Leachate Management, which generally described the process by which leachate would be generated in the newly constructed landfill cells, conveyed to leachate storage tanks and potentially to a treatment plant for treatment and discharge; identified pollutant analysis results from Seneca Landfill and leachate sampled from Piezometer 29 located within the existing waste at the Tri-County landfill site as predictive of leachate for purposes of the application; and utilized data from Seneca Landfill to estimate leachate generation.

c. 3.0 Other Sources of Flow to Outfall 006, identifying other proposed sources of flow to the treatment plant that will discharge to Outfall 006, including transfer station truck wash and sanitary wastewater.

d. 4.0 Proposed Treatment Plant, which estimated the flow from the proposed wastewater treatment plant.

e. 5.0 Stormwater, describing an existing NPDES permit for stormwater associated with the Tri-County Industries waste transfer station.

(J. Ex. 2.)

36. The application contained a description of the business or operations resulting in discharges:

> Tri-County Landfill, Inc. is proposing to re-open the existing historic landfill to relocate the historic waste and accept new waste for disposal into a newly constructed lined municipal solid waste landfill expansion. Currently, the site has a waste-hauling operation and transfer station facility owned and operated by Tri-

> County Landfill Industries, Inc. (parent company of Tri-County Landfill, Inc.) These operations will continue to run in addition to the proposed landfill facility operations. The existing NPDES permit (PAR808328) is held by Tri-County Industries, Inc. for the stormwater discharges associated with runoff of the hauling and transfer station property (Outfalls 001, 002, 003). See Project Narrative for further details.

(J. Ex. 2.)

37. The application states:

> [A]s the Tri-County Landfill is not currently operating and does not have a leachate treatment facility constructed yet, the pollutant analysis for effluent from Outfall 006 is not available. Therefore, the pollutant analysis results from Seneca Landfill's most recent NPDES renewal have been included in this application as comparable information from an existing similar facility. Seneca Landfill currently operates a Centralized Waste Treatment Facility, however at the time of their NPDES renewal sampling they did not accept any additional outside liquid waste streams. As indicated in the pollutant summary tables, the projected results are based on discharge from an Outfall comprised of effluent from a leachate treatment facility that will be comparable to what is proposed for TCL [Tri-County Landfill].

(J. Ex. 2.)

38. An NPDES permit establishes effluent limitations and monitoring requirements for a point source discharge to a receiving stream. (Notes of Testimony Transcript Page No. ("T.") 539.)

39. The NPDES permit does not authorize construction of the treatment plant. A separate water quality permit is required to authorize construction of the treatment plant. (T. 30, 112, 160-61.)

40. The receiving stream for the discharges, a UNT to Black Run, is designated a Cold Water Fishery under Title 25, Chapter 93 of the Pennsylvania Code. (T. 62, 541; J. Ex. 3.) There are no other existing uses. (T. 544.) Therefore, the Department uses the stream's designated uses to establish effluent limitations in the permit. (T. 545.)

41. In addition to the designated use of Cold Water Fishery, the Department also applies the Chapter 93 statewide list of designated uses to all surface waters, which are aquatic life, water supply, and recreation. (T. 546-47.)

42. Black Run (including the UNT) is listed as "impaired" on the Section 303(d) list, which is a list maintained pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d). (T. 74, 589; J. Ex. 3.) A stream is listed as impaired if it is not meeting its designated uses. (T. 541-42.) In other words, the current water quality of the UNT is listed as not being sufficient to support a cold water fishery.

43. The Department has not prepared a Total Maximum Daily Load ("TMDL") for the UNT. (T. 547.)

44. In accordance with the Department's Standard Operating Procedure entitled "Establishing Effluent Limitations for Individual Industrial Permits," the effluent limitations, monitoring requirements, and benchmark values from NPDES PAG-03 General Permit for industrial stormwater Appendix C were placed in Tri-County's permit for Outfalls 004 and 005, which will discharge stormwater runoff that has not come into contact with any waste. (T. 309, 595; J. Ex. 3.)

45. Any stormwater that comes in contact with waste is conveyed by different controls to the leachate management system, including leachate storage tanks, and will not be conveyed to the sedimentation control basin, which outflows to Outfalls 004 and 005. (T. 28, 309, 316-17.)

46. With respect to the proposed discharge of treated wastewater at Outfall 006, Tri-County was required to submit analytical data for pollutants set forth in Pollutant Groups 1 through 6. (T. 548.) The Department's NPDES permit application instructions contain a standard set of pollutant groups that must be sampled for depending on the type of process wastewater proposed

to be discharged by a facility. (T. 109.) Pollutant Groups 1 through 6 contain parameters representative of the general pollutants of concern that are expected to be contained in the leachate for municipal waste landfills. (T. 598-99, 602.) Applicants for a new discharge, like this one, are allowed to use analytical results of samples collected from similar facilities. (T. 548.)

47. Tri-County submitted the analytical results of samples of leachate collected in 1994 and 2000 from Piezometer 29 at Tri-County Landfill, and samples of leachate generated at Seneca Landfill collected from the pump house before treatment. (T. 180-81, 548, 599-600.) These analytical results were used to populate the tables for Pollutant Groups 1 through 6 in the NPDES permit application, which the Department used to establish the effluent limitations in the permit. (T. 602.)

48. Seneca Landfill is a geographically similar landfill owned by the same operator as Tri-County accepting the same non-hazardous municipal waste streams, and the samples from Piezometer 29 represented on-site data at the Tri-County site. (T. 548-49.) Justin Dickey, the Department's Program Manager for the Clean Water Program, Northwest Regional Office, credibly concluded that these analytical results are "as good as it can get" in terms of estimating the potential influent to the treatment plant at Tri-County for permitting purposes. (T. 548-49, 602.)

49. After considering influent information, the Department determined whether the discharge at Outfall 006 is subject to any technology-based limitations. (T. 172-73, 549.)

50. The Department determined that the federal effluent limitation guidelines (ELGs) found in 40 CFR Part 445 Subpart B – ELGs for RCRA Subtitle D Non-Hazardous Waste Landfills applied, and imposed applicable effluent standards and monitoring requirements for that category. (T. 549-50; J. Ex. 3; Department Exhibit No. ("DEP Ex.") 21.) This effluent limitation guideline

is applicable because Tri-County Landfill is a non-hazardous municipal waste landfill. (T. 550, 599.)

51. The Department also applied technology-based effluent limitations drawn from the Department's regulations at Chapter 93. (T. 550-51; DEP Ex. 22.) These limits were based on the type of industrial waste discharge as well as the fact that chlorine disinfection would be used to treat the sanitary component of the wastewater. (T. 551.)

52. The Department next evaluated whether the discharge to Outfall 006 was subject to water quality-based effluent limitations (WQBELs). (T. 551.) WQBELs are site specific limitation required to protect instream water quality. (T. 551.) There are three models the Department uses to establish WQBELs. (T. 551-54.) The models are conservative in that they use conservative inputs including a low Q7-10 flow for the stream and a conservative design discharge rate. (T. 171-72, 558.)

53. Q7-10 flow is defined as "[t]he actual or estimated lowest 7 consecutive-day average flow that occurs once in 10 years for a stream with unregulated flow, or the estimated minimum flow for a stream with regulated flow." 25 Pa. Code § 96.1.

54. The Department used the WQM 7.0 Version 1 water quality model to determine appropriate limits for $CBOD_5$, $NH_3$-N, and dissolved oxygen. (T. 551-52.) The Department evaluated whether WQBELs were required for the discharge at Outfall 006 due to the potential to contain total residual chlorine (TRC) based on the potential use of chlorine for treatment. The Department included limitations for these parameters based to protect the receiving stream. (T. 552, 554-55; J. Ex. 3; DEP Ex. 23.)

55. The Department then utilized its Toxics Management Spreadsheet (TMS) to determine which pollutants have a reasonable potential to exceed instream water quality criteria

and to determine WQBELs for discharges of toxic pollutants. (T. 552.) The analytical data for Pollutant Groups 1 through 6, as well as background information on the stream such as pH, hardness, stream flow, and the proposed rate of the discharge contained in the permit application, were entered into the spreadsheet. (T. 552-53.)

56. The TMS recommended effluent limitations for total aluminum, total antimony, total arsenic, total barium, total boron, total cadmium, total chromium (III), total cobalt, total copper, free available cyanide, dissolved iron, total iron, total lead, total manganese, total nickel, total phenols (phenolics), total selenium, total thallium, total zinc, benzene, 1,2-dichoroethane, methylene chloride, vinyl chloride, bis(2-ethylhexyl)phthalate, naphthalene, phenanthrene, alpha-endosulfan, and color. The TMS recommended monitoring for ethylbenzene and toluene. (J. Ex. 3.)

57. The Department ran a third model because the application suggested the use of chlorine disinfection for the sanitary waste. (T. 554.) The model determined the need for a water quality-based limit more stringent than the technology-based limit for residual chlorine. (T. 554-55; DEP Ex. 23.)

58. The Department's models also used the necessary instream water quality criteria needed to protect and maintain the uses of the receiving stream based on the requirements of Chapter 93. (T. 556.)

59. The Department imposes the more stringent criteria for a pollutant that is the subject of both a technology based effluent limitation and water quality-based effluent limitation. (T. 556.)

60. The Department imposed a best professional judgment limitation for total nitrogen in the permit in accordance with its Standard Operation Procedure entitled "Establishing Effluent Limitations for Individual Industrial Permits." (J. Ex. 3.)

61. The Department considered the Cold Water Fisheries criteria and the statewide uses and developed effluent limitations that are protective of those uses for the UNT to Black Run. (T. 544, 556, 557, 559.)

62. The limitations and monitoring requirements established by the Department reflect the most stringent limitations among technology, water quality, and best professional judgment. (556, 559; J. Ex. 3.)

63. In 2016, the Department published a study assessing potential exposure and impacts from TENORM associated with oil and gas operations in Pennsylvania (the "TENORM Study"). (DEP Ex. 46.)

64. TENORM is Technologically Enhanced NORM, which is Naturally Occurring Radioactive Material. (T. 499-500.)

65. NORM in nature is in equilibrium and TENORM is when the equilibrium is broken. (T. 500.)

66. A portion of the TENORM Study assessed the TENORM associated with oil and gas waste being accepted by landfills by sampling the leachate at all 51 landfills in Pennsylvania. (T. 473, 497; DEP Ex. 46.)

67. The TENORM Study concluded that there was not a measurable difference in average radiation concentration in leachate from landfills accepting TENORM oil and gas waste and landfills not accepting TENORM oil and gas waste. (T. 497, 499.)

68. Tri-County's landfill is permitted to accept a small amount of solid oil and gas waste. (T. 431, 498.)

69. In response to public comments, the Department added a quarterly monitoring requirement to Tri-County's NPDES permit for Outfall 006 for the parameters radium-226 and

radium-228, even though the Department does not expect radium to be a pollutant of concern for a non-hazardous municipal waste landfill. (T. 563-64, 569, 601, 602.)

70. However, the NPDES permit mistakenly lists a monitoring requirement for radium-226 twice, instead of including radium-228, which the Department refers to as a typo. (T. 569, 573; J. Ex. 1.)

71. Among radioactive parameters, only radium (including radium-226 and radium-228) is soluble in water and will leach out of soil when water passes through it. (T. 500-01, 505, 510-11.)

72. Radioactive parameters such as thorium and uranium are not soluble in water. (T. 511, 512.)

73. There is no federal or state technology-based effluent limitation for radium-226 or radium-228 in the non-hazardous waste landfill category. (T. 578, 604.)

74. There is no indication that Tri-County's planned acceptance of oil and gas waste at its landfill will have a statistically significant impact on the concentration of radium-226 and radium-228 in the landfill's leachate. (T. 495, 498, 501.)

75. Any discharge authorized under the NPDES permit will not pose a threat to the UNT to Black Run, aquatic life, or human life in terms of radiation due to Tri-County accepting some amount of oil and gas waste for disposal. (T. 496, 506-07, 516.)

76. The EPA does not review most NPDES permit applications or permits issued by the Department. However, the Department and EPA have developed a list of permit types for which EPA has not waived review, and for which a copy of the application must be provided to EPA. (T. 22-23, 561.) That list is entitled "Types of PADEP-Issued Non-Mining NPDES Permits

Not Eligible for EPA Permit Review Waiver (Non-Waived Permits), Revised December 2019." (Appellants' Exhibit No. ("App. Ex.") 61.)

77. Item 8 on the first page of the list relates to "facilities that accept or are proposing to accept and treat oil and gas resource extraction wastewater" as not being waived. (T. 561-62; App. Ex. 61.) Item 8 is not applicable because the Tri-County wastewater treatment plant is not proposing to accept oil and gas resource extraction wastewaters. (T. 24-25, 562.)

78. The Department did not submit Tri-County's permit application to EPA for review. (T. 24.)

79. The Department conducted a review of the compliance of Tri-County and its related companies and credibly determined there were no open violations and the compliance history demonstrated an ability to comply with the NPDES permit requirements and all other permits. (T. 576.)

80. There has only been one notice of violation issued to Tri-County or any of its affiliated companies since the hearing on the solid waste permit held in April 2023, and the violations noted therein are being addressed to the Department's satisfaction. (T. 356.)

## DISCUSSION

Liberty Township and CEASRA, Inc. (the "Appellants") have appealed the Department of Environmental Protection's (the "Department's") issuance of NPDES Permit No. PA0263664 to Tri-County Landfill, Inc. ("Tri-County"). The same Appellants previously appealed a 2020 major modification to Tri-County's solid waste management permit that authorized the formerly dormant municipal waste landfill to once again accept waste and to operate on an approximately 99-acre area. On January 8, 2024, we issued an Adjudication dismissing the Appellants' appeal. *Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L (Adjudication, Jan. 8, 2024), *appeal pending*, Cmwlth.

Ct. Docket No. 107 C.D. 2024. The NPDES permit currently under appeal sets the terms and conditions for discharges associated with the construction and operation of that landfill.

The Board reviews Department actions *de novo*, meaning the Board "decide[s] the case anew on the record developed before" it. *Borough of St. Clair v. DEP*, 2016 EHB 299, 318 (citing *Dirian v. DEP*, 2013 EHB 224, 232; *O'Reilly v. DEP*, 2001 EHB 19, 32; *Warren Sand & Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975)). In a third-party appeal such as this one, the Appellants bear the burden of proof. 25 Pa. Code § 1021.122(c)(2). The Appellants must show by a preponderance of the evidence that the Department acted unreasonably or contrary to the law, that its decision is not supported by the facts, or that the decision is inconsistent with the Department's obligations under the Pennsylvania Constitution. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 236, *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016); *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1156.

The Appellants phrase many of their arguments as alleged errors in the permit application process. However, this Board reviews *permits*, not permit *applications*. *Snyder v. DEP*, 2016 EHB 705, 706. It is not our responsibility to re-review permit applications. The reason a permit may be defective might be traced back to a deficient permit application, but our focus remains on the permit, not the permit application.

> The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. Indeed, the very purpose of a deliberative, iterative permit review process is to correct errors and ensure that, in the end, everything has been done correctly. The Board's objective is to determine whether any action needs to be taken regarding the final permit. There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.

*O'Reilly v. DEP*, 2001 EHB 19, 51. The Board "do[es] not so much review the Department's review process leading up to a final decision as the final decision itself." *Friends of Lackawanna, supra*, 2017 EHB at 1156. In *Stedge v. DEP*, 2015 EHB 577, we said,

> The Appellants argue that Chesapeake's application did not adequately demonstrate that all of the setbacks were satisfied. This argument is emblematic of the Appellants' approach to this case in general: they criticize the application for not showing setbacks but then fail to show that any setbacks have in fact been violated. This is just the sort of criticism directed toward the permit application as opposed to the permit itself that we have repeatedly said will rarely justify correction of the Department's action on our part, *O'Reilly v. DEP*, 2001 EHB at 51, and part of the laundry list of potential but unsubstantiated problems that also will not support a correction on our part, *Shuey v. DEP*, 2005 EHB at 712.

*Id.* at 612. In short, we ask whether there is anything wrong with the permit, not the application. As a practical matter in this case, however, all of the Appellants' various challenges to Tri-County's permit application, while inelegantly phrased, are the functional equivalent of challenges to the permit itself and we will deal with them accordingly. For example, the Appellants allege the permit *application* was defective because it did not include baseline data regarding the water quality of the receiving stream. We will instead determine whether the *permit* is defective because it is not based on baseline data.

**The NPDES Permit Terms**

Tri-County's NPDES permit authorizes discharges from three outfalls: Outfalls 004, 005, and 006. Outfalls 004 and 005 will discharge uncontaminated stormwater runoff from construction of landfill cells and earth berms. Outfall 006 will discharge treated landfill leachate, transfer station wastewater, truck wash, contaminated stormwater runoff, and sanitary wastewater from a future wastewater treatment plant.[1] The receiving stream for the discharges is an unnamed

[1] Tri-County has not obtained a water quality management (Part II) permit for the construction of the plant to treat the wastewater before it is discharged from Outfall 006. Effluent limits are established in an NPDES permit, while treatment methods to meet those effluent limits are contained in a separate water quality management or Part II permit. *See City of Allentown v. DEP*, 2017 EHB 908, 917 n.3 (explaining difference

tributary (UNT) to Black Run. The designated use for the UNT to Black Run is Cold Water Fishes under Title 25, Chapter 93 of the Pennsylvania Code. It is not designated as a High Quality or Exceptional Value water. There is no other existing use. Of course, the statewide uses apply to every stream, including the UNT.

The Appellants argue that the terms of Tri-County's NPDES permit are "improper, unlawful and inadequate." When it comes to permit terms and conditions, effluent limits are at the heart of any NPDES permit, yet the Appellants have nothing negative to say about the actual limits in Tri-County's permit. The Appellants did not present *any* evidence that there is anything wrong with any of the effluent limits in the permit. The Appellants' only expert witness, Dr. John Stolz, acknowledged that he had no criticisms to offer regarding any of the effluent limits. (T. 433.) He noted that a quick review while he was on the witness stand confirmed that, with the exception of pH (which he did not fault), most of the limits "fall within drinking water parameters, or the EPA guidelines." (T. 433.) The Appellants have also not challenged any of the other specific terms or conditions of the permit. Indeed, the representative of CEASRA who testified at the hearing stated that CEASRA has not made a specific objection to any of the effluent limits in the permit. (T. 290-91.) Instead, they mount a series of generalized attacks, all of which lack any legal and/or factual support.

Instead of offering anything specific, the Appellants say things like the discharge will "pollute" the stream. Unfortunately, their briefs are replete with inaccurate and unhelpful hyperbole, such as a claim that the permit authorizes "essentially unlimited discharges of radioactive, toxic, and hazardous waste." (App. Brief at 53.) The Appellants, and unfortunately, their expert Dr. Stolz (T. 425-26), mistakenly assume that *any* discharge containing any pollutants

between NPDES and water quality management permits); *University Area Joint Auth. v. DEP*, 2013 EHB 1, 1-2 (same).

into any stream will necessarily worsen the water quality of the stream. That is not necessarily the case. For example, query whether a concentration-based effluent limit could actually lower the pre-existing concentration of a pollutant in the stream, especially where, as here (T. 557), the flow of the discharge will dramatically increase the base flow of the stream.

More to the point, the Appellants' position is legally unsound. The law does not prohibit the addition of any pollutants to any stream. *Brockway Borough Mun. Auth. v. DEP*, 2015 EHB 221, 243 ("The point of the environmental laws is not to prohibit the discharge of all pollutants, but to intelligently regulate such activity so that regulatory standards are met, environmental incursions are minimized, and any remaining harms are justified."), *aff'd*, 131 A.3d 578 (Pa. Cmwlth. 2016). Rather, for discharges that are not into special protection waters, the effluent limits in a permit must comply with (1) technology-based limits established in the regulations for the industry involved, and (2) water quality-based effluent limits designed to ensure that the discharge will not interfere with the stream's ability to meet its (a) designated and (b) existing uses. 25 Pa. Code § 93.4a; 25 Pa. Code § 96.4(b); 40 CFR §§ 125.1-125.3 (incorporated by 25 Pa. Code § 92a.3); *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 350; *Borough of Stockertown v. DEP*, 2016 EHB 456, 461-62; *Mun. Auth. of Union Twp. v. DEP*, 2002 EHB 50, 52-53. The effluent limits must be protective of the stream's designated uses even if the stream is not currently meeting them. *Penn Coal*, 2017 EHB at 385. The Appellants have not shown or even attempted to show that Tri-County's discharge will be inconsistent with any of these regulatory requirements. There has been no showing that Tri-County's discharge will interfere with the stream's uses, which is the key inquiry.

Once again in general terms, the Appellants criticize the Department's characterization of the waste stream to be treated at Tri-County's treatment plant. The Department's first step in

developing permit terms is to consider the influent that will be going into the plant for treatment. The goal is to characterize the influent waste stream to determine, using best professional judgment, what parameters should be covered by the permit. The Appellants assert that the Department did not have enough information regarding the influent to the treatment plant to formulate appropriate effluent limits. No expert testified to this, including Dr. John Stolz. Dr. Stolz, the Appellants' only expert witness, did not review the permit application (T. 437), so he was in no position to opine meaningfully on the investigation that was performed.

In fact, the Department did a thorough characterization of the waste stream expected to be treated at the future treatment plant using information that was actually superior to the estimates and information that is typically relied upon when dealing with discharges that do not yet exist, such as pilot studies and engineering literature. (T. 548.) Here, the treatment plant will be treating leachate and other water that has come into contact with waste. The Department was able to use a monitoring well that measured groundwater at the site, and samples of leachate generated at the Seneca Landfill collected from the pump house before treatment. (T. 180-81, 548, 599-600.) Seneca Landfill is a relatively close landfill owned by the same operator with similar expected waste streams. We credit the expert opinion of Justin Dickey, the Department's Regional Clean Water Program Manager, that, for purposes of characterizing the reasonable potential constituents of the future waste stream, the information used here was "about as good as it can get." (T. 548-49.) The Department had enough data regarding the influent anticipated to exercise informed professional judgment in formulating the effluent limits.[2]

[2] On this and on other issues in this appeal, it is worth remembering that permit terms and conditions are not written in stone. The Department has the right to amend the permit when necessary to protect the environment if new information comes to light. 25 Pa. Code § 92a.72 (incorporating 40 CFR § 122.62).

The specific concern of the Appellants in this regard seems to be that, in part because of the allegedly inadequate investigation, the Department left out limits for some parameters that they contend should be in the permit. The Appellants list chemicals found in the groundwater and untreated leachate from the Seneca Landfill that are not included in the permit. Once again, the Appellants presented no expert testimony suggesting this is worthy of our concern. We do not know whether the chemicals are likely to end up in the discharge, and if so, at problematic levels. We do not know anything about the chemicals, how much of them are present, or why the Appellants believe they "should have been included in the permit." We have not been given any insight on what constitutes reasonable limits based on professional judgment on the number and limits of parameters in the permit. We do not know if or why the constituents the Appellants say are missing pose a threat to the uses of the receiving waters.

The Department requires an applicant to submit analytical results for parameters identified in Pollutant Groups 1 through 6, which are then used to establish the effluent limitations. (T. 602.) The parameters in these pollutant groups are indicative of the pollutants of concern and are evaluated in the Department's review of the application. (T. 598-99.) These analytical results were used to populate the tables for Pollutant Groups 1 through 6 in the NPDES permit application, which the Department used to establish the effluent limitations. (T. 602; J. Ex. 2.) The Appellants did not present any technical evidence or expert testimony calling into question this process or the results thereof. The Appellants contend that the Department should also consider unidentified "trade secret or proprietary chemicals" they allege are used by gas drillers and speculate may be in landfill leachate since the Tri-County Landfill is permitted under its solid waste permit to accept a small amount of solid waste from oil and gas drilling. But the Appellants fail to point to any regulation requiring analytical data for such alleged unidentified chemicals to set effluent limits in

Tri-County's permit, and they fail to explain how the presence of any such unidentified chemicals would impact the establishment of effluent limits for the plethora of pollutants listed in Pollutant Groups 1 through 6, how any such chemicals have the reasonable potential to find their way into the discharge from the treatment plant, or how they could threaten the uses of the receiving stream. The Appellants have not met their burden of proving any additional parameters should have been included in the permit.

The Department's next step in formulating effluent limits was to apply the regulatory technology-based limits established in the federal and state regulations. The Department determined that the federal effluent limitations and guidelines (ELGs) found in 40 CFR Part 445 Subpart B – ELGs for RCRA Subtitle D Non-Hazardous Waste Landfills – applied, and imposed the applicable effluent standards and monitoring requirements for that category. This effluent limitation guideline is applicable because the Tri-County Landfill is a non-hazardous municipal waste landfill. Other technology based effluent limitations the Department considered are drawn from the Department's regulations in 25 Pa. Code Chapters 92a and 95. These limits were based on the type of industrial waste discharge as well as the fact that chlorine disinfection will be used to treat the sanitary component of the wastewater. The Appellants have not questioned the permit limits to the extent they are derived from the technology-based regulations.

The Department next evaluated whether the discharge from Outfall 006 was subject to water quality-based effluent limitations (WQBELs). WQBELs are site specific limitations required to protect instream water quality. There are three models the Department used to establish WQBELs. The models are conservative as the Department uses conservative inputs such as a low Q7-10 flow for the stream and a conservative design discharge rate. Because the unnamed tributary to Black Run, the receiving stream for Outfall 006, is designated a Cold Water Fishery,

the Department included in the models the criteria and uses for Cold Water Fisheries identified at 25 Pa. Code § 93.4 to ensure the resulting effluent limitations are protective of those uses.

The Department first used the WQM 7.0 Version 1 water quality model to determine appropriate limits for CBOD5, NH3-N, and dissolved oxygen. The Department evaluated whether WQBELs were required for the discharge at Outfall 006 due to the potential to contain total residual chlorine based on the potential use of chlorine for treatment. The Department included limitations for various parameters based upon these evaluations to protect the receiving stream.

The Department then utilized its Toxics Management Spreadsheet (TMS) to determine which pollutants have a reasonable potential to exceed instream water quality criteria and to determine WQBELs for discharges of toxic pollutants. The analytical data for Pollutant Groups 1 through 6, as well as background information on the stream such as pH, hardness, stream flow, and the proposed rate of the discharge contained in the permit application are entered into the spreadsheet. The model also uses the instream water quality criteria necessary to protect and maintain the uses of the receiving stream based on the requirements of Chapter 93. The TMS calculated effluent limitations for certain parameters, specifically: total aluminum, total antimony, total arsenic, total barium, total boron, total cadmium, total chromium (III), total cobalt, total copper, free available cyanide, dissolved iron, total iron, total lead, total manganese, total nickel, total phenols (phenolics), total selenium, total thallium, total zinc, benzene, 1,2-dichloroethane, methylene chloride, vinyl chloride, bis(2-ethylhexyl)phthalate, naphthalene, phenanthrene, alpha-endosulfan, and color. The TMS recommended monitoring for ethylbenzene and toluene.

The Department ran a third model because the application suggested the use of chlorine disinfection for the sanitary waste. The model determines the need for a water quality-based limit more stringent than the technology-based limit for residual chlorine. The Department also

imposed a best professional judgment limitation for total nitrogen in the permit in accordance with the Department's standard operating procedure entitled "Establishing Effluent Limitations for Individual Industrial Permits." (J. Ex. 3.)

Through use of these procedures, the Department ensured that the effluent would protect the uses of the stream. We credit the testimony of the Department's expert, Justin Dickey, that the limits set forth in Tri-County's permit are consistent with applicable technology-based limits and will protect the uses of the stream.

The Appellants say the Department's modeling was "wholly off base" and "improper." Once again, they offered no expert testimony to back up this claim. In technical cases such as this, the Board is highly dependent on expert testimony. *Brockway, supra*, 2015 EHB at 238-39. Simply asserting baseless claims such as this without offering technical evidence is simply not enough to carry the Appellants' burden of proof. *Id.*

The Appellants' particular complaint appears to be that the modeling was deficient because no baseline water samples were taken to measure pre-existing pollutants in the receiving stream. The Appellants do not explain how or why baseline sampling would have influenced the terms of the permit. They do not point to anything in the law that requires such testing in this situation. The modeling ensured that the permitted discharge would not itself interfere with the designated use of the stream. There is no existing use that elevates protection above the stream's designated use, and the stream is not a High Quality or Exceptional Value stream.

With regard to the Appellants' concern that the discharge will "worsen the stream's impairment," there is no evidence of any potential "worsening" here. Although it is true that the UNT to Black Run is included on the list of impaired waters that the Department maintains pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), it is well-established that

the Clean Water Act did not create a categorical ban on discharges to impaired waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992). *See also Friends of the Wild Swan, Inc. v. United States EPA*, 74 Fed. App'x 718 (9th Cir. 2003); *In re Carlota Copper Co.*, 11 E.A.D. 692 (EAB 2004).

The Appellants are correct that a stream's inclusion on the impaired waters list triggers the state's obligation to prepare a Total Maximum Daily Load (TMDL) for the stream. A TMDL is a calculation of the amount of pollutant(s) that a water body can tolerate and still attain its designated use. *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 343, 347. The Appellants complain that no TMDL has yet been established for the UNT of Black Run. They say no permit can be issued until a TMDL is established. That is incorrect. The Department is not required to refrain from issuing NPDES permits authorizing discharges into impaired waters where TMDLs are not yet available. *See City of Taunton v. United States EPA*, 895 F.3d 120, 139-40 (1st Cir. 2018); *Upper Blackstone Water Pollution Abatement Dist. v. United States EPA*, 690 F.3d 9, 26 (1st Cir. 2012*); In re City of Lowell*, 18 E.A.D. 115, 153 (EAB 2020); *In re City of Ruidoso Downs*, 17 E.A.D. 697, 733 (EAB 2019), *pet. for review denied sub nom.*, *Rio Hondo Land & Cattle Co. v. United States EPA*, 995 F.3d 1124 (10th Cir. 2021); *Carlotta Copper, supra*.

In the absence of a TMDL, the Appellants have not pointed us to anything in the law that requires the Department to further adjust effluent limits to account for the impaired status of the receiving stream so long as the limits are protective of the stream's uses. We are not independently aware of any such requirement. To the extent the Appellants believe the Department should move faster in preparing a TMDL for Black Run, the appropriate incentive is not to withhold issuance of Tri-County's permit.[3] Issuance of the permit does not prevent it from being revised in the future if necessary to comport with any future TMDL. *Penn Coal, supra*.

[3] The court in *Friends of the Wild Swan, Inc. v. United States EPA*, 130 F.Supp. 2d 1199 (D.Mont. 2000), *amended by* 130 F. Supp. 2d. 1204 (D. Mont. 2000), *aff'd in part, rev'd in part, and remanded*, 74 Fed.

The Appellants go on to argue that the Department "failed to do its job" by not identifying the source of impairment for the UNT to Black Run and "causing its restoration." (E.g. App. Brief at 50.) Therefore, presumably, the Department erred by issuing the Tri-County permit pending such restoration. It is true that the cause of the impairment has not been identified. However, if the Department is not precluded from issuing an NPDES permit for a discharge into impaired waters in any case, it necessarily follows that it is not precluded from issuing an NPDES permit for a discharge into impaired waters until the source of the impairment is uncovered and the waters are restored. The effect of the Appellants' extreme position would be to postpone indefinitely all further development with discharges in every impaired watershed in the Commonwealth. Such was never the intent of the Clean Water Act or the Commonwealth's implementing regulations. *Arkansas v. Oklahoma*, 503 U.S. at 108. Indeed, the purpose of TMDLs is not to halt all development and discharges associated therewith, it is to provide an equitable framework for managing permitting going forward in such a way that the stream is eventually restored. Permitting of discharges into impaired waters continues; it just needs to be consistent with the TMDL.

**Radiation**

One of the more particular focuses of the Appellants' opposition to the permit concerns radiation. They say the NPDES permit allows "the unlimited discharge of TENORM" (Technologically Enhanced Naturally Occurring Radioactive Material) or "radioactive waste" that will negatively impact the public and the environment. (App. Brief at 11, 53.) The Appellants believe there will be radiation in the treated leachate that is discharged from Outfall 006 because

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App'x 718 (9th Cir. 2003), enjoined the state from issuing certain permits into impaired waters until the state developed its TMDLs. It is not clear from subsequent developments in the case the extent to which this injunction was followed. This Board does not have equitable powers, but even if we did, we question whether such a drastic measure would be the most prudent way to spur the state on to quicker development of TMDLs. This appeal does not provide an appropriate occasion for analyzing whether the Department is moving forward with appropriate speed in developing TMDLs.

of Tri-County being permitted to accept some amount of oil and gas waste for disposal. The Appellants say oil and gas waste contains radiation, and therefore, the leachate that precipitates out of the waste disposed of at the landfill will also contain radiation. The permit contains monitoring requirements for radium, which the Department added in response to public comments, but the Appellants do not believe this is enough. They argue the permit should have defined effluent limits for radium, as well as a host of other radioactive parameters.

In support of their arguments on radiation, the Appellants rely on the testimony of their expert, Dr. Stolz. Tri-County and the Department rely on the testimony of Tri-County's well-qualified expert, Andrew Lombardo. Weighing competing expert testimony is one of the Board's core functions. *Montgomery Twp. Friends of Family Farms v. DEP*, EHB Docket No. 2020-082-L, slip op. at 19 (Adjudication, Nov. 15, 2024). *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)).

Both in terms of relevant experience, and in the presentation and explanation of his opinions, Andrew Lombardo was undoubtedly the more credible and convincing witness. Mr. Lombardo has spent nearly his entire career working in the field of health physics, which is the

management and evaluation of risk from radioactive material and the recommendation of protective actions to guard against that radioactive material. (T. 452.) He has extensive experience assessing occupational and public radiation exposure from air and water sources, decommissioning nuclear facilities, and remediating sites contaminated by radioactive material. He is a certified health physicist and holds a master's degree in the field. (T. 451, 474.) He has worked on numerous projects remediating landfills that had accepted radioactive waste, including landfills in Pennsylvania, and has performed hundreds of risk assessments for the handling, transportation, and disposal of radioactive material. (T. 461, 465-66, 475.) Mr. Lombardo also piloted the 2016 TENORM Study commissioned by the Department to assess impacts from radioactive material in unconventional oil and gas drilling operations. (T. 473; DEP Ex. 46.) Among other things, the TENORM Study sampled leachate at all 51 landfills in Pennsylvania and analyzed those samples for radioactive material, paying particular attention to a subset of nine of those landfills that accepted more oil and gas waste. Mr. Lombardo's experience is particularly relevant to assessing the radiation that might be contained in the leachate from a landfill like Tri-County, the radiation that might be contained in the post-treatment discharge under the NPDES permit, and the potential radiological risk, if any, of impacts to the receiving stream from the discharge.

The Appellants maintain their objection that Mr. Lombardo should have been disqualified from testifying in this case because he is employed by Perma Fix Environmental Services, Inc., which prepared the Department's TENORM Study. The Appellants rely on our decision in *Carlisle Pike Self Storage v. DEP*, 2022 EHB 214, wherein we disqualified a consulting firm from testifying against the Department on behalf of an appellant while the firm was simultaneously retained by the Department to work on the very project that was the subject of the appeal. We found that admitting testimony from these experts in the face of such a glaring conflict of interest

would have impugned the integrity of the proceedings and tainted our adjudication of the case. *Carlisle Pike* has nothing in common with the case before us. An accurate analogy would be presented if the Appellants hired Mr. Lombardo as their expert while he was simultaneously providing services to the Department regarding Tri-County's NPDES permit. No such glaring conflict of interest exists here. There is no cause for disqualification.

The Appellants think it is unfair that Mr. Lombardo's firm benefitted financially at taxpayers' expense for performing the TENORM Study, and now can turn around and testify on behalf of Tri-County about its NPDES permit, using in part knowledge he gained from the TENORM Study. To the extent the Appellants cite this rather remote connection as impeachment of Mr. Lombardo as well as their other attempts at impeachment regarding his employment with Perma-Fix, we find the effort to have been wholly unsuccessful. The evidence in no way detracts from his credibility. We found him to be knowledgeable, straightforward, and honest, and we fully credit his opinions in this matter.

On the other hand, Dr. Stolz was not convincing or persuasive. While qualified to render opinions on radiation issues in this appeal, his background is in biology and his Ph.D. is in microbial ecology and evolution. (T. 390.) His work involving radiation has only been within the last few years (App. Ex. 60), and he has only studied the effects of radiation on microbes, not humans, mammals, or fish. (T. 392.) As mentioned above, a notable omission in the work Dr. Stolz did in this case is that he failed to perform the basic task of reviewing Tri-County's NPDES permit application. (T. 437-38, 441.) This means that Dr. Stolz did not review any of the information Tri-County submitted to the Department. He did not review the leachate sample from Seneca Landfill or the groundwater monitoring well sample from the Tri-County site, or any of Tri-County's work that helped form the basis for the permit that he freely criticized. This not only

undermines Dr. Stolz's credibility, but it also raises questions about his motivation in testifying. Given the tenor of Dr. Stolz's testimony, we were left with the impression that he was not truly an impartial witness. He did not present his findings as a disinterested expert who was retained to study an issue and relate those findings to the Board within his best professional judgment, whatever the outcome of that study might be. Like in the prior hearing on the solid waste permit, he maintained that oil and gas waste should never be accepted for disposal at a municipal waste landfill, even while acknowledging that there exist effective treatment methods for removing radioactive constituents from wastewater. (T. 446.) All of his opinions in this matter seem to follow from this conviction.

Dr. Stolz also seemed to lack a firm factual understanding of the landfill and the treatment of leachate. For instance, he appeared to believe that the landfill would be accepting liquid wastewater from oil and gas operations, such as produced water (T. 396-401, 430), even though the solid waste permit limits Tri-County to accepting only solid waste from oil and gas operations. *See Liberty Twp., supra*, slip op. at 33 (¶ 185), 86. Overall, many of Dr. Stolz's opinions were conclusory and not well-supported. His final opinions were equivocal. He testified that the discharge of treated leachate under the terms of the permit *could* increase radioactivity in the UNT to Black Run and *could* result in higher conductivity (T. 427), but there was no opinion that it was likely to happen or any data or evidence to support that claim, even if he had made it. Nevertheless, in the interest of a complete record, we will address the Appellants' arguments and Dr. Stolz's opinions in support thereof.

The Appellants critique the radium monitoring requirements in the permit because they merely require quarterly monitoring and reporting of the concentration of radium in the discharge without imposing any mass or concentrations limits on the radium contained in the effluent.

Initially, to put the Appellants' radiation concerns into context, the landfill is only permitted to accept at maximum two percent of its waste as oil and gas waste. *Liberty Twp., supra*, at 87. Much like their more general attacks on the permit, the Appellants have not suggested anywhere in their briefs what any reasonable mass or concentration limits on radium should be, let alone justified with any evidence the imposition of a certain limit. They have not correlated any specific amount of radium to any specific or even generalized harm to the UNT to Black Run, human health, or the greater environment. There is no federal or state technology-based effluent limitation for radium for non-hazardous waste landfills, and the Appellants have not pointed us to any applicable water quality criteria for radium-226 or radium-228. (T. 578, 604.) *See* 25 Pa. Code Chapter 93.

Dr. Stolz testified about samples he collected at a treatment plant accepting leachate from another landfill, located in Westmoreland County, which received oil and gas waste. He said he found a statistically significant increase in radium-226 in sediment samples taken downstream of the treatment plant compared with sediment samples taken upstream of the treatment plant. (T. 410.) To the extent the Appellants rely on Dr. Stolz's work to support their contention that the permit should contain effluent limits for radium, there is not at all enough information to support this as being a relevant comparison for purposes of evaluating Tri-County's NPDES permit, or to justify any changes to the permit. We do not know what kinds of waste streams were accepted at the Westmoreland County landfill, what amount of oil and gas waste was accepted, and what kind of treatment was employed at the treatment plant, nor anything about the waters receiving the plant's discharge. Even if it were a relevant comparison, Mr. Lombardo reviewed Dr. Stolz's study and noted that the study had very limited sample results, and all of the downstream samples were within the range of background levels of radium in Pennsylvania of 0.5 to 2.0 picocuries per gram. (T. 507-08.) Although Dr. Stolz did not establish background in his study, even assuming

that background readings were on the low end of 0.5 picocuries per gram, the exempt limit for soils is 5.0 picocuries per gram above background, and all of Dr. Stolz's samples were below 2.0 picocuries per gram. (T. 508-09.)

Dr. Stolz also looked at the TENORM Study and focused on a landfill he believed to be the Seneca Landfill, which is owned by the same operator as Tri-County.[4] He looked at two tables with sample results of leachate influent and effluent from a group of landfills with on-site treatment plants. He noted that the values for some radioactive parameters for Seneca Landfill were higher for the effluent than the influent, and he opined that it showed that the radiation was being "concentrated" by the leachate treatment process. (T. 407-09, 449.) However, Mr. Lombardo, who designed and oversaw the TENORM Study, credibly testified that the influent and effluent samples were not correlated, meaning the sampled influent was not tracked through the treatment plant and then resampled as effluent upon completing the treatment process; the samples were taken at separate times. (T. 502.) In fact, this is clearly stated in the study itself: "The influent and effluent samples from the same facility do not represent the same leachate at different times in treatment." (DEP Ex. 46 (at 5-1).) We find it concerning that Dr. Stolz, either intentionally or through oversight, would offer the opinion that radiation is being "concentrated" through the leachate treatment process when the study clearly dispels that notion. Even putting aside that Dr. Stolz's opinion is factually incorrect, we again know nothing of the treatment process at the Seneca Landfill. Dr. Stolz relayed an anecdote about an unnamed company in Ohio allegedly making deicer out of conventional oil waste brine that supposedly increased the concentration of radium-226 in its process (T. 408), but even if true, there is absolutely nothing to suggest that creating a

[4] The TENORM Study was blind (T. 487-88) and did not identify the names of any landfills, but the Appellants asked Dr. Stolz, without objection, if Seneca Landfill is referred to as Landfill 4 in the study and he agreed. (T. 395.)

deicer product is in any way analogous to treating landfill leachate, or is a relevant comparison for purposes of Tri-County's NPDES permit. This conclusion drawn by Dr. Stolz based on incomplete and disparate information is another reason why we cannot credit his opinions in this matter.

Mr. Lombardo explained why, in the TENORM Study, there was not a measurable difference in radiation in the leachate between landfills accepting oil and gas waste and those that did not. Uranium, thorium, and radium are already naturally present in the environment, and soils and rocks have various existing concentrations of radium and thorium. Therefore, every landfill will have a certain baseline concentration of radiation that is in the leachate, just from the radiation that leaches out of the soil and rocks. (T. 497-99.) The TENORM Study showed that there was not an increase in radium due to the onset of oil and gas waste being disposed of at landfills. (T. 499.)

The Appellants argue, in proposed findings of fact in their brief, that Tri-County was required to provide sampling in its permit application for the Pollutant Group 7 parameters—gross alpha, total beta, strontium, uranium, and osmotic pressure—because the application seems to require that information for "any facility that has received oil and gas wastewaters within the past three years." (App. Ex. 4 (at AEX000842).) However, it must be emphasized that Tri-County's wastewater treatment plant is not receiving oil and gas wastewaters. (T. 562.) It is receiving landfill leachate from a municipal waste landfill. The Appellants' repeated insistence that the landfill itself or the landfill's wastewater treatment plant will accept liquid oil and gas wastewater is simply incorrect. (T. 24-25, 562.)

Nevertheless, they contend the permit should include effluent limits for the Pollutant Group 7 parameters. Along the same lines, the Appellants say that the permit should also include the radioactive parameters that are identified in the Department's TENORM Study, namely K-40

(potassium), uranium-238, and thorium-232. The Appellants rely on Dr. Stolz, who testified that he believed the NPDES permit should include limits for K-40 (potassium), uranium, thorium, and radon, among others. (T. 406-07, 413-14, 426.) Dr. Stolz did not justify his opinion other than saying these parameters are contained in oil and gas waste or were tested for in the TENORM Study. However, Mr. Lombardo credibly and convincingly testified that there is a valid technical reason why it would be unnecessary or redundant to sample for the Pollutant Group 7 and TENORM parameters in addition to the radium sampling that is already required by the permit. First, radium is soluble while other radioactive parameters like thorium and uranium are not. (T. 500-01.) There are many radionuclides in the decay series for elements such as uranium and thorium, but none of them are soluble in water except for radium. (T. 510-11.) Both radium-226 and radium-228 are soluble. (T. 505.) Therefore, only radium will make its way into the landfill's leachate. When water infiltrates into the waste mass disposed of at the Tri-County Landfill, only radium will leach out of the waste into the water, not other radionuclides, even if they may be present in the waste. If other radionuclides are not present in the leachate that precipitates out of the waste, they will not be present in the effluent that is discharged from Tri-County's future treatment plant. Mr. Lombardo stated that this is supported by a wealth of data in the TENORM Study, where all liquid samples were analyzed for thorium, uranium, and radium, and the results were always negative for thorium and uranium; only radium showed up in the liquid samples. (T. 511.)

Mr. Lombardo also credibly opined that there is no need to analyze for parameters like gross alpha or gross beta radiation because radium-226 decays by alpha and radium-228 decays by beta. (T. 511-12.) In other words, alpha and beta radiation are already being analyzed through the emission of alpha and beta particles by way of the decay of radium-226 and radium-228. For

K-40, Mr. Lombardo credibly testified that it is a naturally occurring radionuclide and that everything disposed of at a landfill is a source for K-40, so it would not be particularly indicative of oil and gas waste. (T. 514-15.) For strontium, Mr. Lombardo testified that strontium-90 is the radioactive isotope of strontium and it can only be made by using a reactor to split uranium-235 atoms into two, but natural strontium is not radioactive. (T. 512-13.) We credit Mr. Lombardo's opinion that it was not necessary to include monitoring requirements in the permit for radioactive parameters other than radium.

The Appellants never really contend with Mr. Lombardo's opinions or attempt to rebut them. They do not present any argument in their briefs on the substance of Mr. Lombardo's testimony or why anything is wrong with his opinions, except for a suggestion that he should have taken background samples at the location Outfall 006, but that obviously does not detract from all of the sound opinions he rendered in this case. Instead, the Appellants have only focused, unsuccessfully, on trying to discredit him for his prior work for the Department on the TENORM Study. Where Dr. Stolz equivocated in his final opinions, Mr. Lombardo was clear, firm, and unambiguous. We fully credit Mr. Lombardo's bottom-line conclusions: (1) that the acceptance of oil and gas waste by the Tri-County Landfill will not have a statistically significant impact on the concentration of radium-226 and radium-228 in the landfill's leachate, and (2) that the discharge of treated leachate will not have an adverse impact on the receiving stream in terms of radioactivity and it will not increase radioactivity in the UNT to Black Run. (T. 495-96.) The volume of oil and gas waste that will be accepted by the Tri-County Landfill is a very small fraction of the total waste to be accepted, and therefore, we agree with Mr. Lombardo that the contribution of radium to the landfill's leachate will likely be very small. (T. 498.)

In short, the Appellants have not established that there is any reasonable basis for imposing monitoring requirements or effluent limits for additional radioactive parameters beyond radium in the permit, and the Appellants did not present any evidence for why effluent limits for radium-226 and radium-228 are necessary to protect any uses of the UNT to Black Run or instream water quality.

One item in the permit necessitates correction, however. Under the monitoring parameters for Outfall 006, radium-226 is listed twice. (J. Ex. 1 (at 7).) The Department and Tri-County maintain that one of those is supposed to say radium-228. All the parties seem to acknowledge that the omission of radium-228 from the monitoring parameters under Outfall 006 is an error. (*See* Stip. 20.) The Department and Tri-County believe it is inconsequential because radium-228 is mentioned in other parts of the permit. For instance, they point out that, on the very last page of the permit, in a section addressing the analysis types for radium testing, the permit identifies EPA analytical methods for both radium-226 and radium-228 that are to be used for reporting purposes. (*Id.* (at 31).) The Department adds that the Discharge Monitoring Reports (DMRs) that Tri-County must submit to the Department contain a parameter for radium-228, and Tri-County must comply with the DMRs, so the failure to include radium-228 as a monitoring parameter under Outfall 006 does not excuse Tri-County from having to monitor for it.

The Department argues that it was a harmless error to list radium-226 twice, but that does not necessarily mean that it is an immaterial error. A permit should correctly list all of the parameters that need to be monitored without having to rely by reference on DMRs or analytical methods listed in other documents or other parts of the permit. The Board has broad authority to take action on permits where we have determined that the Department has erred. *Warren Sand and Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565-66 (Pa. Cmwlth. 1975). *See, e.g.*, *Gerhart*

*v. DEP*, 2019 EHB 534 (modifying Chapter 102 and 105 permits to correct the classification of a particular wetland for purposes of post-construction restoration but otherwise upholding the permits); *Friends of Lackawanna, supra* (adding a condition to a permit for a solid waste landfill but otherwise upholding the permit renewal); *Stedge, supra* (modifying general permit coverage approval to add a condition but upholding the Department's approval in all other respects). While the Department says the omission of radium-228 is a typo, we are not sure why the Department has not corrected that typo at any point since the permit was issued in April 2023. The Department's explanation at the hearing for why it has not corrected the error was not satisfying. (T. 573.) Accordingly, we will correct the permit to reflect radium-228 as a parameter in the monitoring requirements for Outfall 006. No remand of the permit is necessary for the error to be corrected by the Department. No further remedy is warranted.

**EPA Review**

The Appellants argue in the briefest of terms that Tri-County's permit was subject to EPA review. (App. Brief at 47; Reply Brief at 8-9.) It is not clear what the Appellants hope to gain by having EPA review the permit. We do not see any reason to remand the permit to the Department with directions to submit it to EPA for review. It is not clear what aspects of the permit the Appellants believe might be subject to revision based on an EPA review, or why such review would be anything other than a pointless exercise designed to delay issuance of the permit.

In any event, the Appellants base their claim on a Memorandum of Agreement, which waived EPA's review of individual NPDES permits except for a specific list, Item 8 of which is "[i]ndividual NPDES permit for facilities that accept or are proposing to accept and treat oil and gas resource extraction wastewater." (App. Ex. 61.) The Appellants fail to recognize the distinction between a treatment plant treating oil and gas extraction wastewater, and a plant such

as Tri-County's which is treating leachate that in turn may have been impacted by oil and gas waste. The Department has correctly interpreted the agreement to mean that EPA has only retained the right to review the former. Leachate is not an oil and gas extraction water. There is no dispute that Tri-County's plant has not been permitted to accept oil and gas extraction water directly for treatment. (T. 24-25, 562.)

**Compliance History**

The Appellants argue that the compliance history of Tri-County and its related companies required denial of the NPDES permit. We dealt with Tri-County, *et al.*'s compliance history extensively in the solid waste permit appeal. We held that their compliance history did not justify withholding that permit. *Liberty Twp.*, slip op. at 93-98. In the instant appeal, we did not permit the Appellants to rehash Tri-County's entire compliance history. Instead, we directed them to limit their focus on compliance issues that occurred since our hearing in the solid waste permit appeal, which we held in April 2023. The Appellants say "[e]ach of the Department and Tri-County presented witnesses who testified about compliance history, and Appellants argue that this opened the door for the Board to revisit this issue." (App. Brief at 57.) In fact, both the Department and Tri-County abided by our ruling, and neither offered any evidence regarding compliance issues that occurred before April 2023. We hereby reaffirm our ruling that the Appellants are collaterally estopped from arguing that Tri-County's compliance history prior to April 2023 justified denial of the NPDES permit. Although two different permits are involved, the issue is nevertheless identical in both cases. The prior action, in which the Appellants were the same as here, resulted in a final adjudication. The Appellants had a full and fair opportunity to litigate the issue, and in fact did litigate the issue. Our ruling on compliance history was essential to the Adjudication. Therefore,

collateral estoppel applies. *Borough of St. Clair v. DEP*, 2015 EHB 290, 310-12; *Kuzemchak v. DEP*, 2010 EHB 564, 566-68.

Turning to Tri-County's compliance history since the hearing in the solid waste case, the Clean Streams Law prohibits the Department from issuing any permit required under the Clean Streams Law if the Department finds that:

> (1) the applicant has failed and continues to fail to comply with any provisions of law which are in any way connected with or related to the regulation of mining or of any relevant rule, regulation, permit or order of the department, or of any of the acts repealed or amended hereby; or
>
> (2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 611 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department….

35 P.S. § 691.609.

As the Board noted in our January 2024 Adjudication:

> A third-party appellant who would have us overturn a permit based on the compliance history and status of the permittee has a heavy burden. This is an area where the Department has a considerable amount of discretion. *Concerned Citizens of Yough, Inc. v. Dep't of Envtl. Prot.*, 639 A.2d 1265, 1271 (Pa. Cmwlth. 1994). A generalized claim of noncompliance without a showing of specific, concrete problems typically will not suffice. *Friends of Lackawanna*, 2017 EHB at 1178….The purpose of the compliance review is to ensure the applicant is likely to be responsible enough to be informed of what the law and regulations require and motivated to make an effort to comply with those regulations; an applicant's past is certainly an indicator of future behavior. *See Perano v. DEP*, 2011 EHB 453, 494-97; *Colbert v. DEP*, 2006 EHB 90, 109-10.

*Liberty Twp.*, slip. op. at 94.

The Appellants have failed to meet their burden of proving that Tri-County cannot be trusted with the NPDES permit due to its compliance history. Tri-County has not received *any* notices of violation since the April 2023 hearing on the solid waste permit. No orders, civil

penalties, or other enforcement actions have been taken against Tri-County. The Appellants have not shown that there are any ongoing violations that have not been corrected or are in the process of being corrected regarding any of Tri-County's affiliated companies since the hearing on the solid waste permit that rise to the level of instituting a permit bar. Justin Dickey, who signed the permit for the Department, credibly testified that he was confident that Tri-County will comply with the NPDES permit because of how Tri-County and its affiliated companies have responded to violations. (T. 583.) There are no open violations. (T. 576, 579-80.) In sum, the Appellants' argument that the NPDES permit should have been denied under Section 609 of the Clean Streams Law based upon the compliance history of Tri-County and its related companies finds no support in the record.

**Article I, Section 27**

The Appellants argue that the Department violated Article I, Section 27 of the Pennsylvania Constitution.[5] The first step in our constitutional analysis is to determine whether the Department, after considering the environmental effects of its action, has correctly determined that its action will not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. Next we assess whether the Department has satisfied its trustee duties by acting with prudence, loyalty, and partiality with respect to the beneficiaries of the natural resources impacted by the Department's action. *Stocker v. DEP*, 2022 EHB 425, 445.

[5] Article I, Section 27 provides:

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

PA. CONST. art I, § 27.

The record shows that the Department exhaustively and carefully considered the environmental effects of issuing Tri-County's permit. The above discussion amply shows that the Appellants have failed to carry their burden of proving that the permitted discharge will adversely impact the environment. There is no evidence that the Department failed to satisfy its trustee duties. The peoples' right to clean water has not been compromised.

While we acknowledge and appreciate the fact that Liberty Township also acts as a trustee pursuant to Article I, Section 27, it does so in the performance of *its* municipal duties as conferred by statute. Article I, Section 27 does not expand its duties or its power to act beyond the bounds of its enabling legislation. *Frederick v. Allegheny Twp. Z.H.B.*, 196 A.3d 677, 697 (Pa. Cmwlth. 2018).

**Liberty Township and Community Concerns**

The "Appellants argue that the Board should recognize the import of Liberty Township's opposition to the NPDES Permit, including by recognizing its Ordinances." (App. Brief at 54.) It is not readily apparent from this statement what the Appellants mean when they say we "should recognize the import of the ordinances." At other points in the brief's proposed findings of fact and conclusions of law, the Appellants say it is the Township's position that issuance of Tri-County's permit or the "activities under the permit" violate the ordinances "because of the existence of hazardous and radioactive waste that Liberty Township believes will be present in the discharges." (App. Brief at 20, 60.)

The Appellants do not cite any ordinances.[6] They do not explain how language in any ordinances can be said to prohibit issuance of the permit or "activities under the permit." They do

[6] Although we denied the admission of two exhibits containing ordinances at the hearing, App. Ex. 46 and 47, we specifically stated that the exhibits were included in the record for purposes of briefing. (T. 219.) The Appellants have not in their briefs challenged our evidentiary ruling in any way.

not explain what provisions in the ordinance they believe are violated "because of the existence of hazardous and radioactive waste" the Township believes will be present in the discharges. They do not explain or support their contention that the discharges will contain "waste," let alone hazardous or radioactive waste. In short, the Appellants have not adequately preserved this issue in their briefs.

However, in the interests of a complete record, we note that the first ordinance purports to regulate the disposal of hazardous waste within the Township. (T. 200.) Appellants presented no evidence that the effluent to be discharged qualifies as hazardous waste under any state or federal regulation. The second ordinance purports to provide for the cleanup and abatement of spills or deposits of hazardous materials. (T. 205.) This ordinance has no application to an authorized discharge under the NPDES program, which cannot be considered a spill or deposit.

The Appellants variously charge that the Department demonstrated "extreme partiality" toward Tri-County, "improperly accommodating Tri-County's industrial and private profit seeking endeavor," and ignored the Township's and public's comments and concerns. (E.g. App. Brief at 39, 48, 54, 84.) It is difficult to understand how the Appellants can argue in good faith that the Department ignored the Township's and the "community's" concerns given all of the Department's transparency and responsiveness in the permit review process. First, we do not necessarily agree that the Appellants speak for the community at large. For example, Pine Township, where the landfill is also located and which originally appealed Tri-County's solid waste permit, withdrew that appeal and its Supervisor testified in support of the landfill in that appeal. (*See* EHB Docket No. 2021-007-L, Testimony of Richard Stachel, T. 1185-1201.) Pine Township did not appeal the NPDES permit.

With regard to the Appellants' assertion that the Department ignored concerns, along with the traditional *Pennsylvania Bulletin* notices the Department developed a website where all draft and final permit documents were posted for the public to review. (T. 560; J. Ex. 4.) The Department held a public meeting where the public could voice their concerns about the permit directly to the Department. (T. 560.) The Department published notice of the meeting in the *Pennsylvania Bulletin* and a local newspaper, and sent direct notification to all parties who had expressed an interest in the permit. (T. 560-61; J. Ex. 5.) The Department issued a comment response document addressing each and every comment received from the public. (T. 563; J. Ex. 6.) The Department did not just answer the public's comments, it also actually changed the permit based on those comments by adding monitoring requirements for radium-226 and radium-228 despite there being no legal requirement and a questionable need to do so. (T. 563; J. Ex. 7.)

To the extent the Appellants cite *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921 (Pa. 2023), for the proposition that municipalities should have their concerns considered in the permitting process, we heartily agree. There is no question here, however, that the Department fully considered Liberty Township's concerns in the permitting process.[7]

[7] To the extent the Appellants have raised arguments that we have not addressed in this Adjudication, we have fully considered those arguments and have not found them to be persuasive. *Marshall v. DEP*, 2020 EHB 60, 72 ("Although we do not specifically address each and every point raised in Marshall's papers, we have given all of them due consideration and we find that she has not met her burden of proof with respect to the issues she has raised." (citing *Big B Mining Co. v. DER*, 1987 EHB 815, 867, *aff'd*, 554 A.2d 1002 (Pa. Cmwlth. 1989); *Lower Providence Twp. v. DER*, 1986 EHB 802, 821; *Del-Aware Unlimited, Inc. v. DER*, 1984 EHB 178, 328, *aff'd*, 508 A.2d 348 (Pa. Cmwlth. 1986))). *See also Liberty Twp.*, slip op. at 108 n.12.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter. 35 P.S. § 691.7; 35 P.S. § 7514.

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

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

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

5. Issues previously raised in an appeal but not included in a party's post-hearing brief are waived. 25 Pa. Code § 1021.131(c); *Morrison v. DEP*, 2021 EHB 211, 221; *Benner Twp. Water Auth. v. DEP*, 2019 EHB 594, 635; *New Hope Crushed Stone & Lime Co. v. DEP*, 2017 EHB 1005, 1021.

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

7. The Appellants have not shown that any errors or information contained in Tri-County's permit application have any continuing relevance that would require action with respect

to the NPDES permit issued by the Department. *See Stedge v. DEP*, 2015 EHB 577, 612; *O'Reilly v. DEP*, 2001 EHB 19, 51.

8. The Appellants have not shown that any of the permit's effluent limits are inconsistent with technology-based effluent limits or water quality-based effluent limits designed to ensure that the existing and designated uses of the UNT to Black Run are maintained and protected. 25 Pa. Code § 93.4a; 25 Pa. Code § 96.4(b); 40 C.F.R. §§ 125.1-125.3 (incorporated by 25 Pa. Code § 92a.3); *Penn Coal Land, Inc. v. DEP*, 2017 EHB 337, 350; *Borough of Stockertown v. DEP*, 2016 EHB 456, 461-62; *Mun. Auth. of Union Twp. v. DEP*, 2002 EHB 50, 52-53.

9. The Appellants have not established that any additional monitoring requirements or effluent limits for any other parameters should have been included in the permit.

10. The federal Clean Water Act does not categorically prohibit discharges to impaired waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 107 (1992). *See also Friends of the Wild Swan, Inc. v. United States EPA*, 74 Fed. App'x 718 (9th Cir. 2003); *In re Carlota Copper Co.*, 11 E.A.D. 692 (EAB 2004).

11. The Department is not prohibited from issuing NPDES permits that authorize discharges into impaired waters that do not yet have a Total Maximum Daily Load (TMDL) established. *See City of Taunton v. United States EPA*, 895 F.3d 120, 139-40 (1st Cir. 2018); *Upper Blackstone Water Pollution Abatement Dist. v. United States EPA*, 690 F.3d 9, 26 (1st Cir. 2012*); In re City of Lowell*, 18 E.A.D. 115, 153 (EAB 2020); *In re City of Ruidoso Downs*, 17 E.A.D. 697, 733 (EAB 2019), *pet. for review denied sub nom.*, *Rio Hondo Land & Cattle Co. v. United States EPA*, 995 F.3d 1124 (10th Cir. 2021); *In re Carlota Copper Co.*, 11 E.A.D. 692 (EAB 2004).

12. 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).

13. "Expert testimony is required where the issues require scientific or specialized knowledge or experience to understand." *Brockway Borough Mun. Auth. v. Dep't of Envtl. Prot.*, 131 A.3d 578, 587 (Pa. Cmwlth. 2016) (citing *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 828-29 (Pa. Cmwlth. 2010)).

14. The Board has broad authority to take action on permits where we have determined the Department has erred. *Warren Sand and Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565-66 (Pa. Cmwlth. 1975).

15. The Department erred in listing radium-226 twice as a monitoring requirement for Outfall 006 and not listing radium-228.

16. The Department was not required to submit Tri-County's permit application or draft NPDES permit to the EPA for review.

17. Collateral estoppel precludes the Appellants from relitigating the compliance history of Tri-County and its affiliated companies prior to April 2023 when the issue was fully litigated by the same parties and decided by the Board in *Liberty Twp. v. DEP*, EHB Docket No. 2021-007-L (Adjudication, Jan. 8, 2024). *Borough of St. Clair v. DEP*, 2015 EHB 290, 310-12; *Kuzemchak v. DEP*, 2010 EHB 564, 566-68.

18. The Department properly evaluated the compliance history of Tri-County Landfill and its related companies. 35 P.S. § 691.609.

19. The Appellants have not shown that Tri-County cannot be trusted with its permit, that Tri-County lacks the ability or intent to comply with the law, or that it has any ongoing

unlawful conduct. 35 P.S. § 691.609; *O'Reilly v. DEP*, 2001 EHB 19, 44-45; *Belitskus v. DEP*, 1998 EHB 846, 868-70.

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

## O R D E R

AND NOW, this 19th day of December, 2024, it is hereby ordered as follows:

1. Page 7 of NPDES Permit No. PA0263664, addressing the effluent limitations, monitoring, recordkeeping, and reporting requirements for Outfall 006, is corrected to reflect that a quarterly monitoring requirement is imposed for both parameters radium-226 and radium-228.
2. NPDES Permit No. PA0263664 is otherwise upheld, and the Appellants' appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

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

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

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Board Member and Judge**

s/ Paul J. Bruder, Jr.
**PAUL J. BRUDER, JR.**
**Board Member and Judge**

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

**DATED: December 19, 2024**

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

**For the Commonwealth of PA, DEP:**
Carl D. Ballard, Esquire
Nicholas A. Maskrey, Esquire
Kayla A. Despenes, Esquire
Dearald Shuffstall, Esquire
(*via electronic filing system*)

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

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | **Issued: December 20, 2024** |

**OPINION AND ORDER ON DEPARTMENT'S MOTION IN LIMINE TO EXCLUDE ISSUES RESOLVED THROUGH RULINGS ON DISPOSITIVE MOTIONS OR WAIVED, DEPARTMENT'S MOTION TO EXCLUDE TESTIMONY OF MARC GLASS, AND APEX'S MOTIONS IN LIMINE TO EXCLUDE EVIDENCE OF WAIVED CLAIMS AND DISMISSED TOPICS**

**By MaryAnne Wesdock, Judge**

**Synopsis**

Several motions in limine filed by the Department and Permittee are granted in part and denied in part.

**O P I N I O N**

**Background**

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) for the drilling of the Drakulic 1H and 7H wells (the permits) in Penn Township, Westmoreland County. The permits were appealed by Protect PT, a grassroots nonprofit organization formed "to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from unconventional natural gas development." (Notice of Appeal, Docket No. 2022-072-W, para. 7.) That appeal is docketed at EHB Docket No. 2022-072-W (the Initial Appeal). Apex elected not to drill the Drakulic wells while the appeal

was pending, and instead sought a two-year renewal of the permits, which was granted on August 15, 2023.[1] On September 14, 2023, Protect PT appealed the renewal of the permits. That appeal is docketed at EHB Docket No. 2023-074-W (the Renewal Appeal). On September 19, 2023, the Initial Appeal and the Renewal Appeal were consolidated.

On February 7, 2024, the Environmental Hearing Board (Board) issued an Opinion which granted in part Apex's motion to dismiss certain claims that were determined to be outside the scope of the Renewal Appeal. *Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W (Consolidated with 2022-072-W) (Opinion and Order issued on February 7, 2024) (the Dismissal Opinion). On October 29, 2024, the Board issued an Opinion on motions for partial summary filed by Apex and the Department which again dismissed certain claims in the Renewal Appeal which were determined to be outside the scope of that appeal. *Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2023-074-W (Consolidated with 2022-072-W) (Opinion and Order issued on October 29, 2024 (the Summary Judgment Opinion).

This matter is scheduled for hearing beginning on January 15, 2025. Protect PT filed its prehearing memorandum on November 15, 2024 and the Department and Apex filed their prehearing memoranda on November 25, 2024. Pending before the Board are various Motions in Limine. This Opinion addresses the Department's Motion in Limine to Exclude Issues Resolved Through Rulings on Dispositive Motions or Waived, Apex's Motion in Limine to Exclude Evidence of Waived Claims. Apex's Omnibus Motion in Limine to Exclude the Admission of Testimony and Documents on Dismissed Topics and to Strike the Same from Appellant's

[1] A well permit expires one year after issuance if drilling has not commenced. 58 Pa. C.S. § 3211(i); 25 Pa. Code 78a.17(a). An operator may request a two-year renewal accompanied by a fee, a surcharge and an affidavit affirming that the information in the original application is still accurate and complete. 25 Pa. Code § 78a.17(b).

Prehearing Memorandum, and the Department's Motion to Exclude Expert Testimony of Marc Glass.

**Standard of Review**

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing. 25 Pa. Code § 1021.121; *Liberty Township v. DEP*, 2023 EHB 43, 44. The purpose of a motion in limine is to provide the Board an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at hearing. *Kiskadden v. DEP*, 2014 EHB 634, 635. A motion in limine should generally be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison v. DEP*, 2020 EHB 404, 405.

Motions in limine are better suited to address specific and narrow evidentiary matters that focus on particular exhibits or testimony. *Range Resources – Appalachia, LLC v. DEP*, 2022 EHB 84, 85 (citing *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237 ("One clue to determining whether a motion [in limine] is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.")). Motions in limine that contain sweeping claims aimed at eliminating an opposing party's case are rarely successful and generally not a productive use of the Board's resources on the eve of trial. *Range Resources,* 2022 EHB at 85. In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. *McCauley v. DEP*, 2020 EHB 448, 450 (quoting *Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161).

**Discussion**

The Department and Apex contend that Protect PT has included claims in its prehearing memorandum that were either a) dismissed by the Board's Dismissal Opinion and Summary Judgment Opinion or b) waived, and they argue that Protect PT should not be permitted to present evidence on those claims.

It is important to note that this case is a consolidation of two appeals: the appeal of the initial issuance of the permits for the Drakulic 1H and 7H wells and the appeal of the renewal of those permits. As we explained in the Dismissal Opinion and the Summary Judgment Opinion, the scope of the Renewal Appeal is much narrower than the scope of the Initial Appeal. Therefore, certain issues raised in the Renewal Appeal were determined to be outside the scope of that appeal and they were dismissed from the Renewal Appeal. However, as Protect PT correctly points out, "[t]here is a distinct difference between the Issuance Appeal [i.e., the Initial Appeal] and the Renewal Appeal." (Protect PT's Omnibus Memorandum of Law in Support of Its Responses to the Department's and Permittee's Motions in Limine , p. 10.) As a result, some of the issues dismissed from the Renewal Appeal may still remain in the Initial Appeal and are still a part of this overall consolidated case, as the Board noted in its Summary Judgment Opinion. Summary Judgment Opinion, *slip op.* at n. 9 and 16.

Rather than comb through individual statements made in Protect PT's prehearing memorandum, we address the disputed claims by topic since that is how they are presented in the motions:

**PFAS**

The Board's Summary Judgment Opinion determined that Protect PT did not produce sufficient evidence to move forward on this claim and, therefore, summary judgment was granted

to the Department and Apex pursuant to Pa. R.C.P. 1035.2(2). Although Protect PT's prehearing memorandum made reference to PFAS, in its response to the Department's and Apex's motions Protect PT acknowledges that this claim has been dismissed.

**Harms/Benefits Analysis**

One of the claims dismissed from the Renewal Appeal was Protect PT's claim that a harms/benefits analysis should have been conducted prior to issuance of the permits. The Board dismissed this claim as being beyond the scope of the Renewal Appeal. The Board also rejected Protect PT's argument that *Marcellus Shale Coalition v. Department of Environmental Protection,* 292 A.3d 921 (Pa. 2023), suggested that a harms/benefits analysis should have been conducted prior to the issuance of the permits. Summary Judgment Opinion, *slip op*. at 13.

In its Memorandum of Law, Protect PT argues that a balancing of harms and benefits must be conducted pursuant to the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, and quotes language from *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 945 (Pa. 2017) setting forth part of the legislative history of this provision. In support of its claim, Protect PT intends to introduce expert testimony by Sean O'Leary to discuss economic development and economic harm as it relates to the oil and gas industry and, particularly, his opinion that oil and gas development has not led to economic growth in Westmoreland County. Protect PT asserts that this issue was raised in the Initial Appeal by virtue of the fact that the Initial Appeal discusses Article I, Section 27.

Allegations not raised in a notice of appeal are waived. *Rhodes v. DEP*, 2009 EHB 325, 327 (citing *Fuller v. Department of Environmental Resources*, 599 A.2d 248 (Pa. Cmwlth. 1991)). However, both the Commonwealth Court and the Board have allowed some leeway with regard to the manner in which an objection is raised. As the Board explained in *Rhodes*:

> [G]iven the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002); *Jefferson County Board of Commissioners v. DEP*, 1996 EHB 997, 1005.

*Id. See also Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991) (An issue in a notice of appeal may be raised in general terms).

However, while an appellant may raise an issue in a "broadly worded objection" or within the "genre of an issue," nevertheless, there are limits on how broadly the objection can be raised. As the Board explained in *Center for Coalfield Justice v. DEP*, 2016 EHB 523 526, one purpose of this rule is to prevent unfair surprise at the hearing. In this case, while the Initial Appeal generally discusses Article I, Section 27, there is no indication that Protect PT intended to raise a claim regarding alleged economic harm or lack of economic benefit brought on by oil and gas development. Certainly, the Board's review of the Initial Appeal did not reveal this to be an issue that Protect PT intended to raise at the hearing.

Based on the failure to raise this claim in the Initial Appeal, and the dismissal of Protect PT's harms/benefits claim from the Renewal Appeal, we find that Protect PT may not present testimony by Mr. O'Leary on the subject of economic development or economic harm caused by oil and gas development in Westmoreland County.

**Threatened and Endangered Species**

Protect PT raised this claim in its Initial Appeal but it was later waived. Protect PT again raised this claim in its Renewal Appeal.[2] The Board did not dismiss this claim in its Summary Judgment Opinion because it determined that it was within the scope of the Renewal Appeal based on the review of the renewal applications conducted by the Department. Summary Judgment Opinion, *slip op*. at 15. Therefore, this claim remains in the Renewal Appeal.

However, based on a review of the expert reports submitted by Protect PT it does not appear that Protect PT intends to present expert testimony on this issue. Without expert testimony we do not believe that Protect PT is able to pursue this claim. In light of the fact that the hearing begins in less than one month, Protect PT is precluded from introducing an expert at this late date.

**Turtle Creek**

In its prehearing memorandum, Protect PT discusses impairment to Turtle Creek and surrounding waters. This issue was not set forth in the Initial Appeal[3] nor in the Renewal Appeal. It appears to be raised for the first time in Protect PT's Motion for Summary Judgment filed a few months ago in August 2024. In its response to the motions in limine, Protect PT asserts that it raised the subject of Turtle Creek in discovery and, therefore there is no prejudice to the Department or Apex. However, based on the documentation provided by Protect PT in support of its response, it appears that Protect PT served an interrogatory asking for identification of the nearest waterway to the site, to which Apex responded that the closest stream was an unnamed

[2] In Objection 66 of the Renewal Appeal, Protect PT states that the Department abused its discretion by failing to consider the potential impacts of the Apex operation on public resources. "Public resources" includes "rare and endangered flora and fauna." 58 Pa. C.S. § 3215(c)(4)

[3] Paragraph 52 of the Initial Appeal states, "Contamination of waters of the Commonwealth – both surface water and groundwater – is a violation of the Clean Streams Law," and then cites various sections of the Clean Streams Law. We do not believe this statement by itself is sufficient to encompass the claim that Protect PT is now making, i.e., that Apex's gas operation will cause impairment to Turtle Creek and surrounding waters.

tributary to Turtle Creek. Protect PT also served an interrogatory asking if the location of the site was in a protected watershed, to which the Department responded that the site appeared to be in the Turtle Creek Watershed, which it did not consider to be a special protection watershed. We do not believe that this limited exchange of discovery was sufficient to put the Department and Apex on notice that impairment to Turtle Creek and surrounding waters was an issue in this appeal.

Additionally, issues relating to erosion, sedimentation and runoff impacting surface waters were raised in a prior appeal of the Erosion and Sediment Control General Permit 3 that is not at issue in this case. That appeal was subsequently withdrawn and those issues are now waived.[4]

Therefore, Protect PT is precluded from presenting evidence on these issues.

**PPC Plan and Emergency Response**

Certain issues pertaining to Apex's Prevention Preparedness and Contingency Plan (PPC Plan) were raised by Protect PT in a prior appeal.[5] In that case, the Board held that a PPC Plan was not required to be submitted with a permit application pursuant to the oil and gas regulations.

However, in its Memorandum in Support of Its Motion for Partial Summary Judgment, Apex stated that it was not seeking summary judgment with respect to Protect PT's Article I, Section 27 claims pertaining to the PPC Plan and emergency response measures.[6] Therefore, Protect PT may present evidence regarding its Article I, Section 27 claims with respect to Apex's PPC Plan and emergency response measures.

**Air Monitoring**

[4] *Protect PT v. DEP and Apex Energy (PA), LLC*, EHB Docket No. 2021-096-R (Order Following Withdrawal issued Jan. 19, 2023).

[5] *Protect PT v. DEP and Apex Energy (PA), LLC*, 2020 EHB 27.

[6] See Footnote 14 of Apex Brief in Support of Motion for Partial Summary Judgment (EHB Docket Entry no. 35).

The Department and Apex assert that Protect PT should be precluded from presenting testimony regarding air monitoring. Specifically, they seek to preclude testimony by Protect PT's expert, Marc Glass, on this topic. They argue that the issue of air monitoring has been dismissed from the case.

The Department points to paragraph 36 of the Renewal Appeal which states as follows:

> 36. The Applications, Permits, and the PPC Plans do not provide for worker and site safety, reuse of site equipment and materials, waste management, transfer, and disposal, monitoring of surface, groundwater, and air emissions and other environmental monitoring, or adequate levels of financial assurances, which violates the ERA [Environmental Rights Amendment].

(Renewal Appeal, para. 36.)

The Department correctly notes that this objection was dismissed by the Board as being outside the scope of the Renewal Appeal. Dismissal Opinion, *slip op*. at 14. Specifically, in that opinion, the Board dismissed any objections to the initial permits and permit applications as being outside the scope of the Renewal Appeal since the Renewal Appeal applied only to the renewals of the permits. The Department further argues that this issue was not raised in the Initial Appeal and, therefore, because it was dismissed from the Renewal Appeal and waived in the Initial Appeal, Protect PT is precluded from presenting evidence in support of this claim at the hearing.[7]

In its Memorandum of Law in support of its Motion in Limine to exclude the expert testimony of Mr. Glass, the Department acknowledges that Protect PT raises a general allegation of threats to ambient air in paragraph 61 of the Renewal Appeal which states as follows:

[7] Apex also argues that the subject of air monitoring has been dismissed from the case but does not provide a detailed argument regarding its position on this matter. In its Memorandum of Law in support of its Omnibus Motion in Limine, Apex provides a chart detailing facts pulled from Protect PT's prehearing memorandum and a reference to where each claim was dismissed from the appeal but does not reference air monitoring.

> 61. The Drakulic Well Site will threaten the ambient air quality and cause significant noise pollution to nearby residents. See Robinson Township, 83 A.3d at 937- 38 (recounting an affidavit of homeowner living approximately 1,500 feet from drilling operations; "traffic caused significant noise pollution … Air quality also became degraded, beginning 'to smell of rotten eggs, sulfur, and chemicals'"); id. at 1005….

(Renewal Appeal, para. 61.) However, it argues that, even under the language of *Rhodes*, quoted earlier, the issue of "air monitoring" cannot be seen as falling within this general objection.

As we discussed earlier, "[s]o long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the 'genre of the issue' in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver." *Rhodes*, 2009 EHB at 327. As noted above, paragraph 61 of the Renewal Appeal contends that the well site will "threaten the ambient air quality." (Renewal Appeal, para. 61.) Moreover, paragraph 68 of the Initial Appeal states as follows:

> 68. Protect PT objects to the Department's approval of the Well Permits which allow hydraulic fracturing, well drilling, and natural gas production in close proximity to *sensitive receptors and populations* such as residential homes, a school, and species of special concern in violation of the Department's responsibilities under Article I, Section 27 of the Pennsylvania Constitution.

(Initial Appeal, para. 68) (emphasis added). Paragraph 3 of the Initial Appeal contains a similar objection. In his report, Mr. Glass discusses why he believes additional monitoring is necessary and one such basis is his believe that exceedances of certain emissions from oil and gas operations can be "harmful to sensitive subpopulations (i.e., asthmatics, elderly, chemical specific sensitive groups)…" (Glass Report, Ex. A to Department's Motion in Limine to Exclude Expert Testimony of Marc Glass, p. 4.) Mr. Glass's report further states that it is his opinion that the Department should have required additional air monitoring in the permits and, presumably, this is to ensure

that the air quality is safe for the surrounding community. We find that the issue of air monitoring is encompassed within the objections set forth above.

**TENORM**

The Department and Apex assert that Protect PT should be precluded from presenting any evidence regarding TENORM (technically enhanced naturally occurring radioactive material) since these claims were dismissed from the Renewal Appeal and were not raised in the Initial Appeal. Indeed, the Board's prior opinions in this matter dismissed paragraphs 30-42 of the Renewal Appeal entitled "The Permits Authorize the Generation, Storage, and Transportation of Radioactive Waste." These paragraphs of the Renewal Appeal contend that Apex's operation will generate radioactive material which will present a number of risks. These claims were dismissed from the Renewal Appeal as being beyond the scope of the Renewal Appeal since they were challenges to the initial permits.

The Department and Apex argue that because these claims were dismissed from the Renewal Appeal and were not raised in the Initial Appeal, Protect PT should be precluded from presenting any evidence with respect to TENORM and radiation. Specifically, the Department has moved to exclude the testimony of Protect PT's expert, Marc Glass, whose expert report focuses substantially on TENORM, radon gas and the radiological components of gas production.

It is undisputed that the Initial Appeal does not mention TENORM or radiation. However, as we noted above, we find that Protect PT has sufficiently raised the issues of air emissions and air monitoring in this consolidated appeal. Because radon gas and its progeny emissions fall within the scope of Protect PT's claim regarding air emissions and air monitoring, we find that Mr. Glass is not precluded from testifying as to these issues.

However, to the extent that Mr. Glass's report includes a discussion of the management of TENORM waste we do find this topic to be outside the scope of this consolidated appeal, as discussed below.

**Waste Management/Radioactive Waste/TENORM Waste**

Certain paragraphs in Protect PT's prehearing memorandum discuss the management of waste generated by oil and gas operations. For example, paragraph 52 of the prehearing memorandum states, "The Permits do not specify any limitation on the volume of oil and gas drilling waste that could be generated at the Site." (Appellant's Prehearing Memorandum, para. 52.) As noted above, objections in the Renewal Appeal dealing with TENORM waste/radioactive waste/waste management were dismissed, and there is no mention of managing TENORM waste in the Initial Appeal. Therefore, we find this issue to be precluded.

**Hazardous Chemicals**

The Board's prior opinions dismissed paragraphs 25-29 entitled "The Permits Authorize the Use, Generation, Storage, and Transportation of Hazardous Waste." Although entitled "Hazardous Waste," those paragraphs generally discuss what Protect PT contends are hazardous chemicals that it believes will be used at the Drakulic well site. These objections were dismissed from the Renewal Appeal because they pertained to the issuance of the initial permits which was outside the scope of the Renewal Appeal. As we have noted, an appeal of the renewal of a permit cannot be used to attack the original issuance of the permit. Dismissal Opinion, *slip op*. at 4.

As we pointed out earlier, in its Initial Appeal Protect PT raised a concern about the safety of Apex's operation in close proximity to sensitive populations, residences and a school. (Initial Appeal, paragraphs 3 and 68.) Both the Initial Appeal and the Renewal Appeal also include

objections relating to the PPC Plan and emergency response measures.[8] To the extent that Protect PT intends to present evidence regarding chemicals that it believes may be used at the Drakulic site in connection with these claims, it is not precluded from doing so.

**Public Comment**

This issue is preserved in the Renewal Appeal – i.e., whether the Department considered public comments in renewing the permits. However, there is no objection raised in the Initial Appeal contending that the Department failed to consider public comments in issuing the permits in the first place. Therefore, Protect PT is precluded from presenting evidence in support of its claim that the Department failed to consider public comments when initially issuing the permits.

**Lack of Coordination with DCNR**

This issue was not raised in either the Initial Appeal or the Renewal Appeal and, therefore, is deemed to be waived. As such, Protect PT may not present evidence on this issue.

**Conclusion**

Several motions and responses have been filed in this matter, including exhibits comprising an extensive number of pages. Ruling on the motions in limine necessarily involved referring to prior documents filed in this case, comprising hundreds of pages. To the extent this Opinion fails to address an issue that was raised in one of the motions or responses, it will be addressed at the hearing or, if the parties request it, a conference call prior to the hearing.

Accordingly, we enter the following order:

[8] As discussed earlier, Protect PT's Article I, Section 27 claims regarding the PPC Plan and emergency response measures have not been waived or dismissed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 20th day of December, 2024, it is ordered that the following motions in limine are granted in part and denied in part as set forth in this Opinion: Department's Motion in Limine to Exclude Issues Resolved Through Rulings on Dispositive Motions or Waived, Apex's Omnibus Motion in Limine to Exclude the Admission of Testimony and Documents on Dismissed Topics and to Strike Same from Appellant's Prehearing Memorandum, Apex's Motion in Limine to Exclude Evidence of Waived Claims, and Department's Motion in Limine to Exclude Expert Testimony of Marc Glass.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: December 20, 2024**

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

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Lisa Johnson, Esquire
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**For Permittee:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL** | : | **Issued: December 24, 2024** |
| **PROTECTION and APEX ENERGY (PA),** | : | |
| **LLC, Permittee** | : | |

**OPINION AND ORDER ON PERMITTEE'S MOTION IN LIMINE TO EXCLUDE THE USE OF GRAND JURY REPORT, UNIVERSITY OF PITTSBURGH STUDIES, PENNSYLVANIA CASE LAW, AND EXPERT REPORTS**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Permittee's motion in limine to preclude the admission of certain exhibits listed in the Appellant's prehearing memorandum, including expert reports, is denied at this time. The Board does not have a rule or specific practice regarding the admissibility of expert reports, but, rather, it is left to the discretion of the judge presiding at the hearing. As to the other contested exhibits, the Permittee may raise its objections again at the hearing.

**O P I N I O N**

On August 17, 2022, the Department of Environmental Protection (Department) issued permits to Apex Energy (PA) for the drilling of the Drakulic 1H and 7H wells (the permits) in Penn Township, Westmoreland County. The permits were appealed to the Environmental Hearing Board (Board) by Protect PT, a grassroots nonprofit organization formed "to ensure the safety, security, and quality of life for people in Penn Township, Trafford and surrounding areas from

unconventional natural gas development." (Notice of Appeal, Docket No. 2022-072-W, para. 7.) The permits were renewed in August 2023, and Protect PT appealed the renewal of the permits. The appeals are consolidated at Docket No. 2023-074-W.

This matter is scheduled for hearing beginning on January 15, 2025. Protect PT filed its prehearing memorandum on November 15, 2024 and the Department and Apex filed their prehearing memoranda on November 25, 2024. Following submission of the prehearing memoranda, several motions in limine were filed with the Board. This Opinion addresses Apex's Motion in Limine to Exclude the Use of Grand Jury Report, University of Pittsburgh Studies, Pennsylvania Case Law and Expert Reports.

**Standard of Review**

A motion in limine is the proper vehicle for addressing evidentiary matters in advance of a hearing. 25 Pa. Code § 1021.121; *Liberty Township v. DEP*, 2023 EHB 43, 44. The purpose of a motion in limine is to provide the Board an opportunity to consider potentially prejudicial evidence and preclude such evidence before it is referenced or offered at hearing. *Kiskadden v. DEP*, 2014 EHB 634, 635. A motion in limine should generally be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. *Morrison v. DEP*, 2020 EHB 404, 405. In evaluating a motion in limine, the Board is asked to determine whether the probative value of the proposed evidence is outweighed by considerations such as undue delay, waste of time, or needless presentation of cumulative evidence. *McCauley v. DEP*, 2020 EHB 448, 450 (quoting *Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, 161).

**Discussion**

Apex has challenged various exhibits listed in Protect PT's prehearing memorandum, asserting that they constitute hearsay or are otherwise inadmissible. We address each of the exhibits and evidentiary items challenged by Apex below:

**Expert Reports**

In its prehearing memorandum, Protect PT lists the reports of its expert witnesses in Schedule 1, its List of Exhibits. Apex argues that the expert reports may not be admitted as evidence at the hearing on the grounds that they are inadmissible hearsay.

We note that 25 Pa. Code § 1021.104(5) and paragraph 1.E. of Prehearing Order No. 2 require parties to provide a copy of their expert reports (or answers to interrogatories or summary of expert testimony) with their prehearing memoranda, which Protect PT has done. In its response to Apex's motion, Protect PT states that it simply listed the expert reports in compliance with the Board's rules and order and not necessarily because it intends to seek admission of the reports. However, we take this opportunity to address Apex's request that we presumptively deny the admission of expert reports ahead of the hearing.

The Commonwealth Court has held that an expert report constitutes hearsay when it is being offered for the truth of the matter asserted "unless the expert who prepared the report is available for cross-examination regarding the accuracy and reliability of his opinion." *Lower Makefield Township v. Lands of Dalgewicz*, 4 A.3d 1114, 1122 (Pa. Cmwlth. 2010) (citing Pa.R.E. 801(c); *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979 (Pa. Cmwlth. 1992)).[1] However, in a recent unreported single-judge memorandum opinion by now-President Judge Renee Cohn Jubelirer in *William Penn School District v. Pa. Department of Education,* 2021 Pa.

[1] The Court noted the exception to this hearsay rule which permits experts to testify regarding reports of others which are not in evidence, but upon which they relied in reaching a professional conclusion. *Lower Makefield,* 4 A.3 at 1122 (citing *Primavera v. Celotex Corp*., 415 Pa. Super. 41, 608 A.2d 515 (Pa. Super. 1992)).

Commw. Unpub. LEXIS 695,[2] the Court held that, while an expert's testifying at trial is necessary for admission of the expert's report, it is not necessarily sufficient. In that case the petitioners sought an order from the Court declaring that expert reports were presumptively admissible when offered during the authoring expert's direct testimony at trial. The Court held that the petitioners could not "simply introduce the expert reports in their entirety and have those reports be presumed to be admissible in their entirety without full consideration of the Rules of Evidence and the limitations set forth therein." *Id*. at *17. The opinion noted that:

> …even if an expert testifies and is available for cross-examination, the proffered report remains subject to the Rules of Evidence, and other evidentiary issues may be found within the report, such as hearsay within hearsay, whether a foundation is adequately laid, or whether an expert improperly repeats the opinion of another.

*Id.* at *12. The opinion found that the presumptive admission of the reports placed a "burden on [the respondents] to find all potentially inadmissible evidence within the expert reports and to object in order to prevent the consideration of that inadmissible evidence." *Id*. at *17-18. The opinion concluded by noting that "the technically complex nature of the reports at issue counsels in favor of admitting them only alongside expert testimony that provides a foundation and helpful context to aid in the Court's understanding." *Id.* at *18.

Although not binding, the reasoning of *William Penn* is persuasive for the proposition that expert reports should not be presumptively admitted into evidence, but in appropriate circumstances where the Rules of Evidence are met, they may be a helpful tool alongside expert testimony.

[2] As per Commonwealth Court guidelines, this opinion is cited for its persuasive value and not as binding precedent.

The Board does not have a specific procedural rule or practice on whether to allow the admission of expert reports at hearing. *See, e.g., Delaware Riverkeeper Network v. DEP*, 2016 EHB 159, in which now-Chief Judge Beckman stated:

> While the Board does not have a rule governing this issue, as a general matter, I do not admit a copy of an expert report as evidence in hearings and do not consider expert reports that have been filed to the Board's docket to constitute evidence that may be cited in post-hearing briefs or relied on by the parties. Parties are free, of course, to introduce exhibits from an expert report and provide testimony regarding the opinions contained within an export report, but the expert report itself will not be admitted. Mr. Fisher's expert report was not admitted as evidence in the supersedeas hearing and, consistent with my past practice, it will not be admitted as evidence if we proceed to a full hearing.

*Id*. at 162.

In some instances, the Board has recognized that the admission of expert reports may aid the Board in understanding the expert's testimony. The following discussion in *Pine Creek Pine Creek Township v. DEP*, 2011 EHB 98, is particularly instructive:

> The relatively common practice in administrative proceedings of experts submitting written testimony *in lieu of* direct testimony is not followed by this Board. *See* 25 Pa. Code § 1021.123(d) (superseding 1 Pa. Code §§ 35.138 and 35.166 (relating to prepared expert testimony). Pine Creek is technically correct that expert reports, as such, are hearsay. They are, after all, out-of-court statements offered for the truth of the matters asserted. Pa.R.E. 801(c). They typically are not made under oath. They are essentially discovery tools that may be used as alternatives to detailed answers to interrogatories and expert testimony summaries in pre-hearing memoranda. They serve to define the four corners of the expert's testimony. Pa. R. Civ. P. 4003.5 (c). They should not, however, be thought of as trial exhibits. *DEP v. Angino,* 2006 EHB 278, 283; *Sunoco,* [*Inc*.] 2003 EHB [482] at 484; *Kleissler v. DEP,* 2002 EHB 617, 621; *Land Tech Engineering v. DEP,* 2000 EHB 1133, 1138. [footnote omitted]
>
> Having said that, parties can and often do agree to the admission of expert reports. *Kleissler,* 2002 EHB at 621. We encourage that practice because the reports are a very helpful tool in understanding

> experts' testimony when we prepare our Adjudications. Even without agreement, parts of reports are often independently admissible as demonstrative evidence. This case, for example, involves complex mathematical formulae. We tremble at the thought of trying to follow those calculations based upon oral testimony alone.

*Id.* at 99-100 (emphasis added).

The presiding judge in the present case agrees with the philosophy set forth in *Pine Creek*, and declines Apex's invitation "to create an absolute, across-the-board prohibition on the admission into evidence of expert reports." *Id.* at 100. So long as the report's author testifies at the hearing and is subject to cross-examination and the Rules of Evidence, I believe it is prudent to exercise judgment regarding the admissibility of expert reports on a case-by-case basis. Though an expert report does not take the place of expert testimony, there may be instances where admitting all or a portion of the report serves to aid the judge in understanding the testimony, particularly where graphs, diagrams, equations or data contained within the report are referenced. I agree with the opinion expressed in *William Penn* that where the subject matter is "technically complex," admission of all or a portion of the report alongside expert testimony may provide a "helpful context to aid in the [Board's] understanding." *William Penn*, at *18.

Therefore, Apex's motion to presumptively preclude the admission of expert reports at the hearing is denied.

**University of Pittsburgh/Pennsylvania Department of Health Studies**

In its prehearing memorandum, Protect PT lists as exhibits various studies prepared by the University of Pittsburgh for the Pennsylvania Department of Health entitled, "Hydraulic Fracturing Epidemiology Studies" (Pitt/Department of Health studies). (Exhibit Z to Protect PT Prehearing Memorandum). Apex argues that Protect PT should be prohibited from using the Pitt/Department of Health studies as evidence in its case because they are hearsay and because

they do not refer specifically to the Drakulic well site or Apex's activities as an operator. In response, Protect PT argues that experts are permitted to rely on the reports of others, and it states that two of its experts, Ms. Mackenzie White and Mr. Marc Glass, relied on the Pitt/Department of Health studies in forming their opinions.

Pursuant to Pa. R.E. 703, an expert may rely on the facts or data of others if they are of a type reasonably relied upon by experts in the field. Apex has provided no argument as to why the Pitt/Department of Health studies do not fall within this rule.

As to Apex's contention that the studies are general and do not pertain to Apex or the Drakulic site, Apex cites the Board's adjudication in *R.E. Gas Development, LLC v. DEP*, 2018 EHB 447, 486. However, in *R.E. Gas*, the expert was permitted to rely on the studies in question during his testimony. The issue was not that the studies themselves should be precluded, but that the expert's testimony stated only general concerns regarding unconventional gas extraction.

Without further information as to how Protect PT intends to utilize the Pitt/Department of Health studies in the presentation of its case, we find no basis for granting Apex's motion.

**Grand Jury Report**

Likewise, Apex seeks to preclude Protect PT's use of Report 1 of the 43rd Statewide Investigating Grand Jury (the Grand Jury Report) at the hearing on the basis that it is hearsay and irrelevant.

In response, Protect PT argues that the Grand Jury Report is admissible pursuant to Pa. R. E. 803(8) which allows an exception to the rule against hearsay in the case of public records. It also argues that the report is admissible pursuant to 42 Pa. C.S. § 6104 which addresses official records and states as follows:

> (a) ***General rule.*** **—** A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof

> of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.
>
> (b) ***Existence of facts.*** **—** A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to an official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Protect PT also points out that the Department filed an official response to the Grand Jury Report and argues that it should be permitted to use the Department's response to the Grand Jury Report in examining Department witnesses at the hearing in this case.

Without further information as to how Protect PT intends to rely on the Grand Jury Report or related documents at the hearing, we decline to rule on Apex's motion at this time. Apex may renew its objection if and when Protect PT raises the Grand Jury Report or related documents at the hearing.

**Citations to Case Law**

Finally, with regard to Apex's argument that Protect PT is attempting to rely on various Pennsylvania Supreme Court decisions in support of its claims, we read Protect PT's citations as simply attempting to provide legal support for its claims.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PROTECT PT** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2023-074-W** |
| | : | **(Consolidated with 2022-072-W)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and APEX ENERGY (PA), LLC, Permittee** | : | |

**O R D E R**

AND NOW, this 24th day of December, 2024, it is ordered that Apex's Motion in Limine to Exclude the Use of Grand Jury Report, University of Pittsburgh Studies, Pennsylvania Case Law, and Expert Reports is **denied** without prejudice to raise these issues at the hearing.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: December 24, 2024**

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*(via electronic filing system)*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **RANDY A. DIETTERICH** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-024-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: July 25, 2024** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By MaryAnne Wesdock, Judge**

**Synopsis**

The Department's motion to dismiss is denied where there is ambiguity surrounding the action that is being appealed.

**O P I N I O N**

This Opinion addresses a Motion to Dismiss (motion) filed by the Department of Environmental Protection (Department) seeking to dismiss an appeal filed by Randy A. Dietterich. Mr. Dietterich is the owner of two unconventional gas wells located in Robinson Township, Washington County known as the Brown 4 well and the Guy V Ida well. On January 23, 2024, the Department issued an order finding that the wells were abandoned and ordering that they be plugged (plugging order). The plugging order directed Mr. Dietterich to take either of the following actions within 10 days of the order: a) commence plugging of the wells or b) notify the Department in writing that within 30 days he would be submitting a detailed plan and schedule for the plugging of the wells.

On February 2, 2024, Mr. Dietterich wrote to George Traister, a compliance specialist in the Department's oil and gas program, advising Mr. Traister that he would like to put the wells

back into production. Mr. Dietterich asked for an extension of 60 days to restore the wells to operating status as follows:

> I would like to put these wells back into production. We were blocked out of the site by a padlocked chain at the beginning of summer which prevented access to the site. This is currently under litigation and is to soon be heard in Washington County, Case Number CV 2023-04635. In the short time I have fixed the gas leak at the DC Brown 4 well, replaced the permit number tages [sic] and are [sic] getting signed [sic] made with the name and address associated. These will be attached soon. I am scheduling a service company to restore the Brown well after the litigation. The Guy V Ida well is equipped for production with the exception of a stolen motor that has to be replaced. I am working on getting on the schedule of the service company list. Due to the unpredictable weather this time of the year, I am therefore requesting 60 days to restore the wells to operating status.

(Ex. C to Department Motion.)

Mr. Traister responded on the same day, stating that the Department denied Mr. Dietterich's request for extension (the February 2 email):

> The Department will not grant your request for a 60 day extension. The wells in question have been out of compliance for several years and continue to be out of compliance. If you feel aggrieved by the Departments [sic] order you may file an appeal to the Environmental Hearing Board. Instructions on how to file an appeal are located on the last 2 pages of the order.

(*Id.*)

On February 15, 2024, Mr. Dietterich filed a notice of appeal with the Environmental Hearing Board (Board). In response to paragraph 2(b) of the notice of appeal form, asking "[w]hat action of the Department do you seek to have the Board review…?" Mr. Dietterich stated "Plugging Order." (Notice of Appeal, para. 2(b).) However, in a document attached to the notice of appeal, in which Mr. Dietterich provides information regarding the status of the Brown 4 and Guy V Ida wells, he states:

> I am appealing the denial of an extension of the deadline for the plugging order and requesting a 90 day extension to repair the wells for production and restore the wells to active status. I request that, upon fulfillment of these commitment [sic] the plugging order be rescinded.

(Notice of Appeal, Attachment, p. 2.)

It is the Department's contention that the action that Mr. Dietterich has appealed is not the plugging order, but the February 2 email denying his request for an extension. In support of this argument, the Department points to the language of the document accompanying the notice of appeal, stating "I am appealing the denial of an extension of the deadline for the plugging order…" The Department also relies on Mr. Dietterich's response to written interrogatories. In particular, Interrogatory no. 25 reads, "Please state that the sole basis for your NOTICE OF APPEAL is the 'denial of an extension of the deadline for the plugging order and requested [sic] a 90-day extension to repair the wells for production and restore the wells to active status.'" Mr. Dietterich responded, "This was the partial reason for the appeal. The other reason for the filing was the failure of the DEP to work with me on the restoration of the wells and the short timeline." (Ex. D to Department Motion.)

Pursuant to the Environmental Hearing Board Act (EHB Act), 35 P.S. §§ 7511 – 7516, the Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). Although "decision" is not defined in the EHB Act or the Board's rules, "administrative agency laws generally refer to the term 'decision,' as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties." *Borough of Glendon v. DEP*, 2014 EHB 201, 203 (quoting *Sayreville Seaport Associates Acquisition Co. v. Department of Environmental Protection*, 60 A.3d 867, 872 (Pa. Cmwlth. 2012) (quoting *Department of Environmental Resources v. New Enterprise Stone & Lime*

*Co., Inc.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976)). Section 4 of the EHB Act states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board .... " 35 P.S. § 7514(c). An action is defined as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). "In short, the Board has jurisdiction to review final Department actions adversely affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations." *Borough of Glendon*, 2014 EHB at 203 (citing *Lower Salford Township Authority v. DEP*, 2011 EHB 333, 339).

Not all communications from the Department are appealable to the Board. *See, e.g., Sayerville Seaport Associates, supra*) (communications that do not affect a party's personal or property rights, remedies, or avenues of redress are not appealable actions); *Borough of Glendon, supra* (Department email providing interpretation of law that no permit would be required is not an appealable action); *Chesapeake Appalachia, LLC v. DEP*, 2013 EHB 447 (Department letter modifying and approving a corrective action plan established pursuant to a consent order and agreement did not constitute an appealable action.) When it comes to Department communications, there is no bright line rule for what constitutes a final, appealable action; it must be decided on a case-by-case basis. *Carlisle Pike Self Storage v. DEP*, 2022 EHB 25, 28-29.

The Department argues that this case is analogous to *New Enterprise Stone & Lime, supra*, in which the Commonwealth Court upheld the Board's dismissal of an appeal of the denial of a request for an extension. In that case, the Department's predecessor, the Department of Environmental Resources (DER), and New Enterprise entered into an agreement which extended the time for compliance with a DER order. New Enterprise requested DER to modify the

agreement by granting another extension of the compliance date. DER refused and the company appealed. Although the Board dismissed the appeal on other grounds, the Commonwealth Court upheld the dismissal on the grounds that DER's refusal to modify the agreement to extend the time for compliance was not an appealable action. In reaching this conclusion, the Court stated:

> Here, the refusal by the DER to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a "decision" had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered. We believe, therefore, that the DER's determination was not appealable and that the EHB properly dismissed the appeal….

359 A.2d at 847.

Like the matter in *New Enterprise*, the Department argues that the February 2 email lacks the elements of an appealable action and urges us to dismiss this matter. However, it is not clear to us that Mr. Dietterich is appealing the February 2 email, rather than the plugging order itself. As noted earlier, on page one of the notice of appeal form, in response to the question in paragraph 2(a) asking Mr. Dieterrich to state what action of the Department he was asking the Board to review, he replied "Plugging Order." Additionally, in response to the question in paragraph 2(e) asking Mr. Dieterrich if he received written notice of the action being appealed, he responded "yes" and attached a copy of the plugging order. Notably, he did not attach a copy of the February 2 email. Moreover, even in the document attached to the notice of appeal in which he states that he is appealing the Department's denial of his request for an extension of the deadline set forth in the plugging order, he makes several statements indicating that he is appealing the plugging order itself. For example, the document is captioned: "This is the Appeal to the Plugging Order issued to Randy Dietterich…by the Department of Environmental Protection issued on January 23, 2024." The document alleges that "[t]he information in the plugging order describing the wells is not accurate" and then goes on to provide information regarding the wells. The document

concludes by asking that "the plugging order be rescinded." (Notice of Appeal, Attachment, p. 2.) Additionally, we note that Mr. Traister's February 2 email advises Mr. Dietterich, "*If you feel aggrieved by the Departments [sic] order you may file an appeal to the Environmental Hearing Board.* Instructions on how to file an appeal are located on the last 2 pages of the order." (Ex. C to Department's Motion) (emphasis added). These are all indications that Mr. Dietterich intended to appeal the plugging order.

The Department bases its motion on Mr. Dieterrich's response to Interrogatory No. 25 asking him to "state that the sole basis for [his] NOTICE OF APPEAL is the 'denial of an extension of the deadline for the plugging order and requested [sic] a 90-day extension to repair the wells for production and restore the wells to active status.'" As noted earlier, Mr. Dietterich responded that this was a "partial reason for the appeal" with the other reason being the Department's failure to work with him on the restoration of the wells and the short timeframe given to comply with the order. Mr. Dietterich is acting *pro se*, and while the Board has frequently stated that an appellant who chooses to represent himself in a proceeding before the Board does so at his own risk, *Goetz v. DEP*, 2002 EHB 976, 977-79; *Van Tassel v. DEP*, 2002 EHB 625, 628, we also recognize that a *pro se* appellant is not as likely to craft a carefully worded response to interrogatories as is an attorney. Despite Mr. Dietterich's answer to Interrogatory no. 25, it is not clear to us that he intended to appeal only the February 2 email and not the plugging order. This is especially true where Mr. Dieterrich has given plenty of indications that he is indeed appealing the plugging order. Nor is the wording of Interrogatory No. 25 itself particularly clear. We suspect that if the Department had phrased its interrogatory as "please state that the basis for your appeal is the plugging order," Mr. Dieterrich may well have answered in the affirmative. At a minimum, it appears that Mr. Dietterich may have conflated the two – that is, he is appealing the plugging order

and one basis for his appeal of the plugging order is the "failure of the DEP to work with [him] on the restoration of the wells and the short timeline." (Ex. D to Department's Motion, Response to Interrogatory No. 25.)

Mr. Dietterich could have cleared up some of the confusion by responding to the Department's motion, but unfortunately he did not. Based on his lack of response, we may deem all properly pleaded facts in the Department's motion as admitted. 25 Pa. Code §§ 1021.91(e) and 1021.94(f); *Rocky Ridge Motel v. DEP*, 2012 EHB 302, 306; *KH Real Estate, LLC v. DEP*, 2012 EHB 319, 321. However, we must also view the motion to dismiss in the light most favorable to the non-moving party. *Scott v. DEP*, 2023 EHB 138, 139; *Muth v. DEP*, 2022 EHB 262, 264. A motion to dismiss may be granted only when the matter is free of doubt. *Scott,* 2023 EHB at 140; *Downingtown Area Regional Authority v. DEP*, 2022 EHB 153, 155. Here, for the reasons we have articulated, we have serious doubt that Mr. Dietterich is appealing the February 2 email and not the plugging order.

If indeed Mr. Dietterich is appealing the plugging order, there is no question that it is an appealable action. 35 P.S. § 7514(a). The Department admits this. (Memorandum in Support of Department Motion, n. 1.) The Department's only challenge is whether the plugging order is the subject of this appeal. For the reasons set forth above, we believe that the language of Mr. Dietterich's notice of appeal indicates an intent to appeal the plugging order. At a minimum, the language is ambiguous and, in the face of such ambiguity, the Department's motion cannot be granted.

Finally, the Department asks the Board to consider an alternate remedy, stating:

> In the event that the Board finds that there is ambiguity in the notice of appeal sufficient to deny a complete dismissal, the Department requests that any objections related to the denial of the extension to

> comply with the Plugging Order should be dismissed or otherwise stricken.

(Memorandum in Support of Department Motion, p. 7.)

The Department does not expand on its argument. To the extent the Department is asking the Board to preclude Mr. Dietterich from raising any challenge to the compliance schedule set forth in the plugging order, we decline to do so. This issue appears to be within the scope of Mr. Dietterich's appeal of the plugging order. For instance, Mr. Dietterich objects to the "short timeline" for complying with the plugging order. Additionally, it is not clear whether Mr. Dietterich's email to Mr. Traister asking for time to restore his wells was his attempt to comply with the plugging order's directive of providing a detailed plan within 10 days. Without further information, it is not appropriate to dismiss any portion of Mr. Dietterich's appeal. As noted earlier, motions to dismiss or motions for partial dismissal may be granted only when a matter is free of doubt. *Scott*, 2023 EHB at 140.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **RANDY A. DIETTERICH** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2024-024-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**O R D E R**

AND NOW, this 25th day of July, 2024, it is hereby ordered that the Department of Environmental Protection's Motion to Dismiss is **denied**. Upon the issuance of this Opinion, the Board will contact the parties to schedule a conference call in this matter.

**ENVIRONMENTAL HEARING BOARD**

s/ MaryAnne Wesdock
**MARYANNE WESDOCK**
**Judge**

**DATED: July 25, 2024**

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

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